



Trial *by* Video

By Richard Cravens

Jury trials are an integral part of our process. The Supreme Court recently vacated all jury trials until 2021 due to the current COVID 19 pandemic. At this time it appears that the plan is to resume some form of in person jury trials in February 2021. However, plans are fluid because safety is a moving target. Until there is general distribution of the vaccines currently in production, it is not clear when it will be safe to conduct in person jury trials.

However, that does not mean we cannot safely conduct trial by video. In fact, that is the only way to 100% guarantee personal safety in the judicial process during the pandemic. While we do our best with questionnaires and thermometers, we still rely on the honor system and the only way to absolutely guarantee safety is to not be in the same room.

I have family members who cannot get COVID and we have essentially been in quarantine since March 2020. I do not plan on stepping foot in a courtroom again until we are all vaccinated. I have not been able to conduct a trial, hearing, deposition or mediation in person during this time. That does not mean I have not been busy. In addition to numerous mediations and depositions by Zoom, I have already conducted two bench trials by video and there are good reasons to do the same with jury trials.

I seldom need to touch, taste, or smell a person or evidence, and I can see the judge and jury better on my monitors than I can 20 feet away in a courtroom. I don't have to wear a mask on video, but I do in person. I only need one set of exhibits for everyone on video, as opposed to a separate set for everyone in person because we cannot pass objects to each other. I do not have to rely on whether everyone in the room adhered to best COVID practices. I can continue to do business even if I have been exposed and am actively quarantined, without worrying that I will expose others.

I began thinking about the logistics of video trials in March when we first started to face the current reality. One of my first concerns was how to keep honest jurors honest. Fortunately, we have had compliance software in other contexts for many years and most of the bugs are already worked out.

For example, my oldest daughter is currently going to school in Oregon, from our home here in Albuquerque. She takes a

full load of classes including science and math courses, some of which require proctored exams. The exam process is designed to ensure remote-controlled compliance. When taking a test the student is not allowed certain materials depending on the class. The student's proctoring software shuts off access to the rest of her computer and the student is required to physically pick up the computer, scan the camera around the room and show the test environment to the proctors when the exam starts. During the test students are required to do the same at random intervals. My daughter described one of her cats walking in front of the camera during a test and less than a minute later she was instructed by a proctor to scan the room again.

The Court can control the hardware and software used much like Albuquerque Public Schools does for its remote learning process during the pandemic. When the decision was made to conduct classes by video all of the students at my youngest daughter's school were required to pick up a Chromebook, which was provided by the school, so that the tech, software and security were standardized and controlled.

APS, which is not known for speed, got that together within weeks. If we can find a way to keep educating our kids in the midst of this mess, we should be able to find a way to conduct jury trials.

It is not feasible to postpone jury trials until we can meet face to face and we really don't know when that will be. There is no reason we cannot accomplish a fair and successful jury trial by video, just as we are doing right now with bench trials.

On May 4, 2020 I had my first bench trial by video in a civil matter in the Second Judicial District. During the proceeding, my entire file was at my fingertips; all of my exhibits were electronic and cued up on one of my monitors. The judge in our case was fairly adept with the technology and provided counsel with an opportunity to practice using Google Meet at the Pretrial Conference a week before the day of trial. We admitted most of the exhibits at the Pretrial Conference, which streamlined the process significantly. We started at 8:30 and finished at 5:15. My two witnesses, of which one was our expert, appeared by Google Meet. My opposing counsel had witnesses appear by video and by phone.

We got the job done. We presented evidence, we questioned witnesses, and we made arguments, all by video. I presented

rebuttal exhibits on screen and had highlighted demonstrative exhibits, which were easy to share electronically. While my on-screen presence showed a jacket and tie, my lower half was in cargo shorts and flip flops.

I was truly a convert on September 14, 2020 when I had a dispositive motion hearing in ABQ at 11 am and a bench trial in Taos at 1:15 that afternoon and still had time for a leisurely lunch and coffee. I did not put myself in harm's way by driving, which until COVID 19 was the most dangerous activity I conducted on a daily basis. Now it is shopping.

Safety first, of course. Social distancing is lot easier when we sit in different buildings, sometimes in different states. The current health orders make it impossible to have more than five persons gathered and there is no reason to do so when there is software that is easy to use and the actual product is better in some ways than being there.

Sitting in a courtroom will mean wearing masks. Jurys already think we hide stuff and covering our faces will not help our credibility, depending on the face. CLE's have taught us for years that younger juries increasingly learn by video and it is an effective way to communicate with persons who are conditioned to getting their information by screen.

Allowing jurors, witnesses, parties and counsel to attend by video will promote access to the Courts, which is a primary goal of our justice system. If we continue the practice beyond the current crisis we encourage jury participation, which is notoriously viewed as onerous. Working parents, small business owners, and others may more freely participate in the process when actually getting to and being in the Courthouse would otherwise constitute a hardship.

Wheelchair access is not a problem while attending electronically, and my older clients can hear proceedings better on their electronic devices than they can with the glitchy headphones provided by the Court. Translation services will be more accessible across a broader range of languages. We can make the jury trial process more user friendly.

COVID 19 has already affected court personnel, whose jobs have evolved into requiring more tech and video expertise. Job opportunities will emerge. Security would be enhanced. Judges will be safer. Everyone will be safer.

New Mexicans would benefit from remote attendance as we are a rural state and our outlying counties are underserved. This would present more opportunities for rural clients to obtain the counsel of their choice and allow rural attorneys to participate in larger markets.

Technology has significantly evolved the practice of law in the relatively short time that I have had my license. I remember going to libraries and looking in books for statutes, cases and ordinances. When I needed to learn a new area of law, I used hard bound legal encyclopedias to get started. Updating cases involved a laborious process called shepherdizing, which meant going from book to book in an arcane system ostensibly designed to frustrate. I spent a lot of time in libraries. Now it seems that the law library is primarily a place for the public to use free computers preloaded with Westlaw and Lexis Nexis.

It would likely be malpractice to depend on paper books and the University of New Mexico Law Library removed Shepherd's Citations from circulation years ago. With Westlaw and Lexis Nexis I have all those libraries in my laptop, and more. We are more productive attorneys now than we were before.

Ordinarily it would take a great force, or a great catalyst to change fundamental practices. COVID 19 is both and we are forced to adapt. We have all of the technological tools; we just need to adapt them to our specific uses.

Courts were not operating at a leisurely pace before the pandemic and things have not improved since. As we must find a way forward despite the difficulties, let's find all the silver linings we can. Jury trials by video will allow us to continue to get the job done while it is difficult, and help us to be more productive and efficient when we get past the current crisis.

Resources Shared by Mr. Cravens:

IT Help: If you need tech help with any remote platforms, Stephen Money is a trusted source and has worked for attorneys for many years. He understands our needs and is willing to help out the NM legal community.

Contact information: Stephen Money, 702-813-2286, stephen@setmohelpdesk.com

Zoom Support Page:
<https://support.zoom.us/hc/en-us>

GoToMeeting Support Page:
<https://support.goto.com/meeting>

Google Meet Video Support Page:
<https://support.google.com/meet/?hl=en#topic=7306097>

Richard Cravens graduated from the University of New Mexico School of Law at the age of 46. Richard initially practiced as an insurance defense attorney until he opened his own law firm on April 1, 2014. Richard's practice primarily focuses on personal injury and complex litigation; however, he also represents homeowners in the foreclosure process. Richard has been a volunteer member of the Judges and Lawyers' Assistance Program and the University of New Mexico Health Sciences Center Biomedical Ethics Committee since he was a second-year law student.

