

Jury Research in the Time of COVID ... and Beyond

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By Suyash Agrawal and Tara Trask
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The constraints of COVID-19 require trial lawyers to think creatively about trial preparation and management. Remote depositions and hearings are but the tip of the iceberg. All outward-facing aspects of the practice must be reimaged. Technology is a key element to be harnessed, but there are many variables to balance in this challenging and ever-evolving landscape. Many of the changes that are currently the result of necessity may become routine in the post-COVID world.

As many courts continue to set trial dates, lawyers must find ways to safely prepare for trial. In high-stakes, complex commercial litigation, that includes jury research. But when the pandemic precludes trial consultants and mock jurors from congregating in hotel ballrooms for day-long research exercises, lawyers need alternatives. While alternative jury research methods cannot fully replace traditional in-depth research, they fill an immediate need for developing juror insights during COVID-19. And, with the virtue of being less formal, expensive, and time-consuming, they could augment in-depth jury research even when masks and social distancing become less necessary.

As examples, let's examine the benefits and limitations of two alternative jury research methodologies that we have used during the pandemic, both



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of which may be useful in a post-pandemic setting. One is a hybrid between a traditional approach and a virtual option. The other is conducted completely remotely.

In the hybrid approach, consultants, some staff, and mock jurors were on-site (in a larger space to allow social distancing), while all attorneys and clients participated via livestream. Jurors watched prerecorded presentations by lawyers playing both sides (approximately 45 minutes each), and then jurors answered questionnaires and participated in small breakout focus groups, much like traditional research. Counsel could solicit feedback in real time through the on-site consultants.

The hybrid model worked well. Less travel for fewer people minimized potential exposure. Using

prerecorded presentations helped control timing and allowed counsel flexibility in preparing and presenting. Also, having mock jurors and consulting staff on-site enabled us to maintain a high level of juror engagement for a full day's exercise.

In the completely virtual model, all participants joined remotely. We used prerecorded attorney presentations, and we administered questionnaires at various intervals. We engaged a smaller, more manageable set of 16 mock jurors, which we split into two groups of eight for deliberation sessions moderated by a consultant. Counsel and clients could view the entire project live via Trask's proprietary, encrypted Consulting Portal.

The completely virtual format affords obvious safety advantages in our current COVID world. Other benefits include cost and scalability. While we strongly suggest engaging a reputable trial consulting firm for this research, if cost is a significant issue, outside counsel or client staff can conduct the exercise. Jury research without a jury consultant is far from ideal, but some research is better than none. Another advantage is that a remote exercise can be conducted iteratively—whether by providing additional facts, documents, and themes to the original juror group, or by presenting revised case summaries to a new group. Data gleaned from a remote exercise can also be aggregated with more in-depth research conducted later in the litigation.

The remote format, however, has limitations. A primary challenge is time. We found that any online project longer than four-five hours yielded diminishing returns. Even for shortened exercises, mock jurors must be recruited with an eye toward their ability and willingness to complete the project. Jurors wandering off to fold laundry or have

a smoke—or not showing up at all—can quickly derail a project. And, even when physically present, jurors' interest may flag in the absence of direct human-to-human contact. So it's important to set realistic goals for the breadth and depth of insights to be gained from a fully remote exercise. Presentations must be carefully crafted to ensure jurors have sufficient exposure to key facts and case themes to deliberate, without taxing attention spans limited by the remote format.

Another significant limitation: remote jury research cannot capture the all-important group dynamic of face-to-face juror deliberation. Consider how many Zoom meetings you've attended since COVID, and how there nevertheless remains a difference between seeing someone on video and seeing them live. Lawyer and witness credibility and engagement with the jury is also constrained over video. And, of course, we strongly suggest resisting the urge to design an overly elaborate approach. Simpler is better for online research. The cost-savings and advantages in terms of nimbleness diminish rapidly, as does the resulting data. Controlling for fatigue and confusion are a constant challenge.

Remote jury research is a tool that trial lawyers and consultants should add to their arsenal of approaches. In so doing, they can gather information that otherwise may go uncollected. COVID may have forced us to think creatively about how we consider trial preparation, but the lessons learned need not be forgotten once we're on the other side of the pandemic.

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