



# The in-person jury trial during the pandemic: one lawyer's experience

In-person trials during COVID may be the right course for cases of low to medium value

By JOHN ROACH

In November 2020, my co-counsel Daniel Rossi and I completed the first in-person civil jury trial in San Francisco since March of 2020. This article discusses the facts and challenges of the case, the long and winding road toward trial, picking a jury in a COVID trial, and provides a summary of the trial and its highlight involving a broken promise by

the defense; the article concludes by offering some thoughts on whether to proceed with a trial during the pandemic.

## The case

The case, *Garcia v. Lim*, was a personal injury case involving a rear-end collision with a back injury. The impact was moderate. The jury rendered a verdict in the amount of \$100,000 for the plaintiff. We obtained an additional \$20,451.00 in prevailing party costs.

The day after the collision, Plaintiff was referred to a chiropractor by his lawyer. Plaintiff returned to work as a painter three weeks following the collision. Plaintiff treated with the chiropractor for five months for 30 sessions. There were two large gaps in treatment. The chiropractor did not diagnose lumbar radiculopathy or document leg pain. An MRI was ordered, showing degenerative changes and a small bulge at L5-S1. At discharge from



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the chiropractor, plaintiff stated he had no pain that week.

A month after his discharge from the chiropractor, plaintiff was referred by his lawyer to pain management doctor John Hau, M.D., who diagnosed lumbar radiculopathy and recommended an epidural injection at L5-S1. The injection provided relief, and plaintiff had two subsequent epidural injections on a lien. Plaintiff was then referred to Kenneth Light, M.D., for a consultation regarding surgery. Dr. Light recommended a disc replacement surgery at L5-S1.

Defendant admitted 100% liability. Defense expert Dimitry Kondrashov, M.D., testified that Plaintiff suffered a lumbar strain and that only twelve chiropractic visits were related to the injuries from the collision. William Hoddick, M.D., testified that there was no injury shown on the MRI. Defendant retained Benjamin Ewers, Ph.D. as accident reconstruction and biomechanical expert, but decided to not call him to the stand at the last minute. Ewers's opinion would have been that the forces in the collision were the same as walking.

This was a challenging case. The biggest problem was that our client had a past felony conviction that the judge allowed to come into evidence. Another challenge was that Plaintiff's MRI did not show nerve root impingement. Dr. Light's opinion was that there was a microscopic tear of the fibers in the annulus fibrosis at L5-S1, causing referred pain. Another challenge was that our plaintiff testified in Spanish through an interpreter.

The defense wanted to base their entire case on attacking the plaintiff's character and credibility. We fought many battles in motions in limine and were able to successfully keep out a subsequent DUI collision as well as his previous DUIs and other criminal acts.

### Procedural history

Our original trial date was May 26, 2020. After the courts closed and all civil trials were suspended in March, I

associated in to assist Dan Rossi with the jury trial. The parties stipulated to continue the trial to September. We got a September 28, 2020, trial date. Thanks to remote depositions and Zoom, the parties were able to prepare for trial and be ready for the September trial date. Opposing counsel was diligent in working with us to get all the necessary discovery done. With that said, State Farm's attorneys fought us on every single issue, big or small.

We attended an MSC on September 15. The parties were far apart, with the insurance defense lawyers offering nuisance value on a case where the plaintiff had a serious low back injury. Before trial, we had another two MSCs.

We showed up ready for trial on September 28, 2020, in person in department 206 for assignment to a trial judge. The Honorable Judge Wong assured us that he would get us a trial judge and told us to return the following week on October 5, 2020, at 1:30 p.m. for assignment. On October 7, the Court told us to be on standby for a telephone call assigning us to a trial judge. We got a call on October 9 assigning us to Russel Roeca, who had just been assigned to the bench and took his oath in late September. This was Judge Roeca's first trial as a judge.

It was new communicating with the Court and trial judge via e-mail and Zoom so much. One advantage that came of this was the flexibility: I was able to submit supplemental briefing for the motions in limine before the hearing. There were multiple motions in limine that could have made or broken our case. The judge conducted the motions in limine hearing via Zoom.

### Jury selection

The judge instructed the parties to meet and confer on questions to add to the Court's Questionnaire. It was a long questionnaire with most of Plaintiff's questions ending up in the final version. The Court sent electronic questionnaires to 160 potential jurors.

