Trial by Zoom - Overcoming your Zoom Resistance to Deliver Results for your Clients

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I. TO ZOOM OR NOT TO ZOOM? THAT IS THE QUESTION

A. Jury Trials are essential to our legal system
   1. Courts have faced multiple challenges with COVID - 19 Pandemic
   2. Historically courts have been slow to embrace technology
   3. Fear that jury trials will be another pandemic victim if not preserved remotely

B. Health concerns make 'coming to the courthouse' scary for potential jurors
   1. National Center for State Courts held a nationwide jury poll last year to determine whether jurors would feel safe coming to Court:
      i. 55% of jurors would not serve due to their own high risk of COVID or that of a family member, or having primary responsibility for an elderly member of a child without childcare
      ii. 54% rated their comfort on serving on an in-person jury as 0-5 on a scale of 0-10
      iii. 44% said they would prefer jury service remotely than in-person

iv. 32% said it made no difference to them whether jury service was remote or in-person

2. Individuals **<u>least</u>** comfortable with participating in in-person court activities as jurors:
    i. 66% of liberals
    ii. 56% of African Americans
    iii. 49% of college-educated women
    iv. 49% of high-risk households
    v. 47% of older women (55-65 years)
    vi. 47% of seniors over 65 years

C. Prospective jurors may lack technology to participate in remote trial
    1. Court systems have to provide technology (computers) and train potential Jurors how to 'zoom'
    2. Potential jurors need good internet service to be able to capture proceedings and to participate

D. Judges and Court personnel support remote jury trials
    1. Eliminates temperature taking, mask wearing requirements and social distancing issues
    2. Eliminates cleaning of courtrooms, entrances and exits of courthouses
    3. Eliminates courthouse staff and auxiliary folks from being exposed

E. Attorney has to evaluate circumstances:
    1. Do you have a valid opportunity to have an in-person trial anytime soon?
    2. Will it be advantageous to your clients to have an in-person trial and wait that time or to go ahead with a remote jury trial?
    3. Do you have a choice?

4. Have you disclosed the risks and reasons to your client as to remote jury trials?

II. BASIC PRE-TRIAL CONSIDERATIONS

A. Ensure Strict Compliance with All Pre-Trial Scheduling Orders, Including

1. CR 8 damages disclosure, to avoid Fratzke v. Murphy, 12 S.W.3d 269 (Ky. 1999) motion
2. Expert and medical witness disclosure, complying fully with CR 26
3. Witness list
4. Exhibit list
5. Dispositive motions
6. Motions *in limine*
7. Objections to depositions or portions thereof
8. Jury instructions
9. Final supplementation of all discovery

B. Basic Preparation

1. Voir dire/jury selection
    i. Obtain juror information sheets from clerk
    ii. Determine Court's exact voir dire practices and procedures
2. Visit courtroom in advance to determine
    i. Physical layout
    ii. Electronic and video capabilities
    iii. Visibility of witnesses, attorneys, exhibits and videos from jury box
3. Abstract and page index depositions of all witnesses to be called
4. Subpoena, as necessary, witnesses well in advance

5. Organize and have sufficient clean copies of all exhibits (be sure to bring exhibit labels)
6. Bring sufficient authorities for any legal issues likely to arise at trial
7. Review and cue properly any video proof and practice your method for playing at trial
8. Itemize and redact insurance/collateral source information from all medical expenses (provide to opposing counsel well in advance)
9. Prepare to have witnesses available if schedule moves faster than planned
10. Organize and practice using all demonstrative evidence
11. Itemize all tax/wage loss documentation

III. KEY STATUTES AFFECTING JURY SELECTION

A. The relevant provisions are found in Kentucky Revised Statutes, Chapter 29A.

B. Some key sections include:

1. KRS 29A.060- Assignment of jurors by Chief Circuit Judge
2. KRS 29A.070- Juror qualification forms
3. KRS 29A.080- Disqualifications for jury service- Permanent exemption
4. KRS 29A.100- Postponement of service or excusing of juror
5. KRS 29A130- Limitation on jury service within a twenty-four month period
6. KRS 29A.140- Discharge of a juror
7. KRS 29A.150- Contempt- Failure to perform jury service
8. KRS 29A.160- Employer's duties
9. KRS 29A.170- Compensation of jurors

