

My First Jury Trial . . . During a Pandemic!

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It was the end of October 2020. Courts had been shut down since March due to the nationwide COVID-19 pandemic. Los Angeles County was allowing some in-person hearings but only preference trials were being considered for a jury—if they had previously been demanded, and if enough jurors were available. Orange County was open for trials at the Presiding Judge’s discretion. My real estate fraud case, which had been pending for four years, was called on Friday, October 23, 2020. Naturally, we believed our case would be continued since there was no major rush to go to trial, particularly during a pandemic. While my case had been on the docket for four years, there were other cases that had been pending for longer, or that had other issues that could have taken precedence over our case. Nonetheless, because we answered “ready” on March 13, 2020—the Friday before California’s Governor shut down the State on Monday, May 16, 2020—we were next in line for a jury trial when one of the large courtrooms typically used for complex cases became available.

Much to our surprise, the court ordered the parties in our case to appear the following Monday, October 26, 2020, for trial and jury selection. So long as a criminal case did not need the jurors on Monday, the panel that was summoned to appear for jury duty would be sent to our courtroom and we would start our selection. Needless to say, I did not get much sleep that weekend.

***Voir Dire*, Jury Selection & The Socially Distant Courtroom**

In my career, I have tried cases in federal and state criminal and civil courts, on both coasts and in-between, and I have seen all types of jury selection processes. Every court and every judge has its or her own way of handling this process...don’t they? This time, however, was very different.

Due to the pandemic, it was anticipated that more than the usual number of jurors would claim a “hardship” to get out of jury duty. Thus, in an effort to streamline *voir dire*, prospective jurors were given a “hardship questionnaire,” so they could be pre-qualified for jury service before *voir dire* began. Unfortunately, and as an unintended consequence, instead of streamlining jury selection, the questionnaire afforded prospective jurors with the opportunity to opt-out of jury duty for nearly any reason. Unlike the days when jurors were grilled on the particulars of their inability to “perform their civic duty,” this time, if a juror had so much as a snuffle, day care concerns, work concerns, or simply an ‘I don’t feel comfortable being here’ concern, the juror was free to leave if he or she signed a hardship questionnaire. After the panel began rapidly depleting, even before the *voir dire* actually started, it was decided that counsel would conduct preliminary *voir dire* of jurors who claimed hardship on their questionnaire. We also called down for a second panel of forty jurors for the next day so we could repeat the entire process. Jury selection ended up being the lengthiest process I had ever gone through for a civil non-complex trial. Eventually, we had a “pre-qualified” non-hardship panel of fifty to sixty jurors and the real *voir dire* process finally began.

Due to “social distancing,” we could only *voir dire* eighteen jurors at a time. The court’s clerk placed red tape on every fifth seat in the jury box and throughout the gallery so jurors would know where to sit and would remain at least

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six feet apart from each other at all times. The department had four long counsel tables between the well and the gallery. In the middle of the second row of counsel tables was an Elmo for exhibits. Only one attorney could sit at each six-foot long table. Since there were two attorneys for both sides, our clients (Plaintiff and Defendant) were not permitted to sit at counsel tables. More shocking, neither Plaintiff nor Defendant could sit in the courtroom and observe jury selection and *voir dire* because (as our judge reminded us every day) only a certain number of people could be together in the courtroom at all times. In other words, the seats our clients would have normally occupied had to go to a prospective juror instead during *voir dire* in order to accommodate eighteen jurors in the room along with counsel, the judge and courtroom staff. As we also soon realized, when nearing the end of our jury selection process, we could only have one alternate juror if we wanted to reserve the other two seats for our clients (Plaintiff and Defendant). If we had two or three alternates, our clients would have to watch the trial from a computer on the court's live stream.

In order to make the courtroom "open to the public," which it most certainly was not, the daily court sessions were "live streamed" on the court's website for free. Before courtroom proceedings began each day, our judge placed a preliminary order on the record that went something along the lines as this:

...FOR TODAY'S PROCEEDINGS THE COURT IS AGAIN GOING TO MAKE THE FINDING THAT THERE IS AN OVERRIDING INTEREST IN LIMITING PARTICIPATION OF THE MEMBERS OF THE PUBLIC DUE TO THE COVID-19 VIRUS. THIS OVERRIDING INTEREST REQUIRES THE COURT TO COMPLY WITH SOCIAL DISTANCING GUIDELINES. AS A RESULT OF COMPLYING WITH THE SOCIAL DISTANCING GUIDELINES, IT REQUIRES THE COURT TO LIMIT THE NUMBER OF PEOPLE WHO CAN PARTICIPATE IN THESE PROCEEDINGS FROM THE PUBLIC.

