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PERSPECTIVE

Selecting a jury while on lockdown

By **Bill Oxley**
and **Meghan Kelly**

The COVID-19 pandemic has resulted in the closure of courtrooms across the country. The courts that are open for limited business have closed their doors to jurors in order to protect the public health. The longer the pandemic lasts, the more likely it becomes that courts will conduct remote jury trials. One issue that courts and parties will have to figure out is how to select a jury remotely. At first glance, remote jury selection seems like a logistical nightmare. And a prohibitively long process. However, the suggestions described below could solve these problems if counsel put in the necessary work.

From a practical standpoint, it will be impossible to voir dire more than a few jurors at a time (at most). As a result, the parties and their attorneys will need to abandon the idea that they will be able to question many potential jurors at the same time, a practice common in many state courts, including those of California, New York and Texas. Instead, the parties will have to achieve the perceived efficiencies of those systems and streamline a process that is fraught with inefficiencies in every jurisdiction.

We recommend sending a juror questionnaire, accompanied by a substantive (and short!) statement of the case, to potential jurors in advance of voir dire. The questionnaires could be delivered and returned by mail or they could be administered online through SurveyMonkey, Google Forms or

other similar services. The written statement of the case would be the substitute for the description of the case that some judges allow counsel to make in voir dire. The questionnaire would be the substitute for many of the questions that get repeated over and over in voir dire (where do you live, what do you do, what do your family members do) as well as more case-specific questions (have you ever worked in the XYZ industry, do you have any experience with ABC's products, etc.). The questionnaire would also, of course, have space for the potential jurors to provide narrative answers and details.

Some lawyers and judges do not like the idea of juror questionnaires at all and are especially skeptical of longer and more substantive questionnaires. But in order to make remote jury selection work at all, getting jurors to respond to a meaningful and substantive juror questionnaire is imperative. And studies have demonstrated repeatedly that the answers jurors give in response to a written questionnaire are often more reliable, more detailed and more honest than the answers they give while on the spot in open court.

The trade-off for a questionnaire is a simplified – and much shorter – oral voir dire. The court, for example, should require counsel to meet and confer in advance of voir dire and agree on potential jurors who should be excused for cause based on the responses to the questionnaire.

We also suggest that the court schedule juror interviews — in the order of the random list — to

occur over Skype, Zoom, Webex or a similar online system. If a potential juror is unable to access the video portion of those services, he or she should be allowed to call in. The court should require the lawyers conducting voir dire primarily to stick to follow-up questions about the potential juror's questionnaire responses.

Absent good cause, the court should impose strict time limits for juror interviews. If, for example, the court holds interviews of four jurors at the same time (we do not recommend interviews of more than four at a time because a larger group would be unwieldy), each side should get no more than 15 minutes with that group. And no more than five minutes per side, per juror if the court decides to hold individual juror interviews. A need for additional time will usually be obvious from the questionnaire responses, and a request for additional time should be made in advance to allow the

parties and the court to create an interview schedule they can keep.

We also suggest that the court require the parties to exercise cause challenges immediately upon the completion of a juror interview or group interview.

For courts that do not allow counsel to ask questions during voir dire, we suggest the same process as above but with the court asking the questions in oral voir dire. Counsel should submit well in advance of oral voir dire the questions they would like the court to ask and include a reference to the questionnaire response to which the proposed question(s) relates.

The COVID-19 pandemic makes remote jury trials more likely. Whether remote jury trials become a reality during this pandemic or at some point in the future, trial lawyers should be thinking now about solutions that will help them pick the jurors who will decide their clients' cases. ■

Bill Oxley is the head of BakerHostetler's Los Angeles litigation practice. He is a Fellow in the American College of Trial lawyers who focuses his practice on business, product liability, and toxic tort litigation.

Meghan Kelly is a trial lawyer and partner in BakerHostetler's Los Angeles and Philadelphia offices. She focuses her practice on business, product liability, and toxic tort litigation.

