

# ONLINE JURY SELECTION: NEW TOOLS FOR JURY TRIALS

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Fig. 1. Online Jury Selection Study, Maricopa County, Arizona (2021).

## I. INTRODUCTION: JURY TRIALS DURING THE PANDEMIC

In responding to the COVID-19 pandemic, courts had three general options for jury trials: (a) to move forward with in-person jury trials and attempt to employ appropriate COVID-19 safety precautions if such in-person gatherings were permitted in the jurisdiction; (b) to delay all jury trials until relevant in-person gatherings were permitted and trials could be conducted in a safe manner; and (c) to conduct jury trials online, in whole (all proceedings are virtual) or in part (i.e., “hybrid” jury trials involving online or mixed jury selection and in-person trial).<sup>1</sup>

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Furthermore, there are two types of online jury selection, all online and hybrid.<sup>2</sup> These two types differ based on the location of the potential jurors during the jury selection process.<sup>3</sup>

Online jury selection, as the name implies, is conducted entirely online with all jurors reporting remotely via a videoconferencing platform such as Zoom or Microsoft Teams.<sup>4</sup> Jurors report to a virtual courtroom where they are questioned by the judge and parties via this platform.

The hybrid type of jury selection uses a combination of online jurors and jurors who report in-person to the court or other facility.<sup>5</sup> Whatever restrictions and requirements for in-person gatherings would be in effect for jurors appearing in-person. The judge and parties question both collections of jurors (further considerations will be discussed below).

In addition to the two types of online jury selection, there are two potential components in the jury selection process: pretrial (online supplemental juror questionnaires) and trial (online voir dire).<sup>6</sup>

This Essay focuses on conducting virtual jury trials, specifically online jury selection. This can be split up into the pretrial component and the trial component. Part II discusses the former and delves into online supplemental juror questionnaires by explaining what they entail, what concerns may arise from using these questionnaires, and what benefits come from its use. As

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aspects of the criminal and civil litigation process, and a trial consultant for more than 46 years. I would like to thank the Southwestern Law Review Editorial Board, Sara Levine, and those who have provided feedback on drafts, including Ting Yu Lo and Kyle Besa.

1. See Jacqueline E. Campbell et al., *The Future of Jury Trials in a COVID-19 World*, FOWLER HIRTZEL McNULTY & SPAULDING, LLP: COVID-19 RES. CTR. (Aug. 7, 2020), <https://fhmslaw.com/wp-content/uploads/2020/08/The-Future-of-Jury-Trials-in-a-COVID-19-World.pdf>.

2. Jeffrey T. Frederick, *Online Jury Selection*, in *THE ONLINE COURTROOM: THE FUTURE OF REMOTE TECHNOLOGY IN THE LITIGATION PROCESS* (Ken Broda-Bahm & Richard Gabriel eds., forthcoming 2022) (manuscript at 8-9). For an additional discussion of online jury selection, see Pamela Gates et al., *Virtual Juries: We Can, but Should We? And if so, How?*, LITIG., Summer 2021, at 12. For a discussion of online jury trials, see *THE ONLINE COURTROOM: THE FUTURE OF REMOTE TECHNOLOGY IN THE LITIGATION PROCESS* (Ken Broda-Bahm & Richard Gabriel eds., forthcoming 2022); see VALERIE P. HANS, VIRTUAL JURIES (Cornell L. Sch. Legal Stud. Rsch. Paper Ser. No. 21-16, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3860165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860165); see ONLINE COURTROOM PROJECT, ONLINE JURY TRIALS: SUMMARY AND RECOMMENDATIONS (2020), <https://www.onlinecourtroom.org/demonstration-report>; see Michael Pressman, *Remote Jury Trials: Reporting on Judge Matthew W. Williams's Experiences in King County, Washington*, 6 JURY MATTERS (Civ. Jury Project, N.Y.C., N.Y.), Feb. 2021, <https://myemail.constantcontact.com/Revised-February-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=FJrQJeDY8E4>. See *supra* Figure 1.

3. Frederick, *supra* note 2 (manuscript at 9).

4. *Id.* (manuscript at 8).

5. *Id.* (manuscript at 8-9).

6. *Id.* (manuscript at 1).

Part III describes, the trial component includes both virtual voir dire and jury selection. The two methods of selecting jurors, the struck method and the sequential method, are discussed in the online context. Moreover, Part III delineates several tips for effective virtual jury selection logistics. Part IV compares online jury selection with its in-person counterpart, then addresses various issues involved in online jury selection. Next, Part IV presents the benefits of this process. Finally, Part V concludes that online jury selection will likely remain an option for the foreseeable future.

## II. PRETRIAL COMPONENT: ONLINE SUPPLEMENTAL JUROR QUESTIONNAIRES

Supplemental juror questionnaires (“SJQs”) have been around for decades.<sup>7</sup> These questionnaires are designed to supplement voir dire. While jury summons questionnaires may contain limited background information along with qualification and hardship questions, supplemental juror questionnaires address case-relevant information in terms of the jurors’ backgrounds (e.g., contacts within the law enforcement community, case-relevant education or job-related training, and membership in Black Lives Matter or Blue Lives Matter Facebook groups), experiences (e.g., being a victim of a crime, racial profiling or discrimination, or participation in certain activities such as protests, being a prior party in a lawsuit, and exposure to pretrial publicity), and beliefs and opinions (e.g., views on the criminal justice system, police practices, corporations, and awards for noneconomic damages).<sup>8</sup>

### A. *How Are Online Supplemental Questionnaires Employed?*

Online supplemental juror questionnaires (“OSJQs”), as with their written questionnaire counterparts, generally are developed by the parties, with judges ruling on the final product and arbitrating questionnaire content and format disputes among the parties.<sup>9</sup> The resulting questionnaire is “fielded” or administered through an online survey platform (e.g., Google Forms, Microsoft Forms, Qualtrics, Alchemer, and SurveyMonkey, among

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7. For a discussion of supplemental juror questionnaires, see TED A. DONNER & RICHARD GABRIEL, *JURY SELECTION STRATEGY & SCIENCE* (3d ed. 2020); see JEFFREY T. FREDERICK, *MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY* (4th ed. 2018); see *MASTERING VOIR DIRE AND JURY SELECTION: SUPPLEMENTAL JUROR QUESTIONNAIRES* (Jeffrey T. Frederick ed., 2018); see NJP LITIG. CONSULTING, *JURYWORK: SYSTEMATIC TECHNIQUES* (2d ed. 2020).

