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## **When the Mask Comes off: Jury Trials Post Pandemic**

### **I. Prospective Jurors and Masks During Jury Selection**

#### **Will Jurors wear masks during jury selection?**

During the pandemic many trials were postponed or proceeded virtually. However, with many courts re-opening, will the courts allow prospective jurors to attend in-person voir dire without a mask? From recent cases, most courts are still requiring jurors to wear masks during the selection process. Lawyers have already challenged this new issue various times.

Before the Covid-19 pandemic, attorneys during the jury selection process relied on the prospective jurors' answers to questions and their facial expressions to assess their suitability for the trial. Nonverbal communication, such as facial expressions and body language, are arguably more valuable to discerning attorneys as it makes up around 90% of communication.<sup>1</sup> Jurors' reactions to questions often cue indications of bias. However, with prospective jurors being required to wear masks and social distance, a significant number of non-verbal cues are hidden from attorneys.

In response, there have been numerous cases where attorneys challenged the mask requirement. In *Wilgenbusch v. Biltrite, Inc. et al.*,<sup>2</sup> the California Superior Court was unpersuaded by the argument that masks undermined the purpose of voir dire and made the trial process unfair. This sentiment towards masked jurors is echoed in many other jurisdictions, much to the dismay of lawyers.

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<sup>1</sup> Neale de Gravelles, *How Covid-19 is Transforming Voir Dire – And What That Means For Trials*, <https://dplawla.com/how-covid-19-is-transforming-voir-dire-and-what-that-means-for-trials/>

<sup>2</sup> *Wilgenbusch v. Biltrite, Inc. et al.* (Cal. App. Dep't Super Ct., 2020)

While courts are prioritizing the health concerns of potential jurors, they do understand the issues this restriction presents to attorneys. A possible alternative courts have begun weighing is setting up plexiglass and giving prospective jurors face shields during questioning.<sup>3</sup> However, while the clear coverings seem to solve the issue of viewing facial expressions, courts must consider the additional cost of providing this safety measure. A good number of courts are working with a tight budget and cannot provide clear coverings for jury selection. A possible remedy could be requiring attorneys to pay for the face shields and plexiglass barriers, but this resolution is not without its issues. With each lawyer having varying budgets, this could create inequity between lawyers who have the money to invest in the protective equipment and those who do not. Additionally, some jurisdictions, like New Jersey, allow judges to ask jurors to lower their mask if there are protective precautions in place.<sup>4</sup>

### **How do lawyers assess potential jurors when they are wearing a mask?**

Lawyers in post-pandemic jury selections are forced to develop techniques that allow them to read jurors while following guidelines. Though lawyers cannot see facial expressions, they can still look at the body language of the potential juror. They can observe if the juror is fidgeting or any changes in their vocal inflection. Additionally, lawyers can watch for solid or weak eye contact while the prospective jurors are answering questions.<sup>5</sup> While these techniques may not be as clear as facial expressions it can still provide additional insight.

## **II. Masks will Interfere with Establishing Connections Between the Judge, the Jury, the Parties, the Lawyers and the Witnesses.**

**It may be difficult for lawyers to portray their clients as likable and truthful if jurors can't see their client's face.**

Litigators are not only required to argue their client's case, they must also paint their client in a positive light to the jury and the judge. While judges and jurors use cognitive skills to evaluate the relevant evidence when making decisions, it is natural that other factors impact their choices during trial. In typical court settings, it is well-known that the judge and the jury evaluate the character of the client by closely examining their body language and facial expressions. Whether it is negative or positive, these character evaluations can significantly affect the outcome of the trial. Litigators take advantage of this knowledge by instructing clients on how to appear during trial. However, since most in-person trials now require all participants to wear a mask during trial, it is becoming increasingly difficult for judges and juries to get a read on each party.

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<sup>3</sup> De Gravelles, *Supra*. Note 1, at 1.

