

► COMMENTARY



WINTER WHEELER has worked as a civil litigator and currently serves as an arbitrator and mediator in Atlanta at Miles Mediation & Arbitration.



JOE MURPHEY has worked as a civil litigator and currently serves as an arbitrator and mediator in Atlanta at Miles Mediation & Arbitration.

Consider Other Options Than an Unjust Virtual Jury System

WINTER WHEELER AND JOE MURPHEY

IN RESPONSE TO the “unprecedented situation” that is the COVID-19 pandemic, Georgia Supreme Court Chief Justice Harold Melton effectively closed the state’s court system on March 14. Unfortunately—and unavoidably—this judicial emergency has led to an immense backlog of cases waiting to be litigated and tried—a position in which most of the country now finds itself. In response, some states are considering the prospect of conducting virtual jury trials for civil cases, with the states of Texas and Florida having already taken concrete steps toward potentially implementing such a system. While we appreciate these states’ willingness to experiment with possible solutions to the ever-growing caseload crisis, virtual jury trials are not a viable replacement for the traditional, in-person model. To understand why, it is important that we look not only to what is occurring in the courts but also to what is happening in the streets and our communities.

Anti-racism protests have spread throughout the country, causing a huge majority of Americans to scrutinize how governments provide equality under the law to everyone. Much of that attention has been squarely and rightly focused on Georgia, bringing to light issues that those of us working within the legal community have long been aware. One such issue is the difficulty of ensuring juries represent a diverse and inclusive cross-section of the community—a standard of justice that the people of Georgia are calling for their state to meet. And the state and our courts should *want* to meet this challenge. Research shows that diverse teams tend to make better decisions, resulting in better outcomes for those involved. In other words, it is in the state’s own interest to prioritize jury inclusivity and the more just resolutions that would result. Yet when thinking through what a virtual jury system would look like in Georgia, indicators point to a scenario where diversity and inclusion would be relegated to the side for the sake of expediency.

Setting up a virtual civil jury system that reflects the diversity of our communities intuitively sounds easy; especially for those of us who consider the internet as necessary as electricity and water. But in Georgia, the digital divide is very real. Many parts of the state lack the infrastructure necessary for high-speed broadband internet. In areas with broadband, many do not own the laptops, tablets or smartphones needed to securely connect online. For those that do happen to own these devices, many must opt-out of paying for reliable, consistently fast internet due to economic hardship—a fact that is now especially pronounced due to the high levels of unemployment caused by the pandemic. These factors can make the internet more of a luxury than it is an essential in-home utility. This reality exists throughout the state, disproportionately impacting communities of color and rural residents.

Any virtual jury trial programs would require jurors to affirm they are alone in a

room for the duration of the trial proceedings. This means that only jurors who either live alone or have several rooms in their home where they can sequester themselves would be able to serve on a jury. Additionally, people who serve as sole caregivers of children, the elderly and/or disabled would be excluded, thus eliminating a large swath of the community from the jury pool. Those exclusions would disproportionately include women, people of color and lower-income Georgians, all of whom are more likely to serve as caregivers. In a virtual jury system, not only would the types of residents mentioned above be cut off from equally participating in the administration of justice but the system itself would be denied the more thoughtful decision-making that diversity engenders.

Setting up a virtual civil jury system that reflects the diversity of our communities intuitively sounds easy; especially for those of us who consider the internet as necessary as electricity and water. But in Georgia, the digital divide is very real.

It is when these kinds of decisions are reached during deliberations that we see the real magic of having a jury comprised of one’s peers. As jurors compare notes, make arguments, talk it out, weigh the pros and cons and take votes they become a sum greater than their parts. That magic—which can only happen after an engagingly participatory deliberations process—will not be demonstrated by a jury that is structurally set up in an exclusionary way. For every voice to be heard, it helps if jurors feel that they and their experiences are not tokenized but instead truly welcomed—meaning that ensuring diversity might be the best tool we have to produce the more credible decisions Georgians need to see in order to have confidence in our justice system.

In a virtual jury system, it would be extremely important for the proceedings to be conducted using high-speed internet services and high-quality hard-

ware. Streaming video and sound can be adversely affected by a weak signal, an old modem and even a participant’s outdated camera or microphone. Insufficient technological performance would invariably lead to individual jurors having uneven perceptions of any presented evidence. Additionally, the potential for jurors to miss crucial testimony is high. If this should occur, but for a juror speaking up, the judge and attorneys would be unaware. This leaves the court having to rely on jurors overcoming any hesitation to interrupt and pause the proceedings—a responsibility that jurors will undoubtedly find discomforting. A virtual format will feature time lags, cut off voices and lesser Wi-Fi connections yielding to stronger ones; leading to a deliberations process that would be distorted at best and dysfunctional at worst. In these likely scenarios, there is a real possibility that attorneys will face increased malpractice claims associated with technological deficiencies as well as novel appellate issues (ironically adding to the logjam of civil cases).

Overcoming all these logistical and procedural hazards creates an inherent burden for either the government (state and local) or individual citizens. After all, someone will have to pay for the high-quality technology needed. If not, every jury pool will be restricted to only those who can afford to participate. The only acceptable way forward would be for the courts to provide the necessary hardware, internet, security and in-home IT support—an expensive endeavor that is not feasible given that the pandemic has also created financial hardship for state and local budgets.

The logjam of civil cases continues to deepen, and many attorneys and clients alike are understandably anxious to move their cases to conclusion. But it would be counterproductive and counterintuitive for Georgia to invest time and money into building an ad hoc system that we know in advance will be unjust. Fortunately, we can avoid haphazard virtual civil juries by exploring existing trial alternatives that would allow our state to meet the needs of the moment and build a more inclusive justice system for all Georgians. ☐

Free Georgia Legal News

If you are not a Daily Report subscriber, sign up for a free account and our daily headlines at [DailyReportOnline.com](https://www.dailyreportonline.com), then selecting “subscribe,” to receive up-to-date information on stories, cases and news that affect your practice.

* Non-subscribers have a monthly limit of full-length accessible stories.