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Trying your case during the COVID-19 pandemic

A LOSS AT A MEDICAL MALPRACTICE TRIAL LEADS TO USEFUL INTROSPECTION ON THE VALUE AND CHALLENGES OF GOING TO TRIAL IN THIS TIME OF COVID

We are all anxious to get back into the courtroom and try cases. We are all frustrated by insurance companies and their corporate clients who refuse to engage in good-faith settlement discussions unless a trial is imminent. The defense firms do not make it any easier, forcing us to engage in busywork with meaningless written discovery to keep their billable hours up but without any incentive of actually resolving the case.

However, be careful what you wish for. While trial during the COVID-19 pandemic is certainly possible, it is far from ideal. The logistics of trying a case during the pandemic make trying an effective case difficult.

From late September to mid-October of 2020, we tried and lost a two-week medical-malpractice case in Orange County. The case involved an unfortunate young woman who was diagnosed with Stage IV colorectal cancer. We argued that her colorectal surgeon missed an opportunity to diagnose her nearly a year earlier when he attributed her rectal bleeding to pregnancy-related hemorrhoids. The economic damages were enormous given that the patient was a young partner at a large defense firm. The Court granted our client priority under Code of Civil Procedure section 36.

We are not sure if the result would have been different had we tried the case under normal circumstances. The case was very difficult as to liability and the defense attorney was top notch. Nonetheless, the unique circumstances of trying a case during a pandemic made usually rudimentary things rather challenging; i.e., the difficulties presented by the masks and asking the jurors to socially distance, both of which affected the presentation of evidence and seemed to favor the defense.

The purpose of this article is two-fold. The first is to provide suggestions as to the logistics and procedures of trying a case during the pandemic. The second is to discuss the limitations that those logistics and procedures placed on us in effectively presenting the evidence.

Should you try your case during the pandemic?

Dr. Ian Malcolm observed in *Jurassic Park*, "They were so preoccupied with whether or not they could, they didn't stop to think if they should."

We all hate continuances for several reasons. They delay our clients and our firms from getting paid, they require us to spend more money on our experts to refresh their recollection of the case or to review new treatment records, the case goes stale, etc. – all of these painful scenarios caused by delays seem to only inure to the benefit of the defense. Moreover, times are tough financially, not only for our clients but for ourselves.

Despite these issues, rather than wondering whether you *can* try a case during the pandemic, really consider whether you *should*. Really evaluate whether that key "gotcha!" question during your Evidence Code section 776 examination of the Defendant will be as powerful when both you and the Defendant are masked. Consider whether you can adequately tell your client's story or portray the full scope of your client's damages and emotional distress with jurors strewn throughout the courtroom. You should also assess the potential for a mistrial due to loss of jurors because of possible COVID infections and how that will impact you and the client financially.

There are certainly cases that warrant trying, such as cases that strongly warrant preference under Code of Civil Procedure section 36 or cases that are so old that the delay is causing the client prejudice. That said, it is critical that you really assess whether your case needs to be tried during the pandemic or whether a continuance would be better for the client.

Jury selection

We suggest attempting to stipulate to fewer than 12 jurors. This would help alleviate the time and burden of jury selection. Moreover, this would limit the total distance of the jurors throughout the courtroom and make the presentation of evidence simpler. However, in our case, the defense rejected our offer of eight jurors to alleviate the time and burden of jury selection. As such, our only option was to pick 12 with two alternates.

The process of picking a jury was not what these authors were used to. First, they put us in one of the larger, criminal courtrooms so they would have a large enough gallery to spread out the prospective jurors. When in the courtroom, the jurors were spaced out and socially distanced six feet apart so that the entire courtroom could only fit 19-20 jurors at one time. As a result of the social distancing, we were only given packs of 20 prospective jurors.

Second, because each panel consisted of only 20 prospective jurors, we had to go through multiple panels over three

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days to pick a jury and alternates. With each panel, we had to deliver and re-deliver mini-opening statements and ensure that we repeatedly went over the key concepts of a medical malpractice case. We used a hybrid "seven pack" method where we were limited to questioning the first 12 jurors, but the judge would question all prospective jurors in the courtroom.