THE COURT HAS CONSIDERED OTHER ALTERNATIVES, SUCH AS, MAYBE MOVING TO ANOTHER COURTROOM TO ACCOMMODATE MEMBERS OF THE PUBLIC WHO MAY HAVE AN INTEREST IN THIS CASE. THAT AT THIS STAGE OF THE PROCEEDINGS THE COURT WILL NOT MOVE TO A LARGER COURTROOM BECAUSE THE COURT HAS NOT HAD ANY INDICATION THAT MEMBERS OF THE PUBLIC WISH TO OBSERVE THE PROCEEDINGS IN THIS CASE.

FURTHER, THE COURT IS LIVE STREAMING THESE PROCEEDINGS. SO AS A RESULT OF THE LIVE STREAMING, THE COURT IS PROVIDING PUBLIC ACCESS. SO THE COURT WILL FIND THAT THE OVERRIDING INTEREST OF PUBLIC SAFETY OUTWEIGHS OR REQUIRES THE COURT TO LIMIT THE NUMBER OF PARTICIPANTS IN THE COURTROOM, AND CURRENTLY THE COURT DOES NOT HAVE AVAILABLE SEATS OPEN TO THE PUBLIC.

I'LL ASK THE COURT CLERK TO LET STAFF KNOW THAT THE COURT DOES NOT HAVE SEATS AVAILABLE TO THE PUBLIC AND TO HAVE STAFF ADVISE THE COURT IF MEMBERS OF THE PUBLIC WISH TO VIEW THIS TRIAL IN PERSON. IF THE COURT GETS THAT INFORMATION, THE COURT WILL REVISIT THIS DECISION TODAY...

It was agreed that both sides would give "mini-openings" as opposed to the judge reading a "statement of the case" to the jurors. Because our courtroom was not our judge's courtroom, and had been remodeled to accommodate for "social distancing," we had to decide where to stand and how to present our arguments to the jury. Plaintiff's counsel was tall,

at least 6'1, so the jury was able to see him fairly well wherever he stood in the courtroom. Most of the time, he stood up at counsel's table with his back to the judge. Since I was at least a foot shorter, my ability to see all the jurors and their ability to see me, was a little more challenging. I decided the best way to be seen and heard was to stand in the well, directly in front of the judge, but with my back to him. I asked for a podium, but alas, one could not be found until the second round of *voir dire*. For the first eighteen jurors, I spoke to them from two bankers boxes placed on top of counsel table. My notes were partially on the box and partially on a nearby table. In the past, I would have a jury consultant seated at counsel table during this process. Of course, with a limited number of people allowed in the courtroom, an in-person jury consultant was not possible.

We went through two packs of eighteen jurors before we used all our preemptory and cause challenges, so we had to repeat our mini-openings and *voir-dire* questions twice. Each time was great practice for our actual opening statement which would finally be able to go forward on the fourth day of trial and after three full days of jury selection.

Wearing Masks and Building a Relationship with the Jury

It did not take long before I learned that the best mask to wear during trial is a plain blue surgical mask. The material is thin, the sides are not too tight around the face and my voice could project better than if I wore a cloth mask. Two masks were certainly not an option if I wanted to be heard. I was grateful for my Lasik eye surgery, which still allowed me to not have to wear glasses so I did not have to worry about wearing my mask high up on my nose so that the eyeglasses did not fog up. While not very stylish, the blue surgical mask was also easier to breathe in and would not allow me to get hot throughout the course of the day. I never thought I would get used to wearing a mask all day, every day—but I did. I also learned very quickly that this trial was not going to be about style, comfort and charm. Rather, building a relationship with the jury I worked so hard to select, was going to be my biggest challenge. Incidentally, I did try to wear a face shield in lieu of a mask so the jury could see more of my face and expressions when I spoke. Unfortunately, my courthouse had a “no shield” and “mask only” policy.