10. KRS 29A.180- Responsibility for needs of jurors, transportation to view scene, security personnel, equipment and services
11. KRS 29A.280- Number of jurors in Circuit and District Courts—Number required for verdict
12. KRS 29A.290- Examination of petit jurors—Challenges—Alternate Jurors
13. KRS 29A.300- Oath to petit jury
14. KRS 29A.310—Admonition to jury upon separation—View of Property or place
15. KRS 29A.320—Duty of jury and officer after submission—Causes for discharge of jury—Procedure for rendering verdict
16. KRS 29A.330—Jury fee

IV. KEY CASE LAW AFFECTING JURY SELECTION

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), the United States Supreme Court faced an appeal from a criminal conviction by a jury in Jefferson County, Kentucky. During voir dire, and after the Judge excused several potential jurors for cause, the prosecution and defense were allowed to exercise peremptory strikes. The prosecutor used his peremptory strikes to strike all four black members of the jury panel, thus leaving an all white jury to consider the criminal case of the black defendant. Id. at 82-83. Counsel for the black defendant objected on various grounds, including violation of the Equal Protection Clause as attributable to the individual states via the Fourteenth Amendment. The trial court overruled the objection and empanelled the jury. Id. at 83. Upon conviction, the defendant appealed to the Kentucky Supreme Court, which held that under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), no trial reversal was required because there was not a demonstrated systematic exclusion of black jurors from the jury veneer. Id. at 84. The U.S. Supreme Court accepted certiorari and reversed and remanded for a new trial, holding that the Equal Protection Clause,

attributable to states via the Fourteenth Amendment of the United States Constitution, "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant." Id. at 89. The Supreme Court then went on to analyze evidentiary requirements a defendant must prove to make a *prima facie* case of unconstitutional exclusion of black jurors. The Court held "circumstantial evidence of invidious intent may include proof of disproportionate impact." Id. at 93 citing Washington v. Davis, 426 U.S., at 242, 96 S.Ct., at 2049. The Court stated "total or seriously disproportioned exclusion of Negroes from jury veneers," [citation omitted], "is itself such an 'unequal application of the law. . . as to show intentional discrimination,'" [Citations omitted] Id.

After the Supreme Court rendered Batson in 1986, the extent of the ruling was unknown, especially with regard to civil cases and discrimination for reasons other than race. In Edmonson v. Leesville Concrete Company, Inc., 500 U.S. 614, 111 S.Ct. 2077 (1991), the United States Supreme Court held "the courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." Id. at 629. In its conclusion that sufficient state action existed in civil cases for a constitutional Equal Protection claim, the Supreme Court reasoned "race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." Id. at 628 citing Rose v. Mitchell, 443 U.S. 545, 556, 99 S.Ct. 2993, 3000, 61 L.Ed.2d 739 (1979); Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940).

In 1992, the Supreme Court further extended the Batson principles in Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, and held that under the principles enunciated in Batson and Edmonson "the Constitution

prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges." Finally, in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994), the U.S. Supreme Court held "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." Id. at 130-131.

In 1998, the Kentucky Court of Appeals recognized the rulings in each of these cases and their applicability in the Courts of the Commonwealth. Wylie v. Commonwealth, Ky.App., 978 S.W.2d 333 (1998).

KRS 29A.040 sets forth the provisions regulating the maintenance of a master list of prospective jurors. Specifically, the statute provides "a list of all persons over the age of eighteen (18) and holding valid driver's licenses which were issued in the county, of the names and addresses of all persons filing Kentucky resident individual income tax returns which show an address in the county, and of all persons registered to vote in the county shall constitute a master list of prospective jurors for a county."

The Kentucky Supreme Court previously addressed the constitutionality of KRS 29A.040 in Ford v. Commonwealth, 665 S.W.2d 304 (1984). In Ford, a black male convicted of capital murder claimed that the statute providing for a master list of prospective jurors was unconstitutional based on some fairly random statistical data including the United States Census. In essence, the defendant claimed that the Kentucky system for providing jurors unfairly and unconstitutionally eliminated African-Americans from serving on juries. The Supreme Court held "we have been furnished with no statistics reflecting black voters or black property owners, so there is no basis upon which we can imply any

formula reflecting a standard deviation analysis and hypothesis testing." Id. at 307 citing Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), and Moultrie v. Martin, 690 F.2d 1078, 1081 (4th Cir. 1982). As such, the Kentucky Supreme Court held that the statute providing for a master list of prospective jurors was constitutional. Id. at 308. Since the decision of Ford in 1983, however, the United States Supreme Court has undertaken to review the American jury system under Equal Protection principles under the Equal Protection Clause of the Fifth Amendment attributable to the states via the Fourteenth Amendment. See generally, Batson, supra; McCollum, supra, and Edmonson, supra.

