

Getting Back in the Game: Lessons Learned from the First Post-COVID Trial

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When I coached college basketball, no matter how hard our players trained in the offseason, we did not get into 'game shape' until the season started. This is very analogous to heading back into courtrooms across the country for live trials. While I tried to stay in 'litigation shape' during the pandemic by participating in virtual proceedings – summary jury trials, depositions, hearings, and arbitrations - there is nothing comparable to standing up before a federal judge and jury and advocating for your client. As outside counsel and corporate counsel are re-entering courtrooms across the nation, here are some of the lessons I learned from my recent experience trying a commercial litigation case in a Georgia federal court.

1. Work the Refs

While we are transitioning to the new normal, trial attorneys must work with the Judge, court personnel, and opposing counsel to understand how the trial will proceed safely. Here are some of the issues to consider as you prepare.

First, what are the rules around mask wearing for counsel, witnesses, and jurors? In our eight-day trial, counsel were required to wear their masks unless we were presenting or examining witnesses. The jurors had to wear their masks for the entire trial. *Second, will the court provide trial exhibits in a notebook or on an electronic device?* The court felt comfortable allowing the hard copy notebooks to be used in the jury room, despite several individuals touching the documents over the eight-day trial. *Third, how will jury selection be handled?* While courts are always protective over the jurors, you cannot be shy about asking the court how they will handle jury selection. In our trial, the court did a very effective job of protecting the health and safety of all the participants while allowing counsel to get the information needed to select an appropriate jury.

The masked prospective jurors sat in the gallery of the courtroom and had three things – a numbered card, a microphone mesh cover, and a sheet of paper with questions for them to answer. One by one, the jurors walked up to a microphone that was set up between the two sets of pews, placed the mesh cover over the microphone, removed their mask, and answered the basic informative questions provided by the court, i.e., address, marital status, work status, affiliations with social groups and religious institutions, and past jury experience. This process was very efficient and allowed counsel to be very focused in our voir dire with case-specific questions.

2. Get the Jurors in the Game

Some things never change. Counsel must be able to engage with the jury and get them to interact with you. This is even more important when the prospective jurors are masked. After the jurors went through their questions, we had 45 minutes to ask follow-up questions to specific jurors. As usual, asking for a 'show of hands' in response to a question is a great way to

get juror interaction. Using that practice, especially because we could not see their full faces, allowed us to engage in a real conversation.

Also, identify *that* juror, you know the one who is very opinionated. He is always a great foil to gain information on other jurors. For example, our case was about the defendant breaching our confidentiality agreement and stealing our trade secrets. Accordingly, we asked case-specific questions related to betrayal and broken promises. One juror had been involved in litigation related to a breach of non-compete agreement and had a lot of thoughts about his experience, including that he thought that “everyone does it [violate non-compete clauses]” and the judge in his case was unfair to him. We used his comments to ask other jurors if they agreed with him or had a similar experience. More importantly, throughout that process, we were also able to show the Judge *that* juror had a bias and should be struck for cause.

3. Technology Matters to the Jury

Finally, in a multiple-day trial, you must use technology to keep the jurors’ attention and engaged. There was a huge contrast between how we presented our case and the opposing counsel’s strategy. We used PowerPoint for our opening and closing arguments, but also used a flip chart that we wrote guiding questions on for the jurors and witnesses to think about during trial. Additionally, for cross-examination, we used the ELMO to ask adverse witnesses tough questions. On a sheet of paper, we used carefully drafted true or false questions for them to answer. Having the question written simply and projected on the screen before the jury pressured the witness to answer the question directly.

In conclusion, it was great to be back in the trial game and get a quick “W” on the scoreboard post-pandemic. I was very fortunate that Amy E. Davis asked me to try the case with her. It was empowering that our women-led trial team kicked butt! I would be remiss in not commending United States District Court Judge Steven Grimberg for the Northern District of Georgia and his professional court staff and security officers for organizing and overseeing a very efficient and well-run trial. Finally, our client SIS, Inc. and principals Mark Kershteyn and Steve Mulka were a pleasure to work with to bring home the win!