

Opening Statement

Digital Trials in a Digital World

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If you could close your eyes and imagine what a civil trial will look like in 2020, what do you think you would see?

A group of forward-thinking, creative individuals met at DePaul University Law School last April to discuss the future of the civil justice system. The occasion was the Fourteenth Annual Clifford Symposium on Tort Law and Social Policy. Federal and state court judges, lawyers, and academics from across the country were asked to imagine not just what the civil justice system would look like, but also what they would *want it to look like*, a dozen years from now. The discussions were eye opening and thought provoking in their implications for our traditional notions of the trial process and, more fundamentally, for the concept of truth seeking that is at the heart of our adversary system.

One of the participants, former Section of Litigation Chair Patricia Lee Refo, challenged the group to think about what types of cases will be in the courts in 2020 and what jurors, lawyers, and the courtrooms of 2020 will look like. Refo has had a front-row seat in the discussion of the future of jury trials since at least 2003 when, as Section Chair, she convened a symposium on the sharply declining number of trials taking place each year in the United States. Soon thereafter, then-ABA President Robert Grey, Jr. appointed her to head the American Jury Project, which generated a series of 19 principles for jury management that were adopted by the ABA House of Delegates and published in 2005.

At the symposium, Refo offered interesting possibilities with respect to making jury service easier and more efficient for jurors. Because most jurisdictions now allow jurors to take notes, should courts provide them with laptops on which to better take and review those notes during deliberations? Because court reporters now take down testimony in real time, should courts allow jurors to have access to searchable trial transcripts in the jury room during deliberations? Because many attorneys display their exhibits electronically,

should courts make exhibits available electronically on an LCD screen in the jury room?

Another participant took the concept a lot further. Professor Mary Rose of the University of Texas, who collaborated with Professor Shari Diamond of Northwestern University School of Law, discussed the prospect of recorded witness testimony that would be edited to eliminate inadmissible testimony. With the permission of the Arizona Supreme Court, Professor Diamond led a group of researchers who recorded jury deliberations in 50 civil cases in which all participants—the judge, lawyers, and jurors—consented.

While the analysis of these tapes has yielded many articles, the most recent one discusses the extent to which “off-stage” behavior—conduct in the courtroom other than witness testimony, attorney opening statements and closing argument, and jury instructions—affects jury deliberations. For example, a juror notices that the plaintiff, who claims that an injury left him unable to sit still for more than 20 minutes, sits through a full day of trial. Would the use of digital testimony that excludes jurors from observing off-stage conduct affect the outcome of jury verdicts? Professors Rose and Diamond concluded that while most cases involve some juror observation and comment regarding off-stage conduct, it generally supplements the conclusions reached by the jury based on the evidence, the law, and the arguments of counsel. Interestingly, the focus of their research was on the impact of digital recording for appellate review. Professors Rose and Diamond also concluded that appellate judges lose little substantive understanding of the case by utilizing a digital recording that excludes off-stage conduct.

It is worth thinking about those conclusions in light of the reality of jury service today. Having recently been called for jury duty in my local state court, I spent much of the day listening to many of my fellow potential jurors grouse about having to take off a day from work, talk about

why they cannot afford to be selected for a jury, and exhibit unrestrained glee upon learning that they were released from jury service. The substance of most of the complaints was not directed, for the most part, at the fact of jury service, but instead it was about the amount of time it takes and the disruption it causes in their lives. This is a trend that I believe is likely to increase as younger individuals raised in the digital age increasingly come of age for jury service.

Do we not owe it to this most democratic of institutions—trial by jury—to make it less burdensome for people to serve? Do we not want the broadest possible participation on our juries? Listening to Professor Rose talk about the use of digital testimony caused me to wonder whether there is a way of utilizing digital technology to meet this goal while at the same time not sacrificing the human element of courtroom dynamics.

So hold on for a moment while we take a perhaps unsettling ride into a future where juries are filled by Generations X, Y, Z, and beyond, and courtrooms are equipped to rapidly deliver information electronically. Let me caution you that the concepts that follow are not easy to accept, especially for those who have spent a lot of time in the courtroom and who believe, as I do, that such things as eye contact and personal rapport between the jurors and lawyers, parties, and witnesses are essential to the process of trial by jury. But consider this as food for thought as the virtual calendar inexorably turns to a new day.

Principle 2.C of the American Jury Project's Principles for Juries & Jury Trials states, "The time required of persons called for jury service should be the shortest period consistent with the needs of justice." Principle 12 states, "Courts should limit the length of jury trials insofar as justice allows and jurors should be fully informed of the trial schedule established."

Now, this is almost certainly *not* what the Project had in mind, but could you imagine something as radical as semi-virtual trials? Jury trials played out in front of a judge—*without* the jury present—but recorded on a DVD that is edited by the court to eliminate overruled questions, testimony stricken from the record, and other highly prejudicial conduct of the parties, counsel, or witnesses. Opening statements and closing arguments are delivered to a camera rather than to the jury box.

The prospective jurors still would have to show up in the courtroom for qualification

and to go through *voir dire*. But then they could go home, go about their daily lives—instructed, of course, to avoid news accounts of the trial and to discuss the case with no one—and wait for word to return to the courthouse. Periodic e-mails from the court could update them on the progress of the trial and their likely deliberation date. When they do return, it would not be to the courtroom, but to a comfortable viewing room at the courthouse where they would gather and watch the DVD. This would require a few hours of their time, rather than a few days of occasionally watching the trial, interrupted by intervals of sitting in the jury room while evidentiary issues are debated and proffers of evidence are made, not to mention routine breaks and unanticipated delays while the judge deals with emergencies in other cases. Imagine the reduced burden on the jurors.

