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E-Discovery & Legal Tech News

# INSIGHT: Counsel Call for Strategic Attention to Covid-19 New Trial Dynamics

By Julia Brickell

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With all the Covid-19 related changes to remote work, including trials, in-house counsel should take a fresh look at the skills and resources of their litigation and trial teams. Julia Brickell, executive managing director and general counsel of H5, highlights issues and approaches for effective litigation preparation in the post-lockdown era.

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As social distancing, mask mandates, and other pandemic precautions wend their way into the courtroom, it shouldn't come as news that trial counsel must evolve their practices to meet the altered state.

Not only have litigation activities that once relied on in-person contact turned into either video events or live ones with masked and socially distant witnesses, lawyers, and jurors, it is also virtually inevitable that the critical actors—most importantly the finders of fact—will recently have suffered disruption, anxiety, and possibly mourning.

These realities conspire to warrant different case preparation from the start.

## Strategic Planning

One mandate of active in-house counsel is to be sure that litigation counsel are well aligned with the challenges of upcoming (and ongoing) cases. Counsel's early focus on strategy and trial conveys forethought and capability to drive a case efficiently toward its conclusion.

In the best of times, strategic case endeavors need sufficient focus with ample lead time. Today, such early strategic work is especially important as dynamics driven by Covid-19 warrant alignment of themes, discovery, and trial planning for a reality that may differ from what years of practice have led experienced counsel to intuit.

A first measure of attuned case counsel, therefore, is awareness and an early focus on the changes that have occurred and articulated plans to evaluate and address the impact.

## Finder(s) of Fact

Understanding the mindset of the finder(s) of fact should also have an early focus in the era of Covid-19. People will decide the facts of the case, bringing their life experiences with them.

The pandemic has impacted (and continues to impact) a large swath of the U.S. population. There are few who have not experienced some level of fear, anxiety, or health concern as they cope with stay-at-home orders, interrupted schooling, inconsistent directives about risks and protections, and loss of family, jobs, food, homes, and control.

How can this not affect the availability and sentiments of jurors and judges? Sage counsel will prioritize work to gain deeper understanding of the disturbance the pandemic has wrought and how the local fact-finder has processed attendant stress.

While methods will vary with circumstances and budgets, early jury research is important to consider. Whether by survey, focus group, mock deliberation, or otherwise, insight gained from jury research should influence themes to be pursued in discovery, and later, the content of juror questionnaires or voir dire and trial.

For a case that will be tried to a judge, the research could range from tailored and nuanced to in-depth research with former judges, but nevertheless warrants attention early in the case.

In-house counsel should evaluate the likely effectiveness of counsel to learn from and make use of this research. Counsel's listening skills are key—only trial counsel attuned to the changes in the finder of fact will be able to effectively align the case to the new reality.

Therefore, counsel needs to be able to communicate interest in prospective fact-finders (by body language and words) to gain true insight both in research and later in voir dire or at trial. They need to thoughtfully process what they learn and apply it to discovery and the trial plan. These skills are ripe for assessment.

### **Case Themes**

In-house counsel should also expect an early strategic focus on case themes. Themes should be identified and tested against key information available in client data, even before the discovery process has advanced.

Search and AI technologies deployed with requisite expertise can rapidly provide counsel with key documents early in the case rather than sequentially during (or at the end of) a linear review. By testing and refining themes early and balancing them against the expected sensitivities of the finder of fact, counsel can efficiently focus the discovery process to target needed trial evidence and align with case budgets that have likely tightened.

### **Technology and Distance**

Further, at whatever the stage of the case when its court resumes moving its caseload, in-house counsel should gauge the capability of trial counsel to excel given the abrupt need for technical prowess and savvy. While one hopes that trusted outside counsel are not among those admonished for attending video status conferences shirtless or from bed, some attention should be paid to counsel's sensitivity to video decorum.

More nuanced are the skills to effectively elicit needed testimony from a hostile witness with whom traditional techniques of charm or skepticism may not resonate across video.

And does counsel have a plan for preparing and defending client witnesses under socially distant and perhaps physically isolated circumstances? Is counsel cognizant of the need to plan the witnesses' physical location for remote depositions? While cameos by small children may be endearing, it is easy to envision interruptions and backgrounds that harm credibility and increase the likelihood of a deposition's being used at trial to one's disadvantage. Has counsel contemplated these and related considerations? Have the skill sets of the whole legal team been expanded appropriately?

### **At Trial**

Needful evaluation of counsel's skills is compounded when considering trial. The variables will expand and the importance of savvy decision-making in the selection and staging of witnesses, publication of physical and electronic evidence, and effective use of technology will enlarge.

Effective choices require awareness, sound decision-making, and practice. (See Neckers, J. and Herzog, P., *Trial by Webcam: Tips From A Firsthand Experience* (2020)). Bench trials present myriad issues. Jury trials, crucial to our legal system, will present even more. (See Emery, R. and Cooper, D., *COVID-19 Cannot Be the Death Knell for the American Jury Trial* (2020)).

As we hear so often today, our situation is unprecedented. There is indeed an evolving new normal that requires an adjusted mindset, for in-house and outside counsel alike. The logistical changes warranted by the pandemic call for new strategies and enhanced planning, preparation, and practice. For in-house counsel, a demonstration of strategic planning, sensitivity, insight, and skills should figure heavily in the assessment of those to whom they entrust pursuit of their cases.

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

### **Author Information**

*Julia Brickell is executive managing director and general counsel of H5, an expert search and technology company. Previously, she was a litigator at Davis Polk and Wardwell, was AGC of Altria Client Services and vice president and deputy general counsel of Philip Morris USA, where she advised on an array of litigation and compliance matters.*

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