



From: The Capital Area Trial Lawyers Association (“CATLA”)¹

RE: Recommendations for Conducting Jury Trials During the COVID-19 Pandemic

I. Introduction.

The purpose of this document is to offer potential solutions to the civil jury trial backlog in Travis County caused by the COVID-19 pandemic, and to outline CATLA’s position related to proposals made by the Jury Trial Task Force led by the Austin Bar Association (the “ABA Task Force”). Overall, we wholeheartedly concur that all well-vetted and unbiased solutions to relieve the present glut of civil jury trials ought to be given strong consideration. We urge caution, however, as we also recognize that we are about to embark on perhaps the most significant changes in how civil cases are tried to juries that have been made in hundreds of years. When we move forward, we must be able to do so courageously, with the confidence that we have taken all reasonable viewpoints and available information into account. If we fail to adequately consider all such viewpoints and information, we risk running afoul of the timeless guidance from one of our founding fathers, often referred to as the “Father of the Bill of Rights,” who warned:

That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

- *George Mason*

If we do not plan for a methodology to return to our American tradition of trial by jury, then we have lost before we begin this battle. Like any good strategy, the first (and most important) step is to determine the answer to the question: What is the end goal? That question, and its answer, should guide our thinking in this process.²

¹ The Capital Area Trial Lawyers Association (“CATLA”) is comprised of attorneys who primarily represent Texans injured by the negligence or recklessness of others. Our governing mission is:

- To promote the public's right of unrestricted access to the courts and jury system;
- To facilitate the exchange of knowledge and resources among trial lawyers;
- To educate our community about the vital role of trial lawyers in society;
- To inform our community about threats to the Justice system;
- To respond to public attacks that threaten the Justice system; and,
- To encourage cooperation among lawyers engaged in the furtherance of such objectives.

² CATLA recommends review of the Second Report to the Chief Justice of the Supreme Court of North Carolina (dated June 30, 2020) for guidance on specific ideas for dealing with the issues raised by the COVID-19 pandemic in this context.

The issues outlined in this section should be considered for any form of jury trial—whether a traditional in-person jury trial, a virtual jury trial, or any other manner of modified jury trial. The 7th Amendment mandate of an impartial jury that reflects a fair cross-section of the community presents unique challenges in the context of modifying traditional, in-person jury trials. These challenges include equal access to technology, lack of human-to-human authenticity in a virtual process, and personal safety concerns. Overall, we believe that all viable solutions should be considered, based upon objectively verifiable data. Below are some recommendations that we believe deserve further vetting before reaching any final conclusions.

II. Traditional Jury Trials With Adequate Infection Control Measures vs. Remote Juror Trials

Because of the obvious distractions related to virtual trials (family members, text messages, phone calls, failed network connections, etc.), we believe that traditional, in-person jury trials with jurors safely attending must be given first consideration before concluding that jurors attending trials remotely is the agreed-upon solution. We are not aware of any medical data that suggests jury trials with appropriate social distancing in an alternative forum such as an auditorium (or even a large traditional courtroom, for that matter) with adequate personal protective equipment (“PPE”) and measures such as plastic barriers, would be less safe than a visit to any other essential business, including our grocery stores. We should not be too hasty in concluding that virtual remote jury trials or virtual summary trials are the only present viable solutions. Rather, we believe that an evaluation of the degree of safety margin gained by virtual trials vs. in-person trials with adequate PPE, based upon objectively verifiable data, must first be taken into consideration.

We suggest that public health officials should be engaged to evaluate the following broad issues: 1) what specific measurements of community spread of COVID-19 infection require jury trials be conducted remotely, and what specific measurements would allow traditional jury trials (with and without modifications) to resume; 2) what specific modifications can be made to a live courtroom space that would allow for traditional jury trials and under what level of community spread; and 3) what level of PPE should be worn under each scenario.³ Some of our recommendations for further discussion include:

A. “Courtrooms”

Our existing largest courtrooms and other jury congregation areas (e.g., venire gathering, break areas, deliberation spaces, etc.) should be evaluated by public health officials to determine whether very specific social distancing, PPE, cleaning protocols, and other infection control measures can safely allow for traditional jury trials under specific community spread conditions. If our existing largest courtrooms cannot safely host traditional jury trials, other forums should be considered, such as auditoriums, libraries, and other large public spaces. Alternatively, perhaps a trial could be conducted using two courtrooms: one for the participants and another for the jurors.

