AMERICAN INN OF COURT
TRIAL ADVOCACY PROGRAM
WRITTEN MATERIALS
DEC. 8, 2021

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TAB A

MOCK JUROR QUESTIONNAIRE[1]

Wilson v. Netflix

American Inn of Court – Trial Advocacy Program, December 8, 2021

[1] This mock juror questionnaire is based on the questionnaire submitted in the federal case *United States v. Colburn*, 19-cr-10080-NMG (D. Mass.) (Dkt. 2073-1).

Juror Name: Karla Earnedit Juror Number: 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUROR QUESTIONNAIRE

TO THE PROSPECTIVE JUROR:

The information that you provide in this questionnaire will be used by the Court and the parties to select a qualified jury for this case; that is, a jury that can render a verdict fairly and impartially based upon the evidence offered at trial in accordance with the law as instructed by the Judge. All parties in this trial are entitled to a fair and impartial jury.

It is very important that you answer these questions as fully, honestly, and accurately as you can; you have sworn an oath to do so. There are no right or wrong answers; only complete and incomplete answers. Your complete candor and honesty is necessary so the parties will have a meaningful opportunity to select an impartial jury.

Please keep the following instructions in mind:

- You are instructed not to discuss this case or this questionnaire with anyone, including your family, court personnel, and fellow jurors.
- If you are unable to answer a question because you do not understand it, please write "Do not understand" in response to that question. Do not ask anyone, including your family, court personnel, and fellow jurors, for clarification or assistance.
- If you are unable to answer a question because you do not know the answer, please write "Do not know" in response to that question.
- If you are unable to answer a question because it does not apply to you, please write "N/A" (which stands for "not applicable") in response to that question.
- If you prefer not to answer a question because of the private nature of your response, write "Private" after each question. At a later date, the court or a lawyer for a party may inquire about the topic privately.
- If you require additional space for your responses, or wish to make further comments regarding any of your answers, please use the Explanation Sheet (on the last page). Put the number of the question you are answering before you write the response or comment.
- Unless the question states otherwise, the fact that a particular question is asked does not imply that the subject matter of that question pertains to this case. As you read the questions, you should not draw any conclusions about what the issues in this case are.

- After you have completed this questionnaire, you are instructed not to discuss any of the questions or your answers on this questionnaire with anyone, including members of your family, co-workers, or other potential jurors. If anyone approaches you and attempts to discuss any aspect of this questionnaire, the jury selection process, or any aspect of this case, you are not permitted to answer their questions.

At the end of the questionnaire, please sign it, affirming the truth of your answers and the fact that you have given them without assistance.

PLEASE PRINT LEGIBLY AND USE ONLY DARK INK

1. Name: Karla Earnedit Juror Number: 1

2. Age: 54

   State/City of Birth: NY,NY

   Gender: M

3. Current Address: 187 W. 73rd Street, Apt. 16E

   (City) New York (State) NY (Zip Code) 10023

4. How long have you lived at that location? 27 years

5. Please list any other communities in which you have lived in the past ten years:

   _____
   _____
   _____

6. Please list your parents' occupations: (If retired/deceased, list most recent occupation)

Mother: Nurse.
Father:
Stepmother:
Stepfather:

7. What is the highest level of education you have completed?

   Grade school or less ___
   Some high school ___
   High school diploma or GED ___
   Technical or business school ___
   Some college ___
   College degree ___
   Graduate or Professional degree X (specify): Ph.D. Art History

8. Are you presently a student?
   Yes_____No X____
   If yes, describe course of study and anticipated date of completion

9. Please list any jobs you have had in the past ten (10) years, starting with the most recent job and describe what you did at each job:

Job Title	Employer	Job Duties	Dates worked

10. If you are not currently employed outside the home, please check the category below that applies to your employment status: NA

_____ Homemaker
_____ Retired (If retired, what was your primary occupation?): _____
_____ Unemployed – currently looking for work
_____ Unemployed – not currently looking for work
_____ Student
_____ Disabled
_____ Other (please explain):

11. Marital status: Married _____ Single _____ Separated _____
Divorced X Widowed _____
Civil union/domestic partner _____

12. Spouse/partner/significant other:
Name: NA
Occupation:
Employer:

13. Please check the highest level of education your spouse/partner/significant other has completed. If widowed, divorced or separated, please answer regarding your late or former spouse/partner/significant other.

Grade school or less ___
Some high school ___
High school diploma or GED ___
Technical or business school ___
Some college ___
College degree X
Graduate or Professional degree (specify):

14. Do you have children or grandchildren? If so, please list the following information for each:

Gender	Age	Live with you?	Post-high school education (specify degree and school)	Occupation
F	20	Yes / **No**	Brown, B.A. in progress	
M	16	**Yes** / No		
		Yes / No		
		Yes / No		
		Yes / No		

15. What newspaper(s), magazine(s), or websites do you read regularly?

The New York Times, Huffington Post, the Guardian.

16. Please list any internet social networking websites that you use and/or have an account with (MySpace, Facebook, LinkedIn, Twitter, Tumblr, Instagram, Tik Tok or any similar sites):

Facebook, Twitter

17. Have you had prior jury trial service?

Yes_____ No X

If your answer is yes, please answer the following:

Which type of jury service was it?

Is there anything about your prior jury service that might affect your ability to be fair and impartial in this case?

Yes_____ No _____

If yes, please explain:

18. Are you currently taking any medications that might interfere with your ability to concentrate?

Yes_____ No X

If yes, please explain: Not that I know of!

19. Is there any reason relating to the COVID-19 pandemic that would make your jury service an undue hardship for you or anyone in your household?

Yes_____ No X

If yes, please explain:

20. Do you have access to wireless internet in your home?

Yes X No _____

If yes, please identify that type of wireless you have an state whether it is a) extremely reliable; b) sometimes reliable; or c) unreliable: Extremely reliable.

21. Do you have any personal or business affairs that would make it difficult for you to serve as a juror (the trial is expected to last for approximately 2 weeks)?

Yes_____No X

If yes, please explain:

22. Do you have any personal or family responsibilities (such as caring for a young child or ill or elderly person) that would interfere with your service as a juror?

Yes_____No X

If yes, please explain:

23. Have you, a relative, a close friend, and/or anyone you live with ever been employed in law enforcement?

Yes_____No X

If yes, please identify the law enforcement agency:

24. Have you, a relative, a close friend, and/or anyone you live with ever been employed by the court system?

Yes_____No X

If yes, please identify the position and location:

25. Have you, a relative, a close friend, and/or anyone you live with ever worked for a United States Attorney's Office, a State or Local Prosecutor's Office, the FBI, or the IRS?

Yes_____No X

If yes, for each such person, please list in what office the person works or worked, and what your relationship is to that person.

Office Worked In Relationship

26. Have you, a relative, a close friend, and/or anyone you live with ever been arrested for, charged with, or convicted of an offense other than a simple traffic violation?

Yes_____No X

If yes, please explain.

27. Have you, a relative, a close friend, and/or anyone you live with ever been the victim of a

financial crime?

Yes_____No X

If yes, please explain.

28. In this case, plaintiffs are being represented by Kelly College and Joe Jock of Briber & Coach, LLC. Do you know either of these attorneys?

Yes_____No X

If yes, please describe how you know them.

29. Do you know any other employees who are associated with the law firm Briber & Coach, LLC?

Yes_____No X

If yes, please describe how you know them.

30. The plaintiffs in this case are John Wilson, Leslie Wilson, and John Wilson Jr. Are you familiar with any of these individuals?

Yes_____No X

If yes, please describe how you know them.

31. In this case, Defendants are being represented by Sarah Speach and Thomas Telltruth of Fairreport, LLC. Do you know either of these attorneys?

Yes_____No X

If yes, please describe how you know them.

32. Do you know any other employees who are associated with the law firm Fairreport, LLC?

Yes_____No X

If yes, please describe how you know them.

33. The defendants in this case are Netflix, Inc., Netflix Worldwide Entertainment, LLC, 241C Films, LLC, Library Films LLC, Jon Karmen, and Chris Smith. Are you familiar with any of these entities or individuals?

Yes X No _

If yes, please describe how you know them.

I subscribe to Netflix and watch it regularly. I don't know if that counts. I don't know any of the other defendants and I do not have any personal relationship with Netflix or anyone who works there.

34. Attached to this questionnaire as Attachment A is a list of people who may testify at this trial. Do you personally know any of those people?

Yes_____No X

If yes, please describe how you know them.

35. Do you, a relative, a close friend, and/or anyone you live with have a personal affiliation with the University of Southern California, Harvard University, Stanford University, the College Board, Educational Testing Services, or ACT Inc.?
    Yes_____ No X
    If yes, please explain:

36. Have you, an immediate family member, a grandchild, and/or anyone you live with:

    a. Played sports in college?
    Yes X No _____
    If yes, identify the school and sport:

    My daughter rows crew at Brown.

    b. Worked with or for a college counseling service to help a child prepare for college (e.g., academic planning, extracurricular development, standardized exam preparation, college counseling, etc.)?
    Yes X No _
    If yes, please explain:

    My ex-husband and I have hired college counselors for each of our children, and also tutors for the SATs.

    c. Been employed by any college or university?
    Yes_____ No X
    If yes, identify the school and position:

    d. Made a donation or contribution to a college or university?
    Yes_____ No _____
    If yes, explain, stating the school, amount, and fund or program that received the donation:

    e. Worked in fundraising for any organization?
    Yes X No _____
    If yes, please explain:

    I've participated in fundraising events for Stuyvesant High School, where my daughter went to high school.

    f. Helped a child or relative apply to college?
    Yes X No _
    If yes, please explain:

    I helped my daughter apply to college and I am gearing up to help my son apply to college.

g. Sought financial aide for any college applicant?
Yes_____No X
If yes, please explain:

37. Have you ever commented on this case in a blog post, article, on social media, or any other forum?
Yes_____No X
If yes, please explain:

38. Do you believe that if the government indicts an individual of committing a crime that the individual probably did something illegal?
Yes X No ___
If yes, please explain:

I understand that everyone is innocent until proven guilty but if someone is indicted it certainly plants a seed in my mind that something illegal may have been done – especially when there is not a likelihood of systemic bias at play. That said, I emphasize that I know people are innocent until proven guilty.

