

Live Trials During the COVID-19 Pandemic: What's Changed?

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As courts across the country begin resuming jury trials, litigators returning to in-person proceedings must be prepared for the myriad logistical considerations brought on by the COVID-19 pandemic — from mask-wearing and physical distancing to the placement of witnesses and use of exhibits. In this program, Carlton Fields appellate attorneys Matt Conigliaro and James Parker-Flynn discuss their experience participating in live jury trials during COVID-19 and offer practice insights and lessons

learned for effective trial advocacy post-COVID.

Transcript:

Christine Davis: So we're here today with Matt Conigliaro and James Parker-Flynn both Appellate Specialists at Carlton Fields who have participated in live jury trials during COVID. I think we should begin by starting just giving us your overview of what it's like to participate in a live jury trial during COVID. Matt, why don't you go ahead and start?

Matt Conigliaro: Well, happy to give it a try here. The trial I participated in was a multi-week trial in Miami. I was there as appellate support and it was very, very different with all of the different precautions being taken because of COVID. We can probably get into some of the details but just at a big picture level everyone had to wear masks, everyone had to be socially distanced throughout the trial. It created issues with spacing and placement for jurors, for the attorneys, for witnesses, and created issues with being able to hear, being able to see the flow of things, the kind of equipment that was used in the courtroom. It was really just a bunch of different - not to the jury, the jurors - none of them had been at a trial before so it was all just different and sort of new to them because it was, but for the attorneys and even for the judge all of this was not the way we normally handle a trial.

James Parker-Flynn: Yeah and that was about the same experience I had. I was also at a multi-week trial providing appellate support in Bradenton, Florida. And just the basic same outcome there, there was a lot of differences than what you would've seen before COVID as far as the spacing, as far as the masks wearing and it impacted, you know, not just the jury and the judge and the attorneys, obviously, but also, you know, the judge's staff, the deputies, everyone in the courthouse was sort of dealing with this and in general it's just a different environment. The courthouse itself was a much quieter than I'm used to seeing with far fewer people sort of coming in and out than usual. So, like Matt said, "we can get into sort of the specifics as we go" but it was sort of a new experience for everyone. For the jurors, since most of them had never served on a jury and for everyone else who had significant trial experience just having to adjust to a whole new world.

Christine Davis: Did the court limit the amount of people in the courtroom? I've been hearing stories of you could have a big trial team especially in multi-week trials, did the court limit the amount of attorneys that could be in the courtroom at a particular time and were others like in a side room preparing?

James Parker-Flynn: I can say Chrissy that at the trial I was at, the court did have some limitations on the amount of people that could be in the courtroom. It did not impact the trial teams themselves which had, you know, fairly significant amount of attorneys involved. The attorneys themselves were allowed to sit closely during the trial so they weren't having to be distanced as well as all of the support staff. But beyond that, anyone else that wanted to sort of be in the courtroom you had to get,

you know, special permission from the judge. You had to, in advance, let the judge know who you were and that you would be coming and get that approval beforehand so any interested people who might not, you know, be a part of one of the teams they couldn't just come in and watch like we might've normally seen. And so that might've impacted, you know, potential press coverage, interested viewers or friends, things like that. But for us anyways it did not impact the ability of the attorneys to all be in the courtroom at the same time with their clients.

Matt Conigliaro: We were similar. The guards at the courthouse had a list of names so if you weren't on the list you couldn't get in the courthouse, let alone get in the courtroom. Within the courtroom itself, the attorneys were not distanced from each other on the same side so counsel table had kind of the usual set of counsel or client there. But past that, it was a lot of distancing you could have a good number of people in the courtroom but a lot depended on how big your courtroom was. So the particular courtroom we were in was fairly large and so we didn't have troubles with being able to fit counsel teams into the room.

Christine Davis: What was jury selection like? I imagine, you know, when you have all of these people coming in to be questioned there could be particular issues with that. What was jury selection like and were there any issues that you thought about arose about preserving the record or getting answers, forth-coming answers, things like that?

