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VIRTUAL VOIR DIRE IS DRIVING ME CRAZY

ARTICLES (HTTPS://LITIGATIONCOMMENTARY.ORG/CATEGORY/ARTICLES/) | APRIL 25, 2023 |

Back in 2021, I wrote about the problems that I encountered during the first ever virtual voir dire process conducted by the Alameda County Superior Court.^[1] LCA Litigation Commentary and Review, "Virtual Voir Dire – Real Error", June 15, 2021. Therein, I boldly predicted that: "The best evidence that virtual voir dire problems will not improve over time comes from the subsequent virtual trials themselves" and cited a couple examples.

"(The following proceedings were held in the virtual breakout room with counsel only outside the presence of the jury.)

THE COURT: Let's just go on the record now.

We've had a discussion about one of the jurors, who is apparently in his car, and Mr. Hugo has asked that he come into our room and then I ask him and make a determination if there is a problem.

So wait. What's happening? We're leaving the breakout room. That's not what we wanted.

THE CLERK: No?

THE COURT: We wanted him to come in here.

(Prospective Juror No. 54 entered the counsel-only breakout room.)

THE COURT: (Prospective Juror No. 54), you're muted. I can't hear you because you're muted.

PROSPECTIVE JUROR NO. 54: Okay. Can you hear me now?

THE COURT: I can hear you now. How are you? As I've told the - I think I mentioned yesterday. We know each other. You're in your car, which has caused some -

PROSPECTIVE JUROR NO. 54: Yes.

THE COURT: -- concern. And yesterday you seemed to be moving around and doing things and not really sitting still in the virtual jury box, so -

PROSPECTIVE JUROR NO. 54: Okay. I can explain that to you, if you like.

THE COURT: Sure.

PROSPECTIVE JUROR NO. 54: Yesterday, I took delivery of a Peloton, and it was planned months in advance. I'm sorry about that. I carried my iPad with me, and there was a brief moment that I wasn't listening. It was during (Prospective Juror No. 3's) testimony. Otherwise I was there.

The reason I'm in my car now is because there is a power outage here. The only place I have any battery power is in my car, and that's the only place I have any, you know, telecommunications. So I'm okay for the moment.

THE COURT: Okay. I appreciate that. That explains it.

And Ms. (Clerk), why don't we go back into session."

Reyes v. Johnson & Johnson, et. al., the fourth virtual trial to be conducted in Alameda County, Case No. RG 20052391, Reporter's Transcript of Proceedings, October 27, 2020, 2724:10 – 2726:15

"MR. HUGO: Good morning. So let me actually go back to -- like, it seems like a month ago. But a week or so ago, when you were set to show up for the first time for jury duty, did you go to Hayward, by chance?

PROSPECTIVE JUROR NO. 15: I did -- no, not Hayward. No. I was in -- I went to -

MR. HUGO: Dublin?

PROSPECTIVE JUROR NO. 18: Yes.

MR. HUGO: What happened there?

PROSPECTIVE JUROR NO. 18: What do you mean, "What happened"?

MR HUGO: Did--okay. Maybe my question wasn't clear. Did you try to show up for the voir dire process and not get on a computer or end up doing it by phone somehow?

PROSPECTIVE JUROR NO. 18: Oh, I see.

[1] This was likely the first virtual voir dire in California.

So I went the first day, and the second day, I did not see the email that was sent to me in order for me to access Zoom.



And so I went back to the Court, because I called and I was on hold for two hours. So I went back to the Court to find out if they can give me the link so I can access the Zoom meetings.

And so I waited until they gave me the link, and I logged in on my phone while I was driving back home and finished at the house on my phone.

And so now I have a link, and I've been logging in every day.

MR. HUGO: Please understand I'm not being critical. I'm just trying to find what happened. So did you miss the first two hours or so in the morning of the voir dire process because you had to drive to the courthouse?

PROSPECTIVE JUROR NO. 18: Yes-- I missed -- yes, I did on the second day, which was --

MR. HUGO: Okay. And then when -- can you give me a time -- approximate time of when you were first able to log onto Zoom on your phone?

PROSPECTIVE JUROR NO. 18: Roughly, around 11:30.

MR. HUGO: Okay. And then how long were you in the car?

PROSPECTIVE JUROR NO. 18: Probably about 40 minutes. That's how long it takes me.

MR. HUGO: I'd assume -- again, I'm not being critical. I assume you were more concerned about watching the road than the Zoom jury proceedings. Right?

PROSPECTIVE JUROR NO. 18: I was listening. Just don't ask me what was going -- what was being said word for word. But I was listening. And I tried to have my phone propped in a position where I can be seen. But, yes, I had to drive back."

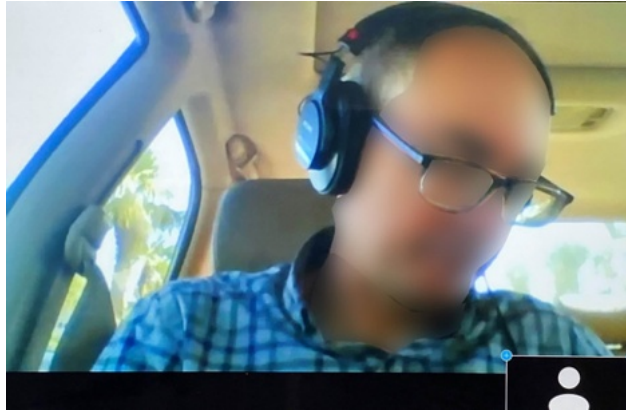
Id., Reporter's Transcript of Proceedings, October 27, 2020, 2724:10 – 2726:15



Prospective Juror attending voir dire in car.