39. Do you have any opinions about wealthy and/or successful people that would impact your ability to decide this case impartially on the evidence presented and the law as stated by the Court?
Yes_____ No X
If yes, please explain:

40. Have you or an immediate family member ever had a dispute with the Internal Revenue Service?
Yes____ No X
If yes, please explain:

41. Are you aware of any preconceived views or prejudice that you may have against the Plaintiffs in this case – John Wilson, Leslie Wilson, and John Wilson Jr. – that would in any way impair your ability to evaluate and judge fairly and impartially the facts of this case?
Yes X No _
If yes, please explain:

I know that Mr. Wilson was charged in connection with the "Varsity Blues" investigation. I do not know anything about his alleged involvement or what he is charged with. I don't think this will impair my ability to judge the case impartially, but I feel I should disclose it.

42. Do you or anyone in your family subscribe to Netflix or do you otherwise use a Netflix account?

Yes X No _

If yes, please explain and state the duration of the subscription or use:

I have subscribed to Netflix for about a decade. I watch their programs and original content regularly.

43. Are you aware of any preconceived views or prejudice that you may have against the Defendants in this case – Netflix, Inc., Netflix Worldwide Entertainment, LLC, 241C Films, LLC, Library Films LLC, Jon Karmen, and Chris Smith – that would in any way impair your ability to evaluate and judge fairly and impartially the facts of this case?

Yes_____ No X

If yes, please explain:

44. As a juror, you would be barred from reading or watching media accounts of the trial, consulting external sources, and discussing the case with other people. The judge may order you to refrain from using social media for the duration of the trial. Do you have any reservations or concerns about your ability or willingness to abide by these rules?

Yes_____ No X

If yes, please explain:

45. Do you have any religious, ethical, moral or philosophical beliefs that would make it difficult for you to sit in judgment on another person in a court of law?

Yes_____ No X

If yes, please explain:

46. Did you have any problems reading and understanding this questionnaire?

Yes_____ No X

If yes, please explain:

47. Is there any other matter or any information you feel that the judge or attorneys should know about you, not covered by this questionnaire? Do you have any concerns that have been raised by the experience of filling out this questionnaire that might affect your ability to sit as a juror, or anything else that you feel we should know about? If so, please explain.

Not that I can think of.

48. Is there anything about your responses to any of the questions in this questionnaire, or anything else in your background, experience, employment, training, education, knowledge, or beliefs that might affect your ability to be a fair and impartial juror?

Not that I can think of.

JUROR CERTIFICATION

I do hereby certify, under the pains and penalties of perjury, that I had no assistance in completing this questionnaire and the answers that I have given in this questionnaire are true and complete to the best of my knowledge and belief.

Signature: Karla Earnedit

Print Name: Karla Earnedit

Date: December 1, 2021

JUROR QUESTIONNAIRE

Please answer all questions. Your answers will be used to assist in selecting a jury. If there is anything you prefer to discuss in private, please ask to speak with the judge out of the hearing of other jurors by answering yes to Question 17. THE QUESTIONNAIRE IS IN FOUR PARTS. PLEASE PRINT FIRMLY.

1. Name

2. Age

3. ☐ Male ☐ Female

4. Town/village or geographical area (neighborhood) where you live?

5. Number of years
   a. living at current address?
   b. living in this county?

6. Where were you born?

7. Are you currently:
   ☐ Single ☐ Married ☐ Other

8. What is the highest level of education you completed?
   ☐ Less than high school
   ☐ High school graduate
   ☐ More than high school
      a. number of years
      b. course of study

9. Are you currently employed? ☐ No
   ☐ Yes — If yes:
   a. who is your employer?

   b. what is your occupation?

10. Occupations and relationship to you of other adults in your household:

11. Gender and age of your children:

12. Did you ever sit on a jury before? ☐ No
    ☐ Yes — If yes:
    a. When?
    b. Where?
    c. Type of jury:
       ☐ Grand jury ☐ Trial Jury ☐ Both
    d. Type of case(s):
       ☐ Criminal ☐ Civil ☐ Both
    e. Did the jury reach a verdict?
       ☐ Yes ☐ No ☐ Both

13. Have you or someone close to you ever: *(check all that apply)*
    ☐ Been the victim of a crime
    ☐ Been accused of a crime
    ☐ Been convicted of a crime
    ☐ Been a witness to a crime
    ☐ Testified in court
    ☐ Sued someone else
    ☐ Been sued by someone else.

14. Have you or someone close to you (relative or close friend) ever been employed by: *(check all that apply)*
    ☐ Law Office
    ☐ Medical profession
    ☐ Law enforcement or criminal justice agency
    ☐ Insurance industry
    ☐ Local municipality (city/county worker)

15. Are you actively involved in any civic, social, union, professional or other organizations? ☐ No
    ☐ Yes:

16. What are your hobbies or recreational activities?

17. Is there anything relevant to your jury service that you prefer to discuss in private?
    ☐ Yes ☐ No

I affirm that the statements made on this questionnaire are true and I understand that any false statements made on this questionnaire are punishable under Article 210 of the Penal Law.

/ /

Signature of Prospective Juror **Date**

TAB B

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 47

Rule 47. Selecting Jurors

Currentness

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

CREDIT(S)

(Amended February 28, 1966, effective July 1, 1966; April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Note to Subdivision (a). This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, Supp.1936) Appendix 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N.C.Code (1935) § 2330(a); Ohio Gen.Code Ann. (Page, Supp.1926-1935) § 11419-47; Pa.Stat.Ann. (Purdon, Supp.1936) Title 17, § 1153; compare U.S.C., Title 28, [former] § 417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A-1, 2:91A-2, 2:91A-3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28:

§ 411 [now 1861] (Qualifications and exemptions)

§ 412 [now 1864] (Manner of drawing)

§ 413 [now 1865] (Apportioned in district)

§ 415 [see 1862] (Not disqualified because of race or color)

§ 416 [now 1867] (Venire; service and return)

§ 417 [now 1866] (Talesmen for petit jurors)

§ 418 [now 1866] (Special juries)

§ 423 [now 1869] (Jurors not to serve more than once a year)

§ 424 [now 1870] (Challenges)

and D.C.Code (1930) Title 18, §§ 341 to 360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges).

1966 Amendment

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of this Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number to a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn."

1991 Amendment

Subdivision (b). The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

Subdivision (c). This provision makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial. Sickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds for excusing a juror. It is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict.

2007 Amendment

The language of Rule 47 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Decisions (21)

Fed. Rules Civ. Proc. Rule 47, 28 U.S.C.A., FRCP Rule 47

Including Amendments Received Through 12-1-21

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 48

Rule 48. Number of Jurors; Verdict; Polling

Currentness

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

(c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

CREDIT(S)

(Amended April 30, 1991, effective December 1, 1991; April 30, 2007, effective December 1, 2007; March 26, 2009, effective December 1, 2009.)

ADVISORY COMMITTEE NOTES

1937 Adoption

For provisions in state codes, compare Utah Rev.Stat.Ann. (1933) § 48-0-5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

1991 Amendment

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. *Cf. Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). If the parties agree to trial before a smaller jury, a verdict can be taken, but the parties should not other than in exceptional circumstances be encouraged to waive the right to a jury of six, not only because of the constitutional stature of the right, but also because smaller juries are more erratic and less effective in serving to distribute responsibility for the exercise of judicial power.

Because the institution of the alternate juror has been abolished by the proposed revision of Rule 47, it will ordinarily be prudent and necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. The use of jurors in

excess of six increases the representativeness of the jury and harms no interest of a party. *Ray v. Parkside Surgery Center*, 13 F.R.Serv. 585 (6th Cir.1989).

If the court takes the precaution of seating a jury larger than six, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly, because all seated jurors will participate in the verdict and a sufficient number will remain to render a unanimous verdict of six or more.

In exceptional circumstances, as where a jury suffers depletions during trial and deliberation that are greater than can reasonably be expected, the parties may agree to be bound by a verdict rendered by fewer than six jurors. The court should not, however, rely upon the availability of such an agreement, for the use of juries smaller than six is problematic for reasons fully explained in *Ballew v. Georgia*, supra.

2007 Amendment

The language of Rule 48 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

2009 Amendment

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Notes of Decisions (5)

Fed. Rules Civ. Proc. Rule 48, 28 U.S.C.A., FRCP Rule 48
Including Amendments Received Through 12-1-21

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 51

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

Currentness

(a) Requests.

(1) ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) ***After the Close of the Evidence.*** After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) ***How to Make.*** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) ***When to Make.*** An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) ***Assigning Error.*** A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

CREDIT(S)

(Amended March 2, 1987, effective August 1, 1987; March 27, 2003, effective December 1, 2003; April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals.

1987 Amendment

Although Rule 51 in its present form specifies that the court shall instruct the jury only after the arguments of the parties are completed, in some districts (typically those in states where the practice is otherwise) it is common for the parties to stipulate to instruction before the arguments. The purpose of the amendment is to give the court discretion to instruct the jury either before or after argument. Thus, the rule as revised will permit resort to the long-standing federal practice or to an alternative procedure, which has been praised because it gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide. See generally Raymond, *Merits and Demerits of the Missouri System of Instructing Juries,* 5 St. Louis U.L.J. 317 (1959). Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by instructing ahead of argument the court has the attention of the jurors when they are fresh and can give their full attention to the court's instructions. It is more difficult to hold the attention of jurors after lengthy arguments.

