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PERSPECTIVE

No one has been paying attention for a while now

What recent experiences with remote juries tell us about our distracted world

By D. Mark Jackson

Some California courts are holding jury trials during the coronavirus pandemic. Logistics have been a difficult challenge. But the biggest problem — one far more consequential than any technical issue and more pervasive than what happens in legal proceedings — is many people's inability to pay attention anymore.

Alameda County recently held two civil trials with jurors attending remotely. The parties experienced problems from the start, including issues with the audio and video feeds, conversations between a judge and his clerk being picked up while inadvertently unmuted on Zoom, and two jurors discussing Zoom backgrounds with the plaintiff while the judge and lawyers were in a "breakout room." Defendants filed multiple motions for mistrial. Jurors returned a defense verdict in one case last week, and to the extent the plaintiff objected to these irregularities, he will undoubtedly have grounds for appeal.

Litigants may clear these technical hurdles in the next race. A more vexing problem, however, is juror inattention. In one case, a juror left his computer to attend to food on the stove. Another juror could



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be seen lying in bed. Jurors switched focus away from court proceedings to other screens, kids, pets, and whatever else was happening at home.

In other words, jurors did what everyone does during video meetings.

Participants in video meetings rarely focus entirely on the discussion. People often look at their smartphones and other devices. Many of the distractions come from the computer — the same medium displaying what is supposed to be the object of our focus. Most participants are obviously multitasking (note the Facebook feeds reflecting off people's glasses!). When a participant inevitably fails to use the mute button, we get to hear all manner of dog breeds,

outbursts of sibling rivalry, and digital notifications, among other distractions.

The video feed forms a veneer of attention. Our image on the screen shows we are physically present. But once our eyes wander to that open email window, or the Twitter feed on the phone in our hands, the video feed also makes evident that this level of attention is superficial. Our image is on the screen; our mind is elsewhere.

Months into the pandemic, many have grown tired of the visual element altogether and have stopped sharing their video. These participants no longer bother to maintain the facade of attention.

Lawyers are among the worst

for managing distractions, based on their perceived need to be "constantly available." At depositions, I've seen lawyers emailing, surfing the web, booking travel, and otherwise being distracted by their digital devices. I've seen lawyers do this in the courtroom too, though less frequently and not during trial. Now that most depositions are by phone or video conference, the garden of distractions has blossomed.

For anyone who's attended a video meeting recently, the jurors' behavior in these remote trials isn't surprising. Juror distraction is merely a special case of a general problem. The jury trial is just an instance of scrutinizing what is happening more broadly.

But in a jury trial, we ask people to pay careful attention — and to pay attention to everything. During work meetings, people may only be half-present and get away with this because of the low regard in which we hold meetings. Remote trials, in contrast, are like meetings where we expect people to actually pay attention. We're trying to enforce the norms we've let slip in our professional sphere. A judge is auditing the behavior we've otherwise come to tolerate.

Trials are unlike TV courtroom dramas. There's waiting around. Testimony can be dull. This tedium is

unacceptable — lawyers can and should do a better job of presenting their cases in compelling and perhaps somewhat entertaining ways. Yet trials are not entertainment; trials are a process for arriving at a public truth and resolving complicated disputes. To fulfill this function, sometimes trials may be a little boring and less captivating than TV. Paying attention to trial proceedings may require effort.

In a live setting, attention is mainly forced: jurors sit in a literal box with only a pen and notepad — there is nothing to do but observe the proceedings. Digital and physical distractions are removed. Multitasking is disallowed. Minds may wander — an irresistible force indeed, as anyone who’s tried mindfulness meditation knows. And I’ve even seen jurors fall asleep (not while I was

presenting, thankfully). But there’s at least nothing physical or digital to distract jurors during a live trial.

Cal Newport writes about how our environment no longer facilitates “deep work” — rare and valuable work, requiring long periods of high cognitive effort, without distractions and interruptions.

We ask juries to do such deep work. Yet jurors are plucked from a world of frequent interruptions, distractions, and the myth of multitasking. Our environment denigrates, rather than facilitates, deep work. We’ve all been conditioned not to pay attention.

It’s tempting to say remote jury trials are a “canary in the coal mine,” warning us of a dangerous inability to pay attention. But this implies an emerging problem. The problem has been here for

some time. It’s more like we’ve been toiling away for years in an unsafe mine, just now happen to bring a bird with us to work and observe it promptly succumb to poisonous gas.

Still, it’s not too late to adapt. Our experience with remote trials is a milestone on our road to learning how to work with digital technology. Employers should facilitate environments that are less distracting and more conducive to deep work. Teachers — especially during our ongoing experiment in remote learning — have a role to play too.

And all of us, individually, must take greater responsibility for improving our attention by reading books, blocking off time for focused work, and finally ceasing our doomed effort to multitask. We will see benefits in how we work, communicate, and create.

Improving our ability to pay attention also ensures that jury trials — a fundamental right under our form of government — remains a fair and functioning system for delivering justice. ■

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