

BAR BULLETIN

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Trial by Zoom: A Closer Look at the Retooled Civil Jury Trial in the Time of Pandemic

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By **Beth Bloom, Patricia Anderson and Becky Roe**

Eight strangers debate the evidence. Sequestered in a Zoom conference room, they consider the damages suffered by a truck driver denied work because of his knee condition. From their living rooms, home offices and bedrooms, the jurors review the finer points of disability law using the screen share feature to review the jury instructions together. The defendant, an international company with a billion-dollar revenue, is about to learn a painful truth — civil jury trials are back.

When U.S. District Court Judge Marsha J. Pechman announced the verdict later that morning, she was making legal history. The third, all-remote jury trial in Washington history was over. Jurors were sworn in. Witnesses testified. Exhibits displayed on screens. The court delivered instructions on the law. The lawyers argued their cases. Nine months into an historic public health crisis, what we thought we knew about the practice of law has changed.

The Constitution guarantees the right to a civil jury trial. But in-person civil and criminal trials are suspended across most of the country because of the dramatic increase in COVID-19 infections. A staggering backlog of cases threatens to delay litigation for months or years even after the pandemic is behind us. Innovative courts in Washington are embracing new technology to conduct as much of the business of the courts as can be done safely and fairly.

More courts in Washington and other states are moving to all-video jury trials. King County Superior Court judges are issuing orders for remote civil jury trials. So are the federal courts in Western Washington. Expect demand for remote proceedings to increase as courts reopen with an eye toward public safety, while litigants reap the benefits of cost, efficiency and time savings.

In this Bar Bulletin feature, we look at the reality, the need and the law surrounding the new remote civil jury trial. Welcome to the new normal.

A Rose by Any Other Name

“What was it like? Does it feel like a REAL trial?” These are the questions heard again and again after Beth Bloom and Ada Wong secured a \$6,851,743 verdict in *Goldstine v. FedEx Freight, Inc.*, an employment case tried entirely over the Zoom teleconferencing platform in the Western District of Washington in November.

The trial proceeded remotely over eight days. Jurors participated from their homes or offices, as did the witnesses, attorneys and the court. The trial included 77 admitted exhibits, demonstrative exhibits, expert testimony, and impeachment through cross examination using published texts and clips of video depositions. The public was able to watch the trial using an online link. In other words, the trial had the same fundamental features of a traditional in-person jury trial.

Jurors appeared attentive as all participants watched their close-up images. Neither party nor the court raised concerns about juror distraction during the trial. The jurors often asked thoughtful questions after witnesses testified. Many took detailed notes. They were on time, alert, engaged and respectful. By all measures, the jurors took their responsibility seriously.

The plaintiff presented 12 witnesses over three days of testimony. This included seven current employees of the defendant whom plaintiff called as adverse witnesses, each cross-examined remotely. Maskless within the safe confines of Zoom, all witnesses

appeared on screen in full speaker-view.

In fact, no one wore a mask during the proceeding. Bloom found this to be a clear benefit over "hybrid" pandemic trials where only jury selection is remote, but the rest of trial is conducted in-person in large rooms with all participants masked and socially distanced.

In this Zoom trial, the witnesses' cadence, tone, inflection, demeanor, delivery and facial expression were apparent to all. Testimony was dynamic, unlike pre-recorded video deposition testimony. Objections and rulings were contemporaneous and as functional as in-person trials. In the few instances when witness testimony appeared far-fetched or insincere, the verdict suggests jurors had no trouble weighing credibility and bias.

Employment cases are never simple. Liability is routinely contested, discovery is extensive, and employers propose numerous affirmative defenses. The court read 32 jury instructions while they were displayed on screen. The eight jurors took two full days to reach their unanimous decision — a sign they carefully considered the evidence and instructions.

The jurors closely considered issues raised by the defense, finding for the defense on one affirmative defense, which reduced the plaintiff's recovery by \$300,000. In the court's jury poll, each reported that they had reached their own conclusions independent of the arguments of either party.

