

# Technology Options for Jury Trials and Grand Jury Proceedings



A Pandemic Resource from NCSC

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## Introduction

The right to trial by an impartial jury is guaranteed in the United States Constitution and all 50 state constitutions. Many states and the federal courts also require that felony cases only be initiated by a grand jury indictment. In terms of court operations, jury trials and grand jury proceedings are uniquely crowded affairs involving dozens, and sometimes hundreds, of individuals for a single case. The need to observe social distancing and other public health and safety recommendations during the COVID-19 pandemic has prompted state and local courts to consider a variety of technology solutions to allow jury trials and grand jury proceedings to continue.

State constitutional, statutory, or regulatory provisions may restrict the extent to which courts can move the entire trial to a videoconference format. The guidance below reflects contributions from judicial policymakers, court administrators, experts on jury system management and trial procedures, and court technology specialists about technology solutions that can greatly reduce the number of people who must assemble in person at a courthouse or in a courtroom to select jurors for a jury trial or grand jury proceedings, reducing the risk of contagion for jurors, judges and court staff, attorneys, parties, and the public. These solutions can be applied to both civil and criminal cases, and to any stage of the jury trial from summoning and qualification through jury deliberations. Some courts may adopt a hybrid model in which prospective jurors with access to appropriate technology appear remotely for the first stages of jury service, but then report in person if selected for trial. Prospective jurors with limited or no internet access may report to the courthouse or to another location for jury selection or trial.

## Juror Summoning and Qualification

***Anticipate lower jury yield due to increased requests from prospective jurors to be excused or deferred and possibly increased failure-to-appear rates.*** COVID-19 also appears to have a disproportionately severe impact on racial and ethnic minorities, which may reduce the demographic diversity of the jury pool. If the court plans to allow jurors to serve remotely, the court should provide options for jurors with limited access to internet reception or devices to serve so that they are not excluded from the jury pool.<sup>1</sup> Options may include providing internet-enabled workspaces within the courthouse or partnering with local government agencies, public libraries, public schools, or nonprofit organizations that can provide space and internet-enabled devices to prospective jurors. To ensure that the court has enough qualified and available jurors to select juries, it may be necessary to increase the number of prospective jurors summoned.<sup>2</sup>

<sup>1</sup> The Sixth Amendment right to an impartial jury requires that juries be selected from a pool that reflects a fair cross section of the community. To minimize the risk of legal challenges to the jury system, especially in criminal cases, courts should mitigate to the greatest extent possible the impact of the “digital divide” on the demographic characteristics of the jury pool. The fair cross section guarantee applies only to the jury pool, however, and not to the empaneled jury. See generally [The Jury Manager's Toolbox: A Primer on Fair Cross Section Jurisprudence \(NCSC 2010\)](#).

<sup>2</sup> Due to the need for social distancing and the expectation that smaller panels sent for jury selection prolong empanelment, some courts anticipate fewer jury trials taking place. If so, the court may not need to summon more jurors to compensate for lower jury yield.

**Redesign the jury summons or include supplemental information about jury management procedures during the pandemic, including information about the use of communication technologies.** Some jurors may be skeptical about the legitimacy of jury summonses that reference the use of remote technologies. Without additional information, they may ignore the summons or mistakenly believe that it is a scam, especially if they believe that courts are closed or that jury trials have been cancelled due to the pandemic.

**Request information about jurors' ability and willingness to appear telephonically or by videoconference; collect email and cellphone contact information for prospective jurors.** Courts typically require jurors to respond to the jury summons to confirm their eligibility and availability to serve. During the COVID-19 pandemic, the qualification questionnaire should be supplemented with questions to document prospective jurors' access to, familiarity with, and willingness to serve using internet communication technologies, including their ability to participate remotely without interruption of distraction. Courts should also consider a mechanism to gather information responsive to the online survey from jurors who cannot access the software. For example, a telephone number may be provided to allow prospective jurors to call the court to provide answers to the survey questions. In addition, request information by which to send electronic notifications about jury service, including login information for teleconference or videoconference proceedings. See Figure 1, below.

