

Chicago Daily Law Bulletin®

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August 12, 2020

Remote jury trials will create more problems than they solve

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“Don’t mistake activity for achievement” was a maxim often preached by legendary basketball coach John Wooden. It is also a polite way of chastising those who implore “do something” to address a problem that they have not sufficiently thought through and thus have not yet developed a proper solution to address. That is the situation with the current backlog of criminal and civil jury trials to which remote jury trials is being suggested as the answer.

As set forth in this space last week, there is a massive amount of currently unusable space in Chicago and around the state at which socially distanced, safe trials can be conducted in person, and that will not raise the practical and constitutional issues of remote jury trials. In addition to McCormick Place, there are more than 200 theaters in Chicago alone and numerous other concert venues and arenas throughout the state that can be used to address this problem. The rush to take what, on its face is, the convenient, technological solution de jour, remote jury trials, is misguided and should be averted because the risks of proceeding with remote jury trials far outstrip any potential benefits.

The Seventh Amendment to the Constitution and the guarantee of a jury trial in Article I, Section 13 of the Illinois Constitution should remain “inviolable.” In Illinois, the right to a jury trial, whether civil or criminal, contains several fundamentals, including being composed of 12 persons that represent the community and who are fair and impartial. Remote jury trial procedures threaten these fundamentals.

From the outset of a trial, the ability to select jurors remotely could be hampered by conducting the trial remotely. As seen in a recent instance in California, during voir dire it was claimed that one juror worked out on an elliptical machine, another curled up in bed, still another checked the stove, while others appeared to be on other meetings or operating other electronic devices, as one cared for a child, and still, others left the screen altogether without permission or explanation. Juror attention is critical throughout the process and even assuming the technology is working seamlessly (which is a very large assumption) the full attention of potential jurors during voir dire and jurors during trial cannot be assumed, much less guaranteed. In an in-person trial, an inattentive juror can be admonished and removed, whereas in a remote trial that will be much more difficult.

If the court's, lawyers' or jurors' internet connection is faulty, then the integrity of the process will be called into question. No one will know what was missed during a lag or outage of service and what was missed cannot be replicated, even assuming the court reporter's connection was consistent. Problems with sufficiency of internet connections and differences in the familiarity with the technology will lead to a focus on correcting basic connectivity issues, not focusing on the trial and the evidence presented.

More fundamentally, explaining the solemnity of the process to jurors, because many have never served before, is substantially hampered when the trial judge and counsel are not in the presence of the jurors to ensure that distractions and barriers to attention, whether technological or environmental, are removed. In addition, it will be even more likely than usual for jurors to access outside information about the case via an alternative device to the device being used to participate in the trial.

On the other end of the spectrum from the technologically advanced juror, gaps in access and familiarity with technology may preclude capable, qualified jurors from participating in jury service and that will be to the detriment of all. One side or the other may believe that there is an advantage to remote jury trials because their side may gain an advantage by having demographics in remote jury procedures that favor their position. That may be so, but this is not the time to gain advantage by gaming the system to obtain a jury pool more to one side's liking. The appropriate manner to proceed is to find a way to provide a fair and just jury trial for all.

Not only will a remote jury trial deprive the system of the basic safeguards of presence in the courthouse, but it will deprive advocates of the opportunity to engage jurors both during voir dire and during the trial, to make connections with the jurors, gauge the effectiveness of arguments and properly evaluate the trial process. As the Court of Criminal Appeals of Tennessee found recently, the confrontation clause of the Sixth Amendment is violated by allowing some of the state's witnesses to testify remotely. *State v. Seale*, 2020 Tenn. Crim. App. LEXIS 491 (July 20, 2020).

Though the right to confrontation does not apply in the civil context, the principle is the same: being remote is not the same as being live, and the ability to evaluate the credibility of witnesses is far inferior when done electronically than when done in person. It is far different having a treating physician or retained expert testify via videotape evidence deposition, where credibility evaluations are of limited utility, than to have key witnesses whose credibility is a substantial issue testify remotely, much less have an entire trial conducted remotely.

But it is the jury deliberation process that is likely most fraught with peril. There is simply no way to secure deliberations from others present in the room with the jurors (both the virtual room and the physical room where each juror will be) during this most critical stage of the process. The integrity of the process is compromised when jury deliberations cannot be secured and that can only be done in person.

Simply doing something, anything, to return to trials is not a solution. Good solutions are available both short-term and long. The constitutional requirement for jury trials applies equally for the state and criminal defendants, plaintiffs and civil defendants. All litigants are entitled to fair trials that lead to just outcomes. This is not a plaintiff or defense, a civil or criminal justice issue. This is an issue of justice. Remote jury trials cannot deliver justice.

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