Matt Conigliaro: I'll jump in, a lot of things were of concern during jury selection. One just practically speaking, everything took longer. The basic lesson of COVID and all of these precautions being utilized in a courtroom during a trial was expect everything to take twice as long. So, jury selection took twice as long as it normally would. We began with hardships, of course, and hardships took far more than twice as long! And partly because people had more to say and partly because you couldn't hear them say it. Everybody had a mask on and at least the lawyers and the judge are folks who are somewhat used to speaking publicly and projecting and so while a mask is a challenge it's not an impossible challenge. But for a lot of folks coming in off the street, to serve as jurors, who are maybe not used to public speaking. Having to be in a courtroom where all of the prospective jurors are distanced from each other and distanced from the attorneys and then having to speak through a mask was hard on them. Because it's rather common in an ordinary situation that you can't hear someone very well, add masks into the equation and it becomes difficult. So everything just took longer and on top of that, they had some pretty good things to say about what was, you know, perhaps going to keep them out of a multi-week trial. And, you know, COVID has just created a crisis in people's individual lives and so there were more hardships than you probably would otherwise get.

Christine Davis: James did you find that the judge in your case was more lenient with hardships than they would normally be? Or was it about the same?

James Parker-Flynn: No, absolutely the judge was probably more lenient than he would've otherwise have been, and as were the attorneys, they were much more willing to agree that a potential juror had a hardship and needed to be excused, and sort of building off what Matt said that "this COVID has presented a lot of crisis, a lot of hardships created by it aren't just health-related or fear of getting COVID, not yet being vaccinated, and needing to get vaccinated during the trial but also economic impacts from a lot of people who have been struggling over the past year and just really felt they could not concentrate on a trial thinking that they might not get the new job they were expecting to get or will not be able to support themselves if they had to serve". So those issues were there and so the judge was absolutely more lenient on that which was part of the reason why, like Matt said, "jury selection took so much longer and particularly the hardship part". I know that we went through something like 110 potential jurors to get to the six plus one we got to, and so we were just filtering people in and out every day - 25, 30 at a time that had to be excused. And then also as to the hearing that was also an issue that we had where it was just difficult to communicate. Jury selection took place and the extra-large jury room that they had so, not in the courtroom so they could get as many jurors in there at the same time while still being socially distanced. And so, everyone's trying to project from 40 feet away, 50 feet away with air-conditioning blowing and with vending machines - so that whole process just took a long time, and frankly a lot of the jurors got more frustrated with it than they might have otherwise been. It was really just a hardship on them being there for that length of time to get through.

Christine Davis: And I imagine that's a problem that's not going to go away quickly even as things begin to return to normal because of concerns; health or economic concerns that have arisen in people's lives because of COVID. What about this general setup of the courtroom and opening statements - did the lawyers have to wear masks while they were doing that and if so, did it make it harder to understand or would you think that it was less effective or you know, maybe had the same impact?

James Parker-Flynn: So, I'll jump in there. On the first question, I think Matt already sort of hit it. The lawyers in the case I was involved in are, like most lawyers, they're used to the public speaking, they're used to projecting. So, I didn't think there was a lot of difficulty during the openings and being heard by the jury but, it did impact the sort of way things were presented where the attorneys could stand in the courtroom in relation to the jury, the jury itself was spread out not only in the jury box but in front of the jury box to make sure they have enough space. You just couldn't quite get the same movement that you might have otherwise seen. But I don't think that the attorneys themselves had difficulty while wearing their masks in projecting to the jury during openings or closings for that matter.

Matt Conigliaro: You know, I think in the trial I did it had a little more of an impact because even when lawyers are professional speakers some folks are little more quiet and maybe a little more deliberate in how they use their voice and their inflection to sort of draw people in to listen, and

pauses as opposed to having one big confident loud static tone and level and so I think that was affected by it because when you put a mask on it's hard to be heard unless you're really speaking very clearly and with some volume.

Christine Davis: Even your facial expressions I imagine - a lot of attorneys in opening statements convey things through their mannerisms and facial expression which you wouldn't be able to see.