<sup>4</sup> *Covid-19 – Criminal And Civil Jury Trials- Public Information and Guidance Pursuant to the Supreme Court's May 11, 2021 Order*, Notice to the Bar, May 11<sup>th</sup>, 2021

<sup>5</sup> Kristin Ault, *Jury Selection in the Age of Covid-19*, ABA, (Dec. 17, 2020), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2020/winter2021-jury-selection-in-the-age-of-covid-19/>

In both criminal and civil cases, a defendant showing emotion can positively sway the jury. Though defendants cannot undo crimes, mistakes, or violations, legal research shows a client showing remorse will have an advantage with juries.<sup>6</sup> Remorse paints the client in a more sympathetic light and gives the image of a positive character. Those clients who look angry or unemotional are more likely to be viewed as guilty or at fault.<sup>7</sup> Since jurors ultimately have the responsibility of determining the verdict, sentence, and damage awards, it is vital for clients to make a connection with them. Overall, a combination of positive body language and remorseful facial expressions humanizes the client.

In April of 2021, the world saw this issue on national television. Millions watched in anticipation of the verdict as the former Minneapolis police officer, Derek Chauvin, was on trial for the murder of George Floyd. The case was the first major trial that occurred during the pandemic, and the court prioritized coronavirus concerns. During the trial, all participants were required to keep on a mask.<sup>8</sup> The only time participants could remove their mask was when they were addressing the court. Chauvin, who opted out of addressing the court in his own defense, only took his mask off while his attorney delivered the closing arguments in his defense.<sup>9</sup>

On April 20<sup>th</sup>, 2021, the jury found Chauvin guilty of second- and third-degree murder and second-degree manslaughter. He now faces up to 30 years in prison. While the jury deliberated the evidence and witness testimony, legal experts contend Chauvin wearing a mask weakened his defense. Due to Chauvin only removing his mask at the end of trial, the main image of his facial expression came from the video May 2020 video, which prosecutors played multiple times during trial. This video showed Chauvin holding Floyd to the ground for almost ten minutes with what has been described as a “cold and heartless” stare.<sup>10</sup> A law professor at DePaul University College of Law further commented on Chauvin’s demeanor during Floyd’s arrest stating, “That look on his face as captured in the video is so powerful.”

Due to Chauvin not having many opportunities to show remorse during the trial, this likely affected how the jury viewed him. Defense attorneys are known to use techniques such as having the client’s family show up and support, instructing the defendant to smile, and getting the defendant to wear nice suits.<sup>11</sup> While Floyd’s family made appearances in the courtroom every day of the two-week trial, Chauvin’s allotted seat remained empty. Many legal scholars believe Chauvin testifying and taking off his mask earlier in the trial would have allowed him to show remorse and garner sympathy amongst the jury.<sup>12</sup> This trial is a primary example of how masks can affect the client’s ability to connect with jurors.

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<sup>6</sup> M.Kimberly MacLin, Corynn Downs, Otto H Maclin, Heather M. Caspers, *The Effect of Defendant Facial Expression on Mock Juror Decision Making: The Power of Remorse*, North American Journal of Psychology, June 2009, at 324

<sup>7</sup> *Id.*

<sup>8</sup> Stephen Groves, Explainer: Did mask hamper Chauvin’s image at murder trial, AP News (April 19, 2021), <https://apnews.com/article/derek-chauvin-mask-closing-arguments-779d8b11006413a5004d4f271812ddf1>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

## **How will Lawyers Connect with jurors on a visceral level when lawyers and jurors are wearing masks?**

While it is crucial to portray the client in a positive light, litigators often learn from the facial expressions of the judge and the jury. When witnesses testify, the client speaks, or the attorney argues a point, they assess how judges and jurors react. A negative or positive reaction to a statement can drastically alter how the attorney will approach the case. A skilled litigator will also analyze how the judge and jury respond to opposing arguments to see which areas are the weakest.

With masks and social distancing requirements, it is difficult for attorneys to use these same techniques to gauge jury interest. While attorneys cannot see facial cues, they can observe body language. Movements such as head nods and jurors taking notes after certain comments can indicate interest or agreement. The American Bar Association further recommends attorneys instruct their clients and witnesses to make eye contact and speak directly to jurors while addressing the court.<sup>13</sup> This small gesture can boost engagement and create a connection with the jury.