2003 Amendment

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Scope. Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51. Among these instructions are preliminary instructions to a venire, and cautionary or limiting instructions delivered in immediate response to events at trial.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that trial evidence may raise new issues or reshape issues the parties thought they had understood. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case--the closer the issue lies to the “plain error” that would be recognized under subdivision (d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a “final” instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance

information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. Johnson v. U.S., 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, U.S. v. Atkinson, 297 U.S. 157, 160 (1936): “In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.”)

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a “plain” error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

2007 Amendment

The language of Rule 51 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Decisions (790)

Fed. Rules Civ. Proc. Rule 51, 28 U.S.C.A., FRCP Rule 51
Including Amendments Received Through 12-1-21

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimited on Constitutional Grounds by Pena-Rodriguez v. Colorado, U.S., Mar. 06, 2017

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VI. Witnesses

Federal Rules of Evidence Rule 606, 28 U.S.C.A.

Rule 606. Juror's Competency as a Witness

Currentness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934; Pub.L. 94-149, § 1(10), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Note to Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

Note to Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz v. Werre,* 129 N.W.2d 681 (N.D.1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2349 (McNaughton Rev.1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev.1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States,* 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict. *Hyde v. United States,* 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald v. Pless,* 238 U.S. 264 (1915); speculation as to insurance coverage. *Holden v. Porter,* 405 F.2d 878 (10th Cir.1969); *Farmers Coop. Elev. Ass'n v. Strand,* 382 F.2d 224, 230 (8th Cir.1967), cert. denied 389 U.S. 1014; misinterpretation of instructions, *Farmers Coop. Elev. Ass'n v. Strand,* supra; mistake in returning verdict, *United States v. Chereton,* 309 F.2d 197 (6th Cir.1962); interpretation of guilty plea by one defendant as implicating others, *United States v. Crosby,* 294 F.2d 928, 949 (2d Cir.1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox v. United States,* 146 U.S. 140 (1892). See also *Parker v. Gladden,* 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, governing the secrecy of grand jury proceedings. The present rule does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

1974 Enactment

Note to Subdivision (b). As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that " * * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that--

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts. House Report No. 93-650.

Note to Subdivision (b). As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodied long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as

unwise by the Supreme Court. In *McDonald v. Pless,* the Court stated:

* * * *

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation--to the destruction of all frankness and freedom of discussion and conference [238 U.S. 264, at 267 (1914)].

* * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors. Senate Report No. 93-1277.

Note to Subdivision (b). Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations. House Report No. 93-1597.

1987 Amendments

The amendments are technical. No substantive change is intended.

2006 Amendments

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule

and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the exception established by the amendment is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8C. Wigmore, *Evidence*, § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978)).

2011 Amendments

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Notes of Decisions (363)

Fed. Rules Evid. Rule 606, 28 U.S.C.A., FRE Rule 606
Including Amendments Received Through 12-1-21

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR § 4105

§ 4105. Persons who constitute the jury

Currentness

The first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.

Credits
(L.1962, c. 308. Amended L.1972, c. 185, § 2.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by John R. Higgitt

2015

CPLR 4105 Requires the Use of Designated Alternates Unless the Parties Consent to the Use of Non-Designated Alternates

CPLR 4105 states that "[t]he first six persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, *must* be sworn and constitute the jury to try the case." Emphasis added. The statute therefore requires a trial court to use designated alternates. The parties may consent to the use of non-designated alternates, a protocol that results in the trial and alternate jurors being randomly selected by the court at the close of the evidence. *See* 22 N.Y.C.R.R. 220.1(a), (c). But the parties cannot be compelled to use non-designated alternates; all parties must consent to that alternate-juror-selection method.

Piacente v. Bernstein, 127 A.D.3d 1365, 6 N.Y.S.3d 793 (3d Dep't 2015), highlights the potency of a party's right to designated alternates.

The plaintiff in *Piacente* commenced a medical malpractice action against various defendants, and the action ultimately proceeded to trial. Prior to the close of the evidence, plaintiff's counsel requested that, consistent with CPLR 4105, the court designate the first six jurors as the ones who would deliberate, and that the remaining jurors be designated as alternates. The court, situated in Albany County, applied a local rule of the Third Judicial District requiring deliberating jurors to be chosen randomly by the court (i.e., the non-designated-alternate-selection method). Employing that procedure, juror numbers one, two, three, four, five, and eight were selected as the deliberating jurors. Under the CPLR 4105 method, juror number eight would have been relegated to "alternate"

status, while juror number six would have joined the deliberating juror coterie. The jury returned a verdict in favor of the defendants.

The plaintiff moved under CPLR 4404(a) to set aside the verdict in the interest of justice and for a new trial, arguing that the trial court violated his CPLR 4105 right to have the first six jurors designated as the deliberating jurors, and that the error deprived him of a fair trial. The trial court granted the motion, prompting the defendants to appeal.

The Third Department affirmed the order setting aside the verdict, stating:

"[a]fter having determined that its application of the Third Judicial District rule contravened plaintiff's substantial right to empanel the first six jurors that had been selected by the parties, pursuant to the 'mandatory procedure' set forth in CPLR 4105, Supreme Court exercised its discretion and granted plaintiff's motion to set aside the verdict and order a new trial in the interest of justice. In the absence of evidence that the court abused such discretion, we will not disturb Supreme Court's determination in that regard." 127 A.D.3d at 1367, 6 N.Y.S.3d at 795.

PRACTICE COMMENTARIES

by David D. Siegel

Before 1972, § 4105 noted alternatives for when a 12-as against a 6-person jury was being used. With the abolition of the 12-person jury for civil actions in 1972, mention of the alternative was unnecessary and CPLR 4105 was amended to strike it out. Under CPLR 4105, the first six jurors approved constitute the jury.

LEGISLATIVE STUDIES AND REPORTS

This section is derived from § 448 of the civil practice act. The Revisers inserted provisions relating to a jury of six.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 226.

5th Report Leg.Doc. (1961) No. 15, p. 525.

6th Report Led.Doc. (1962) No. 8, p. 368.

Notes of Decisions (3)

McKinney's CPLR § 4105, NY CPLR § 4105
Current through L.2021, chapters 1 to 636. Some statute sections may be more current, see credits for details.

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR § 4106

§ 4106. Alternate jurors

Effective: January 1, 2014
Currentness

One or more additional jurors, to be known as "alternate jurors", may be drawn upon the request of a party and consent of the court. Such alternate juror or jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors. After final submission of the case, the court may, in its discretion, retain such alternate juror or jurors to ensure availability if needed. At any time, before or after the final submission of the case, if a regular juror dies, or becomes ill, or is unable to perform the duties of a juror, the court may order that juror discharged and draw the name of an alternate, or retained alternate, if any, who shall replace the discharged juror, and be treated as if that juror had been selected as one of the regular jurors. Once deliberations have begun, the court may allow an alternate juror to participate in such deliberations only if a regular juror becomes unable to perform the duties of a juror.

Credits
(L.1962, c. 308. Amended L.1972, c. 336, § 1; L.2013, c. 204, § 1, eff. Jan. 1, 2014.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2019

C4106. Alternate Jurors

The amendment of CPLR 4106 effective January 1, 2014, which re-tooled the procedures for the selection and use of alternate jurors, has worked well given the paucity of case law that has been generated about the statute since then.

For an alternate juror to be seated before or after the submission of the case to the jurors for deliberation, a regular juror must die, become ill, or be unable to perform the duties of a juror. A scheduling inconvenience of a regular juror or other concerns about continued trial participation, which does not actually prevent the juror from continuing

at the trial, is insufficient to warrant the seating of an alternate juror on the main jury (*Jett v City of New York*, 140 A.D.3d 511, 34 N.Y.S.3d 424 [1st Dep't. 2016]).

Of course, in determining whether a regular juror should be excused from further service and replaced by an alternate juror, a trial court must, after receiving notice that a juror may not be able to perform his or her duty, make a reasonable inquiry to determine whether the juror should be discharged and replaced with an alternate juror. The failure to make an adequate inquiry is trial error (*Garbie v Ahmad*, 168 A.D.3d 687, 91 N.Y.S.3d 222 [2d Dep't. 2019]). The inquiry should be made on the record, in the presence of all counsel. Then, outside the presence of the juror, all counsel should be given an opportunity to be heard before the court renders a determination on whether the regular juror should or should not be excused.

SUPPLEMENTARY PRACTICE COMMENTARIES

by David D. Siegel

2013

Amendment Provides That More Than Two Alternate Jurors May Be Allowed, and That Alternates Need No Longer Be Dismissed After Case Submitted to Jury

CPLR 4106 was amended by Chapter L.2013, c.204, to take effect January 1, 2014.

The statute's instruction with respect to alternate jurors who have been sitting in on the proceedings has been that they be dismissed after the case is submitted to the jury. This has proved “a tremendous waste”--as the Assembly Memo on the bill describes it--when a juror becomes for any reason incapacitated during the deliberations; there's no alternate to call on to replace that juror. This meant either that the parties had to agree to continue with a jury of fewer than six--a consent that the legislative memo on the amendment says is “rarely obtained”--or there would be a mistrial.

To remedy this, the amendment provides that the court may in its discretion “retain” the alternates--as many as the court deems needed--so as to substitute one of them for the incapacitated juror when the need arises.

And the amendment allows the selection of more than just the two alternates that the superseded statute provided for as a maximum; it enables the court to allow “[o]ne or more”, with no stated limit.

From the last sentence of the amendment it appears, however, that the court may still not allow the alternate's actual participation in the deliberations unless and until a regular juror has become unable to perform.

The amendment hopes also to spare the frustration of the remaining jurors, who have sat and deliberated through all of the proceedings, if their efforts come to naught because a mistrial has been necessitated by one of their number's disability.

The memo notes the “disparity” in practice around the state concerning alternates. This disparity should be avoided, or in any event lessened, by the amendment.