³ If any such information has already been gathered, it should be shared with all members of the ABA Task Force to further evaluate with their respective constituents.

B. Spreading Out Physical Space Between Multiple Trials

Within a courthouse or other jury forum, traditional jury trials could possibly be limited to one per floor or every other floor, and start days could be staggered to allow for social distancing. Public viewing of trials could be limited to live streaming to further reduce the number of persons in the trial forum.

C. Jury Size

Civil juries of less than 12 may provide further safeguards, allowing for greater use of traditional in-person jury trials. It would be helpful to better understand health experts' perspectives on the degree of safety gains that could be possibly accomplished by shifting from a 12-person jury down to a 6-person jury. If significant gains can be made by reducing the size of the jury while also utilizing the other safety measures, discussed above we believe most parties would prefer a smaller jury in a traditional, in-person trial rather than a 12-person jury in a trial conducted remotely. As it currently stands, consent of all parties would be required for this option.

III. Prospective Juror Communications, Summons, and Pre-Screen Questionnaire

A. Communicating Safety to Prospective Jurors

Regardless of the manner of jury service, assurances to prospective jurors that their safety will be adequately protected during jury service must be well-communicated. Such assurances should begin through general public education even before a jury summons is issued. Additionally, the jury summons itself should reinforce these assurances. These communications should include not only juror safety during the jury selection and trial process, but also other considerations such as transportation to the location where they will sit for trial, safety during trial, and concerns they may have while being away from home. Simply stated, we cannot have impartial juries that reflect a fair cross-section of the community if the demographics of persons who show up for trial are skewed towards those who believe that the COVID-19 pandemic is a hoax or that masks and PPE are unnecessary or ridiculous, thereby artificially eliminating prospective jurors who are more safety-conscious. This is particularly true given that these issues seem to be so clearly divided along political party lines.

B. Jury Summons Public Media Campaign

To ensure that jurors feel safe, a broad-based public media campaign should address these fears. This campaign should educate the public about the virtual jury summons so that, upon receipt, prospective jurors take it seriously without believing it to be a scam. The following specific efforts should be considered:

1. Informational videos on Travis County websites and social media, and pushed to news sources; press releases. Judges should be the face of these messages.
2. "How-to" videos on responding to a jury summons, logging in to I-Jury, and using/downloading Zoom or other virtual videoconferencing platform.
3. Consider the following examples of COVID-19 jury summons education videos from other jurisdictions:

- a. Allen County, Indiana:
www.youtube.com/watch?v=eycZsxIEcH4&feature=youtu.be
- b. Clark County, Indiana:
<https://youtu.be/kyg5fsJDXPQ>
- c. Maricopa County, Arizona:
<https://youtu.be/GoIw9VtlxEw>

C. Post-Summons Juror Communications

We anticipate that an adequately tailored jury summons can address jury service safety issues and guard against the concern that technology will prevent an adequate representation of cross-sections of our community. Upon receipt of the summons, we believe the following court/juror communications should be considered:

1. Initial Juror Response

Prospective jurors should be allowed to respond to the summons by online I-Jury or by telephone. The summons should clearly state: “You must respond by online I-Jury questionnaire or call-in telephone number to complete questionnaire. Do not appear in person.”

2. Travis County Jury Duty Website

The Travis County Jury Duty website should be updated to state: “If you receive a summons, you must respond by online I-Jury questionnaire or call-in telephone number to complete questionnaire. Do not appear in person.”

3. Pre-Screen Questionnaire

The Travis County Pre-Screen Questionnaire should be updated to include technology questions. (See Attached Proposed Questionnaire.) At a minimum, the questionnaire should address the following technology-related matters:

- a. Questions about access to high-speed internet and any data plan limitations;
- b. Notification that all cell phones should be excluded because of the likely interruptions (phone calls, texts, etc.)
- c. Questions about available devices to participate in virtual proceedings (e.g., laptop, tablet, computer, etc.), including devices’ two-way audio and visual capabilities;
- d. Questions related to privacy and security, such as access to a semi-private space away from other people and pets; and,
- e. Providing a telephone number alternative to the online pre-screen questionnaire.