V. KEY CIVIL RULES AFFECTING JURY SELECTION

A. CR 47 – Jurors

1. **CR 47.01 – Examination of jurors**- The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.
2. **CR 47.02 – Alternate jurors**- At any time before either side has exercised a peremptory challenge or challenges, but not thereafter, the court may direct the clerk to draw from the jury box, in addition to the number of jurors required by law to comprise the jury, one (1) or two (2) cards bearing numbers identifying prospective jurors. All jurors so drawn shall be empaneled and shall hear the case. Should it become necessary for any reason to excuse a juror, the trial shall continue unless the number of jurors be reduced below the number required by law. If

the membership of the jury exceeds the number required by law, immediately before the jury retires to consider its verdict the clerk, in open court, shall place in a box the cards bearing numbers identifying the jurors empaneled to hear the case and, after thoroughly mixing them, withdraw from the box at random a sufficient number of cards (one or two, as the case may be) to reduce the jury to the number required by law, whereupon the jurors so selected for elimination shall be excused.

3. **CR 47.03 – Peremptory challenges**-

   i. In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.

   ii. If one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.

   iii. After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge. If the number of prospective jurors remaining on the list exceeds the number of jurors to be seated, the cards bearing numbers identifying the prospective jurors shall be placed in a box and thoroughly mixed, following which the clerk shall draw at random the number of cards necessary to comprise the jury or, if so directed by the court, a sufficient number of cards to reduce the jury to the number required by law, in which latter event the prospective jurors whose identifying cards remain in the box shall be

empaneled as the jury.

B. **CR 48 – Juries of less than twelve, majority verdict**- The parties may stipulate that the jury shall consist of any number less than provided by law or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

VI. LOCAL RULES AND PROCEDURES TO BE AWARE OF

Each Kentucky Circuit Court has its own local rules and procedures. Every lawyer trying a case must review the local rules and procedures well in advance of trial to avoid any surprise.

VII. GROUNDS FOR CHALLENGES FOR CAUSE

An excellent reference regarding challenges for cause and voir dire in general is William H. Fortune, *Voir Dire in Kentucky: An Empirical Study of Voir Dire in Kentucky Circuit Courts*, 69 Ky.L.J. 273 (1981). I also highly suggest Thomas L. Osborne, *Trial Handbook for Kentucky Lawyers, 2014-2015 Edition*, Chapter 17.

VIII. THE BASICS

A. The words "voir dire" are French meaning to see and to speak.

1. Three times you can speak to jury:
    i. Voir Dire
    ii. Opening Statement
    iii. Closing Argument

    But in voir dire you can actually converse with jurors.

2. Bench vs. lawyer voir dire
3. Pre-trial preparation
    i. Obtain the juror info sheets from the Clerk
    ii. Provide to your clients (if local) and all of family/witnesses

iii. send to local attorney for input (may have had a case with the same venire)
iv. Court's voir dire practices: Any limitations?

4. Content
    i. Empower the jury
    ii. Explain the civil justice system and the importance of their participation
    Process is important, and their decision is important
    iii. Thank them
    iv. 20/80 rule: 20% talking, 80% listening
        1. Let them know it's okay to talk
        2. There are no right or wrong answers
    v. Trouble?
        1. Pick a friendly face
        2. Pick next friendliest and ask what they think about
5. Questioning the panel
    i. Bias
        1. Toward a party or some issue in the case
        2. Established if you cannot follow the jury instructions/law of the case
        "Can you set aside those feelings, listen to the evidence & render a fair and impartial verdict?"
        3. Whatever the potential bias, establish that it's:
            a. Long-held
            b. Cannot be set aside
            c. Juror does not start off neutral
            d. Might not be the best juror for the case
    ii. Don't ask private questions to the whole panel
    iii. Elicit preconceived ideas about the parties, certain injuries, damages issues