When there have been several alternates in the case, and after deliberations have begun the moment arises for one of them to be selected to stand in for an incapacitated juror, how shall the selection of the alternate be made? On that point, the 2004 *Xi Yu* case treated in the original Commentary on CPLR 4106, at page 350 in the main volume,

is relevant. *Xi Yu* holds that random selection must be used; it directed that the alternates' names be placed in the drum, with the clerk to reach in and make the selection.

There were of course only two alternates in *Xi Yu*, the maximum allowed at the time. Now, with more than two allowed, the *Xi Yu* case would presumably require the same random method to be used for selection.

The amendment applies not only to all actions commenced on or after that date (January 1, 2014), but also to all pending actions "in which a jury has not yet been selected".

The Advisory Committee on Civil Practice proposed this amendment on the recommendation of Administrative Judge Minardo of Richmond County with, as the legislative memo says, the support of the Supreme Court Justices' Association of both the New York State and New York City bars.

PRACTICE COMMENTARIES

by David D. Siegel

Before its amendment in 1972, CPLR 4106 permitted only the court to direct the calling of alternates. The 1972 amendment permits the alternate or alternates to be drawn at the request of a party "unless" the court intervenes to direct otherwise. This confirmed what the Office of Court Administration (then called the Judicial Conference), which sponsored the amendment, had found to be a wide-spread practice: alternate jurors were being picked by the attorneys without initial court approval, after which the attorneys would seek a kind of nunc pro tunc approval from the judge. The amendment enables a party to initiate the calling, but reserves to the court the power to bar it in a given case.

It was held in *Xi Yu v. New York University Medical Ctr.*, 4 Misc.3d 602, 781 N.Y.S.2d 416 (Sup. Ct., Queens Co., 2004), that when one of two alternate jurors must be used, the selection of which one it will be must be random. The defendant had argued that an alternate selected to replace a regular juror must be the one first impaneled as an alternate during the selection process, citing the rule applicable by statute in criminal cases. Pointing out that CPLR 4106 contains no similar direction in civil cases, the court rejected the argument. Holding that random selection must be used, the court directed that the two alternates' names be placed in the drum, with the clerk to reach in and make the selection.

The event that required resort to an alternate in the *Xi Yu* case was the "gross" disqualification of a sitting juror because of her "inability to stay awake". The court was signing on to the once radical proposition that jurors are expected to stay awake during the trial.

LEGISLATIVE STUDIES AND REPORTS

Section 449-a of the civil practice act is the source of this section. The Revisers explain in the Second Report to the Legislature that they did not carry forward into the CPLR the provision which required the court to cause an entry to be made in the minutes to the effect that the trial is likely to be a protracted one prior to calling one or two alternate jurors. The actual calling of the alternate juror or jurors by the court is a sufficient record of the judge's decision to that effect, and there appears no need for this formal justification.

Under C.P.A. § 449-a the alternate juror or jurors are required to be called, examined, challenged and sworn after the regular jury has been empaneled and sworn. This entails a wasteful and unnecessary duplication of effort, therefore, this section provides that the alternates shall be called, examined, challenged and sworn at the same time as the regular jurors.

It is further said in the Second Report that no change is made in the provision requiring the alternate jurors to be discharged after final submission of the case. In 1952, § 358-a of McKinney's Code of Criminal Procedure, which provides for alternate jurors in criminal trials, was amended to provide that the court, if it deems it advisable at the final submission of the case, may direct that one or more of the alternate jurors be kept in the custody of the sheriff or one or more court officers, separate and apart from the regular jurors until the jury has agreed upon a verdict. If during the deliberations of the jury, a juror dies or becomes ill or is otherwise incapacitated, the court may then order him discharged and substitute an alternate, whereupon the jury renews its deliberations with the alternate juror. This procedure, while it has merit, has not been incorporated in this section, since it is only in rare situations that the procedure could be used, and it is believed that an alternate juror who enters the jury room after deliberation has begun is not fully qualified to render an intelligent verdict, having missed part of the discussion and consideration which makes up the deliberative process.

An interesting method of utilizing alternate jurors is in effect in some jurisdictions in both criminal and civil cases. If a protracted trial seems likely, the trial is begun with fourteen jurors. If more than twelve remain at the end of the trial, lots are drawn to determine which twelve comprise the jury which deliberates. See Mass.Ann.Laws, c. 234, § 26B (1956); Mich.Comp.Laws §§ 691.421, 768.18 (1948); N.J.S.A. § 2A:74-2 (1952).

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 226.

5th Report Leg.Doc. (1961) No. 15, p. 525.

6th Report Leg.Doc. (1962) No. 8, p. 368.

Notes of Decisions (18)

McKinney's CPLR § 4106, NY CPLR § 4106
Current through L.2021, chapters 1 to 636. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 41. Trial by a Jury (Refs & Annos)

McKinney's CPLR Rule 4112

Rule 4112. Entry of verdict

Currentness

When the jury renders a verdict, the clerk shall make an entry in his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the general verdict and any answers to written interrogatories, or the questions and answers or other written findings constituting the special verdict and the direction, if any, which the court gives with respect to subsequent proceedings.

Credits
(L.1962, c. 308.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2019
C4112. Entry of Verdict

There are times in life, and in courthouses, where persons try to be of help, but in so doing, make a situation worse. An example of this was seen in a medical malpractice action entitled *Kitenberg v Gulmatico*, 143 A.D.3d 947, 40 N.Y.S.3d 459 (2d Dep't. 2016). A jury informed a court officer that it had reached a verdict. The court officer saw on the verdict sheet what he believed to be errors, and without saying anything to any jurors, pointed to certain directions on the verdict sheet. The jurors thereupon continued their deliberations and informed the court officer, for a second time, that a verdict had been reached. That verdict was announced in open court but was internally inconsistent, which prompted the trial judge, who did not then know of the court officer's earlier conduct, to direct the jury to resume deliberations and follow the instructions on the verdict sheet. Thereafter, the jury reached a "third" verdict, which was announced in court and which favored the plaintiff. After the jury was discharged, the court officer disclosed his earlier conduct. The court granted the defendant's motion to set aside the verdict pursuant to CPLR 4404(a) on the ground of juror confusion and the court officer's improper influence. However, instead of ordering a new trial, the trial judge reinstated the "first" verdict as its terms were described by the court officer.

CPLR 4112 requires the clerk of the court to enter juries' verdicts into the court's official minutes. In *Kitenberg*, the first of the three jury verdicts was never provided to the court nor entered into the clerk's minutes as required by CPLR 4112. It therefore was not valid or final, and the trial court erred in trying to reinstate the original verdict that was observed by the court officer. The Second Department held that under the circumstances, the trial court

should not have only granted the defendant's motion to set aside the "third" verdict, but also, should have granted the motion for a new trial. A new trial was required as there was never any reported, valid, "first" verdict for the court to reinstate.

PRACTICE COMMENTARIES

by David D. Siegel

2009

Judge's Denial--as "Unnecessary"--of Party's Right to Poll Jury Voids Verdict Despite Its Clarity

In a case destined to become the last word for a long time on the significance of the right of a party to poll the jury following the verdict in a civil action, the Court of Appeals holds the right absolute and rejects a verdict in which the trial court refused a plaintiff's polling request after the verdict came in for the defendants. *Duffy v. Vogel*, 12 N.Y.3d 169, 878 N.Y.S.2d 246 (March 31, 2009; 6-1 decision).

The case is the subject of the lead note in Issue 592 of the New York State Law Digest.

LEGISLATIVE STUDIES AND REPORTS

The Revisers comment in the Second Report to the Legislature that this rule is based on rule 165 of the rules of civil practice changed only to conform with the new terminology in rule 4111.

Official Reports to Legislature for this rule:

2nd Report Leg.Doc. (1958) No. 13, p. 235.

5th Report Leg.Doc. (1961) No. 15, p. 530.

6th Report Leg.Doc. (1962) No. 8, p. 373.

Notes of Decisions (8)

McKinney's CPLR Rule 4112, NY CPLR Rule 4112
Current through L.2021, chapters 1 to 636. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Judiciary Law (Refs & Annos)
Appendix
Rules of Professional Conduct [eff. April 1, 2009. As Amended to March 15, 2021.] (Refs & Annos)
Advocate

Rules of Prof. Con., **Rule 3.5** McK.Consol.Laws, Book 29 App.

Rule 3.5. Maintaining and Preserving the Impartiality of Tribunals and Jurors

Currentness

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. In addition, gifts and loans to judges and judicial employees, as well as contributions to candidates for judicial election, are regulated by the New York Code of Judicial Conduct, with which an advocate should be familiar. *See* New York Code of Judicial Conduct, Canon 4(D)(5), 22 N.Y.C.R.R. § 100.4(D)(5) (prohibition of a judge's receipt of a gift, loan, etc., and exceptions) and Canon 5(A)(5), 22 N.Y.C.R.R. § 100.5(A)(5) (concerning lawyer contributions to the campaign committee of a candidate for judicial office). A lawyer is prohibited from aiding a violation of such provisions. Limitations on contributions in the Election Law may also be relevant.

[2] Unless authorized to do so by law or court order, a lawyer is prohibited from communicating ex parte with persons serving in a judicial capacity in an adjudicative proceeding, such as judges, masters or jurors, or to employees who assist them, such as law clerks. *See* New York Code of Judicial Conduct, Canon 3(B)(6), 22 N.Y.C.R.R. § 100.3(B)(6).

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Paragraph (a)(5) permits a lawyer to do so unless the communication is prohibited by law or a court order, but the lawyer must respect the desire of a juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[4A] Paragraph (b) prohibits lawyers who are not connected with a case from communicating (or causing another to communicate) with jurors concerning the case.

[4B] Paragraph (c) extends the rules concerning communications with jurors and members of the venire to communication with family members of the jurors and venire members.

[4C] Paragraph (d) imposes a reporting obligation on lawyers who have knowledge of improper conduct by or toward jurors, members of the venire, or family members thereof.