8. Frederick, *supra* note 2 (manuscript at 2).

9. CAL. CIV. PROC. CODE § 222.5 (West 2018).

others). Jurors are sent a notice of the need to complete an OSJQ either via mail (letter or postcard), through electronic communications (email or text), or both. In these communications, jurors are given the appropriate URL link and/or receive a QR scan code<sup>10</sup> where they can access the online questionnaire. Such questionnaires can also be located within an eJUROR portal or other court-administered portals, thus adding another layer of security. The goal is to reach all jurors in the venire. Those jurors who do not have access to an appropriate smart device or computer or prefer not to complete the questionnaire online can request a written copy of the questionnaire with return postage. Additionally, if a kiosk is provided, jurors can go to a kiosk or other court-provided location to complete the questionnaire electronically.<sup>11</sup>

Online supplemental juror questionnaires have several advantages over their written counterparts. First, online questionnaires have design features that enable greater quality control over the jurors' responses.<sup>12</sup> Questions can be designated as "required" which ensures that an answer will be provided since the questionnaire cannot be successfully submitted unless all "required" questions are answered. This dramatically reduces the occurrence of questions being "skipped," missed, or otherwise unanswered. Also, response formats can be designed to avoid common mistakes such as multiple answers being given to a single answer question (e.g., both "somewhat agree" and "somewhat disagree" being checked by mistake). Second, the jurors' answers (data) are more easily managed than with a written questionnaire.<sup>13</sup> Both questionnaire formats allow for the distribution of the individual jurors' answers through either the copying and distribution of written forms or through the electronic transmission of completed online surveys by directly sending completed forms or giving access to file-sharing services. While written questionnaires require either in-person inputting of the responses into a dataset or, if associated with an optically scanned format, optical scanning into an electronic format, online questionnaires provide spreadsheets of all the jurors' answers automatically. This database feature allows attorneys to manipulate the data (the completed questionnaires) for data analysis purposes or the production of "summary" forms of each juror's answers to assist with juror evaluation and voir dire.

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10. See *infra* Figure 2.

11. For a more detailed discussion of OSJQs, see Frederick, *supra* note 2.

12. See ONLINE COURTROOM PROJECT, *supra* note 2, at 22-26.

13. See *id.* at 23-25.

### B. Okay . . . Show Me

To better understand the workings of online supplemental juror questionnaires and to experience what it is like to complete such questionnaires, it is useful to have hands-on experience. To this end, I have converted the written supplemental juror questionnaire from *Minnesota v. Derek Chauvin*<sup>14</sup> into an online questionnaire that is accessible both by scanning the following QR Code or using the following link: <https://tinyurl.com/jftcs-Chauvin-sjq>.

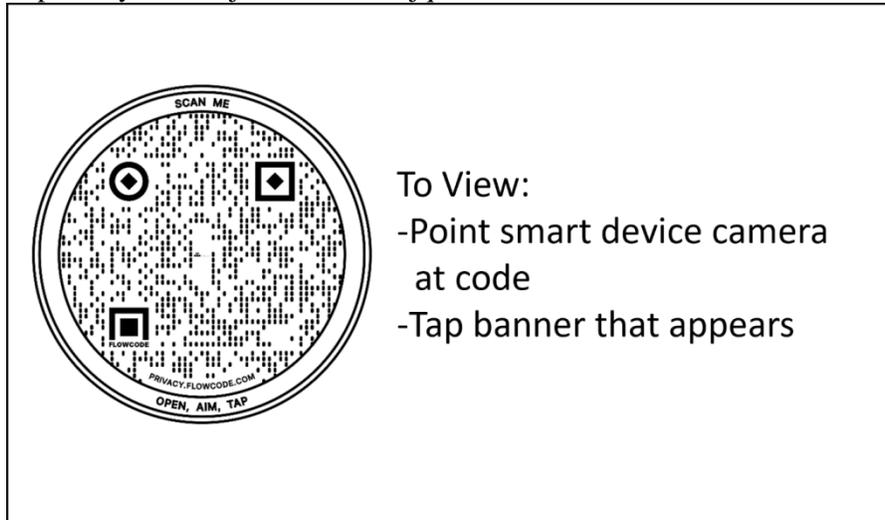


Fig. 2. QR Code for Demonstration Online Questionnaire (2021).

### C. Issues/Questions Raised with Online Supplemental Juror Questionnaires

It is important to consider various potential issues concerning the use of OSJQs.

#### 1. Are jurors more candid during voir dire versus on an OSJQ?

A common objection to the use of supplemental juror questionnaires is that they deprive the parties and the judge of the opportunity to see the juror's body language and listen to jurors while the answers are being given in order

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14. Special Juror Questionnaire, *State v. Chauvin*, No. 27-CR-20-12646, 2021 WL 2621001, (Minn. Dist. Ct. June 25, 2021). This online questionnaire was developed for Frederick, *supra* note 2 (manuscript at 5). Some modifications were made for clarity purposes. However, the major changes needed to meet traditional online questionnaire design and efficiency were not made in order to retain the original appearance of the written questionnaire.

to evaluate jurors and their honesty.<sup>15</sup> Obviously, this is a general criticism of all types of SJQs both written and online. The response to this issue is twofold. SJQs are designed to supplement the voir dire process, not to replace it.<sup>16</sup> The parties and the court will have the opportunity to view and hear jurors discuss more focused questions during voir dire. More importantly, research shows that well-designed questionnaires are better than oral voir dire in terms of eliciting candid and honest answers from jurors.<sup>17</sup> Further, a detailed questionnaire is better at identifying bias than a brief, general questionnaire using the type of questions usually addressed in oral voir dire.<sup>18</sup>

## 2. What is the impact of any Digital Divide?

Segments of the population do not have equal access to technology.<sup>19</sup> Does access to the appropriate technology negatively impact who can participate in completing online questionnaires? Survey-based assessments of technology use and ownership indicate that 85% of the adult United States population own smartphones, with 77% of adults owning a desktop or laptop computer and 53% owning tablet computers.<sup>20</sup> In addition, 73% of adults report subscribing to home broadband internet, with almost one-half (45%) of those without broadband access choosing to rely on smartphone internet

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15. RICHARD GABRIEL, ONLINE COURTROOM PROJECT, THE ONLINE COURTROOM AND THE FUTURE OF JURY TRIALS 4 (2021), <https://www.courts.wa.gov/newsinfo/content/Reference%20Materials/Online%20Courtroom%20Project%20White%20Paper.pdf>.