My understanding is that the actual date of the trial depended on when the Court's limited technological resources were available to the Civil trial department. The Court used technology that allowed it to remotely conduct jury hardships, which for us was available on November 5 and 6. Every juror requesting a hardship was excused. Hardships were conducted by the trial judge outside of the presence of the attorneys. We were left with 143 jurors willing to serve after hardships. This was a surprise and an indication to me that the jurors' attitude was that they were willing to serve and trusted that the Court could keep them safe.

We received completed questionnaires on November 3, which gave us almost a full week to review the responses. Most of the questionnaires were returned in electronic format, with only a handful handwritten.

On November 9, voir dire commenced. Dan Rossi handled voir dire. We had prepared by doing a mock voir dire with Claire Plotkin of yournextjury.com. Mr. Rossi did an excellent job. Working with Claire was extremely helpful, and I highly recommend mock voir dire sessions via Zoom.

Roughly 40 jurors were brought into the jury assembly room for questioning by the Court and the attorneys with another 20 or so in a large courtroom watching via Zoom. Each seat had a number and was at least six feet from the next seat. After a day and a half, 12 jurors and four alternates were selected. The Court granted five out of six of Plaintiff's cause challenges. We used five peremptory challenges.

### The trial

The judge and Court did an amazing job of assuring the jurors, parties and witnesses that safety came first. The Court observed strict social distancing, and everyone wore masks the entire time.

The jurors were great. They showed up every day ready and willing to serve. The safety protocols put in place by the



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Court assured the jurors that they were safe, despite being a large group indoors. To our knowledge, no juror was exposed to the virus during our trial.

In San Francisco there is only one courtroom that can accommodate 16 jurors being six feet apart. Each juror's seat was designated by a number. Three jurors were in the box of 12, and 13 were spread throughout the courtroom gallery. I used a large screen for the PowerPoint. We positioned the screen where all the jurors could see it.

All witnesses except one appeared live. One witness appeared via Zoom during the defendant's case, and the Court was able to provide a TV screen for this witness. There was a plexiglass screen at the witness box, and the judge instructed each witness to wipe down the exhibit binder after testifying. The Court was closed to the public to ensure adequate social distancing.

While it is not ideal to wear a mask while speaking in court, I analogize it to going to the grocery store with a mask. The first time it feels weird, but after a while you forget you're wearing one.

We asked the jury to award between \$1.1 million and \$1.7 million. The defense's number was \$25,000. Some jurors were with us, and some were with the defense. The jurors compromised and gave Plaintiff all his past medical expenses (\$27,000), \$38,000 in future medical expenses, \$25,000 in past non-economic damages, and \$10,000 in future non-economic damages. While we were hoping for a larger amount in non-economic damages, the verdict was enough to put some money in Plaintiff's pocket before Christmas.

### Highlight of the trial

Our client worked as a chemical compound mixer, putting buckets of material into a large vat for mixing beauty products, soaps, and hand sanitizer. The defense had deposed one of plaintiff's supervisors, who said that he was unaware of Plaintiff

ever complaining of back or leg pain at work. Defense attorney Philip Andersen made a promise in opening statement that not a single supervisor of the Plaintiff would testify that he ever complained of back pain while at work. This turned out to be a promise the Defendant could not keep.

During the trial, Plaintiff's immediate supervisor, Mr. Merida, contacted us. He told us in Spanish that he had been contacted by an investigator working against our client. The investigator visited Mr. Merida's house three times. Mr. Merida's family started to question what was going on. Mr. Merida finally called the investigator to avoid further visits. The investigator asked if plaintiff ever complained of pain at work. Mr. Merida told him that they would spend the entire day together, and that the plaintiff often complained of back pain and leg pain. Mr. Merida told the investigator that sometimes plaintiff left work early due to pain. Mr. Merida knew about plaintiff's back injury. Mr. Merida told all of this to the investigator.

### False declaration prepared

After this call, defendant's investigator, Mr. Pawski, left a declaration at Mr. Merida's house. It stated that Mr. Merida knew nothing about plaintiff's injury. It stated plaintiff never left work early due to pain. This was all false. Sometimes you get lucky in trial. The declaration had a proof of service with Dan Rossi's contact information. Mr. Merida contacted Mr. Rossi, and we were able to meet with Mr. Merida and encourage him to tell his truth to the jury. Reluctant at first, Mr. Merida became our star witness.

### Direct examination of Mr. Merida

**Q.** Was there anything different in the document that Mr. Pawski gave you versus what you told him on the telephone?  
**A.** Yes, there is something different.  
**Q.** Tell us what the main difference is.