Editors' Notes

PRACTICE COMMENTARIES

by Kevin Anthony Reilly

2021

It would not be an exaggeration to observe that **Rule 3.5** is intended, at a fundamental level, to prohibit a lawyer from undertaking any action that will threaten to corrupt the court or the jury and thereby undermine the integrity of the proceedings, which forms the necessary template to the public's confidence in the New York justice system. The offending conduct need not be limited to improper financial arrangements that would rise to the level of criminality, although that certainly would be covered, but could consist of a lawyer seeking to surreptitiously reach chambers or a court employee, especially if done *ex parte*, or the jury with the intent of manipulating the fairness of the proceedings.

How might such undue influence be attempted or accomplished? In *Matter of Goffen* (103 A.D.2d 197, 479 N.Y.S.2d 222 [1st Dept. 1984]), a disciplinary proceeding under the former Code of Professional Responsibility, the lawyer was representing a petitioner in a CPLR Article 78 proceeding for which the issuance of a Supreme Court decision seemed to be experiencing a months-long delay. The lawyer found a friend of convenience in a court employee who accepted gratuities from the lawyer in exchange for expediting this matter towards a decision. This

was not the first time that the pair had come to a mutually beneficial arrangement involving a dilatory Article 78 decision. Importantly, the lawyer was only seeking a quicker resolution, not a particular resolution. The goal was to unmoor the decision, not influence it. In the disciplinary proceeding, the First Department took into account several mitigating factors--the lawyer's 74 years of age, the progression of a medical condition, his cooperation with the Departmental Disciplinary Committee (at that time the First Department's investigatory body) and the District Attorney, his plea that further delay would destroy his anxious client, letters of recommendation and an otherwise unsullied disciplinary record. Nevertheless, although declining the DDC recommendation of disbarment, the court found the misconduct sufficiently serious to warrant a two-year suspension. The decision includes internal citations to, and discussions of, several other decisions involving similar conduct. While these are now of some vintage and one must account for different judicial policies involving discipline across multiple eras, the decisions presumably remain good law, albeit under now superseded disciplinary rules, and may be useful for attorneys seeking guidance for similar current cases. This seems to have been a harsh outcome when compared with other disciplinary cases, many more recent, for infractions discussed in the Commentaries to this and other Rules. However, one might detect a pattern whereby financial misconduct involving a court may put the misconduct in a harsher light. Even possibly innocent if misguided courtesies can have disciplinary consequences, as a lawyer discovered who had extended a personal loan for $10,000 to a Rhode Island Family Court judge, before whom he had no pending cases yet who practiced in that state's Family Court. When the judge's repayment check bounced, the lawyer, obviously seeing himself as aggrieved, filed a misconduct complaint against the judge. Whatever the attorney's subjective motivation and reasoning, the tactical mistake became apparent once the law of unintended consequences took rein. The Rhode Island judicial disciplinary proceeding soon enveloped the lawyer in an attorney disciplinary proceeding insofar as any loan to a sitting judge by a lawyer practicing in that court was prohibited. Compounding that violation, the lawyer failed to report the second violation to disciplinary authorities, that of the judge's acceptance of the loan. The lawyer was subjected to a public censure in Connecticut. In the New York reciprocal disciplinary proceeding (*Matter of D'Addario*, 230 A.D.2d 509, 658 N.Y.S.2d 582 [1st Dept. 1997]) the First Department found that the transaction violated New York's judicial disciplinary rules in that the lawyer had loaned "something of value" to the judge outside of the exceptions allowed by the Code of Judicial Conduct. The exceptions therein were inapplicable since the lawyer had previously appeared in the judge's part, which thus potentially invoked the lawyer's interests. Since the lawyer had failed to report the judge's misconduct, which had inveigled himself, to the proper authorities, the lawyer had also violated prohibitions under the disciplinary rules applicable at that time in New York, warranting the reciprocal sanction of a public censure. If the issue were presented today it would be encompassed under **Rule 3.5**(a)(1), which, inter alia, prohibits a lawyer from giving or lending anything of value to a judge who would be prohibited from accepting it. New York's Code of Judicial Conduct, in Canon 4(D)(5), bars a judge from accepting loans or gifts, subject to limited exceptions.

During trial, lawyers not involved in the case may not communicate with jurors. Even after the jury is discharged, there are restrictions on how, and when, a lawyer may communicate with jurors in order to avoid harassment, coercion or other vexatious results. After the jury is discharged, it is not unusual for a lawyer connected with the case to seek insight from the now-discharged jurors about the verdict. This is not prohibited, subject to the lawyer's compliance with the boundaries established by **Rule 3.5**(a)(5), but ethically it should be viewed against a background of the almost sacramental nature of the jury function in American law. Before and during trial jurors should enjoy the assurance that their deliberations and verdict will not subject them to uncomfortable or even hostile post-trial consequences initiated by a lawyer or other's acting on a lawyer's behalf. After being discharged, if a juror resists contacts with a trial lawyer, that preference must be honored by the lawyer. It also must be considered, even if not made explicit in the text of **Rule 3.5**, that post-trial motion practice and appeals may be improperly influenced by a wavering juror even if impeaching a verdict is difficult under New York law. A lawyer or someone acting for the lawyer may not engage in an improper attempt to impeach the verdict. Of course, jurors, too, may violate a court's directives designed to insulate the jury from outside influences during proceedings, misbehavior which can threaten the integrity of the proceedings as easily as can a lawyer's violation of **Rule 3.5**. Although a juror is not bound by **Rule 3.5** or indeed any of the Lawyers' Rules of Professional Conduct, in such an event a lawyer, who is professionally constrained, who becomes aware of the juror misconduct must promptly inform the court.

Notes of Decisions containing your search terms (0)
View all 15

Rules of Prof. Con., **Rule** **3.5** McK. Consol. Laws, Book 29 App., NY ST RPC **Rule** **3.5**
Current with amendments through March 15, 2021.

End of Document

TAB C

MARCH 2019 | AROUND THE MIDYEAR MEETING

11 must-dos from a voir dire master

Share:

For both prosecution and defense lawyers, voir dire can work to identify jurors who can be fair and impartial, rather than unfair and biased.

Jeffery T. Frederick, director of the Jury Research Services National Legal Research Group, Inc., in Charlottesville, Va., spoke about selecting a jury and engaging jurors in the process during the program "Mastering Voir Dire and Jury Selection: Gain an Edge in Questioning and Selecting Your Jury" held Jan. 25 at the ABA Midyear Meeting in Las Vegas. Moderating the program was attorney Alan Olson of the Olson Law Office, P.C., in Des Moines. Olson also serves as budget officer for the ABA Solo, Small Firm and General Practice Division, which sponsored the program.

Frederick has written extensively on jury selection, including three books on the topic. In understanding who would be good or bad jurors for your client, Frederick recommends doing a case analysis of the prospective jurors, whom he calls decision-makers. That analysis involves three main components:

- **Backgrounds.** What backgrounds do jurors have (e.g., their occupations, educational background and training, socio-economic status, media viewing habits and internet footprint and usage, among other background characteristics) that may affect their decisions in the case?
- **Experiences.** What experiences do jurors bring to the case (e.g., being a victim of a crime or involvement in prior lawsuits) that can affect how they view the case, evidence, witnesses and parties?
- **Opinions, beliefs and values.** These are the most important things to know about jurors, because they will serve as the framework or filter through which the jurors will view the case.

"You're looking for people who need to be removed (from the jury pool) and your questions should be designed to uncover those who should be removed," Frederick says.

Frederick provided 11 tips on how to effectively conduct voir dire:

1. **Adopt the proper orientation.** Approach your voir dire questioning as a "conversation," not a job interview. Be confident, reinforce juror participation and listen to jurors to yield the best results.
2. **Set the stage for jurors.** Explain the process, stressing honesty and candor and helping jurors acknowledge the filters and biases we all possess.
3. **Get them talking.** Successful voir dire requires that jurors talk (and not just listen to the attorneys talk at them). Using techniques such as the initial background summary (where all jurors answer three to five basic background questions) and having all jurors raise their hands will increase participation by jurors at the start of voir dire.
4. **Ask open-ended questions.** Open-ended questions (e.g., Why? and "What are your views on . . .?") provide more information than closed-ended questions (e.g., agree/disagree or yes/no questions).
5. **Avoid the Socially Desirable Response Bias.** Questions that include phrases that trigger the "looking good" response from jurors (e.g., "fair and impartial" or "bias or prejudice") should be avoided where possible because these phrases inhibit honest and candid answers.

6 **Focus on difficulty vs. ability.** Jurors are more willing to acknowledge difficulties in doing something than in their ability to do it. Using questions that focus on difficulties and not abilities gives jurors an opportunity to admit where they would have problems.

7 **Use alternative route to uncover bias.** Jurors have difficulty recognizing and admitting their biases. Focusing on the behavioral manifestations of bias (e.g., give less weight or need more evidence) provides an alternate and more useful route for uncovering bias.

8 **Design questions using "bad" answers.** If there is reason to believe that some jurors hold certain negative opinions that have not been revealed, be sure to ask about them.

9 **Harness the power of "reflective" questions.** Using questions that ask jurors to reflect on how certain factors might affect their decisions (reflective questions) are more likely to uncover bias than questions that simply ask if certain factors would affect their decision (nonreflective questions).

10 **Keep jurors participating.** Use techniques that encourage participation as the questioning process continues. Two useful approaches to revitalizing participation are: (a) interspersing majority response questions and (b) using the springboard method where you ask one juror a question and use the answer to talk with other jurors about the topic.

11 **Be persistent.** Don't let jurors hide. If some jurors are not participating in voir dire, ask them directly for their views so that you know what they think and all jurors know that they can't hide from the questioning.

Beyond the questions, Frederick says you have to pay attention to the juror's nonverbal communication. "Based on research on nonverbal cues to deception, pay attention to signs of anxiety and general positive or negative affect," he says. "Rule of thumb: look for deviations in the potential juror's behavior."

Look for such visual cues as body movement, body orientation, body posture, shrugs, eye contact and facial expressions. Also look for auditory cues, including voice pitch, tone, vocal hesitancy and word choice.