Matt Conigliaro: Oh absolutely. But you know, in our case the judge I think quickly perceived that it was going to be hard for folks to hear and folks were prodded to start using microphones and what ended up happening rather quickly into the whole process was the lawyers started using lavalier mics and hooking them up basically to their masks, and that allowed everyone to be amplified and made things much easier for the jury to hear because not only is there a problem with you speaking it's a problem with them hearing. In our case, the jury sat in the gallery because normally you would be in a box, the jury box, which is great except it's very hard to get 6 or so feet apart for everybody and still be in that area - at least in the court that we were in. So, the judge had the jury not just in jury selection but during the trial itself seat in the gallery and everyone was well spaced apart. With that method, if you were a counsel and you were up in the area where attorneys normally work, sort of in front of the bar and you were speaking out into the gallery you had to go rows and rows deep to be able to make sure they heard you. And so the microphone...

Christine Davis: ...And also turn around and put your back towards the judge while you're speaking

Matt Conigliaro: Oh yeah, it created angling issues the whole trial because you always were not ideally angled. The witness and the judge would be up at their normal place and the jury instead of being somewhat next to them was very far in the other direction.

Christine Davis: What about - in that setup, what about the use of demonstrative aids and exhibits if they're not in a jury box - if you have a technologically equipped courtroom sometimes you have the screen in front where they can see - you wouldn't have that in the gallery. So what were the difficulties in seeing exhibits or...

Matt Conigliaro: The short answer is it got added to the gallery. Everyone set up screens and so many, many screens around the courtroom for counsel, for the judge, for the witness, and for the jury.

James Parker-Flynn: Yeah, that's the same with the trial I was at - a lot of screens. The jury primarily was looking at one large screen, though, because they were in the case I was in they were in the jury box or immediately in front of it so it eliminated some of those angling issues. But the screens they were looking at while large was on the other side of the courtroom and so I think at times they still had a little bit of difficulty seeing those exhibits. I don't know that they would've been significantly

different for them during the trial that it might have otherwise been but there was also just the difficulty with the sort of witnesses having to get a little bit use to reviewing the exhibits that way not ever having any paper copies of anything. There was no paper copies handed back and forth, and so I think that at times was a little difficult to make sure everyone's on the same page, making sure whatever tech person was running the exhibits was able to quickly get to the right place in the exhibit that match with where the attorneys needed to go or what the witnesses needed to see. So, there was some challenges there although I give a lot of kudos to both the private tech staff and the court's tech staff for really handling it well and making it about as painless as possible.

Christine Davis: What about sidebar? So, when I did trial support in a case that was being streamed and I was not there live they couldn't do sidebars because you couldn't turn on the white noise and go up to the judge to discuss things they actually had to either take a recess and let the jurors out of the room which of course takes more time or they would go out of the room. Did you guys have those issues?

James Parker-Flynn: We did not. They still did the normal sidebars, they were still able to use the white noise so that did not present a problem.

Matt Conigliaro: We were similar, the judge, I don't think needed white noise because he was so far from the bench but, it was difficult for the court reporter and it was difficult for the attorneys who were going to be arguing in sidebar. Everybody had to have a microphone or deal with their microphones or turn them off or turn them on. Logistically it was a whole set of issues that folks weren't use to.

Christine Davis: What about examining witnesses? What sorts of issues arose there that may be different from a regular trial, I think when we discussed this at the beginning maybe James, your witnesses didn't wear masks, and Matt, yours did. What were the things that arose from those issues just in the examination of witnesses?

James Parker-Flynn: Yeah, I think the - as you mentioned, the witnesses in our trial did not wear a mask when they got on the stand, there was a Plexiglas in front of them so, for the most part, the most difficult thing they had to deal with was not being able to review any paper exhibits. The Plexiglas itself occasionally would impact speaking so the court reporter at times, I think, had a little bit more trouble hearing them than they might otherwise or the attorneys - especially when they're not projecting to a jury but they're sort of getting in the flow of asking questions. Occasionally then the masks impacted the clarity with which the words were coming out and so the witnesses occasionally had a little bit more trouble understanding the attorneys at times but those were the primary ones that I saw.

