

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

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.⁴ 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.⁵ 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).

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

decades.⁷ 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-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).⁸

A. How Are Online Supplemental Questionnaires Employed?

Online supplemental juror questionnaires, generally are developed by the parties, with judges ruling on the final product and arbitrating questionnaire content and format disputes among the parties.⁹ The resulting questionnaire is

Forms, Microsoft Forms, Qualtrics, Alchemer, and SurveyMonkey, among

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.

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 code¹⁰ where they can access the online

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*¹⁴ 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 body language and listen to jurors while the answers are being given in order

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*

to evaluate jurors and their honesty.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

2. What is the impact of any Digital Divide?

Segments of the population do not have equal access to technology.¹⁹ 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.²⁰ 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

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.

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).

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

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

²³ 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.²⁴ Again, an overwhelming majority of jurors (91%)

meant saving time during jury selection.²⁵

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.²⁶ However, recent data from King County Superior

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.²⁷

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

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.²⁸

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 r

6. Screening Potential

OSJQs also allow for the screening of potential jurors, where desired.³³ 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.³⁴ 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 h0W* nBT/F2 9 Tf1 0 0912 0 612 792 reW* nBT/F

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,

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

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,³⁷ 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.³⁸ The use of these methods, or their variations, is generally governed by statutes and local rules.³⁹

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.⁴⁰ The struck method, arguably the best method,⁴¹ is easily handled in an online environment. Jurors are questioned

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

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

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.⁴² 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

continues until the necessary number of jurors is reached, so there are no

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.⁴³ 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

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

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.

qualifying all jurors to be considered. 3[(3t2m0.0000.00000912 0 612 792 reAate) 79mliwo separate lalalomsa46 478.u , Tf 10.10.98 Tf1 0

C. Logistics of Online Jury Selection

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

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

addressed at this time. Juror attendance is recorded. Jurors go through a final

⁴⁵

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

backgrounds are being used);⁴⁶ 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 twenty-

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

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 rors, many of which must wait extended times until they are questioned. Taking a shift approach makes

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).⁴⁹ 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 participate.⁵⁰ Third, jurors should use the most recent version of the videoconferencing platform software. These platforms frequently update

use the most recent platform upgrade can lead to feature incompatibility IL[HVIR] .A 0JETQqtaTm900.

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

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

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;⁵⁴ (c) appropriately confront

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.⁵⁹ 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 voir dire.⁶⁰ Second, the voir dire process is more intimate and revealing in 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 display screen,⁶¹ 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.⁶² 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.⁶³

for all participants.

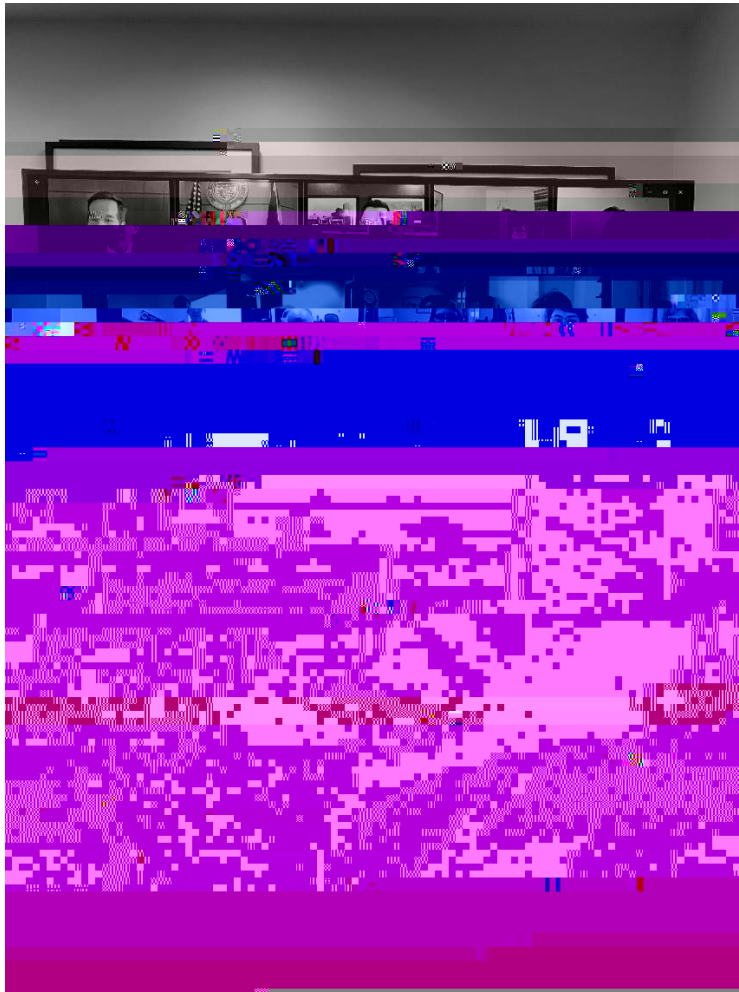


Fig. 3. Example of Big Screen Setup from Online Jury Selection Study, Maricopa County, Arizona (2021).

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.

4. Diversity

Another legitimate concern is the possibility of decreased diversity resulting from differential access to technologies and suitable viewing locations.⁷⁰ Early data and anecdotal information do not show a negative impact on diversity and, possibly, even increase diversity compared to pre-pandemic levels.⁷¹ 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 attorneys⁷² and judges⁷³ have expressed concern, many attorneys and judges have strongly supported the use of online jury selection, in particular.⁷⁴

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.

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

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.⁷⁵ 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.⁷⁶ Finally, the court benefits from jurors being more candid and honest during voir dire when conducted in an online setting.⁷⁷ 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

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