Another key to look for is leadership and group dynamics. Forepersons tend to be drawn from higher status occupations, those with prior jury service, those with relevant experience, those with leadership experience, those who exhibit stronger responses during voir dire and those who blog or maintain online personal journals.

But he warns to be aware of jurors who could "hang" the jury. Red flags are social isolates, opinionated, interpersonal insensitivity and job characteristics. "Jurors with jobs characterized by independence and self-reliance in decision-making are less likely to be influenced by other jurors," Frederick says.

Technology also has a role in the jury selection process. Frederick says the internet and its tools provide both sources of information for jurors and on jurors.

He says attorneys (or paralegals, trial consultants, etc.) need to conduct internet searches on potential jurors. "There is a lot to be gained from such searches and all parties are moving toward making this a common practice. However, properly conducting these searches, while seemingly simple, is more challenging than simply doing a search through the Facebook search tool bar."

Attorneys also need to scrape (basically copy and paste) comments/replies/emotional reactions (e.g., likes) posted to media stories relevant to the case and relevant entities because these actions will not show up on searches through search engines or on Facebook searches.

There is often a limited amount of time to conduct the searches themselves. The jury list may not be available more than a few days before trial and, in some cases, is only available when voir dire begins. This can put quite a burden on attorneys who are preparing for trial, Frederick says.

Despite the challenges, he says there is often valuable information to be gained by such searches.

"Combining this with limited voir dire conditions and the potential for some jurors to not answer candidly during voir dire, internet/social media searches are becoming a necessary fact of life in contemporary litigation."

TOPIC:

COURTS & JUDICIARY

For more, download Legal Talk Network's podcast with Frederick discussing best practices for getting potential jurors to open up for a better selection process.

TAB D

A Tale Of Two Zoom Trials

March 08, 2021

Author: Ryan Davis

Summary

The COVID-19 pandemic led most courts to postpone in-person trials or press ahead with safety precautions, but a minority are experimenting with conducting the whole trial experience via videoconference. Here, Law360 talks to two lawyers who tried their cases on Zoom about the format and what role it could play in the long run.

Body

Chris Wanger of Manatt Phelps & Phillips LLP was preparing Ironburg Inventions Ltd. for its patent infringement trial against gaming company Valve Corp. last March when the coronavirus pandemic shut the country down. After months in a holding pattern, a federal judge in the Western District of Washington ordered the jury trial to be conducted by Zoom in January.

That meant "we had to scramble" to prepare for an entirely new type of trial, Wanger told Law360.

In the wake of a national emergency declaration nearly one year ago, many state and federal courts decided that trials must be held in-person and either postponed them or pressed ahead with safety precautions. But some, including the court in Wanger's case, have experimented with conducting the whole trial experience, from jury selection to deliberations, via videoconference.

This new breed of proceedings creates a road map for virtual trials going forward, and courts and litigants may have reasons to want to hold trials remotely even after courts open back up, some experts told Law360.

And with preparation, remote trials can end up being largely similar to those conducted in person, according to Wanger.

"I never felt that I would have been better off being in an actual courtroom than doing it virtually," he said. "I was pretty satisfied that it's an effective way to try a case."

The Virtual Trial's 'Convenience Factor'

Conducting the trial between Ironburg and Valve from his firm's Los Angeles office meant that Wanger had computers, documents and the trial support team at his fingertips, rather than having to make sure everything was shipped and in place for an in-person trial in Seattle.

"There is a convenience factor to being in your own office in a setting that is comfortable to you," Wanger said. "From that perspective, it was an easier experience than having to schlep down to the courthouse."

Still, preparing for an entirely new type of trial "certainly requires a lot of extra work," he said, describing a lengthy process of finding the best lighting, microphone and camera setups to present the case. For instance, an initial plan to have two attorneys sitting side-by-side in the shot was scrapped when they realized they looked too small on camera.

Wanger said the attorneys were also concerned about jurors falling asleep or getting distracted, "but our experience was very positive."

"In many ways, you can connect more with the jury over this platform," he said. "You are seeing the jurors in the environment of their homes, which is obviously a very personal setting."

Jurors watching the weeklong proceeding on Zoom from their homes around the Seattle area ended up siding with Ironburg in a $4 million verdict in early February.

"I think the more of these virtual trials that happen, the more people will understand the benefits and get over the fear of the parade of horribles that could happen," Wanger said.

One of the jurors in the patent case told Law360 that, having served on an in-person jury in the past, doing it on Zoom "was in almost all respects better," saying it was easier to see the documents, exhibits and witnesses on the screen than it would have been in person.

Lessons From a Zoom Trial 'Guinea Pig'

The first Zoom trial in the country took place last summer in an asbestos case in Alameda County Superior Court in California. It was a lengthy affair that ran from late July to early September and had its share of challenges, since "we were the guinea pig and the test case," David Ongaro of Ongaro PC, who represented the defendant, told Law360.

"It [was] trial and error," he said. "Nobody had done it before, at least when we had done it, so it was a bit of groping around in the dark."

One way the attorneys found they had to adapt was that "in the courtroom, you can be a little more dramatic than on Zoom," Ongaro said.

"Everyone's used to using Zoom for meetings, so it would seem to be odd to get all emotional over a Zoom," he noted.

Getting ready for a remote trial also involved spending a substantial amount of time working with witnesses to ensure they weren't doing things like talking with their hands, which the team found was much more distracting on camera than in real life, and perfecting lighting and camera angles in their own home, he said.

"We were just trying to make sure that it wasn't a shadow speaking, and the jury could see their face and make evaluations of their credibility," he said.

The trial team was concerned about the jury getting distracted and doing other things on the computer during the trial, Ongaro said. Judge Jo-Lynne Lee's solution was to send all the jurors a computer that had nothing but Zoom on it and instruct them to use that to watch the trial.

"Our experience was that the jurors were, for the most part, very attentive," he said, apart from occasional technical hiccups. For instance, jurors occasionally lost their connection and missed some testimony, so the trial would have to be paused until they reconnected and the court reporter could read back what they missed.

"It was nothing I thought was awful, but there were delays due to technical issues," Ongaro said.

He also noted that because the trial stretched on for weeks, each day was scheduled to end by early afternoon.

"I think it would have been much harder to do from 9 to 5, staring at a screen all day," Ongaro said.

Ongaro said he isn't convinced that observing jurors over Zoom is an effective substitute for looking over at the jury box, saying it could be difficult to pick up on individual mannerisms or responses, like nodding in agreement.

"It's much more difficult for the lawyers to build any rapport with the jurors in the process, because they're looking at you like the Brady Bunch on a little screen," he said.

Will Zoom Trials Outlast the Pandemic?

Litigation consultant Karen Lisko of Perkins Coie LLP has been studying virtual trials around the U.S. over the past year and found that jurors, courts and attorneys have for the most part responded favorably to the new format.

"I've been talking with a lot of people across the country about this, and the ones who tend to say remote jury trials cannot work are the ones who haven't tried it," she told Law360. "The ones who have tried it have seen that it does work."

Lisko reported hearing many positive reactions from those who have served on virtual juries, including a project she worked on where the same mock trial was conducted twice, once in person and once online.

"One of the biggest things we found was that the remote jurors said they actually preferred being remote, and that they could be more candid, especially during jury selection," she said. "Because they were in their own home, it wasn't as intimidating as a courtroom."

Jurors also reported that they appreciated being able to read the facial expressions of lawyers and witnesses on the computer screen, rather than across a large courtroom, Lisko said.

"It is literally a more up-close and personal vantage point for a juror in a remote setting," she said.

Paula Hannaford-Agor, director of the Center for Jury Studies at the National Center for State Courts, has also heard positive reviews from participants in virtual trials. She said the resistance among some attorneys to the idea appears to have a cultural aspect, since it necessarily requires modifying their personal styles and approaches.

"There are some lawyers who have spent their entire careers perfecting their technique for in-court theater," she told Law360. "They want to be in-person because that's the stage that they feel most comfortable in."

But if remote trials become more widespread and attorneys learn to find ways to advocate effectively in the medium, they might start to wonder, "Why should I put myself and the parties and everyone else to the costs and trouble of having to do all this traveling?" Hannaford-Agor said.

Now that it has become clear that virtual trials can work, the question is whether any courts will continue using them once the pandemic subsides.

Ongaro isn't convinced, saying that while virtual trials are certainly easier for jurors and some courts may want them to continue all the time, they aren't a full substitute for in-person proceedings.

"I think jurors probably get a better feel for witnesses in the case if they're sitting in the courtroom than they do over Zoom," he said. "It seems to me like it should be more of a stopgap, pandemic-only situation."

Wanger said that it will be up to courts and parties in individual cases to weigh what medium makes sense even when it's safe to meet in person again, but he thinks there could be incentive to continue with virtual trials, especially when parties and witnesses are spread around the country.

"I could certainly see this as an acceptable solution going forward," he said.

--Editing by Alanna Weissman and Emily Kokoll.

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The Problem With Online Juries: One NJ Bar Association Fears Disparity in Virtual Trials

Law.com (Online)

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Length: 847 words

Body

A plan to mandate civil jury trials via Zoom in New Jersey courts is drawing criticism for the potential to exclude members of diverse communities from jury pools.

Virtual jury selection "hinders the empaneling of juries comprised of a fair cross-section of the community," the *Essex County Bar Association* wrote Wednesday in a letter to Acting Administrative Director of the Court Glenn Grant. And disparities in access to broadband service and in familiarity with technology would mean the ability to serve on a jury would become "subject to a socioeconomic litmus test" if mandatory virtual civil trials go forward, the Essex group said in calling for such trials to proceed on an "opt-in" basis.

The Essex County Bar Association's arguments carry special weight because the group is the state's largest county bar association and because of the degree of racial and economic diversity in the communities it serves.