Matt Conigliaro: I'll use this as a chance to speak to the larger issue of masks - not just for the witnesses who - some had them but for the jurors and for the attorneys, and Chrissy, you kind of mentioned this earlier about - just an opening statement how attorneys might be able to use their face and their looks to convey messages without having to necessarily say them, and that's, you know, body language and facial reactions are a huge part especially in a jury trial, they're a huge part of everyday life but boy, in a jury trial they're extremely important, and that issue, it impacted the witnesses and being able to watch them and judge them and assess them. It impacted jury selection in how do you evaluate this person when you can't really watch their facial reactions. You know, folks had different types of masks. We had one juror who wore pretty much a gator the whole time which covered everything and we had several jurors who wore what I would think of as rather full masks as opposed to a kind of a thinner, smaller mask and you lost most of their face to the masks. So the usual sort of tells you might be looking for from a juror who's been questioned or someone who's just sitting there watching things and you're looking at the body language or looking at the facial reactions, a lot of that was just gone and that makes it hard, and it carried over certainly in the witnesses and testimony. It just made the whole trial different. I would think that from a juror research standpoint, if you're going into a trial tomorrow where you had a deal with these circumstances, it's probably worth whatever effort it takes, at least in a potentially large verdict case to put some resources into trying to get as much intel as possible on the jurors as soon as you learned who the prospective folks might be because you may not get the feedback you're used to seeing during the trial or during jury selection and every bit of information you could get in some other means may become all the important because your usual root of watching and reading is different at the least, and maybe not existent at the worst.

James Parker-Flynn: Yeah, and to add to that, I know that one of the parties at the at the trial I was at did have a jury consultant and I know it was very difficult on her to do her job the way she's used to doing it, and evaluating jurors during the jury selection process but also, the mask issue itself came up as an hardship type of issue or just another issue for why jurors may or may not want to sit on the jury, that was something that was asked a lot about during jury selection was, "are you going to be able to sit through a three or four week trial, for eight plus hours a day and maybe with mask on the entire time, are you going to be comfortable, are you going to be able to pay attention and focus, are you going to like constantly adjusting your mask and annoyed with it to the point where you're missing out on things" and that actually became a bit of an issue with multiple people just saying, "no, I'm absolutely not comfortable with that, I'm thinking about it sitting right now. I can't get comfortable just sitting here" so, yeah, I think the mask issue is much as anything really impacted the way everything went.

Matt Conigliaro: Well, let me add to that too. I think it's actually a really interesting topic because we may not be done with masks, right. There may be folks who going forward even when there's no more guidance or requirements that we must or should wear masks. There may be folks who decide they just feel better wearing them but, even that comes with a cost, maybe it affects attention span,

it affects the ability to read their body language and facial movements. And so, going forward there's an uncertainty about how all that is going to happen. For as long as we're in this situation where masks are required, I think it puts enormous additional pressure on trial counsel to get through it because, trials can be really annoying, right. Especially if you're the juror because the stuff that the lawyers fascinating and incredibly insightful and really riveting, they might think it's just boring as heck and waste of their time and I don't know they're talking this for hours, and most of the normal dynamics but in this situation where people are annoyed - maybe it's a good way to put it at having to wear a mask all day and just being in the setting where they probably don't want to be. Everything is doubly annoying so, if you're struggling to find your place if you can't get the right questions for your witness, you don't have your exhibits lined up - anything that might take a little longer in terms of getting ready for testimony, listening to testimony, questioning, if questioning just goes on and on, and on. Whatever was annoying before became twice as annoying.

Christine Davis: Well, that's a good lead-in to my next question. Obviously, trials are likely to not go back to the way they use to be for a while, if ever. Depending on jurors' personalities and concerns. Did you pick up any best practices to take from this experience and to trials going forward even when things - as they start to go back to normal or when they go back to normal. Are there any lessons learned that would be - that you could take away to benefit a trial or benefit your advocacy during a trial?

Matt Conigliaro: Well, I'll echo what I started to say earlier about jury research. Some places you can get venire info early and learn who your prospective folks might be and if you're in one of those places and being able to do some research on them in advance is probably even more significant than it was before. And if you can't get that info in advance - as soon as you can get it when you're in the room being able to run that down, having somebody outside who can start to do some work in order to make up for the lack of - sort of transparency when it comes to good old fashion body language and facial movements, I think that's a real big deal. And the rest of it to me, I hope probably boils down to efficiency. It is - it's just so much more important to be less annoying, right. And to be quicker about getting through things because so many folks are uncomfortable in these situations and that's hard on trial counsel because there's a lot you want to do and there's a lot you want to get through in all series of points you want to make. So, it's a balance that's - it always being hard to strike and now it's just harder.