Third, in an effort to suss out any COVID-specific hardships, the judge used a written hardship form as his basis for deciding whether a prospective juror could not be on our jury; i.e., an essential worker, an elderly family member at home, etc. The judge liberally granted these hardships, clearly not wanting to waste a chair on a juror who did not want to be there and ultimately unlikely to be on the jury.

Conversely, it was apparent that this judge was *far* less likely to grant for cause challenges under Code of Civil Procedure section 225, subdivision (b). It was clear that he wanted to restrict challenges due to the limited number of available seats in the courtroom as well as the limited number of panels overall. To the judge, if a juror stated that he or she would "try" or "attempt" to be fair, that was sufficient to deny a challenge for cause. This was true even when the jurors informed the attorneys that they could not be fair given their preconceived notions or prior life experiences. That being said, our judge was fair to both sides during this process and rejected "for cause" challenges on both sides consistently.

Most importantly, even in a difficult venue like Orange County, we immediately recognized that our jury pool appeared to be more conservative than usual. This was not overly surprising as, generally speaking, liberal jurors appear to be taking the virus more seriously and less likely to report to jury duty. For this fourth reason, we were already starting slightly behind.

Lastly, as the jurors were also required to wear masks, it was often difficult to obtain a juror's full impression or opinion as we could not see facial expressions. They were also more reluctant to open up during voir dire due to the difficulty of speaking with a mask on. Particularly for foreign jurors, communication was extremely difficult, and the court reporter had to interrupt frequently to transcribe accurately.

Social distancing the jurors

Consistent with social distancing, only four jurors remained in the jury box while the remaining 10 jurors and alternates were placed throughout the audience. This was less than ideal. During opening and closing statements, it was often difficult to talk to the jurors collectively or even directly. While questioning witnesses, we often had our backs to the majority of the jurors. In the audience, at a significant enough distance from the witnesses, it was often easy for jurors to become disengaged and bored. It also made it difficult for the jurors to see and hear the witnesses.

Logistically, having the jurors peppered throughout the courtroom made the presentation of evidence challenging. The courtroom was designed so that a screen to show the evidence was in clear view of the judge and jury. However, since the jury was all over the courtroom, we had to place the screen in the back of the courtroom, which was difficult or uncomfortable for several jurors.

If you decide to try your case during COVID and jurors are placed in the audience, make sure that the screen showing the evidence can easily be seen by all jurors. If not, find a way to bring your own projectors into the courtroom so that you can present multiple screens at once. However, some courts may not let you use additional power cables and surge protectors due to the increased risk of electrical fire. For this reason, these authors recommend trying to work through these logistical/technical issues before you put any prospective jurors in the courtroom.

Use of masks

During all phases of trial, all attorneys, witnesses, court staff, and jurors were required to wear masks at all times. We were not permitted to wear just face shields. Moreover, the Orange County courtroom we were in was technologically lacking. For instance, the microphones and sound systems did not work, and there was no drop-down screen from the ceiling.

The masks made things even more difficult given that the jurors were seated throughout the courtroom. Logistically, it made it far more difficult to ensure that all of the jurors could hear every question, every answer and every argument.

The masks concealed key emotions and sentiments of both the attorneys and witnesses. We felt as though the masks concealed discomfort or embarrassment for the defendants or their experts when confronted with tough questions on cross-examination or during examination pursuant to Evidence Code section 776. Likewise, the masks prohibited the plaintiff, her husband, and her family members from fully conveying the true devastation of her injury.

During opening statement, the masks hampered our ability to effectively tell our client's story and what the evidence would show. In closing arguments, the masks impacted our ability to connect with the jurors and convey our client's noneconomic and economic damages. Based on this experience, we were left the following impression about trying a case during COVID: Masks and social distancing can (and likely will) negatively impact a case with moderate injuries where it is critical to thoroughly and effectively explain to the jurors the limitations caused by the injuries.

