



Virtual trials, a path forward

From jury selection to deliberation, trial by Zoom was an overall positive experience for all participants

By JAMIE GOLDSTEIN

In the past 10 months only a handful of civil jury trials have moved forward, many of them being preference cases. In November, against all odds, I tried a non-preference jury trial in Alameda County. The trial lasted five days after jury selection and was overall a smooth process. The virtual trial confirmed for me that we can and should adjust so we can all return to the courtroom, even if it is a virtual courtroom. The failure to push forward and adjust to change will only continue to negatively impact our clients and our practices.

The case I tried with my law partner, Elise Sanguinetti, was *Grace DeWitt v. Odiseo Jimenez*. Judge Pulido presided over the matter. A brief background of the case is as follows: Our client was a college student walking to campus with friends for lunch. The defendant, who was a friend, picked her up without her consent and began running with her. He tripped, and she went flying into the hood of a car and then fell to the curb. The defendant fell on top of her, smashing her between him and the curb.

She sustained injuries to her shoulder, ribs, sacroiliac joint, back, hip and knee. She underwent two shoulder surgeries, and required a future shoulder and hip surgery and SI joint fusion. The defendant admitted liability, and causation for the shoulder injury and related surgeries, but disputed the remaining injuries and treatment. We claimed past and future wage loss related to her delayed education, future lost earning capacity related to missed work due to future medical care, future medical care and past and future pain and suffering. We called a total of 10 witnesses. The defense called one witness, a medical expert.

Trial

The trial days were 8:30 a.m. – 1:30 p.m. with two fifteen minutes breaks, Monday through Thursday. The last day of trial was a full day, 8:30 a.m. – 4:30 p.m. with a morning and afternoon break and a 90-minute lunch break. The jurors also deliberated for full days, including breaks and lunch. The total deliberation time was seven and a half hours over two days. The verdict was returned in favor of Ms. DeWitt.

The original trial date was set for August 2020 but was continued at the last minute so preference trials could take place first. Judge Pulido continued us to November 2020, and we did everything we could to not lose that trial date. This included not only having everything ready for trial and ruled on but also being prepared to answer questions about how to use Zoom and



offering guidance on technology for the jurors and the court. We also prepared a technology sheet for the court and jurors' use to ensure everyone was well prepared to move forward. The technology sheet provided information on how to use Zoom, including settings so jurors could best see witnesses and exhibits.

We also did everything in our ability to have jury selection and trial run as smoothly as possible. This included delivering hard copies of juror questionnaires and then picking them up and scanning them for the parties to review. We also supplied the court with all the hard copy documents required at any trial, so the judge had easy access, although we did find during trial that electronic copies were acceptable for trial briefs and last-minute witness designations. The judge's agreement to receive electronic copies saved us from having to run back and forth to court multiple times.

Jury selection

When the first day of jury selection arrived, we were surprised to learn that there were over 80 jurors present.



JANUARY 2021

The turnout was greater than the normal jury pool for in-person trials. We were hoping for at least 60 jurors. The jurors presented to the courthouse the first day and filled out hardship forms, juror questionnaires, and confirmed the technology they had available. The jurors were then released, and we met virtually with the judge to discuss hardships. At that time, we learned there were only two jurors with technology concerns. While we discussed providing hotspots, and/or laptops we agreed that with such a large pool of jurors and only two who could not participate, we would dismiss them. With that said, we were prepared to provide the technology if we would have lost more jurors. It is an important item to consider before moving forward with a virtual trial.

Jury selection occurred over the next two days and was completely virtual. While there were concerns about not being able to connect with the jurors, this never seemed to be a problem. In fact, the comfort of one's home seemed to put some jurors at ease, and they opened up more than they may otherwise have in a courtroom setting. The jurors seemed eager to participate and interested in the process. We later learned post-trial that many of the jurors were more than happy to attend the trial in a virtual setting. The lack of a commute and ability to take care of other matters before and after trial and during breaks was far easier when at home than in a courthouse. One clear advantage to virtual jury selection was the ability to more easily scan the jurors. We also were able to have additional people assist, which is not always possible in a courtroom. Additionally, we received the names and order of the jurors the day prior, along with the questionnaires. This gave us an entire afternoon and evening to research and prepare, far more time than an in-person trial.

Moving right along

The next five days brought several pleasant surprises. We never had a juror

late for trial. This is contrary to almost every case I have previously tried. There is always someone who is stuck in traffic, oversleeps or just does not care enough to make it on time. We also found that the jurors were engaged. Yes, we had a sleeper a couple of times, but that was no different than in a live trial. However, what was different was that the jurors were able to see each witness, the parties and the lawyers up close and personal since they each had their own screen. We saw jurors crying as our client's mother testified about her daughter's injuries, which prompted other jurors to start crying. We also saw jurors using magnifying glasses and requesting exhibits so they could be certain to read the documentation. We could see their reactions to witnesses far better than in a live setting. Post-trial we also learned that some jurors watched our client to see her reaction to certain testimony. There was no question about the level of engagement.