The judiciary *has proposed conducting* virtual civil jury trials for all types of civil cases, with judges and attorneys working together to decide which cases should be tried based on individual factors. At the moment, no in-person trials are being conducted, in line with an order issued by Chief Justice Stuart Rabner on Nov. 16 that suspended those proceedings in light of a resurgence of COVID-19 infections.

The court's proposal for virtual civil trials would begin with cases involving one plaintiff and one defendant and a modest number of live witnesses, and complex cases needing several weeks to complete would not be tried until after more straightforward cases have done so. The court has already received at least 20 comments on the proposal, including a proposal from the Morris County Bar Association that also seeks to have remote civil trials conducted on an opt-in basis and a letter from the Middlesex County Bar Association that expresses no view on whether such trials should be mandatory.

"The inequities that would result from a mandatory virtual civil jury trial system would run counter to the fair administration of justice, flood our appellate courts with legal challenges, and exacerbate already palpable social justice issues," the association said in its letter to Grant.

Kevin Walsh of Gibbons in Newark, president of the Essex County Bar Association, said he feels positive that the judiciary will listen to his group's concerns.

"Judge Grant and the court system are doing everything they can to keep the essential functions of the court system going, and I have every confidence that the leadership of the New Jersey court system is trying to manage this crisis the same way as every business and law firm is,"

Because jurors serving remotely would need to be familiar with technology and to have access to the internet, the Essex County bar expressed concerns that in a remote civil jury trial in that county, jurors from the affluent suburbs in the west part of the county would dominate over jurors from Newark and other diverse cities in the east part of the county.

"We submit that a county such as Essex, with its diversity of population and dramatic socioeconomic differences, is particularly susceptible to skewed jury pools. A resident of a town that is considered 'high-income' would be much more likely to have and be comfortable with the technology and virtual environment essential to the functioning of a virtual jury trial," the Essex County letter said.

While the judiciary has pledged to loan out tablets to prospective jurors who don't have a computer, the Essex County group said a "mandatory statewide virtual civil jury trial program will, in all likelihood, tax that court-issued technology supply beyond its available limits." The group also expressed concern that "certain jurors" could be placed at risk of harm if, when court personnel delivers technological equipment to their residence, "neighbors jump to incorrect conclusions about why government employees are visiting that neighborhood and that residence."

Walsh said that "there are certain communities that we've learned simply don't trust portions of the government and the court system might be perceived as an extension of the police."

Since the pandemic started, the state judiciary has held a handful of criminal trials that used remote technology for the early phase of jury selection, but that venture drew widespread criticism for the jury selection procedures used. In one bellwether case, State v. Wildemar Dangcil, in which a Bergen County jury convicted a man in October of attempting to burn down a woman's home, the state Supreme Court is expected to review jury selection procedures.

Judiciary spokesman Pete McAleer said about the Essex County Bar position paper, "As is often the case when the Court receives proposals from committees, the Court shared the report for public comment. We have received feedback from 43 different groups and individuals, including the Essex County Bar Association, and their comments are publicly available on the court website. Their comments will be presented to the Court for its review and consideration."

Load-Date: March 12, 2021

The Virtual Trial: Is It Our New Normal?

Litigation Daily (Online)

October 6, 2020 Tuesday

Length: 1665 words

Body

The COVID-19 pandemic has changed nearly every aspect of our society, including not least of all the legal profession. Although we pride ourselves in our profession on our abilities to adjust and adapt to new circumstances, this pandemic has tested and stressed those talents. Social distancing guidelines and procedures implemented across the country have rendered in-person jury trials impossible.

Last month, we completed a 55-day jury trial on Zoom in the Superior Court of California, Alameda County, before Judge Jo-Lynne Lee in the matter styled OCampo vs. Aamco Transmissions. Although we were in Oakland, California, with some of our local counsel, the remainder of our trial team worked out of Los Angeles and Houston.

If our experience could be reduced to a few words, which it cannot, we would say that the most important takeaway is to plan ahead ... and practice, practice, practice. The remote format is too novel for counsel, judges, court staff, witnesses or jurors to have gained enough experience to forego practicing the skills necessary to get through your virtual trial. Because all are adjusting, your trial team should diligently practice every aspect of your case (e.g., use of exhibits, lighting for remote witness, and sound) before the trial begins.

In the interest of full disclosure, we are a staunch advocate of trial by jury in the traditional sense. In our view, that is manifested by in-person jury selection and jurors deliberating collectively in each other's presence. We believe a right to trial by jury is one of the cornerstones of democracy, which should be cherished and protected. Thus, after experiencing the virtual jury trial first-hand, we felt the need to describe what we believe are the five best practices critical to the preservation and protection of this right in the virtual setting.

Five Best Practices

1. Prepare as you would for any other trial.

Yes, successful preparation for a virtual trial requires that your team treat it the same as any other trial, at least initially. Establish an office or war room near the court, and, to the greatest extent possible, have your trial team together as you normally would. From there, conquer the remote issues.

2. Use technical support as much as possible.

Consult your conferencing platform's internal personnel to discuss their features. These companies have the expertise needed to effectively and efficiently use the technology, and a vested interest in ensuring that their platform operates properly. Gain an understanding of their capabilities and limitations of the platform, and leverage this information to maximize the use of their technology to aid your virtual trial. As a result of this type consultation, we better understood how to use Zoom features, such as "break out" and "waiting rooms" to improve our internal communication and witness examination during trial.

3. Plan.

· Physical workspace. Make a plan for your physical workspace. A newly important issue is proper spacing. Yes, more than six feet is required for trial members in the same location, but it is also necessary to prevent sound reverberation that results from laptops being too close together. In our case, counsel occupying the same conference room in Oakland was constantly reminded by various levels of feedback to pay particular attention to volume levels and which mics should be live and when.

· Appearance. Plan for how you will be viewed on the screen, from background settings to how much of your torso is visible. Get feedback from your team, and maintain awareness of what you are presenting to your audience to avoid creating additional distractions.

· Juror conduct. Create a plan to monitor juror conduct. Start by prescribing a set of agreed-upon rules, such as, keep the video on, and audio muted at all times, or notify the court immediately of any technical issues, etc. This sets clear expectations for the jurors, and it provides advanced notice to the judge of any issues you may raise if jurors fall below the prescribed standard of conduct.

· Technology. Include a plan for communicating about technical issues. Identify an internal point of contact to notify the judge and/or IT team immediately about any problems or anticipated delays.

Also, plan for all witnesses and jurors to wear headsets or headphones during all proceedings, and prepare to test their technology on a daily basis to determine if there are any audio or visual issues. Developing a technical checklist to work through before each session helps identify problems that can be solved in advance.

4. Practice.

· With your trial team. Each trial team member appearing before the jury should practice using the remote platform before trial to gain adequate competencies regarding its use. Sufficient practice ensures each member gains adequate competencies to operate the technology independently.

Practice the offering of exhibits with IT support personnel and trial team members. For example, understand how you want to offer exhibits, whether utilizing screen-sharing technology or providing advanced copies of exhibits to minimize unnecessary delays during trial.

· With the court. Develop a plan with court personnel to execute the trial because they understand the technical limitations of their particular court. Providing a virtual trial plan in advance allows them to practice, as well, particularly if their staff includes a Zoom point person responsible for managing technology aspects from their end.

· With witnesses. Practice with your witnesses, so they are acquainted with the technology and how it operates. Spend sufficient time with each witness, so they are familiar with just features as gallery and speaker view, and check audio and video transmission with each witness prior to actual trial testimony.

5. Capitalize on the limited advantages wherever possible.

The most critical aspect of any trial, civil or criminal, is voir dire. It was our sense that remote jurors were more responsive and willing to share than usual, because they were in the confines of their homes. Capitalize on this openness by directing all questions to prospective jurors individually. This will help maintain an environment where they feel comfortable responding.

In the Ocampo matter, the court provided each of the 12 jurors and three alternates a laptop with a hotspot power source, which creates a unique opportunity for counsel to control what software is accessible to jurors while the computers are in use. The laptops were configured so the juror could only click on the Zoom application and could not use it for any other purpose.

It is also important to convince the court that there should be a technology manager, whose sole responsibility is to observe the demeanor of jurors and validate the integrity of the technology. This allows immediate identification of inattentive jurors and appropriate admonishment from the court.

Risks and Things to Avoid, if Possible

While our trial team was successful, the right to trial by jury must not be put at risk by the inefficiencies that can come with virtual trials, primarily in regard to witnesses and jurors.

For example, in the 55-day trial in California, we had an expert on direct examination, and, as we displayed an exhibit on screen, the screen went to speaker view, and the expert no longer saw us onscreen, so he stopped to ask, "Where did Mr. Raven go?" Even though we'd practiced this very scenario the day before, he evidently forgot.

On a more serious note, because more outcomes are decided in voir dire than any other segment of trial, the biggest concern about virtual trials is the inability to build a rapport with jurors that occurs with being in their physical presence. Equally important is the rapport that develops between jurors when they are impaneled, serve together, lunch together and deliberate together. In our view, there is no substitute for this process.

Also, the potential for juror misconduct during a virtual trial is very high. In our trial, although the jurors had court-provided laptops, there were still technological challenges that required jurors to return to their own personal computers, providing a number of additional distractions and privacy concerns. Consider prohibiting jurors from reviewing exhibits, jury instructions, or verdict form outside the presence of the other jurors. Also, jurors should not take any "individual" breaks or absences, nor allow other non-jurors, pets or any other distraction to be in the room with them while the jury is deliberating.

Post-trial juror investigation and interviews also raise new considerations in the context of virtual trials. While general questions regarding juror misconduct still apply, virtual trials require additional considerations absent from pre-pandemic jury trials. These include whether jurors viewed other devices, experienced technical problems or performed internet research during trial.

For example, if the court must hold virtual deliberations, consider the following post-trial interview questions:

- How did deliberations go, what was the dynamic among the jurors?
- Did all jurors remain on screen and participate during deliberations?
- Was any non-juror visible or audible to the other jurors during deliberations?

