

## Focus | Appellate Law/Trial Skills

# Masks Hide More Than Faces During Trial

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Hopefully, someday soon, attorneys, judges, and jurors will again find themselves in a courthouse together. Everybody benefits when jurors are unhindered in their ability to judge the credibility of the parties. While we collectively and fervently hope for this, it is highly unlikely the next year will see many jury trials without social distancing and masks. Which raises the issue: how will 'masking' affect the jury's view of the parties, lawyers, and witnesses?

First, masks disrupt how we judge credibility. Empirical studies show that emotional expressions are the most important factor in evaluating a witness's credibility. In judging a person's character, we all take cues from the

myriad expressions of the face, including twitches, smirks, smiles, and frowns. Many of these are hidden by masks. Furthermore, we all know jurors covertly pay a lot of attention to parties and counsel when they are not "on stage." So, even if masking is alleviated by using a plexiglass witness stand, there is a lot that will continue to be missed.

Studies show wearing a mask may harm trustworthiness ratings, as the mere act of concealing expressions can be attributed as deceitful. While many argue this (or any) negative effect would be felt equally by all sides, we can all think of cases where a party's story is largely verbal and based on his credibility. In these cases, the burden of masking has an unequal effect.

Second, communication is harder behind a mask. From the obvious issue

of difficulty with diction, muffled words, the lack of lip-reading cues, and volume, masks also obscure nonverbal cues.

Finally, masks affect bonding. Jurors often socially bond with witnesses through mirroring their expressions, but if they cannot see witnesses' faces, they have less to mirror and synchrony is diminished.

In order to keep trials up and running in courtrooms, masks are a necessity; however, we do have some practical tips to lessen their potential negative impact:

**1. When possible, clear face shields should be employed during voir dire.** This is usually only feasible for the speakers. If you are the lawyer asking questions, ask the judge for permission to use a face shield while asking questions from a safe distance. It helps your communication, as well as bonding (more on that later). Make sure you explain to the panel that you were given permission to use the shield during questioning, so they do not interpret it as a lack of care or a sense that you're "above" the rules. If venire members are given both masks and shields, ask the judge if they may be permitted to remove their masks while they answer questions so you can understand them better and get a better view of their faces.

**2. Use large hand gestures while speaking.** Also, ask your panel to show (not just say) their responses, such as "raise your hand, if" or "hold up one finger for X and two fingers for Y." Even, "stand up if..." or "point to..." can be helpful. Be creative. Do not let the panel disengage behind their

masks, expressionless.

**3. Communicate with your team, but do not whisper.** If at all possible, use electronic communication when you are in front of the jury. Whispering in front of the jury is clunky at best.

**4. Microphones are very helpful—**unless it makes you sound like part Vader. If you are offered a mic, you will likely want to accept it, but test it first.

**5. Be ready for bench trials.** Your judge has hopefully found a system that works to safely conduct bench trials. If she hasn't (yet), raise the issue.

All of this leads to the elephant in the room: Should you agree to a virtual trial? Only you and your clients can answer that question. We believe virtual proceedings present their own downsides. Jurors pay less attention, are easily distracted, and bond less than in masked live proceedings. One major advantage of online trials, however, is that all parties have the ability to closely examine others' facial expressions to evaluate credibility. Consider your case and how important cues and credibility will be to its success. If you believe witness or party credibility is at the crux of the matter, you might opt for a virtual trial. Of course, credibility is an important factor in any trial, but if you decide your case can be won in an in-person trial, keep in mind our tips for how to bypass drawbacks presented by masks and distance.

Good luck.

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## DVAP'S Finest



### ISREAL MILLER

Isreal Miller is Of Counsel with Gray Reed & McGraw LLP.

#### How did you first get involved in pro bono?

I first got involved in pro bono work when I was a law student at Texas Tech. I did initial intake application interviews at legal clinics for Legal Aid of NorthWest Texas at St. John's United Methodist Church in Lubbock.

#### Describe your most compelling pro bono case.

The most compelling pro bono case I handled was one in which I prepared an estate plan for a young grandmother who had custody of her grandson. She was HIV positive and wanted to make sure she provided for her grandson when she died. Her daughter, the boy's mother, struggled with drug addiction and had abandoned him. The grandmother wanted to make sure that he not only would be cared for but that he would receive and understand the meaning of some prize family heirlooms. She lived on government benefits and yet every time we met, she insisted on buying me a cup of coffee at Starbucks.

#### Why do you do pro bono?

I do pro bono work because I care.

#### What impact has pro bono service had on your career?

Pro bono work has introduced me to a lot of amazing lawyers. No one was ever too busy to help me on a pro bono case.

#### What is the most unexpected benefit you have received from doing pro bono?

The most unexpected benefit I received from doing pro bono work was a bag of persimmons from my client's tree.

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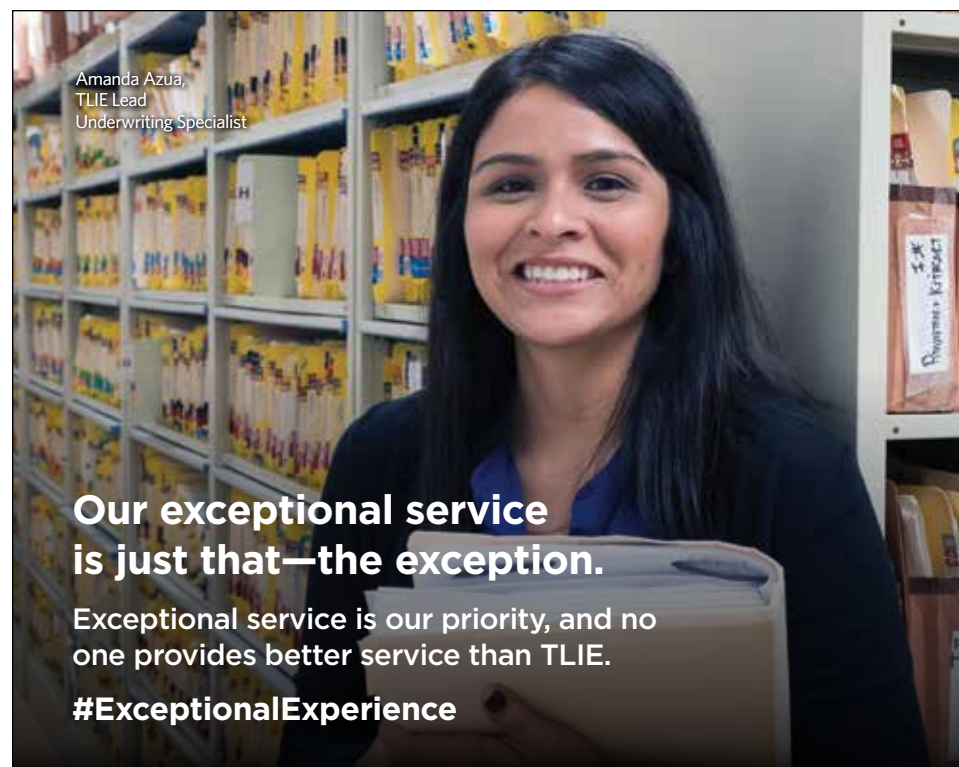
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