

## Real Problems with Virtual Jury Trials: The Shallowing of Jury Pools

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As the COVID-19 pandemic continues with no certain end in sight, courts and lawyers alike must come to terms with the possibility that the conduct of trials may require dramatic changes to keep the wheels of justice turning. While bench trials (by video, and in some instances, live) present their own logistical challenges and strategic considerations, the prospect of video trials by jury adds additional layers of complexity. One threshold factor that must be carefully considered is the impact of video jury trials on the jury pool itself.

Significant change to any longstanding practice has consequences, both good and bad, and a shift to conducting jury trials remotely is no exception. Replacing the need to report to court for jury duty with the need to report to one's personal computer may help remove barriers associated with transportation, but invariably presents a host of new questions and challenges. What about potential jurors who do not own or have access to the necessary technology to participate? What about potential jurors who do not possess the necessary skills to operate the technology required to fully and appropriately participate? These and similar questions highlight an unintended, but likely consequence: the de facto exclusion of jurors who do not own the requisite assets or possess the necessary technical skillset to qualify for remote jury service. In turn, there is a realistic possibility that neither plaintiffs nor defendants will have access to the jury of their choosing or a jury of "their peers."

Judges and lawyers who regularly participate in Zoom conferences using court or firm-issued laptops may take for granted the hardware that make participation possible, but represent only a small percentage of necessary participants in jury trials. Even in 2020, not everyone has access to a computer, a suitable video camera or reliable internet access. While over 76% of households nationwide have access to a desktop computer, laptop computer or internet-capable handheld device, and over 81% of households nationwide have internet access,[1] 29% of adults with annual household incomes below \$30,000 do not own a smartphone; 44% of those making less than \$30,000 do not have broadband service, and 46% of those do not have a traditional computer.[2] Additionally, over half of low-income Americans do not own a tablet. *Id.*

Further, data suggest that lower income Americans tend to rely on their smartphones – if they have them – to access the internet. *Id.* While it is possible to use a smartphone to attend a Zoom meeting, functionality is at best limited – thus giving rise to real questions about whether jury service can be fairly and effectively accomplished from a smartphone alone. A substantial number of lower-income jurors will face insurmountable barriers to remote jury participation, thus excluding an important subset of the pool of otherwise qualified jurors.

The data for computer and internet access for higher-income Americans reveals problematic, albeit predictable, trends. Access to computers and internet increases as household income increases.[3] Thus, courts and lawyers must grapple with whether it is acceptable and just to proceed with jury trials where data suggest that participation may be principally determined by each potential juror's economic circumstances.

Of additional concern is the impact of access-to-technology requirements on diverse members of the jury pool. The importance of jury diversity, and the historical and ongoing challenges associated with achieving a diverse jury, are not new issues.[4] Data suggest that remote jury trials may have the unintended, but problematic, consequence of decreasing racial jury diversity. Among Black and Hispanic households, desktop and laptop computer access is approximately 64% and 68%, respectively, as compared to approximately

81% for white households according to a recent American Community Survey report.[5] The upshot is that instituting remote jury trials may lead to less racially diverse jury pools, further compounding the problem that courts, the bar, and various advocacy groups have worked so hard to address. At bottom, consideration of these factors suggests that the composition of jury panels for remote trials may be significantly different than the communities in which the trials are being held and potentially affect the fairness of the trial.

The composition of remote jury panels may also be affected by the exclusion of qualified jurors who are technologically challenged. Although technophobes exist in all age groups, senior citizens are statistically less likely to have or use the internet or to be technologically savvy. According to a 2017 Pew Research study, only 51% of people age 65 or older have broadband at home.[6] Only 42% of people over age 65 own a smartphone; 32% own a tablet and only 19% own an e-reader. *Id.* Perhaps most astonishingly, 73% of people over the age of 65 say that they are only somewhat confident, a little confident, or not at all confident in using electronic devices. *Id.* This same percentage of senior citizens say that they usually need someone else to set up and show them how to use electronic devices. *Id.*

Appearing for jury service for a video trial will require more than putting on a clean shirt, traveling to the local courthouse, and drinking bad coffee. Pandemic-era jurors will not only need to have a computer, computer camera, WiFi, and a quiet place to serve, but also be comfortable with that equipment and confident with the technology that makes it operate. They will need to trouble-shoot the problems that come from a frozen screen, the staccato speech of another participant, and maddening echoes. These technical problems present obstacles to the ability to clearly communicate, which will become all the more problematic in a video jury trial. Those without confidence in their ability to use technology may simply choose not to participate.

The loss of tech-challenged jurors means the loss of potentially valuable jurors who see it as their duty to serve. Of citizens age 65 and older, 78% believe that serving on a jury is part of what it means to be a good citizen.[7] By way of comparison, only 50% of those age 18 to 29 equate jury service with good citizenship. *Id.* Senior citizens often are attractive members of a jury because they bring a lifetime of experience and tend to have more time to devote to jury service. Their absence stands to have a significant impact not only on the composition of the remote jury panel, but also the size of the jury pool at large.

As society searches for ways to keep the wheels of justice turning during the pandemic, we must be mindful of the unintended collateral effects that may result from conducting video jury trials. It is imperative that jury pools remain diverse and populated with members representative of our communities and population. The data suggest that, while well-intentioned, remote jury trials may not be compatible with those expectations. Accordingly, courts and lawyers must proceed with caution so that the fairness of trials is not sacrificed in the name of expediency.

If you have questions or would like further information, please contact Thomas B. Fiddler (fiddlert@whiteandwilliams.com; 215.864.7081), Vincent N. Barbera (barberav@whiteandwilliams.com; 215.864.7137) or another member of our Commercial Litigation Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

[1] <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf>

[2] <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>

[3] *Supra* at FN 1.

[4] Chief Judge Juan R. Sanchez, [A Plan of our Own: The Eastern District of Pennsylvania's Initiative to Increase Jury Diversity](#), Temple Law Review Online, Vol. 91 (2019).

[5] *Supra* at FN 1.

[6] <https://www.pewresearch.org/internet/2017/05/17/technology-use-among-seniors/>

[7] <https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/>

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