

Reproduced with permission. Published August 06, 2020. Copyright © 2020 The Bureau of National Affairs, Inc. 800-372-1033. For further use, please visit <https://www.bloombergindustry.com/copyright-and-usage-guidelines-copyright/>

INSIGHT: Lessons From a Rare in-Person Courtroom Experience in a Pandemic



BY LEE G. DUNST AND JOEL M. COHEN

The Covid-19 pandemic caused the unprecedented shutdown of in-person court appearances in mid-March, but as the weeks now turn to months, courts are beginning the process of tentatively reopening for live appearances when it is deemed necessary and unavoidable. We know, because we just participated in live hearings.

We recently participated in five days of in-person evidentiary hearings in a multi-defendant criminal case in federal court in Rochester, N.Y., and think there are important takeaways for lawyers to consider as we venture back into the courtroom in the “new normal.”

New York is in [Phase 4](#) of its reopening process. Participants were not required to have their temperatures taken.

Masks on, Social Distancing in the Court Room A Gibson Dunn team, along with other defense counsel, court staff, the judge, and several witnesses, participated in mid-July in a live, multi-day evidentiary hearing in U.S. District Court for the Western District of New York. In advance of the hearing, the court relied on recommendations of an epidemiologist in ensuring compliance with the current Covid-19 restrictions in place.

As a result, counsel were spread throughout the courtroom (including in the seats in the gallery normally reserved for the public) and were asked to distance and keep masks on at all times. The public was not permitted in the courtroom, but could watch via Zoom in a spill-over courtroom. All told, there were nearly 20 people in the courtroom in total over the course of five days of testimony.

Not surprisingly, everyone in the courtroom wore masks at all time—with the exception of the live wit-

nesses who sat in the jury box behind a plexiglass barrier and were permitted to remove their masks. The rationale for them to remove their mask was to ensure that the judge and the attorneys could judge the credibility of the testifying witness.

This setup for testifying witnesses, of course, created its own issues. For example, the use of removable microphone covers (to ensure sanitary conditions) and social distancing made witnesses difficult to hear at times and required the judge to regularly remind witnesses to speak louder.

Difficulty Hearing, Seeing Facial Expressions It also was challenging for attorneys wearing a mask to question witnesses—both in terms of being heard and also due to the obvious limitations on facial expressions caused by the use of masks. During normal times and even recently by Zoom, there is so much that we naturally communicate non-verbally through smiles, smirks or other facial cues. Wearing a mask, of course, makes this almost impossible, other than winking eyes which would not have the same desired effect.

We dealt with this at our recent hearing by trying to adjust the tone of our voices to ensure that the witness understood the nature of the question (either sarcasm or humor). But the use of masks certainly diminishes the impact of non-verbal expressions in the courtroom.

Another issue for attorneys operating under these conditions is getting comfortable with wearing a mask during extended questioning of a witness or during colloquy with the judge. In the pre-pandemic era or more recently by Zoom, no one of course would wear a mask.

We thought about this prior to the hearing, so when we were preparing our witness for his lengthy direct testimony, the examining attorney actually wore a mask to practice getting comfortable with the give and

take of asking questions in this different manner. We found this to be a very helpful exercise to get accustomed to extended mask wearing during a witness examination in court.

Difficulties Conferring With Co-Counsel Finally, there also were some additional challenges presented by attempting to maintain adequate distance in the courtroom while conferring with co-counsel and the joint defense group. While all counsel kept masks on and undertook careful efforts to sanitize all surfaces and materials (with hand sanitizer and cleaning products provided by the court), it proved tricky to shuffle around the courtroom and to confer while maintaining distance, given the large number of attorneys.

The use of electronic devices in the courtroom (with the court's permission) helped us communicate with each other real-time with the appropriate distancing, but this remains a challenge to navigate during the course of examination of witnesses in a hearing.

All things considered, this multi-day, in-person hearing went extremely well and smoothly, despite the unprecedented challenges of doing so during a once-every-hundred-years pandemic. The judge, the court staff professionals, the attorneys and the witnesses all dealt with the obvious issues and did so with a great spirit (and sense of humor).

However, the challenges here would multiply exponentially when one starts to consider the possibility down the road of conducting criminal jury trials during the Covid-19 pandemic. This runs the gamut from picking a jury with social distancing to delivering opening and closing statements to a jury while wearing masks and to juries deliberating with distancing while wearing masks.

Our recent hearing before only a judge certainly provided us with some real-world experience on how to deal with these challenges and was a dry-run for how to do more of these in the future—but the issues surrounding this will get only more complicated with a criminal jury in the box while we all face the more stressful challenges of the pandemic.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Lee G. Dunst is a partner in the New York office of Gibson, Dunn & Crutcher. He has more than 25 years of experience handling significant white collar criminal investigations, as well as complex civil lawsuits.

Joel M. Cohen is co-chair of Gibson, Dunn & Crutcher's White Collar Defense and Investigations Practice Group and a partner in the firm's New York office. He has been lead or co-lead counsel in 24 civil and criminal trials in federal and state courts.