**Figure 1: Questions Concerning Jurors’ Ability to Serve Remotely**

The Court is exploring whether individuals can use technology during the jury selection process or trial to allow you complete some or all of your jury service remotely or from home. Individuals who do not have the ability to appear remotely will be provided alternative methods to serve, including spaces equipped with technology or the opportunity to appear in person. Please indicate whether you have internet access and technology capability to serve remotely.

[Alternate: The Court is currently permitting jurors to appear for jury service remotely using videoconferencing technologies. Individuals who do not have the ability to appear remotely will be provided alternative methods to serve, including spaces equipped with technology or the opportunity to appear in person. Please indicate whether you have internet access and technology capability to serve remotely.]

- I have highspeed or broadband internet access at home. Y/N
- My computer, tablet, or cellphone has a webcam or camera. Y/N
- I have internet access ONLY through a smartphone, or other mobile device. Y/N
  - (Answer if you would need to use your smartphone to connect remotely) My cellphone contract provides unlimited minutes of talk. Y/N
  - My internet data plan on the device I would use to appear remotely provides unlimited data. Y/N
- I have used videoconferencing technologies (i.e. Skype, Teams, Webex, Zoom) at home or work. Y/N
- I have access to a private place in my home or office where I can arrange to use the internet without interruption from others. Y/N
- I have the ability to listen to the audio from my device through headphones or earbuds. Y/N
- I would not be able to appear remotely for jury service due to a lack of equipment to connect or comfort with using the technology. Y/N

Please provide contact information and indicate your preference concerning notifications about jury service.

Email address: \_\_\_\_\_

Mobile phone number (if applicable): \_\_\_\_\_

I prefer to receive notifications about jury service by (check all that apply):

- Phone call
- Email message
- Text message (Data charges may apply depending on your plan)

***The court should recommend options for jurors who lack access to or familiarity with communication technology solutions.*** Options may include partnering with local government agencies, public libraries, public schools, and nonprofit organizations that can provide space and internet-enabled devices to prospective jurors. As a last resort, jurors can report to the courthouse and be directed to a location equipped with internet-enabled devices. Alternatively, prospective jurors who object to using internet technologies can be informed that the court will set them for in-person jury when it resumes.

## Juror Orientation

***The court should post its juror orientation video online and send the URL to prospective jurors with instructions to watch the video before their reporting date.*** Court staff should conduct a “live” orientation a few days prior to jury service that includes court-specific information and a test of the technology used by the court. The court should likewise videotape and post on its website orientation information and include information about the minimum technology requirements (access, devices) for jurors to serve remotely, whether jurors can access court-provided resources, and any eligibility criteria for doing so. In addition to the orientation information, courts should include links to online tutorials about the teleconferencing or videoconferencing systems used by the court and a link to test the device connection if available.

***The juror orientation information should specify any modifications to court policies concerning remote jury service, including juror compensation.*** In addition to juror fees, many courts reimburse prospective jurors for mileage to/from the courthouse. Some courts have policies concerning partial compensation for prospective jurors who are released before noon. Most states provide a statutory exemption allowing jurors to opt out of jury service for a defined period of time (typically 12 to 36 months) after completing jury service. Any modifications to these policies should be disclosed during orientation.

***If other administrative tasks were routinely performed during juror orientation, the court should likewise transition those tasks online.*** Juror orientation in many courts also involves a variety of administrative tasks, including processing juror fee waivers and donations, distributing and collecting demographic surveys from jurors, and inviting jurors to suggest improvements to jury operations. These tasks should also be performed remotely through the development of fillable forms and authorization for electronic signatures, where necessary.

## Final Pretrial Conference

Conducting jury selection or jury trials remotely is a very different experience than in-person proceedings. The final pretrial conference is the last opportunity for the trial judge and lawyers to plan for the upcoming trial.