iv. Lawsuits
    Personal injury lawsuits
v. Doctors
    1. Do you believe doctors, even with the best of intentions, can make mistakes?
    2. Do you believe they should be held accountable?
    3. Is there even a little bit of your conscience that would have a hard time finding against a physician?
vi. Damages
    1. Down economy
    2. Tort reform
    3. Loss of consortium
vii. Burden of proof
    1. Only 50.1%
    2. You may not be certain
viii. If the case is old, it does not mean it's not important
ix. Speak in terms of whether the witness can be neutral i/e couching their bias in terms of fairness
    1. nobody likes to admit they can't be fair
    2. i.e. "Given what we know, would you agree that you might have a hard time being NEUTRAL?"
x. Consultants

6. Strikes for cause vs. peremptory strikes

7. Be Yourself
    i. Jurors are looking to see which Lawyer they will follow, i.e. who will be their guide
    ii. Determines which party will they pull for
    iii. Jurors don't decide cases on facts alone

8. Experts suggest assembling 5 or 6 non-lawyers to discuss your case with
    i. Spouse
    ii. Friends

9. Always get someone to help you.
    i. Co –counsel
    ii. Paralegal
    iii. Friend
    iv. Client

10. Prepare Your Client
    i. How to dress
    ii. Face jurors
    iii. Make eye contact
    iv. Show interest

11. Be Aware of Juror Perception of You
    i. First impression
    ii. Dress
    iii. Credibility
    iv. Be polite
    v. Be respectful
    vi. Be yourself

12. Self Disclosure
    i. Get close to the jury box
    ii. Make jurors feel comfortable when you are near them
    iii. Make them want to help you and your client

IX. OPENING STATEMENT

A. Role
    1. "The first impression" – this is your first chance to speak to jury directly. Make it count
    2. Two primary functions
        i. Legal function – assist the jury to understand the evidence to be presented at trial
        ii. Advocacy function – first opportunity to advance your theory of the case

B. Rules/Considerations
    1. No argument – broadly, argument occurs when counsel tells the jury how to reach a decision
    2. Avoid discussing the law – focus on organizing/previewing evidence
    3. Persuasion – comes from selection and ordering of facts

C. Structure/Elements
    1. Coherent theory of the case
    2. Coherent theme of the case
    3. Focus on primacy – best facts first
    4. Focus on recency – repetition of facts, theory and theme
    5. Use evidence and details persuasively

D. Content
    1. All facts must be true and provable
        i. Focus on strongest, central, non-disputed facts
        ii. Consider necessity and provability of questionable evidence
    2. Key facts – what happened and how
        i. Key events/actions
        ii. Scene
        iii. Parties

iv. Motivations
v. Damages

3. Defense case – how will it be addressed?
4. Bad facts – how will they be handled?
5. Introductions of parties and counsel

E. Delivery

1. Read as little as possible – especially beginning
2. Simple and straightforward
3. Move for transition/emphasis
4. Use visual aids and exhibits

X. DIRECT EXAMINATION

A. The Role of Direct Examination

1. Introduce undisputed facts
2. Enhance the likelihood of disputed facts
3. Lay foundations for the introduction of exhibits
4. Allow assessment credibility of witnesses
5. Hold the attention of the trier of fact

B. The Law of Direct Examination – Considerations

1. Competence of witnesses
2. Non-leading questions
3. Narratives
4. The non-opinion rule
5. Refreshing recollection

C. Planning Direct Examinations

1. Content
    i. What to include
    ii. What to exclude
2. Organization and structure

i. Start strong and end strong: primary and recency
ii. Use topical organization
iii. Do not interrupt the action
iv. Give separate attention to the details
v. Try not to scatter circumstantial evidence
vi. Consider defensive direct examination
vii. Get to the point
viii. End with a clincher
ix. Ignore any rule when necessary

D. Questioning Technique
1. Use short, open questions
2. Use directive and transitional questions
3. Reinitiate primacy
i. Use general headline questions
ii. Explain where you are going
iii. Use body movement
4. Use incremental questions
5. Reflect time, distance, intensity
6. Repeat important points
7. Use visual aids
8. Avoid negative, lawyerly, and complex questions

