

Judges Weigh Bigger Rooms, Cleaner Mics as Jury Trials Restart

By Matthew Bultman and Maeve Allsup

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- Trials won't look the same in the age of Covid-19
 - Some judges have outlined courtroom safety plans
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Federal courts in some parts of the country have prepared for a cautious reboot of jury trials in civil lawsuits—equipped with disinfectant, measuring tapes, and extra jurors.

New courtroom dynamics could alter non-verbal cues, skew jury demographics, and limit communication between attorneys. Even so, some district court judges have signaled an openness to holding in-person civil jury trials in June or July, following an extended break because of the Covid-19 pandemic. Others are eyeing a return in late summer or early fall.

Judges face difficult decisions as they weigh how, and when, to reopen their courtrooms for jury trials—and try to strike a balance between avoiding a deep backlog of cases and minimizing the health risks of bringing in jurors, lawyers, and witnesses, attorneys say.

“Judges are going to have to make a lot of balancing decisions regarding safety and keeping the business of courts moving that they've never had to make before,” said Ted Stevenson, an attorney at McKool Smith PC in Dallas.

Courts Planning

Courts aren't all reopening at the same pace. There have already been a handful of in-person trials in criminal cases in Oregon state court while, in Connecticut, there will be no federal jury trials before September.

Meanwhile, the Eastern District of Texas scheduled a trade secrets trial for jury selection June 1, though the two sides later agreed to settle the case, and other civil trials are on the calendar for early July.

The chief judge in East Texas, Rodney Gilstrap, has said potential jurors will be more spread out during voir dire, and multiple microphones will be used so they can be disinfected. The Western District of Texas has also set an intellectual property trial for late June.

One of the biggest differences in holding jury trials during the health crisis is the amount of space required: two-to-three times more than normal, according to Renee Rothauge, a Perkins Coie LLP attorney in Oregon and member of an American Board of Trial Advocates task force studying the issue.

Some judges have already previewed how civil trials may necessarily change in the pandemic.

U.S. District Judge Beth Labson Freeman in San Jose, Calif., outlined safety measures she planned to take in a patent case, later pushed back, between Finjan Inc. and Cisco Systems Inc., including adding one person to the typical eight-person jury panel in case someone got sick.

Jurors would've taken breaks and deliberated in a separate courtroom, rather than in one of the designated jury rooms, which are often small and windowless. The trial would also have been moved to a spacious ceremonial courtroom, where court staff would "literally measure out the courtroom" for social distancing, Freeman said according to a transcript of an April 30 pretrial conference held over Zoom.

The court also planned to send potential jurors a questionnaire and hardship form by email, which they would return before coming to the courthouse.

"I'm expecting that many, many jurors are going to go on hardship because they'll have risk factors that make them appropriate not to be coming into the court," the judge said, according to the transcript. Jury selection was to begin June 19, but the district pushed all civil jury trials back until at least October.

War Room Dynamics

Many attorneys aren't sure what to expect in a pandemic courtroom but anticipate new dynamics. Their ability to move around will likely be limited, and discreetly passing notes between attorneys and clients, or whispering in one another's ear during trial, will be more difficult.

There is also the issue of whether jurors, witnesses, or attorneys will wear masks, which would dramatically change the feel of the trial, said Matthew Menchel, a former Justice Department prosecutor and attorney at Kobre & Kim LLP in Miami.

"Quite literally, I think a mask can actually mask a lot of the cues that we're used to looking at when we're evaluating people," Menchel said.

Brad Brian, chair of Munger Tolles & Olson LLP, expects judges may be more open to experiment with using video calls to put on some witnesses.

Lawyers also face adjustments outside the courtroom. Fish & Richardson PC's Juanita Brooks, an attorney for Finjan in the California patent case, said in an interview, before the trial was delayed, that her team would be trading the usual shoulder-to-shoulder spaces in their hotel war room for larger rooms.

There would be no communal meals or shared supplies, "lots and lots of disinfecting," temperature checks, and Covid-19 tests for everyone on the team beforehand, said Brooks. She said she had joked that she was spending "as much time preparing for the virus as I am preparing for the trial."

'Guinea Pigs'

Questions linger about how people might respond to being asked to sit on a jury during a health pandemic. Jury duty can be an inconvenience even in normal circumstances, and some might be apprehensive about coming to court in largely untested circumstances, lawyers and legal scholars said.

"You're essentially asking them to be guinea pigs," Lara Bazelon, a law professor at the University of San Francisco, said.

Only half of the roughly 600 potential jurors surveyed in a recent Miami-Dade County-Eleventh Circuit poll said they would report for duty in July, citing safety concerns, but more said they'd be willing to appear this fall.

Certain courts, including the Eastern District of Texas, may screen potential jurors before calling them into the courthouse to assess their comfort level. That could result in jury panels that skew younger, or toward individuals who believe the coronavirus risk is overblown, as older or sickly jurors more susceptible to severe illness from Covid-19 ask to be excused.

"I do think the juries are going to look more like my friends on Facebook that think that the risk is low, that disregard some of the warnings that we've gotten from scientists with experience with viruses," Michael Smith, an attorney at Siebman Forrest Burg & Smith LLP in Marshall, Texas, said.

Under U.S. law, federal juries must be drawn from a "fair cross section of the community," a requirement that could be called into question if jury selection doesn't ultimately take in a diverse set of people, attorneys said.

Other issues, such as what to do about other jurors if one falls ill, could also arise.

"I don't know that we know the answer to some of those questions," said Gerald Ivey, a lawyer at Finnegan Henderson Farabow Garrett & Dunner LLP. "And frankly, depending on the jurors and where they are in the country, the reactions could be quite varied."

Virtual Trials

As for virtual trials, there's been experimentation. One Texas state court this month held a virtual jury trial over Zoom. The Online Courtroom Project, a task force that includes trial consultants and litigation researchers, is planning to hold mock virtual trials. A pilot program in Florida has also been created for civil jury trials to be held remotely.

Some worry online trials could skew juror pools in their own way by potentially excluding people who don't have a computer or high-speed internet access.

Ken Broda-Bahm, a litigation consultant and advisory board member for the online project, said there are technological solutions, such as court-provided iPads, to address such discrepancies. "What hasn't happened are the social decisions about what we want to demand," he said.

Many attorneys are hesitant to embrace virtual trials. Lori Cohen, who leads the trial practice group at Greenberg Traurig LLP, said it could be difficult to pick up on verbal cues from jurors or ensure they aren't doing their own research online.

"I think we should try to protect that as a live experience as long as possible to ensure the protection of the parties' constitutional rights," Cohen said.

As tricky as reopening will be, some see opportunity in the pandemic-era to re-evaluate the jury trial system and figure out what has, or has not, worked.

"This is what I would call a once-in-a-generation opportunity to reassess and reinvent," Rothauge said.

To contact the reporters on this story: Matthew Bultman in New York at mbultman@correspondent.bloomberglaw.com; Maeve Allsup in San Francisco at mallsup@bloomberglaw.com

To contact the editors responsible for this story: Keith Perine at kperine@bloomberglaw.com; Cheryl Saenz at csaenz@bloombergtax.com

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