**Practice with the technology.** Hold the pretrial conference using the same technology platform on which the trial will be held to ensure that the attorneys know how to connect and that their devices work. Suggest to the attorneys that they set up with multiple monitors so they are able to view documents and the videoconference simultaneously. Give the attorneys an opportunity to practice screensharing evidence, including any audio and video clips they plan to use. Show the attorneys how the platform breakout rooms should be used for bench conferences during the trial. Discuss how attorneys can communicate privately with clients. For example, will the chat function be enabled in the videoconference platform for the judge, attorneys, and clients?<sup>3</sup>

Request that the attorneys practice the technology with each witness before trial, ensure that witnesses are provided copies of exhibits in advance to make testimony about documents less difficult, and confirm whether there are any issues with witnesses appearing remotely. Clarify whether parties and witnesses will appear remotely from their own homes or offices, from the attorneys' offices, or in person at the courthouse.

**Set expectations for the timing of trial stages and any time limits.** It may be difficult for jurors, or even the attorneys and judge, to spend a full day of trial on videoconferencing platform. Consider spreading the trial out over several half-days. If voir dire will be conducted with multiple panels, clarify whether any time limits on voir dire apply to each panel or to voir dire overall. Also address trial recesses. For example, will participants disconnect and reconnect, or remain connected and mute their audio/video feeds?

**Finalize as many legal decisions as possible during the final pretrial conference, including evidentiary motions and jury instructions.** Addressing evidentiary issues at the final pretrial conference reduces the risk of surprises for all trial participants, resulting in a more streamlined process. Specifically, admit uncontested evidence and decide motions in limine. Discuss how evidence will be submitted to the court (e.g., uploaded to a Dropbox). Clarify whether any evidence not submitted will be excluded or how undisclosed rebuttal evidence may be used. Address how jurors will have access to exhibits. One option is to instruct the jurors that they may request exhibits to be published to them in open court, another option is for the admitted evidence to be placed into a Dropbox and for the jurors to receive a link when they begin deliberations. Discuss whether the jurors will have the ability to screenshare exhibits with each other during deliberations. Similarly, request that attorneys submit proposed jury instructions in editable format before the pretrial conference. Discuss how the instructions will be provided to jurors and how they will return a verdict (e.g., sign a form electronically or announce the verdict on the record).

**Discuss how to provide public access to the trial and how the trial record will be created.**

The trial can be livestreamed to internet or the public may be given access upon request. If the trial is likely to involve issues that would require closing the proceedings to the public (e.g., trade secrets), address how to manage those situations with the attorneys. For the trial record, decide whether a court reporter will participate in the virtual trial and create a written transcript, or audio or video be preserved and made available.

**Voir Dire (or, in plain English, Jury Selection)**

The term “voir dire” refers to process of examining prospective jurors to identify and remove individuals who cannot serve impartially due to preexisting relationships with the parties, preexisting knowledge about factual information related to the case that cannot be introduced as evidence, life experiences that will inform how jurors may interpret evidence presented at trial, and attitudes or opinions that may bias their interpretation of evidence presented at trial. Jurors may be removed “for cause” when the trial judge concludes that there is reasonable doubt that a prospective juror can be impartial, or when attorneys exercise a statutorily prescribed peremptory challenge to remove jurors they suspect of being biased against their side.

**Request that jury office staff randomly select a panel of prospective jurors from the jury pool several days before the scheduled trial date.** Ideally, the panel should be available to the judge and lawyers for the final pretrial conference. In most courts, the status of prospective jurors changes at each stage of the jury selection process. Previously, only jurors who had responded to the jury summons and were qualified and available to serve would be told to report in person, and only those who actually reported to the courthouse could be assigned to a case.<sup>3</sup> Providing a randomized list of jurors before the trial date may require modifications to the jury system or procedures, including possibly adding new status codes to indicate that jurors have been selected for a specific trial even though they have not actually reported to the courthouse.

**To reduce the number of prospective jurors who need to appear in person in court, the court should use survey methods to identify and remove individuals for hardship and for obvious “for cause” strikes.** Figure 2 includes a list of generic voir dire and case-specific questions and topics that can be included in the online survey. To provide sufficient time to format and test the online survey, trial attorneys should submit case-specific questions to the judge to include in the survey at least one week before the trial date. The online survey software should have the capability to display photos of parties, lawyers, and other key trial participants when asking prospective jurors about any preexisting relationships with those individuals.