The current options for juror communication on the Travis County website are inadequate to accomplish all of the needs related to virtual presentations. There are options for online (I-Jury), in-person, mail, or fax, and a person can call with a request for an ADA accommodation:

▼ What options do I have for answering a jury summons?

You can respond to a summons one of two ways:

- Anytime, on the Internet using [I-Jury™](#)
- Weekdays, Monday-Friday from 8:00 AM to 4:00 PM, in person at the Travis County Jury Office.
 - 5501 Airport Blvd.,
North entrance, Room 220
(Airport Blvd. between 53½ St. and Koenig Ln.)
[Map](#)

▼ What should I do if I'm not qualified to serve?

If you are certain you are not qualified, just use the [I-Jury™ Online Impaneling](#) form to tell us, or mail your disqualification to Velva L. Price, Travis County District Clerk/Jury Management Office, P.O. Box 679003, Austin, TX 78767. You may also fax it to (512) 854-4457. Please be sure to include the jury number found on the front of the summons, along with your full name and the disqualification you are claiming. All disqualifications are subject to review.

If you are not certain about whether you are qualified, you may contact the jury office in writing and ask for a clarification. In your letter, describe why you think you may not be qualified. Your letter can be e-mailed to ijury@traviscountytx.gov, mailed to Velva L. Price, Travis County District Clerk/Jury Management Office, P.O. Box 679003, Austin, TX 78767, or faxed to (512) 854-4457.

▼ What do I do about a medical problem?

Travis County will accommodate anyone with a medical problem or a disability to help them complete their jury service.

However, any juror with a medical problem or disability who wishes to be excused may request so in writing. The request should be accompanied by a letter from the health care provider verifying the medical problem and the need for you to be excused. The request can be sent to the jury office by mailing it to Velva L. Price, Travis County District Clerk/Jury Management Office, P.O. Box 679003, Austin, TX 78767, fax to (512) 854-4457 or scan and email to ijury@traviscountytx.gov Please be sure to include your jury number found on the front of your jury summons along with your full name. All requests to be excused are subject to verification.

4. Other Post-Summons Recommendations

- a. Have the panel questionnaires available for judge and attorneys 72 hours in advance.
- b. Have the panel questionnaires available to the judge and attorneys for the final pretrial conference.
- c. Consider emailing and texting jurors to update them with information on how and when to appear.
- d. Provide access to technology for jurors who do not otherwise possess it.
- e. Strong consideration should be given to requiring jurors to attend trials at a public computer, which would only be used for jurors viewing jury trials. This is much the same as requiring a juror to sit in a courtroom, and PPE can be better controlled in this fashion.

III. Virtual Modifications to Jury Trials

Regardless of whether only the jury or all trial participants attend trial remotely through technology, we strongly believe that the 7th Amendment requires that technology substitutes for traditional, in-person jury trials can be made only with consent of the parties. With such consent, we support using technology for some or all of the trial attendees to participate in remote locations.

A. Overview

In the event that in-person jury trials cannot be safely conducted (having been ruled unsafe after consideration of objective data), use of technology to modify in-person jury trials should closely mirror the traditional approach as closely as possible. The following methods for using technology are listed in order of preference:

B. Virtual Jury Trials

The term “virtual jury trial” describes a juror participating in a live-stream of the trial process, in whole or in part. For example, while one or more jurors may be watching the live-stream of one or more phases of the trial process, this does not necessarily eliminate other participants (e.g., judge, attorneys, witnesses, etc.) being physically present in the same location—with adequate safety measures, of course.