As such, my goals each day were simply to be heard, be seen—in whole or in part—and get my client heard, seen and understood. With my client seated in the far back corner of the gallery, behind all the jurors, and my back to two-thirds of the jury most of the time while I questioned witnesses each day, these goals were serious challenges. Even getting the testifying witness in the witness box seen and heard by jurors seated in the far corners of the courtroom was a challenge. After the first couple of witnesses testified, it was decided that a TV monitor would have to be set up for some of the jurors to get a closer look at the testifying witnesses. Indeed, “where to stand” was actually an ongoing issue throughout the course of the three-week trial. Being 5'1, I often wondered where my place in the courtroom should be in order to best be seen and heard and to not block the juror's line of sight to the Judge or to the testifying witness in the witness box. Did I really want to stand by the Elmo with my back to two-thirds of the jury who were seated throughout the gallery as I questioned witnesses? For opening and closing arguments, was it better to stand in the well, with my back to the judge? If I stood there, at least everyone could see half my face behind my mask, I would not block the testifying witness and perhaps the jury could hear most of what I said...so long as spoke up, projected loud enough through my mask and kept it interesting. Of course, I was limited to where the microphones were stationed. One day I tried to ask questions of a witness while seated from counsel's table, but I knew almost as soon as I started, that was the wrong thing to do. Alas, it was a little hit or miss the first few days.

The only jurors who consistently got to see the front-side of the trial attorneys were the three jurors who were lucky enough to get a seat inside the jury box. Everyone else, typically saw the back of my neck and whatever color jacket I

wore each day. For these reasons, I wore neutral colors, nothing flashy, I had my hair pulled up, away from my face and attempted to appear the exact same way, every day, for all three weeks. The process was exhausting, but I did not want to distract the jury from anything other than the evidence and testimony that was being presented each day. If two-thirds of the jury could not see me, I did not think it was fair for the three jurors in the box who had the best view of everyone, to see something the others could not.

Incidentally, there was no such thing as a “sidebar,” or “may we approach” to discuss a particular objection or document outside earshot of the jury due to social distancing. If the judge had to talk to counsel outside the presence of the jury, the entire jury had to leave the courtroom and wait in the hallway. Needless to say, objections, legal argument over exhibits, questions were minimal as we did not want to annoy the jury.

Trying a Case in the Dark

When asked how it is to try a case in a mask to a jury that is also masked and scattered about a large courtroom, I analogize it to trying a case in the dark. *In retrospect, I wonder if this is the better way to try a case to a jury?*

Instead of focusing on whether a juror’s smile meant something, whether good or bad, all I could focus on was the evidence that I planned to get admitted each day, the testimony I planned to elicit and how I could possibly get my message across without knowing whether people liked it or not. Trying to guess what the jury was thinking, whether it liked my expert, whether it liked me or my client, was hopeless. One day, I was cross-examining a witness and I told (what I believed) was a pretty good off-the-cuff joke. All I heard in response to my effort was radio silence. Did the jury laugh? If it did, I could not hear the jurors. Did the jury not laugh at all because I lost the jurors and did not know it? Did the jurors smile, but I could not see their smile because they were behind me or because they were masked? And what about body language? I could not count on body language because everyone was, for the most part, uncomfortable. Indeed, wearing a mask all day is not comfortable. The seats in the courtroom were not comfortable. (One juror even brought in a seat cushion after the first week.) The temperature in the courtroom was not always comfortable either.

After the verdict was read and we went to talk to some of the jurors who waited for us in the hallway, I learned that in fact...they had laughed at my joke during the trial, I just did not hear them. I also learned that despite the fact that they could not see my client every day, they did like her...a lot. One juror became emotional as she talked to my client—the Defendant—who had wrongly stood accused of fraud for four years.

So, what can I offer about having tried a case during the middle of a nationwide pandemic? Not much more than I could offer when talking about any other case. Every trial has its punches that we have to roll with, doesn’t it? Whether it is a judge who has particular rules or styles we are not used to, a witness that turns on us, or we have to figure out how to fix a mess on the spot. Or a smiling juror who can be smiling because she hates us, or is smiling because she loves us. At the end of the day, each trial is like trying a case in the dark—we just may not realize it. But not being able to second guess yourself and remaining completely oblivious as to whether something we did each day worked or did not work—does that have an overall positive affect on performance, confidence and outcome? I think so.

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