**A.** That I didn't have any knowledge of the accident. And I told him that I did have knowledge of the accident.

**Q.** Did you sign that declaration under penalty of perjury?

**A.** No.

**Q.** Why not?

**A.** I can't sign something that I didn't say.

**Q.** Let me ask you this. Did you ever feel pressured to lie?

**A.** Since they were – they were giving me those papers, asking me to sign them, I did feel pressure, because I didn't know quite what to do.

**Q.** Now, if someone stood up here two days ago and told this jury that Kelman Garcia's supervisor never observed Mr. Garcia having a problem with his back at work that would not be true, would it?

**MR. ANDERSEN:** Objection, your Honor. Argumentative. Calls for speculation. Incomplete hypothetical.

**BY MR. ROACH:**

**Q.** It's not true, is it?

**THE COURT:** I'm going to overrule the objection. But you don't need – keep it down.

**MR. ROACH:** I want to make sure everyone can hear me.

**THE COURT:** They can hear you.

**THE WITNESS:** It is not true.

**BY MR. ROACH:**

**Q.** Now, is that document I handed you, labeled Plaintiff's Exhibit 39, is that a true and correct copy of the declaration Mr. Pawski left at your house for you to sign?

**A.** Yes.

**MR. ROACH:** Your Honor, Plaintiff would move to introduce Plaintiff's Exhibit Number 39 into evidence.

**MR. ANDERSEN:** Your Honor, no objection. We'll be using this in our case too.

**THE COURT:** All right. It shall be admitted, Exhibit 39.

(Exhibit 39 was received into evidence.)

**THE WITNESS:** May I speak?

**BY MR. ROACH:**

**Q.** Yes.

**THE COURT:** For the record, it's a photocopy of a photograph of a declaration



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of Harmin Miguel Merida Grijalva, unsigned.

Anything further, Counsel?

**MR. ROACH:** Yeah. I thought Mr. Merida wanted to say something further, but I do have further questions, your Honor.

**MR. ANDERSEN:** Objection. Calls for a narrative. There's been no question pending.

**THE COURT:** Why don't you ask another question?

**BY MR. ROACH:**

**Q.** Mr. Merida, have we spoken before today?

**A.** No. Today?

**Q.** Before today.

**A.** Oh, yeah. Yes.

**Q.** Did you feel any pressure from me to say anything other than the truth, the whole truth and nothing but the truth?

**A.** He just told me to tell the truth.

**Q.** After they presented that false declaration for you to sign, would you believe anything that these people say?

**MR. ANDERSEN:** Objection, your Honor. That's argumentative.

**THE COURT:** Sustained.

**MR. ROACH:** Withdrawn.

No more further questions."

The defense never called their investigator, Mr. Pawski, to the stand.

### Thoughts on COVID trials

Should you do a jury trial during COVID? In this case, it made sense. Our

alternative was to walk away with nothing. We were able to outwork the defense, and the defense was noticeably weaker working remotely and not at full capacity. The insurance-defense lawyers are less able to adapt and do things themselves. Their Exhibit Binder was missing exhibits and very sloppy. The jurors noticed.

In a catastrophic injury case, I would think twice about proceeding with trial with masks and social distancing. Some recent studies show that the jurors who are willing to serve with masks in the height of the pandemic are inclined to come back with smaller jury verdicts. In a pandemic trial, the jurors do not go to lunch together because the cafeteria is closed, and it is difficult to find a place to eat. Consequently, there is less of an opportunity for the jurors to come together and form a community. The judge orders them to remain six feet apart at all times. They lose the opportunity to socialize and talk. You don't get to see a group forming where you can anticipate who the leader is and who will be the foreperson.

COVID trials are most important for preference cases. It would be nice to have an option to do a remote Zoom trial for preference cases. Elise Sanguinetti and Jamie Goldstein recently won a seven-figure verdict in Alameda in a Zoom trial.

There is increased risk of a mistrial in a live COVID trial. Jurors can simply tell the Court that they believe they have been exposed to the virus, which would

almost certainly trigger that juror getting excused. It appears to be a get-out-of-jail-free card for a reluctant juror. Matt Price of Orange County had a jury trial in November in which a mistrial was declared after two jurors were exposed to the virus in separate events.

If you have a case where the defense has taken a ridiculous position and it is not a high-value case, I encourage you to roll up your sleeves and do a COVID trial. In a catastrophic-injury case, my advice is to wait until things open up and we have normal jury trials again because your client gets only one shot at a full cup of justice.

*John J. Roach has experience pursuing injury claims against many major insurance companies in Northern California. He opened his own practice in 2015 and has since tried four cases to verdict and completed three binding arbitrations. When not practicing law, Mr. Roach enjoys spending time with his wife and two daughters.*



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