- Did you experience any technical problems during deliberations (with Zoom, Wi-Fi, etc.)?

Conclusion

As virtual trials become more of the norm it will become incumbent upon all trial team members to appreciate the advantage of exposure to the new technologies and to strive to gain technical competencies, so ... practice, practice, practice!

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Load-Date: October 7, 2020

How Seattle's Federal Court Has Pioneered Zoom Jury Trials

November 20, 2020

Author: Cara Salvatore

Summary

It was something lawyers predicted at the start of the pandemic would never happen: a civil jury trial conducted over the internet. But Seattle's federal court has proven it can work — not just once but three times. U.S. District Judge Marsha Pechman, who presided over two of these trials, told Law360 how the now well-oiled machine was built.

Body

It was something many lawyers predicted at the start of the pandemic would never happen: a federal civil jury trial conducted live over the internet, with the judge, the lawyers and the members of the jury all in different locations.

Judge Marsha PechmanBut Seattle's federal court district not only proved such an arrangement can work, with the first verdict coming in weeks ago, it has repeated the feat twice more.

U.S. District Judge Marsha Pechman presided over two of those trials, one in which a former FedEx Freight employee won damages against the shipping company and one where insurer Integon was ordered to pay nearly $1 million to a policyholder. A different judge presided over the first trial, which ended in early October and saw an elderly cruise ship passenger awarded $1.3 million over a fall.

The district's fourth Zoom jury trial, an excessive-force case against the Tacoma Police Department that is expected to take several weeks, is scheduled to start Nov. 23.

The ability to conduct remote trials seems more urgent now than at any earlier point in the pandemic, as many courts that attempted to reopen over the summer are now closing again in the face of a fearsome third wave of COVID-19 and some courts that stayed open find they have outbreaks on their hands. One, in the Eastern District of Texas, saw a major coronavirus outbreak this month that sickened more than a dozen people and forced a mistrial.

In a conversation with Law360, Judge Pechman emphasized just how meticulous and iterative the work was to get jury trials in her district online. Steps were tried, then tested, discussed and tried again in a process that seemed in

some respects to echo the process of software development and validation during the long journey of building the district's now-proven system for trying cases remotely.

This interview has been edited for length and clarity.

Starting broadly, how did your district become what appears to be the first federal court that embraced doing online Zoom jury trials?

What happened in June is I had a bench trial that I thought could be pulled off with a remote trial. We were using the WebEx platform at that time, and the parties said that they were game. So I basically took the testimony, heard the arguments, got the exhibits, and I decided this bench trial.

That basically caused the chief judge in our district, Judge [Ricardo] Martinez, to ask if I would chair a committee that would put together a handbook for doing Zoom bench trials. The handbook would be a handbook for attorneys, but it would be on our public website. And there would be another handbook internally for judges, court staff, of how you would do it, click by click.

I pulled together a committee and we worked on our bench handbook. But it soon became obvious, after we got our bench handbook done, we asked ourselves, "Is there a way we can expand this to jury trials?"

What preparations did you make for the first jury trial?

We knew some of the state courts were experimenting with this. We looked at Florida, who had run a pilot project.

One of the first things was to make a committee. We had IT people. We had courtroom deputies. We had the jury coordinator. We had a magistrate judge. And I chaired the committee.

We started to look at [jury matters]. We have a very large district. We draw people from long distances. Literally some of our jurors come in by train, plane, boat from the islands. And we said, "Is this conceivable that we could get a representative jury if we invited them via Zoom?"

We sent out a questionnaire to 600 potential jurors. We asked them questions about whether they could participate remotely, whether they would be willing to come into the courthouse. We found that the vast majority of jurors did not want to come into the courthouse, travel that far and potentially spend the night overnight to participate.

We started to think about ways to ensure that people could participate, that we wouldn't get a skewed pool and get only those people who were wealthy enough to have the equipment to participate, or because of generational issues.

We asked the question of potential jurors, "Would you participate with us by coming in one day to get the court's equipment or check out the court's equipment and participate in an educational session?" And [we would] let them take the equipment home so they could participate. That's one solution to how we could ensure that everybody who wanted to participate could participate.

The next thing we did is we went through multiple drafts of the order that would serve as a template for all of the things that we thought lawyers needed to do and prepare for in order to put on a Zoom trial.

After we went through that process, we looked for a prototype case. Judge [Thomas] Zilly in my district had an easy-fact-pattern case that we decided that we would use as a mock trial. The lawyers agreed to put on an abbreviated version of their trial, and we actually paid jurors to come in and listen to the trial and debrief with us about things we needed to do in order to make this a good process. That resulted in us putting together protocols. Then Judge Zilly actually tried the real trial.

We also worked on an orientation for our jurors, and we worked on putting together an educational program so that everybody could understand how to use Zoom, how they would move into the virtual jury room, how to log on, all of those things.

Since that time, I've tried two jury trials, both to conclusion. We've debriefed the jurors in both, as well as the lawyers. And much to my amazement, it's gone quite well.

I'm about to go into my third jury trial. It's a three-week excessive-force case against Tacoma police.

Was there anything during the first or even second trial where you were in the trial and realized, "Oh my gosh, we didn't plan for that"?

One of the things that we didn't think about until really the very end was the verdict form. Because the jurors are deliberating in their own virtual room, we needed to have a fillable verdict form so they could answer it online and then transmit it to the judge. So that was one of the things that came about a little last minute, thinking about, "Oh my gosh, how do we get the answer back from the jury?"

Zoom actually has some very nice features to facilitate trial functions. For example, I allow jurors to ask witnesses questions. Zoom's chat feature allows the jurors to basically write questions that I review with the lawyers. We have a record of all the questions that came in, and we have a record in real time that shows what questions were actually asked.

What lessons did you learn from the first trial?

I think it's still important for the judge to have paper documents because sometimes you need to review the document itself before it's shown to the jury. And the monitor is taken up with watching the jury.

The other thing that quite surprised me is how attentive all the jurors were. People were saying, "Oh, they're going to be sleeping in their beds. They're not going to be paying attention." Well, I actually have a better view of them on Zoom [than in court] because they're face-on. And our courtroom deputies were watching them to make sure nobody's left their position, nobody's off doing video games.

I think that perhaps the best lesson learned is that when you have problems or glitches technologically, it takes some time and patience to work them out. But I actually kept a record of how much time we lost with that sort of problem, and it really is not more than you lose with somebody missing their bus or can't get through security or walking the jury into and out of the jury room if you have to have a bench consultation.

Perhaps the most surprising thing for me is I spent 32 years trying to evaluate witnesses by looking at the side of their head. With a virtual trial, I'm shocked to see them face-on.

Can you talk a little bit more about making sure a Zoom jury is representative of the community in the same way a live one would be?

I know that Judge Zilly felt in his trial that he got a jury that looked very much like one that we would normally have. We were worried we would be cutting off a generation from participating, or we would be cutting off minorities, or people who fell below a certain poverty level, because they wouldn't have the equipment. That has not been the case.

My second trial, I actually had a bigger representation of minorities on my jury than I usually do, and part of it is because we've made it easy for people to participate. They don't have to drive from Bellingham, Washington, to come to court and spend the night, or drive an hour and a half in traffic, or run the risk of being exposed to COVID.

You are now the most experienced federal judge in the nation when it comes to Zoom jury trials, and I would imagine people would be breaking down your door for advice. Is that so?

Various districts have contacted our clerk of court, Bill McCool, and he's distributed to them our handbooks. We have one judge in Arizona who's actually volunteered to take a case of mine. My courtroom deputy is actually sitting here and running the case for the judge in Arizona. I assume that the more publicity we get about it, the more people will be asking. I know that the Administrative Office of the Courts has contacted me. And I am going to give a talk to the Federal Bar Association Dec 9.

Let's say theoretically, and depressingly, the pandemic went on for another year the way it is now. Would you be an advocate for starting to use Zoom in criminal jury trials as well?

Well, of course, on the criminal side, you have to deal with constitutional provisions of right to confrontation, and that's something that we don't deal with on the civil side. And we don't have any guidance. There's no law out there about this. So before judges are going to be comfortable doing that, it's going to take some brave soul to say, "I'm going to try it. Let it go up and let the court of appeals tell us whether the circumstances of COVID have justified this methodology and whether that methodology satisfies that need for confrontation."

And of course the other question begging to be asked is: After the pandemic hopefully is well controlled and it's safe to do in-person trials again, would you be in favor of still continuing to do some trials over Zoom?

I think there are certainly going to be some trials that will be more efficient, that witnesses from all over the world will be able to testify without great expense, that expert witnesses will get paid for the time that they actually testify rather than the time they travel to get here. So I see it as a cost savings in some cases. And it might be a perfectly good way for people to resolve their disputes.

I hope that in-person jury trials don't go away, but I do think this gives us another arrow in our quiver of how the federal courts can be responsive.

The real key is training your staff to be adept at moving people around the platform. And for the judge, it's exercising a little patience and humility as you learn it too, and then trying to be a good problem solver because you've got slightly different problems that come up in a trial that require some common goodwill to find the solutions.

There's one other thing that we didn't talk about, and that is public participation. And the chief justice [U.S. Chief Justice John Roberts] does not want us to be broadcasting our trials, so the public can participate by listening to it. But they also can participate by watching when, with us, they get permission from the court to do so. So the trials that I've had, I've probably had about 75 people a day who've been watching and listening, which is certainly more than I've ever had for trials in the flesh. Now, most of those may be lawyers and they're just curious.

Finally, do you think it's critical for courts to have this capability for online trials right now, especially given that there's been at least one COVID-related outbreak connected to a trial recently?

Well, I think it's absolutely critical. I just saw a piece from the Administrative Office of the Courts that courts that had opened are now closing again. And there were two cases in Washington where jurors had become ill, where jurors had become exposed to COVID and had to quarantine. So for the foreseeable future, I think this is the only game in town.

--Editing by Jill Coffey.

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