In our case, we ran a mock trial through Zoom with participants we found on Craigslist. We showed videos of the various depositions and also provided our focus group with openings and a closing argument. While we gained invaluable feedback, we did not perform our mock

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openings and closings with masks on. This was a mistake.

Practice your opening and closing with a mask on and truthfully assess whether you can convey your client's story effectively. Have your client wear a mask when you prepare your client for both direct and mock cross-examination to see if your client is as sympathetic and articulate with a mask on. Not only will this help you evaluate whether to try your case during the pandemic, but it will also help you effectively prepare for trial.

Availability of witnesses

We knew that we had to try our case during the pandemic because of our client's condition and the staging of her cancer. For this reason, we were cautious in our decision-making to call witnesses in-person versus playing their videotaped deposition testimony. If any witness contracted COVID-19, that witness would obviously be unable to testify at trial. Likewise, a witness may not even be capable of providing testimony if the reaction to the virus was severe. As for medical experts in certain fields, the pandemic could also limit their availability due to a rise in hospitalization rates.

Accordingly, out of an abundance of caution, we videotaped every deposition that was taken in the case, including depositions of treating physicians and all experts. When taking depositions, expect that you will need to play those depositions at trial.

Indeed, we ordered videographers of our own experts as the defense did not order a videographer. We even engaged in a full direct of our expert witnesses at deposition after they were questioned by the defense. Under Code of Civil Procedure section 2025.620, any party is permitted to use the videotaped deposition of any expert or any treating physician even without a showing of unavailability. We wanted to ensure that we had all the testimony preserved in the event of an unexpected absence of one of our experts at trial due to COVID-19.

However, doing a full direct examination at deposition provided a free and clear playbook for both the defense attorney and his experts at trial. Moreover, the use of some videotaped transcripts of treating physicians was simply not as effective as calling them at trial.

In Orange County, all entrants to the courthouse had to go through a long and arduous process of being questioned and having their temperatures measured in addition to the typical security. Make sure that your witnesses arrive at trial well in advance of their expected testimony to ensure that they have enough time to go through the process.

Lastly, we all know of the danger of an attorney or witness making a stray comment in the hallways or in the bathrooms within potential earshot of a hidden juror. That danger is far more pronounced during these times as the normal hustle and bustle of a courtroom is no longer present as a result of the pandemic. Even in the normally busy cafeteria, there were not that many people and sound carried across the room.

Positive takeaways

We have talked a lot about the potential negative aspects and pitfalls of trying a case during this COVID pandemic. These authors will be the first to acknowledge that the tone of this piece would likely be a little different had we been successful in achieving a Plaintiff's award. Nevertheless, a lot of the difficulties and challenges we faced would still have been present – win, lose or draw.

With that said, there were positives of trying a case during the pandemic. First, kudos to the Orange County Superior Court for making the trial happen in the first place. If there was ever a need to try a preferential case, this was that case. Our 38-year-old client had stage IV disease, with a six-month life expectancy. Our judge, his clerk and their staff, the courthouse deputies and cafeteria workers, all showed up every day ready to give our clients an opportunity for justice. Hats off to them for making it happen.

A second kudos goes to our three panels and primarily, the 14 jurors ultimately empaneled. They showed up every day, on time, without objection or incident. They all properly donned their masks, maintained a safe distance from one another, and took the trial and our client's injuries seriously. Despite all the hurdles trying a case during the pandemic, our jurors stuck around after the trial and offered a very sound and plausible reason for why they voted "No" to Question No. 1; i.e., whether the Defendant was negligent.

A third and final kudos goes to the defense attorney. Not only was he exceptional at his craft and a pleasure to work with, but he had the opportunity to object to the process in its entirety and chose not to. He, like us, wanted to make sure that our client (and his) had her day in Court before her passing. Without his professionalism, this case never would have crossed the proverbial finish line.

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