XI. CROSS EXAMINATION

A. The Role of Cross Examination

B. The Law of Cross Examination
1. Leading questions permitted
2. Limitations on scope

C. The Content of Cross Examination
1. Consider the purposes of cross examination

2. Arrive at the “usable universe” of cross examination
    i. The entire universe
    ii. The usable universe
    iii. Risk adverse preparation

D. The Organization of Cross Examination
    1. Guidelines for organization
        i. Do not worry about starting strong
        ii. Use topical organization
        iii. Give the details first
        iv. Scatter the circumstantial evidence
        v. Save a zinger for the end
            a. It must be absolutely admissible
            b. It should be central to your theory
            c. It should evoke your theme
            d. It must be undeniable
            e. It must be stated with conviction

    2. A classic format for cross examination
        i. Friendly information
        ii. Affirmative information
        iii. Uncontrovertible information
        iv. Challenging information
        v. Hostile information
        vi. Zinger

E. Questioning Technique
    1. Planning for control
        i. Avoid written questions
        ii. Using an outline
        iii. “Referencing” your outline

2. Questions that achieve control
    i. Use incremental questions
    ii. Use sequenced questions for impact
    iii. Use sequenced questions for indirection
    iv. Use sequenced questions for commitment
    v. Avoid ultimate questions
    vi. Listen to the witness and insist on an answer

3. Questions that lose control
    i. Non-leading questions
    ii. “Why” or explanation questions
    iii. “Fishing” questions
    iv. Long questions
    v. “Gap” questions
    vi. “You testified” questions
    vii. Characterization and conclusions

4. Reasserting control
    i. Refusal to agree
        a. Determine why the witness has refused to agree
        b. Retreat to constituent facts
            i. Mistaken facts
            ii. Compound details
            iii. Imbedded characterizations
        c. Invited explanation
            i. Determine why the witness has explained
            ii. Reasserting control, part one
            iii. Reasserting control, part two
        d. Impermissible lack of cooperation
            i. Obtaining help from the judge
            ii. Reasserting control by yourself
                1. Pointed repetition

2. Discipline

F. Ethics of Cross Examination
   1. Basis for questioning
      i. Factual basis
      ii. Legal basis
   2. Assertions of personal knowledge
   3. Derogatory questions
   4. Discrediting a truthful witness
   5. Misusing evidence

XII. CLOSING ARGUMENT

A. The Role and Function of the Closing Argument
   1. The whole story
   2. Use of theory and theme
      i. Theory
         1. Logical
      ii. Believable
         1. Admissions
         2. Undisputed facts
         3. Common sense and experience
         4. Credibility
         5. Legally sufficient
      iii. Theme
   3. What makes it argument
      i. Conclusions
      ii. Inferences
      iii. Details and circumstantial evidence
      iv. Analogies, allusions, and stories
      v. Credibility and motive
      vi. Weight of the evidence
      vii. Demeanor

viii. Refutation
ix. Application of law
x. Moral appeal

B. Format
1. Plaintiff's argument in chief
2. Defendant's argument in chief
i. Responding to the plaintiff's argument in chief
ii. Anticipating rebuttal
3. Plaintiff's rebuttal
4. Variations

C. Structure
1. Topical organization
i. Issues
ii. Elements
iii. Jury instructions
iv. Turning points
v. Alternative structures
1. Chronological organization
2. Witness listing
2. Other organizing tools
i. Start strong and end strong
ii. Affirmative case first
iii. Cluster circumstantial evidence and accumulate details
iv. Bury your concessions
v. Weave in witness credibility
vi. Damages

D. Content
1. Tell a persuasive story

i. Known facts – what happened
ii. Reasons – why did it happen
iii. Credible witnesses – who should be believed
iv. Supportive details – how can we be sure
v. Common sense – is it plausible

2. Tie up cross examination
3. Comment on promises
4. Resolve problems and weaknesses
5. Discuss damages
6. Use jury instructions
7. Use verdict forms
8. Introductions and thanks

E. Delivery and Technique
1. Do not read or memorize
2. Movement for effect
3. Emotion
4. Visuals
5. Headlines
6. Simple, active language

F. Ethics and Objections
1. Impermissible argument
i. Statements of personal belief

NOTE:	Portions of this general outline follow the general form of Steven Lubet, Modern Trial Advocacy, Analysis and Practice, Third Edition, 2004, National Institute for Trial Advocacy.