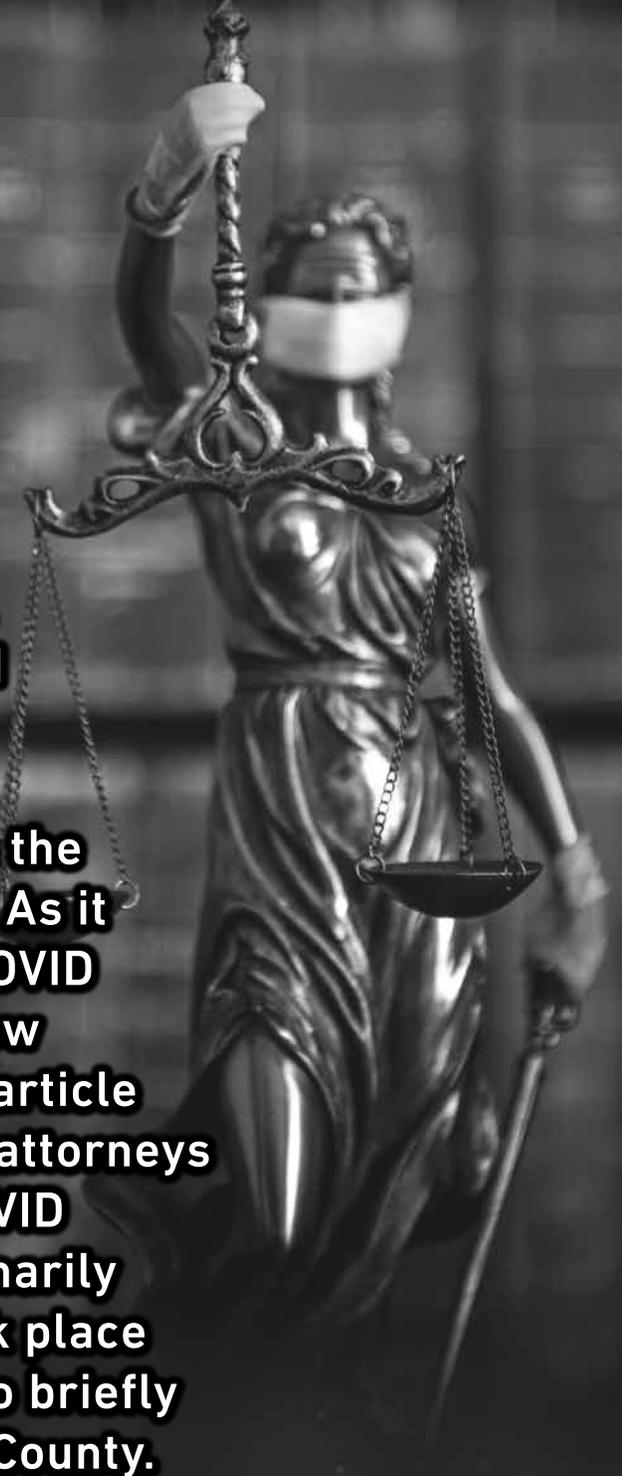


MEDICAL MALPRACTICE TRIALS IN THE **COVID ERA**

BY CHRISTINA R. HEDGES

A Tale of Two Courtrooms

As a result of the COVID 19 pandemic, on March 15, 2020, the South Carolina Supreme Court postponed all jury trials in South Carolina. Although some proceedings resumed on May 4, 2020, courts remained essentially shuttered until September 21st, when normal scheduling resumed. Upon resuming, however, courts no longer operated in the manner in which we are accustomed. As it has in so many aspects of our lives, COVID 19 created a new normal guided by new protocols and social distancing. This article intends to provide several takeaways attorneys can use to prepare for trials in the COVID 19 era. While this article focuses primarily on the first COVID-era trial, which took place in Spartanburg in October 2020, it also briefly touches on a subsequent trial in York County.