Didn't hear the witness's answer? Hit the rewind button. Didn't have enough time to study the exhibit? Just click on it. Want to listen to the judge's instruction on the definition of fraud again? You get the picture. More importantly, so does the jury. Deliberations follow immediately after watching the DVD.

Prefer something a little less unconventional that preserves more interaction between lawyers and jurors? Keep the jurors in the courtroom for opening statements and bring them back to watch the witness testimony and jury instructions on DVD, followed by live closing arguments and deliberations.

Is all of this simply unimaginable? Only to those of us from the baby boomer generation or older. But the trial landscape is changing, driven largely by the realities of how younger people receive and process information. While the idea of jurors not actually being in the courtroom to feel the drama build or to see the expression on counsel's face when a key witness delivers a critical, shocking answer detracts from the human dynamic that many believe is essential to a trial, it would more closely mimic the way many jurors of tomorrow already opt to receive information today. If our goal as trial lawyers is to communicate effectively with jurors, perhaps we should be focusing on how jurors prefer to listen, not how we prefer to talk.

I do not mean to suggest we should jump headlong into the digital world. No doubt many significant risks need to be explored and tested. However, the current process, which evolved hundreds of years before anyone conceived of digital anything, has its flaws as well. So before you dismiss

this concept, you owe it to future litigants to think about the potential benefits:

- We would reduce the imposition on juror time and the disruption of their daily lives, making it possible for more people—and more types of people—to serve.
- Fewer people would seek or would need to be excused from jury service because of work obligations, childcare responsibilities, illness, or vacation plans.
- There would be fewer mistrials or reversals for prejudicial error because many would be edited out before the jurors see the DVD.
- Litigants and courts would incur reduced fees and costs for retrials—just edit out the error and, where necessary, edit in the new witness testimony or revised jury instructions—and send it out to a jury for viewing again.
- Witnesses outside the trial court's jurisdiction could testify remotely and their testimony included in the digital record at less cost to the parties and less inconvenience to the witness. This is not unlike video depositions of witnesses outside the subpoena power of the court, except that by making all witness testimony digital, the remote witness appears to the jury to be no different from witnesses appearing in the courtroom.
- There would be less time needed to prepare the appellate record and less cost to the parties. Just send the disk to the appellate court.
- Because jury service would take less time, taxpayers would save money through reduced juror fees.
- Because courtroom time for each trial would be reduced, there likely would be savings through better utilization of courtroom space (i.e., multiple judges sharing a single courtroom rather than each one having an assigned courtroom). Thus, less taxpayer money would be spent on building courtrooms.
- Those who believe public access to the courts is essential to public confidence and trust in the civil justice system win as well because trials on disk would allow wider public dissemination and viewing by those who otherwise cannot make it to the courtroom and who have an interest in the workings of their courts and judges.
- Finally, the disks also would become a staple of trial training for law stu-

dents and young litigators who otherwise might wait years to get to the courtroom to see, let alone participate in, a real trial.

Older trial lawyers are learning what the younger crowd already knows: Jurors from Generations X, Y, and Z are beginning to become more prevalent and, before long, will dominate jury pools. Those jurors do not hear and process information in the same way as previous generations. They want instant information and active presentations, and they want to be a part of the process, not merely silent observers.

Okay, therein perhaps is at least one flaw (no doubt many more could be pointed out) in the world of virtual trials. Once the DVD has been recorded and the witnesses have gone home, how does a juror suggest a question he or she would like answered by a witness, as many judges are allowing these days and as the American Jury Project recommended? I don't have the answer for that one. And, yet, as the federal district court judges in the Seventh Circuit have found out, it is an important question.

The American Jury Project's report, *Principles for Juries & Jury Trials*, recommended 19 Principles "that define our fundamental aspirations for the management of the jury system. Each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints." Principle 13.C

states that, "In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses." The questions are submitted to the court, which may pose the question or permit a party to do so, after modifying it to eliminate any objectionable material.

Some of these principles, including juror questioning, have had a test drive in the Seventh Circuit, thanks to the leadership of Chief Judge James Holderman of the Northern District of Illinois. Chief Judge Holderman, a participant in the Clifford Symposium, found that younger jurors "do not want to be factual sponges. They want to be interactive."

A self-professed skeptic at the outset, after two years of experimenting with seven of the principles, Chief Judge Holderman now has come to the conclusion that three of the principles proposed by the American Jury Project are imperatives. These include allowing jurors to submit written questions, allowing lawyers to make interim statements to the jury between witnesses, and telling jurors early on what factual issues they will have to decide and what the law is that will govern the decision.

Many times juror questions are relevant and helpful. Even if they are not, Chief Judge Holderman has found that such questions allow him the opportunity to get the jury back on track and allow the attorneys to respond to juror concerns.

Interim statements allow lawyers to preview upcoming witnesses (in which case their statements are in the nature of opening statements) or to address the importance of testimony already given by a witness (in which case the statements are more in the nature of closing argument). With early instruction on the issues to be decided and the applicable law, jurors tend to focus sooner and understand the importance of evidence as it is presented.

Implementation of each of the principles is a positive development that will make trials more user friendly for the jurors. Except to the extent the length of trials is shortened, however, none will make it easier for citizens to serve or ease the disruption in the daily lives of those who do serve.

We are—and should be—very cautious when it comes to changing anything to do with jury trials. However, trials are about the delivery of information, both fact and opinion, in oral and visual form, through which we seek to persuade the audience (jurors) to accept our client's version of truth. Just as the many organizations, from the law firms to the news industry, have responded to the digital revolution by moving to blogs, podcasts, and other uses of the Internet to deliver information, so, too, must the bench and bar start thinking about how best to engage and communicate with jurors of the future. □