16. See Lois Heaney, *Voir Dire in a Nutshell*, PLAINTIFF MAG., Oct. 2007, at 1, [https://www.plaintiffmagazine.com/images/issues/2007/10-october/reprints/Heaney\\_Voir-dire-in-a-nutshell\\_Plaintiff-magazine.pdf](https://www.plaintiffmagazine.com/images/issues/2007/10-october/reprints/Heaney_Voir-dire-in-a-nutshell_Plaintiff-magazine.pdf).

17. See research cited in FREDERICK, GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY, *supra* note 7, at 177; SUPPLEMENTAL JUROR QUESTIONNAIRES, *supra* note 7, at xiii.

18. See Jessica M. Salerno et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, L. & HUM. BEHAV. (forthcoming 2021), 10.1037/lhb0000455, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733136](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733136).

19. E.g., Emily A. Vogels, *Some Digital Divides Persist Between Rural, Urban and Suburban America*, PEW RSCH. CTR. (Aug. 19, 2021), <https://www.pewresearch.org/fact-tank/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america/>.

20. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> (finding that some subgroups reported less smartphone ownership, e.g., 65 years and older tends to be less than other age groups).

access instead.<sup>21</sup> These results suggest the lack of any vast digital divide, although some gaps remain.<sup>22</sup>

### 3. Will jurors find it too difficult to complete OSJQs?

Ease or difficulty in completing OSJQs has an impact on the utility of their use. If jurors find it difficult to complete OSJQs, jurors may fail to complete the questionnaires or, if completed, the answers may be confusing or unusable. Fortunately, there are data on this issue. A series of studies using jury pool members conducted by the Maricopa County Civil Innovations Task Force which administered online versions of both a detailed qualification questionnaire (forty-six questions) and supplemental juror questionnaire (seventeen questions) found that jurors overwhelmingly rated the online questionnaires as easy to complete with 91% choosing “very easy” for the longer online qualification questionnaire and 98% choosing “very easy” for the OSJQ.<sup>23</sup> In addition, jurors indicated that they would be willing to complete such online questionnaires if it meant that it would save time during jury selection.<sup>24</sup> Again, an overwhelming majority of jurors (91%) said that they would be “very willing” to complete such questionnaires if it meant saving time during jury selection.<sup>25</sup>

### 4. Will jurors complete OSJQs?

Finally, a fundamental question regarding OSJQs is whether jurors actually will complete them if it is part of their jury service. In the Arizona studies reported above, the completion rate was 100% since it was a requirement of the study.<sup>26</sup> However, recent data from King County Superior

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21. Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RSCH. CTR. (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

22. Courts should not ignore the possibility of underrepresentation of certain groups who might lack access to technology and/or suitable private surroundings, e.g., people of color, the less affluent, and older jurors, among others, and accommodations should be available to ensure participation from all eligible segments of the community and not just those having access to the necessary technology. See Thomas B. Fiddler & Vincent N. Barbera, *Real Problems with Virtual Jury Trials: The Shallowing of Jury Pools*, WHITE AND WILLIAMS LLP: NEWS & RES. (July 21, 2020), <https://www.whiteandwilliams.com/resources-alerts-Real-Problems-with-Virtual-Jury-Trials-The-Shallowing-of-Jury-Pools.html>.

23. Frederick, *supra* note 2 (manuscript at 4-5).

24. Gates et al., *supra* note 2, at 13-14.

25. Frederick, *supra* note 2 (manuscript at 5).

26. See Gates et al., *supra* note 2, at 13.

Court found completion rates of 88.5% and 96.3% in a recent online civil and online criminal trial, respectively.<sup>27</sup>

#### *D. Benefits of Online Supplemental Juror Questionnaires*

While various potential issues and questions with OSJQs were addressed above, there are a number of benefits in their use.

##### 1. Increased Candor and Honesty

As discussed above, SJQs, both written and online, produce more candid and honest answers by jurors. This is exactly what is needed to promote effective jury selection.

##### 2. Easy Administration

Providing potential jurors with a URL link and QR code enables a broad range of jurors to access OSJQs in a quick and easy manner. The few jurors who are unable to access OSJQs or prefer answering a written SJQ can have the questionnaires administered in the court's traditional method or through court-provided kiosks. As noted above, jurors found it very easy to complete such questionnaires and were willing to do so in the future if it meant reducing the overall time needed for jury selection.<sup>28</sup>

##### 3. Potential for Greater Diversity

While sufficient data is not currently available, there is some evidence that the increased accessibility to jury service that online summons and attendance in online jury selection has resulted in higher response rates and greater diversity.<sup>29</sup> One study reported that response rates were higher than pre-pandemic rates.<sup>30</sup> In addition, some trial judges have reported that the

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27. Email from Judge Williams, King Cnty. Super. Ct., to author (July 16, 2021) (on file with author); Frederick, *supra* note 2 (manuscript at 5). It is worthy to note that almost all jurors who failed to complete the OSJQs had received deferrals or failed to meet the statutory qualifications for jury service. I will address the issue of the impact on diversity again in the section on online jury selection.

28. *See supra* Section II.C.

29. BRUCE ANDERSON, FOURTH JUD. CIR., REMOTE CIVIL JURY TRIAL PILOT PROJECT xvii (2020), <https://www.courts.wa.gov/newsinfo/content/Reference%20Materials/Remote%20Civil%20Jury%20Trial%20Pilot%20Project%20Fourth%20Judicial%20Circuit.pdf>; GABRIEL, *supra* note 15, at 10.