Spartanburg, South Carolina

The first medical malpractice trial (and to the best of my knowledge, the first complex jury trial since COVID began) convened the week of October 19, 2020, in Spartanburg. Ashley White Creech and Jordan Calloway, both of McGowan, Hood & Felder, represented the Plaintiff and Ashby Davis and Mitchell Appleby, both of Davis & Snyder, represented the Defendant. This was actually the second time the case had been tried. The first trial ended in a directed verdict (subsequently overturned) in 2015. The trial ultimately resulted in a defense verdict, but Plaintiff's counsel learned valuable lessons that will surely lead to trial victories in the future. Among other things, they had the opportunity to try a very tough liability case to verdict and do so under unprecedented conditions.

Pre-trial

In the COVID era, pre-trial tasks were required to be done earlier than normal. For instance, the trial judge's deadlines required everyone to submit all of the typical pleadings (motions, briefs, exhibits, etc.) well in advance of trial. The Honorable Judge Grace Knie oversaw this trial and required court exhibits, demonstrative exhibits, and a set of joint exhibits to be presented a week before trial. Also, all motions and briefs were filed and heard two-weeks in advance. Because Judge Knie sought to limit movement around the

courtroom, she also ordered the parties to make as many exhibits as possible digital – a process that also took a considerable amount of time.

Infection Control

Infection control was the main consideration. Hand sanitizer, gloves, and masks were required. Court security took everyone's temperature every morning before they were allowed to enter the building. A plexiglass barrier surrounded each juror's seat. Court staff sanitized the courtroom daily and wiped down the witness stand after each witness. Attorneys were permitted to give opening statements and closing arguments without a mask. Still, social distancing was strictly enforced, and the judge required the attorneys to stand at a podium six feet away from the jury. Masks could be removed when attorneys spoke from their table but were otherwise required for everyone at all times.

Jury Selection

Jury selection followed a completely different process than in the past. The jury pool consisted of 500 individuals. To maintain social distancing, jury qualification and selection took place at the Spartanburg Regional Auditorium. The judge, both parties, and court staff sat in the auditorium pit while the pool was spread out throughout the auditorium. Before jury selection, both parties agreed to a universal COVID questionnaire.

Because the court administration was concerned about jurors wanting to leave or possibly getting sick, voir dire was conducted on the entire qualified jury panel – a process that took almost two entire days. The extended time needed for jury selection required rescheduling experts, witnesses, and the timing of the trial itself. Twelve jurors and four alternates were eventually chosen.

Technology

Technology varies greatly in courthouses across South Carolina. Some are cutting edge, and others have hardly anything beyond maybe an Elmo. One of my chief responsibilities in this trial was to manage the audio-visual elements. This required coordination with the onsite IT staff and attorneys to ensure they could present their

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cases digitally. Though the Spartanburg courthouse recently upgraded its technology, there were still some difficulties. The plexiglass surrounding jurors made it difficult for some to see existing monitors, so I provided a 60-inch TV on wheels that could be rolled around the courtroom. Joint exhibits and all demonstrative exhibits were exchanged and agreed on before trial. I organized these electronically and created a comprehensive index, which I provided to each attorney, the Judge, and the court reporter. During each attorney's examination of a witness, the attorney would call out the exhibit's identifying information, including the Bates number, to ensure a clean trial transcript. Pre-trial agreements on the joint exhibits greatly reduced the number of evidentiary objections during trial. This was a tremendous time-saver. Since there were numerous exhibits, I provided a dropbox link for the joint exhibits to assist the court reporter.

Trial

There was a mix of in-person and virtual witness testimony. Based on security concerns, the South Carolina Court Administration generally requires the Cisco WebEx platform but using it at trial resulted in multiple audio feedback issues. The problems were so significant; the court ultimately allowed us to use Zoom for virtual testimony. We believe the WebEx feedback was mainly due to multiple microphones being on the same circuit in the same room. This

is generally true for all virtual platforms but less on some than others. Zoom worked so well that the court reporter commented it was as if the witnesses were in the courtroom live.