When Judge Pechman debriefed the jurors, she found them enthusiastic about their service on a remote civil jury trial. They found it easy to follow the testimony because they could clearly see, hear and evaluate each witness. Exhibits were legible and appeared in full size on their screens.

Jurors said they would encourage friends and family to serve as remote jurors if summoned. This feedback is consistent with the federal court's report of seeing an increased response to jury summonses for remote proceedings. The safety and convenience of the proceeding is undeniable. As one juror joked, "the parking was no problem."

All of this indicates that despite the Zoom platform — or maybe because of it — the lawyers were able to clearly present their cases and the jurors did their job. This is what

lawyers hope for, regardless of whom we represent. The constitutional right to a jury trial continues to be a superior means of resolving legal disputes. In this respect, this all-Zoom jury trial was no different than any other jury proceeding.

Timely trials are important for litigants, the court system and the broader community. Delay increases costs while witness memories fade, and without trials, clients cannot resolve disputes and reach closure, and insurance companies are disincentivized. Moving ahead with widescale adoption of remote civil jury trials is a viable option while we wait for the courts to reopen to in-person proceedings. A fair adjudication of the rights of the parties can be achieved.

King County Superior Court’s ‘presumption’ of Remote Civil Jury Trials

On December 3, as King County began its dramatic increase in positive COVID-19 rates, Presiding Judge Jim Rogers issued Emergency Order #22 suspending all in-person criminal and civil jury trials until after January 11. At the same time, he found “good cause and compelling circumstances to allow all pending civil jury trials [to] proceed virtually.”

While Order #22 stops short of an express presumption for remote civil jury trials, the order requires trial judges to determine when a case may be “appropriate” for a remote video trial. In those cases, the judge must hold a pretrial conference to vet the parties’ positions, legal issues and remote trial procedures.

What makes a case “appropriate” for Zoom? There are no hard and fast rules. In one example, Judge Kristin Richardson ordered a full remote civil jury trial over the defendant’s objection in a product liability, personal injury, and punitive damage case against Monsanto.

King County is uncertain when in-person trials will resume. When they do, judges warn that the criminal backlog is likely to swallow the trial calendar. As of mid-December, more than 1,100 criminal cases were set for trial, another 5,000 open cases were waiting to be set, and 500 more cases were awaiting filing.

The civil trial backlog is harder to measure but it’s safe to assume that it is significant. In a typical year, 100 to 110 civil cases will be tried. Although King County reportedly was able to complete 70 jury trials in 2020 through pre-lockdown in-person trials, hybrid trials, and fully remote trials, the reduced ability to resolve cases while in-person trials are suspended is expected to grow the civil backlog.

All of this — safety, backlogs, and concerns over delaying justice — fuel the bench’s enthusiasm for remote trials. King County recently completed several successful remote civil jury trials to verdict after months of successful Zoom hearings and bench trials. Reportedly, as of the end of November, King County had held 70 jury and 150 bench or non-jury trials by Zoom, more than any other court in the country.

Western District of Washington Embracing Remote Civil Trials

Remote civil jury trials via Zoom are increasingly common in Western Washington’s federal courts, as well. In addition to Goldstine, by the end of November the federal court in Seattle had conducted three other civil zoom jury trials. The U.S. District Court posted a detailed Zoom Trial handbook and training material on its website. (See sidebar)

Some federal judges see remote jury trials as absolutely critical at this time, including Judge Pechman. She cites to two trials in Washington where jurors tested Covid-positive and the entire courtroom had to quarantine. At least one case resulted in a mistrial.

It is fair to say that remote civil jury trials are here to stay, at least until it is safe to go back in the courtroom.

But is it constitutional? A preview of the legal arguments

With the safeguards the Western District and King County have adopted, the answer is clearly yes. Article 1, Section 21 of the Washington Constitution establishes the right to a jury trial. Two other constitutional provisions are directly implicated.