30. ANDERSON, *supra* note 29, at xvii. For a discussion of interviews with jury administrators indicating show rates rising from approximately 40% for pre-pandemic in-person jury trials to 60% to 80% for online jury trials, see Christopher J. Dominic & Laura L. Dominic, *Managing Jurors in*

response rates to online jury venires may more closely match local census data on racial characteristics than did pre-pandemic venires.<sup>31</sup>

#### 4. Easy and Effective Data Management

Online survey platforms allow for questionnaire formats and designs that efficiently guide jurors through the process, which minimizes the possibility of errors and missing data. Once completed, the information is electronically delivered in formats that maximize user utility, e.g., completed questionnaires, databases/spreadsheets, and summary forms. In addition, OSJQs allow for the tracking of completed questionnaires, thus enabling the courts to take measures to seek completed questionnaires from jurors who fail to complete them in a timely manner.

#### 5. More Focused Voir Dire

Armed with the answers to OSJQs, the parties and the judge can focus their voir dire questioning in an efficient and useful manner. Basic, sensitive, and potentially prejudicial information can be collected along with the answers to “gateway” questions. This enables the parties to build on this information in subsequent and more efficient voir dire questioning. Some courts have recommended the use of detailed online questionnaires (e.g., OSJQs) as a necessary supplement to online voir dire.<sup>32</sup>

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*the Virtual Courtroom from Summons to Deliberation*, in *THE ONLINE COURTROOM: THE FUTURE OF REMOTE TECHNOLOGY IN THE LITIGATION PROCESS* (Ken Broda-Bahm & Richard Gabriel eds., forthcoming 2022) (manuscript at 3) (on file with author).

31. Jury venire data from a study conducted in 2017 for King County, Washington reported that between 71.4%-77.9% of jurors self-identified as Caucasian. After implementing online jury selection in 2020-2021, one judge observed that 67.2% of the jurors who reported for online voir dire in his court self-identified as Caucasian, as compared to 2020 U.S. Census data which reported 66.2% Caucasian for the County. He cautioned against any suggestion that his report was statistically significant, but that it was consistent with the anecdotal reports from other judges in his jurisdiction. That same judge observed an increase in the diversity of jurors selected to serve, citing two recent juries with less than 45% Caucasian jurors. E-mail from Judge Williams to author, *supra* note 27; *Bureau Quick Facts: King County, Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/kingcountywashington,US/PST045219> (last visited Sept. 13, 2021); also the Washington State Supreme Court and the Office of Administrator of the Courts in Washington State conducted a state-wide voluntary survey of jurors which, among other findings, showed an increase in participation by nonwhite jurors (to an overrepresentation of +1.26% in King County). See Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 *CRIMINOLOGY, CRIM. JUST., L. & SOC'Y*, no. 1, 2021, at 1, 10.

32. See REMOTE JURY TRIALS WORK GRP., WASH. COURTS, BEST PRACTICES IN RESPONSE TO FREQUENTLY ASKED QUESTION (FAQ) 8 (2021), <https://www.courts.wa.gov/newsinfo/content/Best%20Practices%20in%20Response%20to%20FAQ.PDF>.

## 6. Screening Potential

OSJQs also allow for the screening of potential jurors, where desired.<sup>33</sup> Issues of hardship, ability to serve in in-person and online trials, and potential significant bias issues can be addressed. This gives the parties and court the ability to eliminate the need to have potential jurors report unnecessarily when they would not be able to serve for any of these reasons. Jurors also benefit from potential screening in terms of not having to participate in voir dire, particularly when voir dire is conducted in an in-person setting that adds additional time, stress, and transportation issues.

## 7. Cost Savings

OSJQs are potentially more cost-effective than their written counterparts.<sup>34</sup> Written SJQs must be copied and made available to the potential jurors through either the mail or in-person attendance. Upon completion of the SJQs, additional copies are made for distribution to the parties and the court. All of these activities have associated costs in terms of personnel, supervision, copying, and, potentially, postage. OSJQs, given their electronic platform, incur few of the costs associated with written SJQs.

### III. TRIAL COMPONENT: ONLINE VOIR DIRE AND JURY SELECTION

#### *A. Types of Jury Selection Revisited*

As mentioned earlier, there are two types of online jury selection: all online and the hybrid approaches. The approach taken has implications for how jury selection is conducted. In the all-online approach, jurors appear in panels and are questioned by the judge and, if allowed, the attorneys.<sup>35</sup> In the hybrid approach, some jurors appear online while others appear in-person.<sup>36</sup> The questioning of jurors in the latter approach has some significant differences. Depending on the jurisdiction, in-person jurors may be questioned at the same time as online jurors. For example, in-person jurors may be placed in the jury box (depending on the number present and social distancing requirements, if any) while the online jurors appear on a large screen monitor placed in the courtroom.

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33. Frederick, *supra* note 2 (manuscript at 19).

34. *See id.*

35. Campbell et al., *supra* note 1.

36. CT. OPERATIONS DURING COVID-19 TASK FORCE, ILL. JUDICIAL CONFERENCE, GUIDELINES ON REMOTE JURY SELECTION IN CIVIL TRIALS 6 (2020).

The hybrid approach has a potential problem. If both in-person and online jurors are questioned at the same time, it has at least two negative consequences. First, attorneys must question and attend to groups of jurors in two different locations (i.e., the in-person location and large screen monitor) which makes it difficult to engage jurors in the questioning process and to keep track of the responses of jurors. In fact, attorneys run the risk of jurors responding nonverbally (e.g., raising hands, shaking heads, frowning, or giving skeptical looks) at one location while the attorneys' questioning or attention is directed to the other location. Second, jurors may become disengaged in the process when attorneys are addressing jurors in the other location. This disengagement can lead to jurors not raising their hands or otherwise failing to participate when attorneys are addressing the "other" panel of jurors. A remedy to this situation would be to have any in-person jurors report at different times or on different days. Thus, in this manner, both attorneys and jurors can fully attend to the voir dire process.

### *B. Exercising Challenges*

While there are two types of challenges by which to remove jurors, peremptory challenges and challenges for cause,<sup>37</sup> the method for exercising peremptory challenges has the greatest impact on the logistics of jury selection and how questioning is conducted. There are two general methods for exercising peremptory challenges: the struck method and the sequential method.<sup>38</sup> The use of these methods, or their variations, is generally governed by statutes and local rules.<sup>39</sup>

#### 1. Struck Method

The struck method requires that jurors are questioned until the number of jurors qualified, after any cause challenges have been resolved, equals the number of trial and alternate jurors required, plus the number of peremptory challenges available to all parties.<sup>40</sup> The struck method, arguably the best method,<sup>41</sup> is easily handled in an online environment. Jurors are questioned

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37. FED. R. CIV. P. 47.