<sup>3</sup> The chat functionality should be disabled for jurors on the platform to prevent unobserved communication among jurors or between jurors and other trial participants.

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<sup>4</sup> The procedure in some courts allows jurors to report for service without having previously responded to the jury summons to indicate their eligibility and availability. This procedure is not recommended during the COVID-19 pandemic, particularly with respect to remote jury selection, as it lacks a mechanism for assessing prospective jurors’ ability to serve remotely and for communicating information to them electronically.



## **Figure 2: Online Questionnaire for Jury Selection**

### **Juror Information**

- Marital status
- Number/age of minor children
- Occupation/employer
- Occupation/employer of spouse/adult children
- Education
- Military service
- Relationships/experience with legal services, law enforcement
- Previous jury service

### **Case-Specific Information**

- Time or hardship conflicts during anticipated trial period
- Relationship to parties, lawyers, witnesses, judge, courtroom staff
- Personal knowledge of case facts
- Read/heard information about case
- Previous life experience related to case facts
- Opinions about case-relevant issues

**Send a link to the online survey to prospective jurors assigned to the case several days before the trial date with instructions to complete within a short period of time (e.g., 24 to 48 hours).**<sup>5</sup> The survey link should be formatted to document the email or cellphone number of the juror automatically, permitting court staff to monitor response rates and send reminder notices to jurors who fail to complete the survey. To facilitate subsequent review of survey responses, the email address or cellphone number should be linked to qualification and administrative information provided in the juror's response to the jury summons and to the juror's randomized number on the voir dire panel. Jurors who cannot respond to the online survey should be directed to call the court and request that court staff enter the survey responses on their behalf.

**After the deadline for completing the survey has elapsed, download and sort the survey responses in order of the randomized list and forward to the trial attorneys.**

The court should schedule a conference to identify and remove jurors who cannot serve due to hardship and jurors with obvious conflicts of interest (e.g., related to a party or witness). Unless the court has identified means to provide jurors with appropriate devices with which to participate in a trial remotely, the criteria for removing jurors for hardship may include lack of access to a suitable internet-enabled device. For example, watching a 2-day trial on a cellphone will be challenging for many people. Similarly, empaneled jurors should either possess headphones or earbuds or have a private location where they can watch trial proceedings without interruption and without being overheard by coworkers or household members, who might otherwise be tempted to comment on the trial, exposing jurors to ex parte information. The remaining jurors should be examined using teleconference or videoconference technologies.

**Assign responsibility to a technologically competent staff person to assist with remote jury selection and trial tasks.** This person should be tasked with checking in prospective jurors as they log on, renaming each juror with the appropriate name and randomized juror number, assisting jurors with poorly functioning video or audio feeds, and managing jurors who arrive late. Staff should also monitor the videoconference feed to alert the judge and attorneys when jurors submit chats, raise their hand, appear to be having technical difficulties, or have disappeared from the video feed. If trial proceedings will be recorded or live-streamed to the public, staff should verify that the recording feature or that the public viewing feed is enabled. Jurors should receive the staff person's cellphone and email information to contact in case of technology problems.

<sup>5</sup> Ideally, jurors should respond to the survey before the final pretrial conference so the judge and attorneys can prescreen for hardship and obvious for cause strikes at that time.

## Remote Jury Trial Procedures

State and local courts began transitioning to remote hearings and trials fairly quickly after the COVID-19 pandemic closed courts for in-person proceedings. Most courts have now developed workable practices for submitting documents, witness testimony, and routine occurrences during trial. These recommendations focus exclusively on managing juror-related issues in trial using remote technology.

***Provide the selected jurors and alternates with login information for the trial.*** The information can be provided to the jurors at the same time they are selected (one the other venire members are excused) or by email or text message. The meeting ID can be the same one used for jury selection or a new meeting ID just for the trial. Jurors should be admonished not to share the meeting ID.