Prospective Juror attending voir dire in auto repair shop.



Sworn Juror attending trial in car.

Fast forward to April of 2023. Was I right, wrong or even crazy to worry about a fleeting omission of decorum and due process? And, if virtual voir dire were to continue after 2021, surely the law would catch up and build in safeguards – especially in cases where tens of millions of dollars are in play – right? To be transparent, as a “car guy” who races cars as an obsessive hobby, I may be overly sensitive or even paranoid when it comes to cars.

The following occurred this month when I swore my seventh virtual jury with my partner, Bina Ghanaat.

“(WHEREUPON THE FOLLOWING WAS HEARD OUTSIDE THE PRESENCE OF THE JURY AND THE PROSPECTIVE ALTERNATE JURORS.)

THE COURT: Go ahead, Ms. Ghanaat.

MS. GHANAAT: Thank you. I just want to raise a concern I had about one of the potential jurors. It's Ms. B[.]. I can look up her number. I don't know for how long, but I noticed that she is a passenger in a moving car and has been for some time. She's in a car with, it looks like, two other people and the car is moving. I want to note that for the record that that's a concern to me that she's not fully engaged in the process and listening and having her full attention on proceedings.

MR. HUGO: Edward Hugo for Foster Wheeler. I don't know which one she is. She could be driving the car as far as I can tell, but if you look at the video, she is -- apparently they have a phone set up on the windshield looking into the car, and they are clearly driving. She needs to be excused.

MR. [PLAINTIFF ATTORNEY 1]: Your Honor, this is the second-to-last juror on the panel. This doesn't seem like a good use of our time.

THE COURT: I gather Foster Wheeler is suggesting that she be excused?

MR. HUGO: For cause.

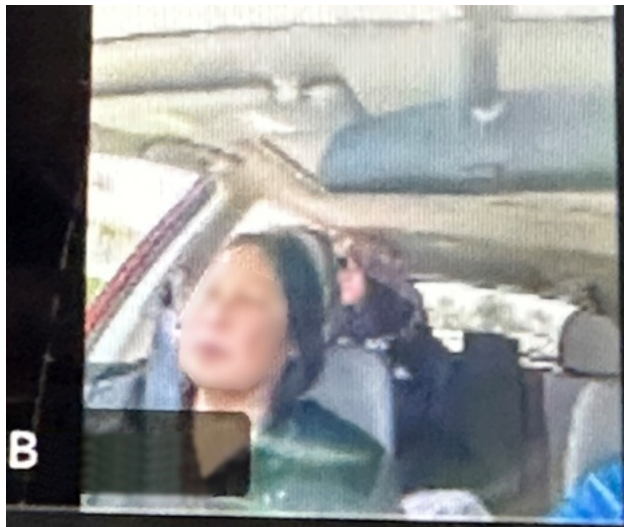
THE COURT: Do plaintiffs have a position on that? I didn't see it.

MR. [PLAINTIFF ATTORNEY 2]: Let's wait until we get to her and then the court can inquire upon her conduct.

MR. [PLAINTIFF ATTORNEY 1]: It's actually simpler than that. If there's a statute -- there's only a few statutes about cause. I don't think this fits under any of them.

THE COURT: That's my reaction.”

Hargan vs. Allied Packing & Supply, Inc., et al., Case No. 22CV008625, Reporter's Transcript of Proceedings, April 4, 2023, 1:15 – 3:1.



Prospective Juror "B" attending voir dire in passenger's seat on April 4th, 2023.



Prospective Juror "B" attending voir dire in driver's seat on April 5th, 2023.

Well, both the plaintiff attorney and the judge were correct, California has no statute (still) regarding the propriety of cause challenges that are applicable during virtual voir dire.

To be continued? I hope not !!!

Edward R. Hugo is a trial attorney, appellate lawyer, litigator, and litigation manager for cases involving products and premises liability, toxic torts including asbestos and talc, environmental claims, construction defect, personal injury, wrongful death, insurance, professional negligence, sexual molestation and criminal law. He has also been retained as an expert witness and testified in trials, arbitrations, and depositions regarding: the duties of defense counsel, the effectiveness of defense strategies, the reasonableness of settlement values and defense costs, and insurance coverage issues. Ed earned his J.D. degree from the University of California, Hastings College of the Law, in 1986. He is a Certified Civil Trial Specialist, accredited by the State Bar of California; a "Board Certified Civil Trial Advocate" and a "Board Certified Civil Pretrial Practice Advocate" by the National Board of Trial Advocacy; a Charter Member of the Institute of Trial Presentation; named a "Super Lawyer" in Northern California for eighteen consecutive years; and is AV® Preeminent™ Peer-Review Rated by Martindale-Hubbell. He is licensed in California, Colorado, Hawaii, Oregon and Washington. Ed is a Charter Senior Fellow of the Litigation Counsel of America.

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