Again, upon consent of the parties, we encourage the use of juries with fewer than 12 members to ease inherent trial delays due to variable technology platforms used by individual jurors. This may be relieved if we require jurors to attend trial at a county-operated remote viewing site. We note that in a recent experience with a virtual (summary) jury trial in Collin County, it

took over half an hour for the court to get just 30 venire participants to connect to the Zoom meeting before proceedings were even able to begin.⁴

Much like the COVID-19 safety protocols discussed in above Section II, jurors making any type of in-person appearance should do so at a location that allows for social distancing, temperature checks upon arrival, mandatory masks, and sanitation. Jurors can watch the parties, judge, and witnesses through monitors with multiple simultaneous views.

A bailiff should also be onsite to collect cell phones from jurors, monitor, verify identification, and provide assistance. This will protect against jurors being influenced by information or persons not directly in evidence at trial. It would also alleviate security concerns regarding Zoom or other virtual meeting platforms.

Other specific recommendations for virtual trials include:

- 1) Jurors will only meet for morning or afternoon sessions, to avoid breaks for lunch;
- 2) Parties, lawyers, judge, and witnesses appear remotely as much as possible;
- 3) Secure breakout rooms are utilized for attorney-client communications;
- 4) Breakout rooms are also used during arguments and rulings upon evidentiary objections;
- 5) Bailiff or other court staff monitor jury in main meeting rooms while breakout rooms are being used;
- 6) Exhibits should be pre-admitted during pre-trial to the extent practicable. Ideally, an electronic trial notebook of admitted trial exhibits should be made available for each juror. This electronic trial notebook should have the capability for the jury to simultaneously view the exhibit and the witness testifying about the exhibit. An electronic repository of such exhibits should also be available to each juror during deliberations at a minimum;
- 7) During jury deliberations, a bailiff should be available, virtually or in-person, to provide the jurors with the exhibits and the jury charge, and to monitor for jury questions;
- 8) Multiple monitors should be available to the court, counsel, parties, witnesses, and jurors to simultaneously view each other and documents;
- 9) Dedicated court staff should be readily available to host the virtual trial and respond to technology issues;
- 10) Court staff should record audio and video of jury trials to assist the court reporter; and
- 11) Guard against unauthorized virtual meeting room entry through the use of virtual waiting rooms, photo ID checks, and regular use of new meeting IDs.

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<https://link.edgепilot.com/s/3684b711/JjwYEkUtWk2NfacBqLnddw?u=https://www.youtube.com/watch?v=HIXrOInM7B8%26feature=youtu.be>

C. Virtual Jury Selection

If at all possible, in-person jury selection should first be considered before settling upon a purely virtual jury selection. For example, an agreed-upon jury of fewer than 12 members, would effectively reduce the size of the venire. With effective vetting of inappropriate jurors through questionnaires from the court and the parties, this could further reduce the size of the in-person venire. Additionally, in tandem with these reduced venire efforts, an in-person jury selection should be considered by having the attorneys conduct *voir dire* in stages with less than the entire venire in back-to-back small groups. Whether with an in-person jury selection or a virtual one, we encourage smaller groups of potential jurors (8-10) to allow for efficient time use for questioning by the judge and all parties. This will allow the jurors to be able to see each other, and each other's responses, as well, which is necessary for group dynamics and critical to effective jury selection.

If it is objectively determined to be unsafe to conduct an in-person jury selection, we support virtual jury selection when properly conducted. In that event, we make the following specific recommendations:

- 1) Jury selection begins with party questionnaires being sent with the jury summons, with electronic responses provided by the prospective jurors when possible (party questionnaires must be disclosed and agreed upon by all parties);
- 2) Take smaller groups of jurors (8-10) to allow for efficient time use for questioning by the judge and all parties. This will allow the jurors to be able to see each other, and each other's responses, which is necessary for group dynamic and critical to effective jury selection;
- 3) Actual jury selection should take place a minimum of one day prior to the start of trial;
- 4) When possible, to provide juror privacy and reduce distraction, each juror should have a uniform virtual background;
- 5) Breakout rooms should be utilized to individually discuss hardships;
- 6) Chat functions should be disabled for the jury panel;
- 7) Polling function should be available for the trial court to quickly screen for hardships, and to pre-screen for conflicts (e.g., lawyer names, party names, witness names);
- 8) Each side should be limited to three peremptory challenges; and
- 9) Court should provide juror questionnaire responses to the parties 48 hours in advance of *voir dire*.