***Develop admonitions about juror conduct during the remote trial.*** Traditional admonitions concerning juror conduct, such as refraining from independent investigations and communicating with others about the trial apply equally in remote trials. In addition, the trial judge should develop new admonitions concerning the jurors' conduct while online, including a prohibition against multitasking during the trial, the use of headphones or earbuds to prevent household members from overhearing and commenting on the trial proceedings, that jurors must stay visible at all times during the trial, and how jurors should configure viewing preferences (e.g., gallery view or speaker view) on the videoconference platform. Ensure that the oath administered to jurors includes reference to their conduct during the trial. Admonish jurors at each phase and at each break that they are not to research the case, be on social media about the case, discuss the case with anyone in their household, or discuss the case with each other.

***Establish expectations for jurors about the length of trial sessions.*** Many judges and lawyers now appreciate that long videoconferences can be exhausting. Limit trial sessions to no more than 75 minutes without a break, and no more than 5 hours on on-screen time per day. To be able to do this, the judge should impose reasonable time limits on counsel for the trial and encourage attorneys to stipulate to the admissibility of uncontested evidence to the greatest extent possible, allowing them to focus the jurors' attention on the factual issues in dispute and the evidence necessary for jurors to reach an informed verdict. The judge and attorneys should also draft preliminary jury instructions on the applicable law in advance of the trial to avoid the necessity of a lengthy charge conference at the conclusion of the evidentiary portion of the trial. Decisions about trial length, motions in limine, objections, waivers, and jury instructions should be finalized during the pretrial conference. Likewise, trial exhibits should be submitted and marked in advance of trial.

**Mute jurors during the trial to prevent background noise from disrupting the trial and to ensure that oral comments or questions from jurors do not inadvertently prejudice the trial proceedings.** Juror should be instructed about how to alert the judge and court staff if they are having technical difficulties, including the specific person (judge, attorneys, court staff, anyone who can view the chat function). If jurors are permitted to submit questions to witnesses, they should also be instructed about the procedure for doing so. Court may wish to disable the chat feature completely or restrict the private chat feature to eliminate the potential for private chatting between jurors or with parties.

**Provide a URL or email documentary evidence and written jury instructions to jurors.** Although jurors often are given an opportunity review documentary evidence during the trial and during deliberations, this will be more difficult in a remote jury trial. Jurors should receive a URL or email with the documentary evidence attached for jurors to view, download, or print at home for review. Consider using a cloud storage platform such as Dropbox, Box, or Google Drive to place the evidence that should be available to jurors during deliberations and permitting jurors to review the evidence by clicking a link (without the need to create an account). Similarly, final jury instructions should be sent to all jurors in a similar manner for their consideration during deliberations. Photographs of physical evidence, including documentation of measurements or weights, should also be provided for juror review. Jurors should be permitted to share screens during the deliberation to simplify the review of evidence, but courts should consider admonishing the jurors about limiting the shared screen information only to evidence that has been admitted.

### Jury Deliberations

Ensure that the videoconference platform can provide a private, secure area for jury deliberations. Jury deliberations can take place in a private breakout room on the platform provided that jurors can be assured that their deliberations will remain confidential. Consult the videoconference platform provider about security protections to prevent hacking or unauthorized access to juror deliberations. If a private breakout room is used, the court must monitor the platform in case a juror is disconnected and needs to be placed back in the breakout room. Court may wish to consider placing a high-tech “bailiff” who is off-video and muted the jury deliberation room to provide technical assistance to the jurors, including displaying evidence if requested. If a court places a high-tech “bailiff” in the jury room, the court should ensure that the bailiff maintains the secrecy of the deliberations.

**Advise jurors about procedures for communicating with the court.** Jurors should be instructed on how to communicate with the court to report technology problems, questions about the jury instructions, general questions from the jury to the court, requests for a readback of witness testimony, or to inform the court that jurors have reached a verdict or are deadlocked. Provide guidance to jurors about deliberating remotely, including advice about videoconferencing etiquette as well as instructions on electronically signing the verdict form.