During trial we used Trial Director to show exhibits and play video testimony. This was really no different than how we present our trial in a live setting. One item that did cause a slight challenge was when our life care expert shared her screen to show her life care tables. We did not have the ability to zoom into certain portions while she was testifying, and the jurors had a difficult time seeing the exhibit. However, the judge allowed the jury to view the tables during deliberations. In the future, I would control all of my exhibits to ensure the jurors' ability to see the necessary portions of exhibits. We also had multiple instances where the defense expert displayed documents that were not agreed-upon exhibits. Specifically, he showed imaging of our client unrelated to the incident. In the future, I would address this prior to the beginning of trial with confirmation that witnesses would not be permitted to display anything without prior agreement. In the end, the doctor's improper behavior was remedied through a stipulation between the parties.

Deliberation

At the conclusion of closing arguments, the judge instructed the jury and then the jury deliberated in a breakout room. Each juror was provided via email the agreed-upon exhibits, the jury instructions and the verdict form. The court attendant was in the breakout room, though she was not participating. Her sole purpose was to ensure the jurors were all present and deliberating. When the jurors had questions, they were provided to the judge via email and then submitted to the attorneys for review. We would then discuss responses with the judge via Zoom in a separate breakout room. When necessary, an email answer was provided to the jurors. At the end of deliberations, the presiding juror printed the verdict form, filled it out, signed it and scanned and emailed it to the court. During the judge's prior virtual trial, the presiding juror did not have print and scan access, so he drove to the courthouse to fill out a paper verdict and sign. In our case, the parties agreed to use DocuSign, if there was an issue.

Advantages

There were also clear advantages to trying our case virtually. We had no problem using previously videoed depositions of witnesses. While there is at times hesitation to doing this in a courtroom, in a virtual setting when everyone is presented on a screen, we found it made little to no difference. The jurors confirmed after the trial that it did not matter to them if they viewed a witness live via Zoom or pre-recorded. Other advantages included zero commute time, which allowed for extra prep hours, not having to find a place to eat for lunch and not worrying about running into jurors. This all contributed to less stress and a smoother trial.

Another advantage was accessibility of the judge. Since we were virtual, we did not have to worry about being out of the courtroom during off hours and lunch. We had hearings with the judge before



JANUARY 2021

8:30 a.m. and during lunch breaks when we went full days. We never had to worry about whether a court attendant was available or if the courtroom was locked. This cut down on having the jury wait and waste time during trial hours. We also had minimal sidebars because of the additional time we were able to secure with the judge. This allowed for a smoother and quicker trial.

Technical difficulties – backups

While there were many advantages, not everything was perfect. There were adjustments made along the way, but that is true in all trials. Specific to virtual trials though, there are several items to keep in mind. First, always have a backup computer or laptop. My laptop, which was less than a year old, had a hardware issue the day before trial started. I had to purchase another laptop on the eve of trial, which brings me to another point, virtual or not, always have a backup of your trial materials. On the first day of trial, I ran into another issue. My new laptop did not properly install Zoom, so I was continually being kicked out of the Zoom session after I entered. I had a backup laptop, so I was able to quickly switch and log in without much time lost. Staying calm and having a good team in place is key. I would not recommend trying a virtual case without two attorneys or at the very least a paralegal. You need someone else there to alert the court if you have a glitch.

Another issue was Bluetooth. My Bluetooth earbuds with microphone were cutting out on the new laptop. Again, I quickly adjusted and used the speaker and microphone on the laptop,

which was not ideal as the microphone is not always great. The next day I purchased a hardwired microphone and used the laptop speakers. I had no further problems. I would highly recommend *against* using anything Bluetooth at trial.

Internet was also an issue for me, but only the very last day of trial. I would recommend always hard-wiring instead of going over the WiFi. A hardware connection is always more stable and leaves less chance of lagging and freezing. Also, make sure you have as reliable an Internet provider as possible. If you live in a rural area, like I do, where your Internet is slower or less reliable, it may be worthwhile to head to the office for trial or somewhere that you have a better connection. On the last day of trial during the rebuttal for our closing argument, my Internet went completely out. Luckily, I was not giving the argument. Lesson learned; next time I will likely try the case from my office or somewhere that has more reliable service. Our court reporter also lost her connection at one point, but she was able to reconnect fairly quickly, and everyone was very patient and understanding.

Conclusion

Post-trial we emailed the jurors and over half of them agreed to speak with us. There were a lot of good comments and suggestions. The most interesting aspect was that being virtual seemed to have very little effect on what they had to say. They all seemed fine with being virtual and most liked it over having to go into court. One huge advantage to being virtual, though, was their ability to take

typewritten notes. We had at least a few jurors who did this and said they had far more notes than if they had a notepad. The notes allowed them to deliberate much more efficiently. One juror had 61 pages! The advantage to typewritten notes would make me consider requesting jurors be allowed to use tablets or laptops at live trials.

Overall, the virtual trial experience was an extremely positive one. While there were adjustments, advantages and disadvantages, that is true in every trial. A true trial lawyer learns to adjust to her surroundings, stay calm and always be prepared. Preparation, whether live or virtual, is the key to success. I highly recommend trying your cases virtually, if given the option. Most of our clients are looking at trial dates into late 2021 or 2022, and there is no guarantee that those trials will be live. If we cannot adjust, our cases will continue to fall behind and justice will continue to be delayed.

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