As the third co-equal branch of government, the court has broad inherent powers.¹ The court’s discretion in an emergency such as this derives from the court’s authority to protect itself in the performance of its constitutional duties.² Appellate courts are likely to approve remote civil jury trials under the current state of emergency.

Article I, Section 10 of the Washington Constitution requires justice be delivered “openly and without unnecessary delay.” The remote civil jury trial occurs in open court and is recorded by a court reporter. Indeed, in the Goldstine case, as many as 75 members of the public watched the proceedings online each day.

The prohibition against unnecessary delay is met because, without remote trials, there would likely be no civil jury trials at all for the foreseeable future. The building backlog of criminal cases will take priority when in-person trials return and greatly limit civil plaintiffs' substantial interest in expeditious conduct of their cases.³

Article I, Section 3 provides that no person may be deprived of property without due process. Due process requires an opportunity to be heard at a "meaningful time and in meaningful manner."⁴ Due process is flexible and calls for such procedural protections as a particular situation requires given: (1) the private interest involved; (2) the risk the procedures will deprive a party of that interest; and (3) the government interest involved.⁵

Unlike a person criminally accused, civil litigants do not have a strict, constitutional standard of face-to-face confrontation.⁶ Instead, the applicable rule is Civil Rule 43(a) (1), which permits remote testimony "for good cause shown."⁷

Though everyone concedes a preference for in-person testimony in many or most circumstances, the preference can give way to other concerns such as the inability of the courts to process civil cases at all, if remote trials cannot proceed. The due process cases referenced above involved testimony presented to a judge without a jury. The courts in Washington have been conducting remote hearings and non-jury trials, including oral argument at the state Supreme Court, since March 2020. Some suggest the addition of remote jurors is an unconstitutional change. But is it really?

Issues that have arisen include whether there will be a significant change in jury pool composition. Information so far suggests the sheer convenience for jurors results in greater access to jury service, specifically including those who could not previously afford time away from work to serve.

The ability of jurors to see and evaluate witness testimony has been enhanced, not detrimentally impacted. Concerns about jurors following the court's instructions, such as not consulting outside sources and paying adequate attention, appear unaffected. Such concerns have always presented issues for trial judges who are charged with preventing misconduct and determining, on a continuing basis, fitness to serve. With this concern, the remote platform does not appear to differ from in-person trials.

Remote civil jury trials retain the most important indices of reliability: a fair jury and the tools to weigh the evidence. We lose the ability to see one another physically

present, though the value of in-person assessment may be more art than science.

As noted by Justice Gonzalez in his *State v. Saintcalle* dissent, many lawyers' belief in their skill at reading signs of credibility are misplaced.⁸ Most importantly, any negative impact of video testimony affects parties equally.

As for the importance of the courtroom decorum — we all await its safe return.

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¹ *State v. Saintcalle*, 178 Wn.2d 34 (2013).

² *In Re Salary of Juv. Div.*, 87 Wn.2d 232, 245 (1976).

³ *King v. Olympic Pipeline Co.*, 104 Wash. App. 338 (2000). *Smith v. Smith*, 1 Wash. App. 2d 1017 (2017).

⁴ *Smith v. Smith*, 1 Wash. App. 2d 1017 (2017).

⁵ *Morrison v. State Dep't of H&D*, 168 Wash. App. 269 (2012).

⁶ Wash. Const. Article I § 22.

⁷ *In Re Marriage of Swaka*, 179 Wash. App. 549 (2014). In fact, other state statutes permit proceedings via video even without good cause shown. For instance, RCW 71.05.020(24) permits involuntary commitment proceedings conducted by video even without the compelling circumstances required by CR 43(a)(1). *J.H. v. State*, 9 Wash. App. 2d 385 (2019).

⁸ 178 Wn.2d 34 (2013).