Partially because this case was being retried, Judge Knie pushed for a streamlined trial and required the attorneys to work through most disagreements. The court started at 9:00 a.m. daily, with the jury being dismissed each day around 5:00 p.m. The attorneys and judge stayed later on certain days working through jury charges or other procedural issues. The trial itself lasted a week.

Preparation

Early preparation and thorough organization are critical for trials in the COVID era. Each attorney's comfort level with technology played into presenting their case or questioning the witnesses. Attorneys who are uncomfortable with digital presentations may find it difficult to mount an effective case, especially if opposing counsel is digitally competent. It is also necessary to be prepared to compensate for limitations in the court's technology. For instance, having access to widescreen monitors on wheels, 200-foot HDMI cables, multiple individual monitors, WolfVison projectors, etc., is necessary. Attorneys should also take the time to ensure witnesses presented virtually are familiar with the virtual platform to project confidence and expertise. Using a virtual

platform to present witnesses also creates opportunities for rebuttal testimony by experts that otherwise would not have been available in the past.

Benefits

Some benefits of these trial modifications were readily apparent. For instance, there was far less for the attorneys to physically carry to trial as most of the documents and exhibits were digitized. Large notebooks, whiteboards, etc., were not required. Pre-trial agreements between attorneys and the joint presentation of digitized exhibits resulted in a shorter trial, which, in turn, reduced costs and lessened jury fatigue.

Weaknesses

Obvious weaknesses include a more limited jury pool. The number of COVID exemptions can alter the jury pool age bracket and reduce the number of respondents over 65. The jury's continual wearing of masks also works as a barrier to gauging its reaction to trial presentations. This increases the guesswork for both sides in determining how their arguments and/or presentations are being perceived. While it is difficult for both sides, this difficulty may be mitigated somewhat for an experienced litigator who has more experience reading juries.

York, South Carolina

On November 9, 2020, less than three weeks after the Spartanburg trial, plaintiffs' counsel John Kassel and Theile McVey of Kassel and McVey attempted to bring a case to trial in York County before The Honorable Judge William McKinnon. This case was defended by Marian Scalise and Lydia McGee of Richardson Plowden. I was once again asked to assist with the audio-visual and digital aspects of the case. Due to inadequacies in working audio-visual capabilities at the Historic York County courthouse, the trial took place at the Moss Justice Center. The attorneys provided the exhibits digitally and agreed to a joint set similar to the Spartanburg trial. I then created a comprehensive index for all parties and the Judge.

Pre-trial Motions in York were made as in the past. Notably, Plaintiffs filed a motion for

attorney voir dire. Judge McKinnon granted the motion with a time limit of 30 minutes per side.

Jury selection was conducted at the historic courthouse, with each juror using numbered paddles to indicate their juror number. (I personally found this helpful since I can never hear the juror number when called out normally). The plan was to seat 12 jurors with 4 alternates. The court summoned 200 jurors, and on the day of jury selection, 43 jurors appeared. After qualification, the pool was reduced to 31 potential jurors. The first selection question dealt with Defendant's practice and patients or immediate family of patients. The court struck an additional 9 potential jurors. This left an inadequate number of jurors to allow the attorneys to use their four peremptory strikes. As neither side agreed to waive their strikes, the court was forced to declare a mistrial. The York experience's biggest takeaway was that clerks need to increase

the venire to prevent situations like this from happening.

In both cases, the necessity of digital presentation was apparent. Trial teams would be well-served to streamline their cases and prepare digital exhibits as much as possible as the case is being worked up. Teams should also ensure anyone giving testimony via Zoom or other virtual platforms is familiar with the program and how to present exhibits. Attorneys should work to increase their comfort level using virtual platforms for direct or cross-examination of witnesses. I cannot stress enough the importance of having independent resources to handle the case's audio-visual aspects. Eliminating the need to handle the audio-visual aspects allows the attorneys to focus on the trial itself rather than the technology.

This new era will affect trials for a long time and will likely provoke changes that outlast the concern over COVID itself. Be prepared.



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