38. FREDERICK, *supra* note 7, at 7.

39. See CAL. CIV. PROC. CODE § 231 (West 2021); see ALA. R. CRIM. P. § 18.4 (2012). These rules were developed long before online jury selection was possible. As such, unless changes are made in these rules, the online platform is being laid over the traditional approaches taken in the jurisdictions. Fortunately, the online platforms are fairly adaptable.

40. FREDERICK, *supra* note 7, at 7-8.

41. I believe that the struck method is superior to the sequential method in that it does not require the parties to *unnecessarily* exercise their peremptory challenges in an informational "blind spot." That is, in the struck method, the parties only exercise their peremptory challenges after

in panels of twelve to fifteen and those qualified and not removed for cause are either placed in a virtual waiting room or told to return to the virtual courtroom at a designated day and time.

## 2. Sequential Method

The sequential method requires that the parties exercise their peremptory challenges at various stages depending upon the jurisdiction.<sup>42</sup> For example, in many jurisdictions, the party with the burden of proof, the prosecutor or plaintiff, questions a panel containing the number of jurors needed to fulfill the appropriate size of the trial jury and then exercises peremptory challenges. The “empty seats” are filled with “new” jurors and questioning continues until the necessary number of jurors is reached, so there are no empty seats. The “passed” panel is then turned over to the defense which goes through the same process. This overall process of exchange between the parties continues until neither party chooses to remove jurors or is unable to do so.<sup>43</sup> Online jury selection can accommodate the sequential method provided there is some flexibility based on the platform used. Platforms that allow for the fixed placement of jurors can fairly easily match the in-person counterpart of the sequential method. However, platforms that do not allow for the “fixed” positioning of jurors will need to develop alternative approaches. For example, it would be possible to move excused jurors to a separate breakout room for dismissal and leave the remaining jurors to be questioned in the virtual courtroom, if needed. Once one or more jurors have been “passed” by all parties, they could be moved to a separate breakout room or told to report at a future time. As long as courts are flexible in honoring the intent of the statutes or local rules, online platforms can be modified to fit the jurisdiction.

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qualifying all jurors to be considered. As we will see, the sequential method requires that the parties exercise their peremptory challenges before knowing who will replace the ones excused. This problem is further exacerbated as the party exercises the last of its challenges, leaving the possibility of one or more less desirable jurors being seated without the benefit of any further peremptory challenge(s).

42. See CIV. PROC. § 231.

43. FREDERICK, *supra* note 7, at 7. This is a simplistic version. There are many variations and the process can be complex, including the ability of parties to exercise “back-strikes” against previously passed jurors prior to the swearing in of the trial jury. Clare E. McWilliams, *I Strike, You Strike, We All Strike When We Back-Strike*, 25 CBA REC. 42, 42 (2011).

### C. Logistics of Online Jury Selection

Courts and counsel must also consider the most effective way to setup online jury selection.<sup>44</sup>

#### 1. Waiting Room

As is the case with in-person jury selection, online jury selection begins by assembling jurors before voir dire begins. For online jury selection, jurors assemble in an online “waiting room.” Several preliminary matters are addressed at this time. Juror attendance is recorded. Jurors go through a final “tech check”<sup>45</sup> by the court, court personnel, or a “technical” bailiff to ensure that jurors (a) are assigned the appropriate identification for their device (e.g., their name or assigned a juror number); (b) have an appropriate device with the latest update of the videoconferencing software; (c) are able to use the device; (d) are using the appropriate settings (e.g., smartphones set on horizontal orientation and no filters such as “cat” images or virtual backgrounds are being used);<sup>46</sup> and (e) have general logistical instructions and contact numbers if contact is lost or disruptions occur.

#### 2. Panel Size

While some videoconferencing platforms, e.g., Zoom, can display up to forty-nine tiles or thumbnails in gallery view, most videoconferencing platforms, including Zoom, have a default “gallery view” display of up to twenty-five tile images depending on the device used.<sup>47</sup> Given the fact that the number of tiles shown on a screen affects the size of the individual tiles, a useful panel size is between ten to fifteen jurors. Limiting the number of

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44. For discussions of best practices for online jury selection, see *Protocols for Jury Selection in Videoconference Trials 1.0*, CIV. JURY PROJECT AT NYU SCH. OF L. (May 16, 2020), <https://civiljuryproject.law.nyu.edu/protocols-for-jury-selection-in-videoconference-trials-1-0/>; RIVERSIDE SUPER. CT., PROTOCOL FOR REMOTE JURY TRIALS (2021); ANDERSON, *supra* note 29; Pressman, *supra* note 2; Dominic & Dominic, *supra* note 30; Frederick, *supra* note 2; GABRIEL, *supra* note 15; ONLINE COURTROOM PROJECT, *supra* note 2; Gates et al., *supra* note 2; and REMOTE JURY TRIALS WORK GRP., *supra* note 32.

45. Ideally, jurors should go through an initial tech check in the days preceding the trial. This will minimize the time needed for troubleshooting and allow accommodations to be made, if necessary, and shorten the time needed to “check in” jurors in the juror waiting room. Dominic & Dominic, *supra* note 30, at 6-7.

46. For an example of the inappropriate use of filters, see Daniel Victor, *‘I’m Not a Cat,’ Says Lawyer Having Zoom Difficulties*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>.

47. *Changing the Video Layout of the Zoom Room Display (Active Speaker View and Gallery View)*, ZOOM HELP CTR. (Jan. 11, 2021), <https://support.zoom.us/hc/en-us/articles/115003322603-Changing-the-video-layout-of-the-Zoom-Room-display-Active-Speaker-View-and-Gallery-View>.

jurors in this manner allows for the other participants (i.e., parties, attorneys, judge, and any necessary court personnel) to be present onscreen.<sup>48</sup>

### 3. Scheduling

Online jury selection has a distinct advantage over in-person jury selection in that panels of jurors can more reasonably be scheduled to fit an efficient schedule. Online jurors can be directed to report for jury selection at specific times thus avoiding large “pools” of jurors, many of which must wait extended times until they are questioned. Taking a shift approach makes efficient use of both the court’s and jurors’ time.

