

Trying Your Case in Alternate Venues

AAJ: Jury Trials During The Pandemic Webinar Series

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“Alternate Venues” is a polite way of saying warehouses, conference halls, or auditoriums – places we never dreamed would be used as courtrooms. The COVID pandemic has changed the practice of law forever. Adapt or die. Your trial preparation and presentation must embrace this new reality, whether you like it or not.

The good news is, there are many reasons to like it. Like many unintended consequences of the pandemic, the adaptation needed here is just an acceleration of trends that were already good trial practice. Meeting the needs of COVID-era jurors is more work up front, but substantially less work at trial, because you’re going to be more focused, you’re going to take less time, and you’re going to have everything that is important up on that big video screen behind you.

It’s a swarm of “bees”:

- Be Simple
- Be Brief
- Be Clear
- Be Visual
- Repeat

BE SIMPLE

It is 100% certain that complexity favors the defense. We’re all scared! We are all preoccupied with disease, a dismal lifestyle, child and elderly parent care, horrendous politics, and a bad economy. “I have no time to listen to your complexity.” This is no time to teach algebra. I have absolutely no data to back this up, but I think most people’s brains are running at about 60% of their normal capacity for external events. NO ONE is going to figure your case out for you. $1 + 1 = 2$. Bad choices + no training = harm. That’s about all people are going to listen to.

BE BRIEF

NO ONE is going to pay attention to ANYTHING for more than 20 minutes. Period. “I have too much on my mind, buster, for you to keep me here a week on a car crash case.” By the 5th day, I will hate you. I will make sure you lose.

BE CLEAR

1. What did the defendant do wrong?
2. Why was it wrong/who says it was wrong?
3. What was the alternative – what should the defendant have done?
4. What difference did it make?

These points are what jurors care about. Also, don't forget, they want to know why this happened. The "what" – the fact of running a stop sign - isn't enough. Jurors want to know the "why." Only then can they judge the moral fault that is the basis for the damages assessment.

Blah, blah, blah, negligence, blah blah, blah, proximate cause, blah, blah, blah, standard of care. WHAT ARE YOU TALKING ABOUT? Holy cow. If you can't explain your case so a 10th grader can understand it, you're not being clear. A great trial lawyer I know said he tries to never use a word in trial that he didn't use in high school.

BE VISUAL

These days, NO ONE is going to remember ANYTHING that is not reinforced with a visual aid. Here's what they will remember: whatever you put on the GIANT screen behind you. Have you been to a rock concert, and instead of watching the performer, you watched the Jumbotron image of the performer right behind her/him? Yeah, that's what's going to happen when your jurors are 20 feet away from you and from the witness. Control the visuals, control the case.

REPEAT

- We are all preoccupied with disease, a dismal lifestyle, child and elderly parent care, horrendous politics, and a bad economy.
- NO ONE is going to pay attention to ANYTHING for more than 20 minutes.
- Most people's brains are running at about 60% of capacity for external things.
- NO ONE is going to remember ANYTHING that is not reinforced with a visual aid.

Think about this: why are top 10 songs in the top 10? Or, looking at it another way, what do nearly all top 10 songs have in common? The chorus, which is repeated over and over and over. And over. Make your case theme a chorus that the jury will be singing to themselves in deliberations.

SPECIAL CONSIDERATIONS FOR WEARING A MASK:

Put on a mask and go to a drive thru and order a meal. What did you do to be understood? It was probably: **speak more s-l-o-w-l-y, enunciate, and SPEAK UP!**

You need to substantially drop the pace of your speech. The mind takes longer to process blurry sounds under normal conditions, let alone if you're worried that you're going to catch a deadly virus from the person you rode up the elevator with. If you talk too fast, you'll leave your audience behind. If you leave your audience behind, you will lose.

There are special clear masks available, so the jurors and witness can see your face. Would you rather be the one "hiding" behind a mask that makes you look like a bandit, or be the one whose mask is transparent, like their belief in the justice of their cause???

POSITION AND MOVEMENT

The first time I saw a picture of an "auditorium courtroom" two things jumped out at me:

1. That GIANT screen (see "BE VISUAL" above).
2. This is now theatre.

No more looking in people's eyes, pleading your case for justice one-on-one. What do actors in a theater do? They enunciate. They speak slowly. They look at the audience – not some guy in the witness chair. They move deliberately, with accentuated movements of their body, particularly the arms – think of the body language of someone speaking Italian – IN SLOW MOTION. They put on a little more makeup, wear brighter clothes. You are now on a stage. Step it up.

THIS IS NEW. Practice! Practice talking, practice moving, practice Zoom voir dire, and coordinate your voir dire note taking and grading with the team that is going to be helping you decide who to excuse. Practice working with your remote witnesses and get them to take down the beer signs from their walls. Play with screen-share exhibits and be smooth with getting them up and running. Practice hooking into the courtroom system; do NOT be the person fumbling around with the technology.

This is a new environment! Whether it is playing a golf course, skiing down the slope, or entering an auditorium courtroom: to succeed, you have to be able to visualize success. You have to be able to visualize where you will stand, and how you will relate to the judge and jury and bailiff and witnesses. When will you look toward the witness? When will you walk across the courtroom? How close can you get to anyone while respecting their personal space?

I'd write more, but that would violate the rules above. It's a new world. Get with it.

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