James Parker-Flynn: Yeah, I think I would echo what said which is that "for counselor you need to; (1) you need to be more patient and not get frustrated with the process and the delays and you need to probably try to be as efficient as possible. Probably need to be as considerate as possible, understanding that everyone is now dealing with this issue and to the extent on things that don't matter, right - the things that aren't actually impacting your case. Working together is going to be more effective than sort of being contentious on every minor little thing. So, I think that's helpful but as far other best practices I think those are the kind of things we're going to really learn about more

as this goes on because these live trials are just starting again and in places, they may be different, right. So, not every - now that the guidance is changing maybe we will see continued required masks use in someplace but maybe not in other places, and who knows if people start or if different courts start changing the distancing department. So, I think those real best practices are going to be established as we go forward and have the ability to collect a little bit more data on these trials to how they are going. But I think the basic takeaways are just what Matt said "try to be efficient, try to be considerate, and try to make sure that you're sort of respecting your jurors time" as you're going forward because you don't want them getting angry at the process and somehow taking it out on either parties if possible.

Christine Davis: At trials, especially multi-week trials tend to take a lot of time as it is and what I'm hearing is this is even more delay that even more preparation from trial counsels perspective could be a good idea.

Matt Conigliaro: I'll add more, which is something that we touched on earlier. The lack of physical touching, right. With exhibits, passing things around, publishing things to the jury. In our courtroom there was very little that was handled. You had to be ready with notebooks or whatever items the witness had to have in advance. Have that stuff at the witness's seat before the person took the stand and - you didn't have the ability to really pass anything to the jury and let them eyeball it in that way. So, you had to be ready with the video, the screens, whatever tech person is helping out to be able to present to the whole courtroom at one time exactly where you wanted folks to focus and it's a big difference. A lot of folks at times want to be able to move up to the jury, hand people things, watch and see what they look at or what they don't look at, and I think certainly it - today, In this moment that's not happening, and maybe going forward it might not happen. It might be that we don't go back to some of those things.

Christine Davis: We're all Appellate specialists so we participate in trial as the Appellate counsel. Did you come up with or notice any issues with respect of preservation that were more difficult in a trial like this or was preservation typically dealt with the same way because you can obviously not stop from talking but...

Matt Conigliaro: Communication was harder. So, with folks being spread around more not being able to whisper the same way was difficult-other than that, I mean, as you said "so preservation requirements are what they are" so we have to make sure we're on top of those things but, to the extent there was a difference, I think it was just in the difficulties and trying to communicate and not being able to just sort whisper the way - traditionally, you would

Christine Davis: So, obviously as we've been saying, this is probably not going to end anytime soon, what is your overall impression, do you think that these live trials are effective even though they've

got some delay issues as far as moving cases forward and making sure justices proceeding as best they can, what is your overall feeling about trials like this going forward?

James Parker-Flynn: I thought it was, overall a very positive experience. I think that even with all the difficulties and challenges that everyone faced we ended up - still with a good jury, an attentive jury that cared. They thought through it, they were willing to sort of put in the extra time that was necessary to get it done and to really consider everything before reaching a verdict and at the end of the day that's what we were looking for, we were looking for a fair trial with a verdict and we were able to get there. So, I think that it is something that will continue - I think that it will benefit the justices to continue to have live trials. I think it was a net positive but you know, just understanding that along the way you might face some difficulties that you haven't previously and so, I think that everyone is going to start to prepare for that and spend more time prepping ahead of time that you already are which is already a tremendous amount of prep but maybe with a little more time prepping ahead of time for those things but like Matt said: "to make sure that you're ready to present to the jury and present to the court is efficiently and as appropriately as you can". And then other than that, just, you know, hope we can get to a verdict.

Christine Davis: Well, thank you both very much. I think that's very helpful. Hopefully, it will shed some light on what these live trials are like and we will see what happens going forward.

Matt Conigliaro: Thank you!

James Parker-Flynn: Thanks, Chrissy.

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