### 4. Technology and Environment

There are certain basic technological and environmental requirements for online jury selection. First, jurors need appropriate devices with cameras (e.g., desktop computers, laptops, tablets, or smartphones).<sup>49</sup> It is desirable to encourage jurors to participate on tablets, laptops, or desktops with cameras and headphones for the purposes of jury selection. However, if such devices are not available or cannot be provided by the court or parties, a smartphone can be used. Second, jurors need access to reliable internet access (either ethernet connection, Wi-Fi, or a cell phone data plan). If some jurors do not meet this requirement, the court or parties have accommodated these jurors by providing “hot spots” or kiosks whereby jurors could participate.<sup>50</sup> Third, jurors should use the most recent version of the videoconferencing platform software. These platforms frequently update their software with new features and “fixes” for prior problems. Failure to use the most recent platform upgrade can lead to feature incompatibility or other unnecessary problems. Finally, jurors should participate in a private location free of distractions and in an environment that fosters candid and honest disclosures.

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48. Trial team members and other individuals who need to view the jury selection proceedings can still do so without affecting the tile parameters by choosing settings that disable their cameras and having jurors choose a viewing setting that does not show tiles for anyone who has disabled their cameras.

49. Laptops and desktops can show all twenty-five (or more) tiles, but smaller devices are more restrictive. Tablets may only display eight to twelve tiles and smartphones may display only four to six tiles at a time. These display numbers vary with devices and videoconferencing platforms and should be used for relative comparisons only. For example, some larger tablets (e.g., iPad Pro) can display up to forty-eight tiles but most tablets are more limited than their desktop and laptop counterparts. Will Chan, *New iPad Pro Updates! Stay in Frame as You Zoom, See More People in Gallery View*, ZOOM BLOG (May 26, 2021), <https://blog.zoom.us/zoom-ipad-pro-updates/>.

50. REMOTE JURY TRIALS WORK GRP., *supra* note 32, at 11.

### 5. Virtual Bench Conference Room

Online trials should have a separate virtual room for bench conferences and for individual questioning outside the presence of other jurors when needed.

### 6. Questioning and Screen Displays

Voir dire is best conducted in the videoconferencing platform's version of gallery view or what might be called the "Brady Bunch" view. This display setting enables the parties and judge to see all jurors at one time. While not all videoconferencing platforms allow the tiles to be moved and rearranged, Zoom allows the viewer to arrange tiles in a fixed order on the user's display screen.<sup>51</sup> At least one videoconferencing platform (Zoom) allows the judge (host) to set the order of jurors, ideally in order of consideration, for all those who are participating.<sup>52</sup> This approach can minimize confusion during discussions with the court or trial team members because the order of appearance of jurors on the display screens of participants are not otherwise uniform.

## IV. CONDUCTING VOIR DIRE ONLINE

Online jury selection is relatively new.<sup>53</sup> The technology can be intimidating and is constantly changing. It will take some time and considerable practice to master the technological and presentational aspects of online jury selection. However, this initial hurdle should not be confused with the similarities and differences between voir dire conducted in online and in-person settings.

### A. Comparing Virtual Voir Dire with In-person Practices

#### 1. Similarities

There are a number of similarities in conducting online and in-person voir dire. The goal is the same. Attorneys need to foster candor, honesty, and participation to identify potential biases and provide information to guide

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51. *Changing the Video Layout (Speaker View and Gallery View)*, ZOOM HELP CENTER (July 16, 2021), <https://support.zoom.us/hc/en-us/articles/201362323-Changing-the-video-layout-Active-Speaker-View-and-Gallery-View->.

52. The ZOOM setting, "Following Host Order," displays the order as assigned by the host and is good for keeping jurors in proper sequential order as considered by the court. *See id.*

53. For a more in-depth discussion of conducting online voir dire and jury selection, see Frederick, *supra* note 2.

the exercise of peremptory challenges and challenges for cause. Achieving these goals requires that attorneys (a) set the stage for jurors, letting them know what to expect in terms of the questioning process and responses needed; (b) establish early and continued participation over the course of voir dire through the questioning approaches used;<sup>54</sup> (c) appropriately confront nonparticipation (e.g., jurors “hiding” through nonparticipation or group silences); (d) provide opportunities for renewed participation (e.g., second chance questions); and (e) treat voir dire as a one-way conversation, where an attorney listening is preferred to speaking and jurors command most of the “talking” time. In essence, most of the skills, questioning techniques, question phrasing features, and attorney demeanor and styles that maximize success in voir dire apply to both online and in-person voir dire environments.

## 2. Differences

There are significant differences in conducting voir dire in an online versus an in-person setting. Yet, while some differences can be negative, others are positive. Some of the potential negative differences are the following. First, jurors are potentially subject to distractions. Jurors have been seen checking email, leaving the location to take a phone call, or looking at a second screen or other activities that distract their attention.<sup>55</sup> Second, technical disruptions (e.g., loss of internet connection or a juror’s device failing because of a rundown battery) can occur.<sup>56</sup> Third, the lack of familiarity by some jurors with technology (e.g., using a videoconferencing platform or speaking into a camera on a device/computer) could lessen their participation if they are not allowed to become comfortable with the technology or if they are asked to use features that they have not mastered (e.g., the electronic hand raise).<sup>57</sup> Fourth, some videoconferencing platforms do not allow for the fixed ordering of jurors on screen. As a result, it can be difficult to keep track of jurors during questioning.<sup>58</sup> Finally, online voir dire

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54. For a more in-depth discussion of voir dire and jury selection, see FREDERICK, *supra* note 7.

55. See Angela Morris, *Jurors Are Vaping, Eating, Sleeping on Zoom: Incidents Spotted Across the Country*, TEX. LAW. (June 21, 2021, 3:19 PM), <https://www.law.com/texaslawyer/2021/06/21/jurors-are-vaping-eating-sleeping-on-zoom-incidents-spotted-across-the-country/>.

56. Courts need to have plans for such failures and advance instructions to jurors on how to avoid them or what to do should they arise. Such disruptions are not limited to the jurors but can be experienced by the parties and judges as well.