## Grand Jury Proceedings

In many respects, remote grand jury proceedings may be more feasible legally and practically than remote trial juries. Grand juries typically serve for longer periods of time (e.g., several days per month for up to 24 months), but most states do not require all grand jurors to participate every time provided the quorum requirement is satisfied. Nor must the grand jury be unanimous to issue an indictment, although most states require a supermajority.

***A private, secure videoconference platform is essential for grand jury proceedings.*** A major difference between the grand jury and the trial jury is that grand jury proceedings are completely confidential. Typically, only the grand jurors, a prosecutor, a court reporter, and a witness are permitted to be in the grand jury room when the grand jury meets to hear testimony, and only the grand jurors are present during deliberations. Grand jurors are prohibited from discussing any information about the cases they hear, even after their service has concluded. Consult the videoconference platform provider about security protections to prevent hacking or unauthorized access to grand jury proceedings and deliberations.

***Modify the grand juror instructions and oath concerning the secrecy of grand jury proceedings as needed to extend its application to videoconferencing.*** For example, grand jury instructions and oaths should include language that grand jurors must promise that their remote participation in grand jury proceedings will only occur in a private location where others cannot see the screen or overhear audio. Because grand jurors often meet multiple times over a longer period of time, these instructions and oaths should be renewed at the beginning of every session of the grand jury. The oath can be given orally or in writing in the form of a non-disclosure agreement.

***Determine the appropriate institution and person to manage the videoconferencing platform for grand jury proceedings.*** Depending on the jurisdiction, either the court or the prosecutor may be the primary institutional organizer of grand jury sessions. That role should also include managing the videoconferencing platform provided that the institution's staff have the requisite technology experience, including the ability to assist grand jurors who experience technology difficulties during deliberations.

***Provide access to grand jury materials, including documents and transcripts of witness testimony, with a link to a secure drop box.*** In most jurisdictions, either the prosecutor or the court reporter is responsible for maintaining the files of evidence presented to grand jurors during proceedings. Local procedures dictate how the grand jury foreperson or individual grand jurors may access those records. In remote proceedings, the grand jury foreperson or individual grand jurors may be given a URL to access records saved to a secure drop box, but only for viewing the records online, but not for downloading and printing records at home.

## Post-trial Issues

**After the trial has concluded, the trial judge should inform jurors about routine post-trial procedures.** This information may include an explanation of when and how jurors will be compensated or provided with certification of their completed jury service in addition to any routine post-trial admonitions, especially concerning communication with media about their remote jury experience. a

**Solicit feedback from the jurors about their remote jury experience.** The COVID-19 pandemic has forced unprecedented changes on the American justice system, including the necessity of holding jury trials remotely, and the knowledge of the impact on juror comprehension, performance, and satisfaction is limited. Courts should make every effort to evaluate the impact of remote jury trials on jurors, parties, and public confidence in the fairness of the process. If possible, courts should collaborate with experienced researchers to collect and analyze survey, case-level, and video data from the trials. See Appendix A for performance measures of interest.

**Discuss how to provide public access to the trial and how the trial record will be created.**

The trial can be livestreamed to internet or the public may be given access upon request. If the trial is likely to involve issues that would require closing the proceedings to the public (e.g., trade secrets), address how to manage those situations with the attorneys. For the trial record, decide whether a court reporter will participate in the virtual trial and create a written transcript, or audio or video be preserved and made available.

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**Request that jury office staff randomly select a panel of prospective jurors from the jury pool several days before the scheduled trial date.** Ideally, the panel should be available to the judge and lawyers for the final pretrial conference. In most courts, the status of prospective jurors changes at each stage of the jury selection process. Previously, only jurors who had responded to the jury summons and were qualified and available to serve would be told to report in person, and only those who actually reported to the courthouse could be assigned to a case.<sup>3</sup> Providing a randomized list of jurors before the trial date may require modifications to the jury system or procedures, including possibly adding new status codes to indicate that jurors have been selected for a specific trial even though they have not actually reported to the courthouse.

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