### **III. How will lawyers judge the credibility of witnesses if they are wearing masks?**

#### **There is a greater need for witnesses to testify without a mask**

While there is a general push for all trial participants to keep on a mask while in the courtroom, an increasing number of courts are allowing witnesses to testify without a mask. As seen in the Derek Chauvin Trial, only witnesses were allowed the opportunity to take off their mask while addressing the court. In the *U.S. v. Robertson* case, the New Mexico court upheld the order to require prospective jurors to wear face masks during voir dire.<sup>14</sup> However, they allowed testifying witnesses to replace their face masks with clear shields while addressing the court. The court reasoned that the selection of juries is not as hotly contested as testifying witnesses. Additionally, the court stated that seeing a witness's facial expressions is an essential element of the 6<sup>th</sup> Amendment.

#### **Confrontation of witnesses will be severely weakened by wearing masks**

The most highly contested Covid procedure in courtrooms is requiring witnesses to wear masks while testifying. Courts are trying to balance public health concerns with traditional justice. Many attorneys have challenged this requirement by arguing that masks prevent the defendant from confronting and assessing the witness's credibility. Additionally, jurors, whose decisions in

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<sup>13</sup> Melissa Ho, Edwin Novack, *What's it like to Try a Case to a Jury During the Covid-19 Pandemic*, ABA (March 11, 2021), <https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/2021/jury-trials-during-covid-19-pandemic/>

<sup>14</sup> *United States v. Robertson*, 946 F.3d 1168 (10th Cir. 2020)

part rely on witness testimony, will not have the opportunity to evaluate the witness fully. While some jurisdictions allow witnesses to take off their mask during testimony, some courts have stuck with the restriction. In several criminal cases, attorneys have argued masked witnesses violate the defendant's 6<sup>th</sup> and 14<sup>th</sup> Amendment rights.

### **Does a witness wearing a mask violate the 6<sup>th</sup> and 14<sup>th</sup> amendment rights of the defendant?**

The 6<sup>th</sup> Amendment grants defendants the right to view and assess the credibility of witnesses against them. Additionally, the 14<sup>th</sup> Amendment presents a due process issue because the jury is also blocked from judging the witnesses' facial expressions. While this is a more pressing issue in criminal cases, civil courts have commented on the importance of viewing a witness's face. In the beginning stages of the pandemic an employment case, *Joffe v. King & Spalding LLP*, challenged the court to allow in-person testimonies of witnesses.<sup>15</sup> Though the court thought it was too soon to allow in-person contact, it did state "mask wearing and distancing significantly diminish the value of in-person testimony...If witnesses were to wear masks during depositions Joffe would lose the ability to approximate the trial experience."<sup>16</sup>

Many criminal cases echo the importance of the ability to confront witnesses by viewing their facial reactions. However, some courts, such as the Georgia District court, have held being able to see a witnesses' nose and mouth is not essential to test the reliability of the testimony.<sup>17</sup> Attorneys, clients, and juries under these rulings must rely on body language and eye contact.

### **Conclusion:**

In conclusion, though states across the country are beginning to fully re-open, Covid procedures safety procedures are likely to remain in place for some time. Though jurisdictions are significantly split on which social distancing measures are necessary for trial, many still require prospective jurors to wear a mask during voir dire. All participants, including witnesses, wear masks during the trial

These restrictions present new challenges for attorneys who are accustomed to using facial expressions to gauge the interests of prospective jurors, evaluate testifying witnesses, and establish a connection with the jury and the judge. While some attorneys have established new techniques to work around the mask mandate, many have challenged the requirement. Many argue masked witnesses violate the defendant's 6<sup>th</sup> and 14<sup>th</sup> amendment rights to confront the witness and have a jury that can confront the witness. While courts in different jurisdictions have ruled differently on this issue, these cases will likely continue to arise as we transition out of the Covid era.

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<sup>15</sup> *Joffe v. King & Spalding LLP*, 17-CV-3392 (VEC) (S.D.N.Y., 2020)

<sup>16</sup> *Id.* at 11

<sup>17</sup> *United States v. Crittenden*, (M.D. Ga., 2020)