57. Frederick, *supra* note 2 (manuscript at 1-2).

58. As noted earlier, at least one videoconferencing platform, e.g., ZOOM, allows participants to fix tiles on their display screen, and ZOOM allows for the host (the judge) to fix the visual display

inserts the medium as a factor. Now, attorneys and jurors are dependent on the lighting used, camera angle, visible background, and technical features of their devices that display participants or in some cases obscure portions of the participant.<sup>59</sup> Failure to master the medium can present presentation issues.

Despite the differences that could cause difficulties, there are still several positive features to online voir dire. First, as noted below, jurors appear to be more candid and feel “safer” in the informal setting associated with online voir dire.<sup>60</sup> Second, the voir dire process is more intimate and revealing in terms of the juror’s location. That is, jurors are often appearing in a comfortable area of their home, oftentimes with personal articles in the background such as posters, books, artwork, personal pictures, and awards. The latter of which can provide insights into the juror that would not be available in a courtroom. Third, there is *potential* intimacy on a technological level as well. The jurors’ images are much larger on the display screen,<sup>61</sup> thus allowing attorneys a closer look at jurors as compared to seeing jurors across the courtroom; attorneys could see multiple jurors through these larger images at the same time.<sup>62</sup> Finally, given the limit of display tiles, which is a default setting of twenty-five images on most videoconferencing platforms, the number of jurors participating in voir dire at one time is often limited to twenty jurors or fewer.<sup>63</sup>

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for all participants. Beyond the issue of fixing tiles on a display screen, other technical considerations (i.e., speaker view) can produce problems. With speaker view, tile images are displayed on screen via voice activation. When this happens, valuable information can be lost such as a juror frowning or smirking in response to a question before he/she answers and, thus, activates the display feature after the expression occurs.

59. See Frederick, *supra* note 2 (manuscript at 10).

60. *Id.* (manuscript at 9-10); Gates et al., *supra* note 2, at 14; ONLINE COURTROOM PROJECT, *supra* note 2, at 8; REMOTE JURY TRIALS WORK GRP., *supra* note 32, at 8.

61. Opting for a larger screen provides an even larger view of each juror. See *infra* Figure 3.

62. Some may say that the general “torso and head” images available online cuts off meaningful nonverbal information that is available in the courtroom (e.g., below the waist movements). However, as noted by Judge Williams, “It’s important to see faces, eyes, and body language. But even in the courtroom, credibility decisions usually are not made by observing a witness or juror from the waist down.” Matthew Williams, Super. Ct. Judge, State of Wash. for the Cnty. of King, Panel Hosted by American Society of Trial Consultants: The Evolution of Jury Selection, Jury Selection/Internet Research on Potential Jurors (June 24, 2021), in <https://youtu.be/FiTujavuADQ>, Aug. 2020.

63. It is possible to have more than one panel questioned at a time, but I do not recommend that approach. As discussed with hybrid jury selections, a second panel being questioned simultaneously has a number of disadvantages.



Fig. 3. Example of Big Screen Setup from Online Jury Selection Study, Maricopa County, Arizona (2021).

### *B. Issues and Questions Raised with Online Jury Selection*

Several issues or questions arise with online jury selection. These issues range from the impact of the online environment on the degree of formality inherent in the online process and the impact on the diversity of the venire to the perceived experience and preferences of the stakeholders.

### 1. Degree of Formality

There is a distinct difference in the degree of formality between the in-person and online setting.<sup>64</sup> While online jurors can report from any location, they often appear in their bedrooms or other secluded locations in their homes. The informality associated with these locations is apparent. However, this informality has its benefits, particularly as it relates to voir dire. Jurors have reported feeling more comfortable and feeling “safer,” with some jurors reporting that the online environment increased their candor.<sup>65</sup>

### 2. Attention

Another concern is the potential for jurors to become inattentive during the questioning process. This is not an idle concern. There have been reports of jurors being disengaged from the trial proceedings and engaging in inappropriate activities including checking email, viewing a second screen, eating, vaping, or even leaving to take a phone call.<sup>66</sup> However, early data indicates that jurors are attentive and involved in the voir dire process. For example, 89% of jurors in one study reported that it was “very easy” to pay attention during the online jury selection.<sup>67</sup>

### 3. Juror Preferences

Beyond issues of attentiveness, online jurors have responded positively to online jury selection. After having experienced online jury selection, one study reported that jurors preferred online jury selection in terms of (a) preferred location with 77% voting for online versus 7% for in-person and (b) willingness to participate in online versus in-person jury selection with 93% very willing as opposed to 34% very willing, respectively.<sup>68</sup> This is supported by jurors’ overall general preference for online versus in-person jury trials.<sup>69</sup>

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64. Frederick, *supra* note 2 (manuscript at 9).

65. Gates et al., *supra* note 2, at 14; ONLINE COURTROOM PROJECT, *supra* note 2, at 8; ANDERSON, *supra* note 29, at 33.

66. Morris, *supra* note 55. Courts and court personnel will need to pay close attention to jurors at all times and instruct jurors accordingly in order to minimize the occurrence of these and other inappropriate juror activities.

67. Peter A. Buchsbaum et al., Presentation to Members of the ABA Judicial Division: Judging During the Pandemic: What Judges and Lawyers (and Jurors) Think About Remote Proceedings and the Future of Court Operations (May 20, 2021); THE COVID-19 CONTINUITY OF CT. OPERATIONS DURING A PUB. HEALTH EMERGENCY WORKGROUP, ARIZ. SUP. CT., POST-PANDEMIC RECOMMENDATIONS 27 (2021).

68. Buchsbaum et al., *supra* note 67.

69. ANDERSON, *supra* note 29, at 106; Gates et al., *supra* note 2, at 14.

#### 4. Diversity

Another legitimate concern is the possibility of decreased diversity resulting from differential access to technologies and suitable viewing locations.<sup>70</sup> Early data and anecdotal information do not show a negative impact on diversity and, possibly, even increase diversity compared to pre-pandemic levels.<sup>71</sup> However, the courts and parties should take steps to accommodate those who do not have the appropriate technology or the environment to participate to ensure otherwise qualified jurors are not excluded.

