

# A Civil Jury Trial During the Pandemic: Observations From Those Who Know

*The Legal Intelligencer*

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**W**hile many envision what a socially distanced trial will look like and how it should proceed, we had the unique experience of actually participating in a five-day civil jury trial in the commonwealth of Pennsylvania that went to verdict in July.

Civil jury trials will resume in Pennsylvania at some point, possibly in the absence of a COVID-19 vaccine. While many envision what a socially distanced trial will look like and how it should proceed, we had the unique experience of actually participating in a five-day civil jury trial in the Commonwealth of Pennsylvania that went to verdict in July. The following are some observations from that trial and recommendations for all trial lawyers and the judiciary as we consider trying cases in the COVID-19 era.

## **Go Big and Be Creative**

Most have now adopted the safety provision that requires the wearing of masks while maintaining six feet of distance between persons. This obviously poses a challenge to courts who have smaller courtrooms and, particularly, during jury selection, where it is common to have over 100 people in one room.

In our case, day one was dedicated solely to jury selection due to logistical issues and to provide extra time, if needed, to address

COVID-19 related juror concerns. Jurors were directed to report to a nearby high school auditorium, where they filled out COVID-19 screening questionnaires and had their temperatures taken upon entry. The nearly 100 jurors were then seated in the audience with appropriate distancing. The auditorium was the perfect size for a jury pool appearing in one room. The parties, counsel and judge were positioned onstage, seated at tables with microphones overlooking the potential jurors. Courtroom tipstaff were armed with wireless microphones to capture the responses from the jurors to our questions. For sidebar questioning, jurors were directed to a private area offstage.

Other than the change in location, jury selection was nearly identical to what we typically face. To our knowledge, no jurors complained about the process. There were no protests about the efficacy or need to wear face masks by anyone. We believe the jurors felt safe during the process, which was very important. It was very clear that the court administration and judge put considerable time and thought to their new jury selection process, and for that they should be commended.

Once we had our jury of 12 with two alternates, they were directed to appear at the courthouse, which benefited from

having a grand, large courtroom in which to hold the trial. In order to appropriately distance the jurors, they sat in the large gallery section which normally seats the general public. Witnesses were directed to the corner of the jury box closest to the jurors, rather than the witness stand. Similar to the high school auditorium, the large courtroom afforded appropriate social distancing which again appeared to appease any safety concerns of the jury.

### **Get More Information**

During this pandemic, we have to “go big” with our trials to ensure the safety of all participants. This may mean holding trials, or parts of trials, offsite in large auditoriums. Holding trials offsite can also reduce the risk that an entire courthouse and its employees become ill, which could further burden the entire legal community. With a little creativity and forethought, civil trials at normal jury size can be accomplished with minimal risk to the entire community if conducted in large enough rooms that can accommodate appropriate social distancing measures.

### **Cut to the Chase and Be Efficient**

In the current climate, it is even more important to cut to the chase and avoid a lengthy trial. The last thing anyone wants right now is for someone to get sick and spread the virus. This is particularly true with a jury panel—no one wants to lose a jury panel due to illness, which could mean an expensive retrial. You want to get the evidence in and to the jury as fast as possible to eliminate the possibility that a juror, trial participant or lawyer (or family member thereof) is diagnosed with COVID-19.

There are several things that counsel can do to speed up a trial. Witnesses can be eliminated, or perhaps videotaped before trial to fill time gaps between witnesses who are scheduled to appear live. If your witnesses are going to appear live, make sure they arrive well in advance of their anticipated testimony to eliminate time gaps between witnesses. Consider paring down questions during your witness examination, or asking questions on a broader scale. You may even want to narrow the scope of the prosecution of the case or the defenses. Irrespective of what one does to shorten the trial, it will be appreciated by the judge and jury. Lastly, and in particular to longer anticipated trials, requests to bifurcate or even trifurcate the issues for the jury could be of benefit.

Technology is key in a socially distanced trial. Consider using a system with speakers and microphones, if the court does not provide them. Exhibits should be easily visible to all, and could be shown on a television screen or via projector. If possible, have witnesses testify live via videoconferencing. Making every effort to make it easier for a distanced jury to see and hear masked counsel and witnesses will be integral to conveying your case in a clear and concise manner.

Time is an enemy for all during a trial in the time of COVID-19. The longer a trial lasts, the greater the opportunity for a participant to become ill. Reevaluate your strategy, arguments and witnesses before and during the trial itself to expedite proceedings and avoid the spread of COVID-19 and the possibility of a costly re-trial due to illness.

## Do Not Underestimate Potential Jurors' Willingness to Serve

It was widely speculated before trial that “you will never get a panel to sit through a long trial in this climate” or “you will never get a jury to focus on the trial issues because they will be thinking of the pandemic.” In our case, those generalizations could not have been more wrong. Granted, the jurisdiction of our trial would be considered by most to be conservative and rural, and has avoided the ravages of COVID-19 as compared to other areas of the commonwealth. But to everyone’s surprise, not a single potential juror used COVID-19 as a hardship that prevented them from being involved in the trial. We had some jurors who were over 60 years old and one who was in his 80s. So, even those who are considered the most at-risk for COVID-19 stayed involved in the case. Conversely, not one person complained about their perceived loss of personal liberty by having to wear a mask.

We are not naive to think that all potential jurors across the commonwealth will behave the same way as our jurors. Given the opportunity, we anticipate a considerable number will attempt to use COVID-19 as a reason to not serve as a juror. Some will legitimately raise the virus as a valid

concern, but unfortunately some will use it simply to avoid service because they do not want to be there. However, if our courts take the necessary steps to make potential jurors feel safe, we believe you can get a panel who will objectively listen to the evidence.

No one benefits from a stalled judicial system. Witnesses become unavailable, memories fade and evidence can be lost for legitimate reasons. But no civil case is worth the health of those involved. Courtroom lawyers need to work with the courts as we settle into a “new normal” and rethink the trial process. We can safely hold trials similar to ones in the past with limited risk for all, including jurors who are ready and willing to participate. We know because we did it.



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