



Superior Court of California, County of San Joaquin

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April 7, 2021

VIA EMAIL

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**Re: Letter from Honorable Barbara Kronlund In Support of ABOTA's Letter
Opposing Mandatory Remote Civil Jury Trials**

Preliminary Statement

I support CAL-ABOTA's opposition to mandated remote civil jury trials. It should be noted that ABOTA is the preeminent attorney association in the country, with the nation's top litigators vetted for inclusion, only upon having significant jury trial experience and then, only upon invitation after a membership vote. ABOTA is the first organization to speak out when a judge is unfairly attacked or unfairly targeted for recall, since they devote a good deal of their time to preserving an independent judiciary devoted to the rule of law.

Background

I have presided over or tried approximately 200 jury trials as an attorney and during the 25 years I've been on the bench. For the past 11 years, I've had a direct civil assignment. Forcing mandatory remote jury trials upon unwilling litigants results in denial of access to justice, and ultimately, justice denied. It will unnecessarily increase litigation costs and have the unintended consequence of actually delaying trials, as they wind their ways through time-consuming Writs and Appeals at every possible juncture in the proceedings. I believe mandated remote civil jury trials contravene litigants' 7th Amendment rights. Stipulated remote trials are fine, as civil litigants may stipulate to nearly every aspect of litigation. However, it is the mandated remote jury trial I am arguing against.

Clearly the pandemic has resulted in some positive innovations in our courts, including e-filing, special remote traffic citation procedures and even remote mandatory settlement

conferences. But remote proceedings are not a panacea or "one size fits all" solution for every type of court hearing, particularly jury trials.

It's important to recognize that civil cases are important to the litigants and many times these cases truly involve life or death issues, and the result of the litigation has a significant impact on the litigants' lives. The importance of civil cases should not be understated, and allowing criminal cases to proceed live, but civil cases forced into remote hearings, ignores the constitutional foundation underlying both criminal and civil jury trial rights. And there is virtually no difference as far as procedure in trying a criminal or civil case; procedurally, it's a distinction without a difference.

Recognizing Potential Increased Risks In Remote Jury Trials

Remote jury trials carry many risks well above and beyond in-person trials, which also present challenges for judges trying to safeguard the fair trial process. In a live courtroom setting, judges and court staff are constantly vigilant to prevent jurors from doing independent research, from falling asleep or using electronic devices during the proceedings, or otherwise engaging in juror misconduct. But with remote jury trials, all of these risks are magnified, inherent problems with this format can easily go undetected, and therefore they simply cannot be controlled.

The increased risks which cannot be controlled, in a remote jury trial setting, are the very reason mandated remote jury trials are such a poor substitute for a live jury trial. Remote civil trials merely pay lip service to the constitutional right to a jury trial to deny access and justice to civil litigants in violation of the 7th Amendment right to a jury trial in civil cases.

Impact of Unreliable Internet Access and Technology Impediments

The additional risks embodied in remote jury trials include jurors not having suitable or reliable or any access to internet. Or having glitchy internet, power outages at some but not all jurors' locations, and other internet-related issues. Notably, many students are still doing 100% of their schooling from kindergarten through college and law school, online at home, a full year after the COVID pandemic shut down the country. Add to that the fact the many adults are working from home remotely, which when accumulated, this use can strain the internet within people's homes, causing frequent system failures. Hearing every other word of a witness' testimony falls far short of constitutional muster. This isn't even taking into account "user-errors" which come from people's own incompetence with technology. And what about jurors without electronic devices that are compatible with a remote jury trial format, or those who lack any device at all. Will lawyers have to supply computers to jurors? Or tablets or smart phones? Or will those jurors simply be excluded from jury service altogether, in violation of their constitutional right to serve on a jury? Of course this doesn't pass constitutional muster, and obviously will interfere with a proper cross-section of the community serving on juries as is constitutionally mandated.

Increased Risk of Distractions

Jurors serving remotely can more easily multi-task and not pay attention, without detection. This can range from having other devices, such as a cell phone or tablet device in operation doing something else, all while "appearing" to be engaged in the trial. Or, they can

simply be reading or looking at school books, work manuals, answering e-mails, grading papers, exercising, dosing off and on, etc. The list is literally endless.

Jurors can ignore admonitions to return after breaks, without consequence. A bailiff can't look for them in the restrooms or court hallways to direct them back.

Absence of Effective Controls or Prohibited Activities by Jurors

Jurors can actually be doing all sorts of prohibited research, despite admonitions to the contrary, which will go undetected. They can look up parties' Instagrams and Facebook pages for themselves, research corporations and any litigation against them, research medical terms and diseases, go right to the location of the event via Google Maps or another application, or simply having terms defined which are not defined by the witnesses, attorneys, or court. They can even research jury instructions, where the lawyers are from and what kind of cases and verdicts they usually get, and so forth. Again, this list is literally endless.