#### 5. Acceptance by Stakeholders

As we have seen, one major stakeholder, jurors, have been found to favor online versus in-person jury selection. A question remains as to acceptance by two other major stakeholders: attorneys and judges. More attention has been paid to the global issue of stakeholder acceptance of online jury trials, in general, and the greater issues involved therein. Less attention has been paid to the specific issue of online jury selection. While some attorneys<sup>72</sup> and judges<sup>73</sup> have expressed concern, many attorneys and judges have strongly supported the use of online jury selection, in particular.<sup>74</sup>

### C. Benefits of Online Jury Selection

There are a number of benefits to online jury selection for several stakeholders including the courts, jurors and attorneys, and parties. The benefits discussed below are in addition to the previously discussed benefits of OSJQs and, combined, these two components maximize the online approach.

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70. See Gates et al., *supra* note 2, at 14.

71. See also *supra* Section II.D.3.

72. See Morris, *supra* note 55.

73. See John C. Coughenour, *What Gets Lost when Zoom Takes Over the Courtroom*, SEATTLE TIMES (June 1, 2021, 2:47 PM), <https://www.seattletimes.com/opinion/what-gets-lost-when-zoom-takes-over-the-courtroom/>; but see Thomas S. Zilly & Marsha J. Pechman, *What the Public Gains by Remote Trials in Federal Court*, SEATTLE TIMES (June 8, 2021, 2:06 PM), <https://www.seattletimes.com/opinion/what-the-public-gains-by-remote-trials-in-federal-court/>.

74. See Bruce Anderson, *An In-Person Jury Selection Alternative*, JACKSONVILLE DAILY REC. (July 1, 2021, 5:00 AM), <https://www.jaxdailyrecord.com/article/an-in-person-jury-selection-alternative> (exploring hybrid jury trials using online jury selection with an in-person trial); ANDERSON, *supra* note 29; Gates et al., *supra* note 2; ONLINE COURTROOM PROJECT, *supra* note 2; Pressman, *supra* note 2; REMOTE JURY TRIALS WORK GRP., *supra* note 32.

### 1. Courts

For courts, the benefits of online jury selection derive from the ability to complete jury selections without having to bring in large numbers of jurors to the court. Court personnel does not have to manage and shepherd these jurors within the courthouse. Instead, jurors are managed from their online locations, which is especially advantageous when pandemic-related measures are in place.<sup>75</sup> These efficiencies may not only yield management benefits but cost benefits as well, given the reduced time and effort costs for court personnel. Panels of jurors can be moved with several clicks within the virtual courtroom as compared to physically moving jurors within the courthouse. The courts also benefit from potential increases in diversity produced by conducting jury selection online.<sup>76</sup> Finally, the court benefits from jurors being more candid and honest during voir dire when conducted in an online setting.<sup>77</sup> Since the goal is to seat a fair and impartial jury, the court benefits whenever tools are employed that forward the identification of bias on the part of potential jurors.

### 2. Jurors

Likewise, jurors gain several benefits from online jury selection. First, jurors are in a more comfortable environment, both physically and psychologically, when participating online versus in a courthouse. Second, jury service is more convenient for jurors when they are allowed to participate from their homes or other private locations, and they do not have to travel to the courthouse. Third, jurors save time and money by not having to travel to and from the courthouse for jury selection, thus avoiding commuting costs (e.g., parking, transportation time, and transportation costs) and potential childcare costs. Finally, jurors benefit from having their time being used efficiently. Online jurors can more accurately be scheduled into time slots, thus minimizing the wasting of their time sitting around waiting for their turn.

### 3. Attorneys

Furthermore, attorneys can benefit from online jury selection in several ways. First, jurors can be more candid and honest in the online setting provided attorneys focus on having jurors speak as compared to speaking at jurors. Second, attorneys can see jurors in their natural state such as in their

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75. Frederick, *supra* note 2 (manuscript at 20).

76. ONLINE COURTROOM PROJECT, *supra* note 2, at 80; *see also supra* Section II.D.3.

77. *See also supra* Sections II.C.1 and II.D.1.

bedrooms or home offices. This provides an opportunity for attorneys to note what objects (e.g., posters, artwork, pictures, books, and awards, etc.) these “free range” jurors place in their surroundings. Third, the trial team has greater latitude to participate behind the scenes. Trial consultants and other team members can participate off-camera and need not be in the attorneys’ conference room, including conducting real-time online research on potential jurors, where allowed.<sup>78</sup> Finally, attorneys, along with the courts, benefit from a potentially more diverse trial venire.

## V. CONCLUSION: FUTURE OF ONLINE JURY SELECTION

This Essay focuses on online jury selection<sup>79</sup> and will limit my conclusions to this component of online jury trials. Going forward, it is likely that online questionnaires will have the greatest immediate impact. The potential for cost savings, greater efficiency in juror management, more focused voir dire, promotion of honesty and candor, and minimizing the number of jurors unnecessarily reporting for service in online (or in-person) jury trials bring significant benefits to the court system.<sup>80</sup> Yet, online voir dire and jury selection, while having its own significant benefits, will take longer to attain mass usage.<sup>81</sup> In those jurisdictions that have been aggressive in its use, the reaction has been generally positive.<sup>82</sup> Even though the ability of online jury selection to interface with both online jury trials and hybrid jury trials, which is a combination of online jury selection and in-person trial, is a significant benefit, it will take some time to obtain general acceptance. At least in the near term, more serious consideration of online jury selection is needed, particularly in light of its benefits and promotion of juror safety. Though it may not be overnight, over time, as technological capabilities and access improve and as courts and attorneys become more familiar with the

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78. As a case in point, I participated in two online jury selections as part of the Arizona studies discussed in this article from my offices in Charlottesville, Virginia, which is more than 2,000 miles away from the study site in Phoenix, Arizona.

79. See Karen Lisko, *Bearing Witness to, Well, Witnesses: An Examination of Remote Testimony Versus In-Court Testimony*, 51 SW. L. REV. 63 (2021), for further reading about addressing the issue of remote witnesses. Karen Lisko was and continues to be a key participant in some of the research cited in this article, along with the Honorable Pamela Gates who directed the Arizona simulation studies cited above.

80. It will take some time for court clerks to make the shift to seeking electronic contact information and relying on electronic communication, with accommodations being made for nonelectronic communications (and printed questionnaires, both summons and SJQs) where needed.

81. Frederick, *supra* note 2 (manuscript at 20).

82. ONLINE COURTROOM PROJECT, *supra* note 2, at 45.

online jury selection environment, online jury selection will gain substantial support and will continue to serve as an effective option.