D. Virtual Summary Jury Trials

Non-binding summary jury trials have been authorized pursuant to the ADR statute since 1987. It is notable that their use is not widespread, and the Travis County courts have had little success in getting volunteers to participate in them. We also note that, as in many things, uncertainty may account for some of the attorney hesitation to use this form of ADR. The enabling statute provides scant information to the parties of exactly how the summary jury trial should be conducted, except for the fact that it results in a non-binding advisory opinion from a minimum 6-member jury panel. Rather than simply having courts order virtual summary jury trials, we believe

that the ABA Task Force should develop more detailed recommendations concerning such trials to instill further confidence in this option. Otherwise, if parties are simply ordered to participate in summary jury trials without more, we envision party pushback by merely going through the motions of a summary jury trial without being committed to the process—which ultimately serves no one and would in fact increase the current backlog.

To facilitate greater use of virtual summary jury trials, we offer the following recommendations for further evaluation by the ABA Task Force:

- 1) All of the above discussions regarding virtual proceedings, including virtual jury selection, generally should be considered for possible implementation during virtual summary jury trials.
- 2) Exhibits and demonstrative exhibits may be displayed and used in the presentations. However, no exhibits will be submitted to the jury.
- 3) Exhibits and demonstrative exhibits must be disclosed to all counsel two days prior to summary jury trial.
- 4) A pretrial conference should be conducted prior to summary jury trial to determine jury charge and any motions *in limine* rulings on presentation materials.
- 5) Each side is limited to three hours of evidentiary presentation. Evidentiary rules apply to the presentations. Extensive witness testimony is discouraged. Attorneys are encouraged to have all exhibits pre-marked and pre-admitted during the pretrial conference.
- 6) Evidentiary objections should be raised primarily during pretrial and generally discouraged during the summary trial presentations, given the non-binding nature.
- 7) Jurors should be given a maximum of one hour to deliberate, with the goal of concluding the summary jury trial in less than one day.

E. Pre-Recorded Jury Trials

We are strongly opposed to the use of pre-recorded jury trials. The forced provision of trying cases to a digital recorder, prior to the presentation of that trial to a jury, deprives the litigants of the ability to present their case in the most credible manner—in person, if it can be done safely, or via a live-stream if not. Moreover, it infringes upon both the 7th Amendment to the U.S. Constitution and the Open Courts provision of the Texas Constitution. This practice will also further backlog the courts.

Requiring a digitally recorded trial in a case prior to its presentation to a jury will lead to the expense of trying nearly every case prior to reasonable settlement offers being made by civil defendants and/or their insurers. Why would any party EVER offer to resolve a case for fair value prior to watching the trial live to see if the evidentiary calls went their way, or if the quality of the legal representation affected outcome? They wouldn't.

In fact, this becomes the expressed intent of the lead proponent of pre-recorded jury trials: “It is difficult to imagine that once insurance adjusters and other decision makers can see exactly what the jury is going to see – that they won't be able to properly evaluate the settlement value of

the case. Parties should even be allowed to play the trial tape to mock juries and have it observed by jury consultants to advise and provide predictions....”⁵

The very existence of this procedure supplants an insurer’s common-law duty to evaluate a case prior to the trial. This will result in more cases—not fewer—being tried. This effort will virtually guarantee significantly more trials, as insurance adjusters wait to see the final product before making decisions.

In the proposal for the summary jury trial methodology, the comment is made that “it is nonsensical that ... the jury trial is still trapped in byzantine processes.”⁶ Yet, in the words of Thomas Jefferson, we, as trial attorneys, must “*consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.*”



L. Todd Kelly, President



Drew Gibbs (Jul 13, 2020 11:20 CDT)

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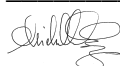


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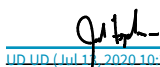


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⁵ Memorandum from Gary Schumann re: Proposal for Prerecorded Jury Trials, p. 2

⁶ Memorandum from Gary Schumann re: Proposal for Prerecorded Jury Trials, p. 1