Jurors can be in the presence of other people in the same room, listening to the same trial, and confer with them about the case. Many people share small living spaces, or just have a whole lot of people living in the same household, particularly post-pandemic. From small, disruptive babies, children, or pets of all varieties, to adult friends, household members, or visiting family members, in whatever iteration, these are all major distractions to a juror who is trying to pay attention while fighting "Zoom fatigue". These extra folks can be present and interact with the juror in evaluating the evidence, but go undetected. How will the Court know this is occurring if this information is not offered during a remote trial? What this interaction with others does is influence this remote juror, consciously or unconsciously, and can seriously affect the verdict, and the integrity of the entire proceeding. Litigants are no longer getting that individual juror's opinion as required by their Oath. This list of juror problems is also endless.

It's much easier for a remote juror to do some extra research on the case, yet such efforts can go undetected because it won't appear on the limited view which the remote screen provides. During protracted, complicated expert testimony, or testimony via an interpreter, it is impossible for a Court to observe each juror during testimony to ensure they are all paying attention to the task at hand.

The Increased Risks and Lack of Controls Result In A Denial of Justice

What all of this illustrates is that mandating remote jury trials absent a stipulation for same, actually denies access to justice, which means justice is denied. This will assuredly result in added costs, for routine writs and appeals, as well as the unintended consequence of actually delaying justice further. Justice delayed is truly justice denied. Mandated remote civil jury trials violate litigants' 7th Amendment right to a jury trial in civil cases, because remote trials can't come close to achieving actual justice and they are a poor and unacceptable substitute for in-person trials.

A Sampling of the Success of Live Jury Trials In State Court

Of significance is that many courts have managed to safely implement post-COVID protocols and conduct live jury trials during this pandemic. In taking a quick poll of just a few courts, I found that San Joaquin County has had 60 in-person post-COVID criminal jury trials and 3 in-person civil jury trials; Los Angeles has had 15 in-person post COVID criminal jury trials and 2 civil jury trials; San Diego has had 22 in-person post COVID criminal jury trials and 3 civil jury trials; Santa Clara has had 30 in-person post COVID criminal jury trials and no civil jury trials; Contra Costa has had 94 in-person post COVID criminal jury trials and no civil jury trials; and Orange County has had 175 in-person criminal jury trials and 34 civil jury trials. Since procedurally there is no difference between conducting an in-person criminal versus a civil jury trial, it's significant that a random sampling of just 6 of the 58 courts in this state shows that 438 in-person jury trials were conducted. There's no good reason to discontinue in-person jury trials as this state gets the pandemic under control and is opening up businesses and reducing pandemic-related restrictions.

I presided over an in-person civil jury trial in January. Our county happened to be raging with COVID at that time, and had just experienced another lock down except for essential business. Of the 100 jurors I summoned for the morning hardship conference, 98 appeared. Of the 100 jurors I summoned for the afternoon hardship conference, all 100 appeared. I conducted the hardship hearing in the jury assembly room, with all jurors socially distanced and masked. We easily picked a jury with pandemic protocols in place, including only having 16 potential jurors in my courtroom since they were all socially distanced and spaced throughout the entire courtroom. All jurors were screened upon entry to the building, including having their temperatures taken. Hand sanitizer dispensers are located throughout the courthouse and all around the courtroom, and masks are required at all times in the building. The jury selection was conducted via live stream to the jury assembly room where the rest of the hard-shipped jury pool observed until they were called into the courtroom to join us.

Ensuring Safe and Efficient Live Jury Trials

Having watched numerous Zoom presentations on pandemic protocols and best practices for conducting jury trials safely, I required attorneys to remain masked and always use a microphone. I required attorneys to use the Elmo to show exhibits rather than approach the witness or walk around the courtroom. No exhibits were to be passed among the jurors. The witness microphone had a baggie over the mouthpiece which was replaced after each witness. The witness stand was wiped down with bleach wipes after each witness testified. Counsel wiped down their tables each day, and enhanced COVID-approved cleaning of the courtroom was done each night following the trial adjournment. I set strict time limits which allowed us to get the case tried as expediently as possible, to avoid any problems with a juror being exposed to COVID outside of court and causing a delay or mistrial. My experience was very positive, and from what I've heard from other judges who have presided over in-person jury trials post-pandemic, they have had similar positive, smooth jury trials, with jurors who appear when summoned and who want to serve.

I believe it is wrong to mandate remote jury trials in civil cases, and I support ABOTA's letter in opposition to that practice. I believe for the reasons set forth above that requiring remote jury trials in civil cases absent a stipulation by the parties violates the litigants' 7th Amendment right to a jury trial.

Sincerely,

A handwritten signature in dark ink, appearing to read "Barbara A. Kronlund", written over a horizontal line.

Barbara A. Kronlund
Superior Court Judge, San Joaquin County