



# Zoom or Not to Zoom

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## Introduction

**Even during a global pandemic, it is vital to our democracy that our justice system function in a manner consistent with the principles upon which it was founded.**

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**This includes the resolution of civil disputes through the means of trial by jury as guaranteed by the Seventh Amendment.**

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**As James Madison wrote in 1789, “Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the preexistent rights of nature.”**

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**Rule 77(a) of the Federal Rules of Civil Procedure, seems to preclude the possibility of a completely online trial in which the lawyers and jurors participate from a remote location.**

**There is no legal precedent in support of a completely virtual (remote) trial.**

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## **Jury Selection and Voir Dire**

**There is no reported case that specifically addresses the question as to whether voir dire can be held online in a virtual setting.**

- **Difficult to build rapport with jurors**
- **Difficult for jurors to build rapport with each other**
- **Difficult to measure reactions of jurors to responses of other jurors**
- **Narrow the scope of your voir dire topics (Sympathy, Burden of Proof, and Anti-Corporate Sentiment)**
- **My impression was that the Court was reluctant to grant challenges for cause**
- **Critically important to talk to each juror**

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## Opening Statements and Closing Arguments

- Use as many demonstrative slides as possible
- Be mindful of limited attention span of jurors
- Juror attentiveness is your chief concern in a virtual proceeding
- Let 1 hour be your benchmark → Too long is a strategic mistake
- Review jury instruction and verdict form with jury during closing

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## Presentation of Evidence: Testimony and Exhibits

- Make sure trial team members are technically familiar with technology
- Zoom has internal personnel that will provide instruction how to navigate technology
- Practice the use of technology with each witness
- Advise each witness on how the technology works
- Use of exhibits
- Breakout rooms

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## Presentation of Witness Testimony

- **Advise Witnesses on idiosyncrasies of judge and technology**
- **Practice with witness on how things will proceed**
- **Ocampo → The Court asked a lot of questions of each witness that Plaintiff called**
- **Focus on juror attentiveness or lack thereof;**
- **Consider having trial team to observe jury while things are proceeding**
- **Continually make record on juror attentiveness issues**

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## Presentation of Exhibits

**Ocampo → Use of Exhibits**

- a) 72 hour rule**
- b) Cross examination exhibits**

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## Jury Deliberations

- All jurors deliberate together in same physical location
- Jury instructions cannot adequately admonish jurors on the importance of jury deliberating together when they are all in different locations
- Ocampo → what happened
  - a) Court surveyed the wishes of each juror (Half of the jurors wanted to deliberate at the courthouse)
  - b) Court decided to do virtual deliberations
  - c) Foreperson decided to deliberate at courthouse because she did not have a scanner at her home
  - d) Getting exhibits, instructions and verdict form to jurors
  - e) Jurors signing verdict form

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## Conclusion

- It is important, even in the midst of a global pandemic that our justice system function in a manner consistent with those principles upon which our country was founded.
- Due to the complexities and challenges presented by COVID-19, it is now more important than ever that those involved in the judicial process take every possible step to ensure the preservation of civil trial by jury as guaranteed by the Seventh Amendment.

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# Questions

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