

## A Case Study in Navigating Shifting COVID Courtroom Protocols at Trial During the Delta Variant Surge

Orange County Superior Court mandated that lawyers and jurors wear masks just as a Latham & Watkins team was set to put their defense on in a novel, multiweek securities case.

By [Ross Todd](#)  
August 3, 2021

As the courts continue to cope with the pandemic and the current delta variant surge, flexibility is the watchword of the moment for any trial lawyer.

That's my takeaway from a conversation I had Monday with **Michele Johnson**, the global chair of the litigation and trial department at **Latham & Watkins**, and her partner **Peter Wald**. The pair scored a defense verdict last week for client NextGen Healthcare Inc. in Orange County, California, in an unusual state court securities case the company was facing from former board member Ahmed Hussein. You can read the details about Hussein's novel \$400 million "holder" claim against the company, which was formerly known as Quality Systems, over at the "[On the Case](#)" column my friend and former colleague Alison Frankel writes for Reuters.

What jumped out to me about the case, aside from the result, was the loop that was thrown at the Latham team mid-trial: Johnson, Wald and their team, which also included partners **Nicholas Siciliano** and **Andrew Gray**, were preparing to put on defense witness just as the court announced new guidelines forcing all lawyers and jurors to



Credit: Shutterstock

wear facemasks while in court. Although jurors had been spaced out in the jury box and the gallery throughout the prior weeks of trial, the stepped up guidelines, made in response to a surge in the Delta variant, meant that everyone but the witness had to mask up.

Both Johnson and Wald said that they were glad to have had the prior weeks with the jurors before the mask mandate was put into effect.

"We had the advantage of having had interactions with the jurors," Wald said. "We felt like we had relationships with the jurors that we could build on."

After the masks went on, Johnson said she made an extra effort to connect with jurors' eyes. "Being able to read body language and eye contact, I think became of heightened importance," she said.

But both Wald and Johnson said the change was felt more at the personal level, since the lawyers and their team had been able to go maskless prior to the change. "It was kind of warm to begin with in the courtroom. And then you wear those N95 masks all day," Wald said. "When you're examining witnesses or giving closing argument, it all sort of falls away, because you're in the moment." But Wald said when he sat back in his chair at counsel table to take a breath or watched a colleague handle a witness, it occurred to him how uncomfortable the situation was. Wald said he even considered opening his summation by quoting the Grateful Dead: "What a long, strange trip it's been."

But, then again, the Latham team did what they could to make the "trip" a bit shorter. Johnson said the team originally intended to use the entire week to put on their defense but ended up squeezing all the company's witnesses into two days.

"Our judgment was that the jury was putting a very high premium on using their time wisely and

efficiently," Johnson said. "So, we took a second and third and fourth looked at our outline and asked 'What do we really need?'"

Johnson said jurors would appreciate that approach at any time, but it seemed to go over especially well "here when we were all sort of living through this unique circumstance together."

The Latham lawyers say a key moment for the defense came prior to the changes, when the plaintiff Hussein took the stand. Johnson said the judge had jurors leave the courtroom three times during Hussein's testimony because he was "melting down" on the stand. "That, I think, wouldn't have changed if the mask mandate had come through earlier, because the witnesses themselves did not have to wear masks," she said.

Here's one last practice tip from Johnson: If you're put in a similar situation, make sure to use a mask you're accustomed to wearing. Johnson initially went with a mask that matched one that Wald was wearing, but found it uncomfortable. She changed into one she was more familiar with before handling a witness.

"You want to be able to predict what's going to happen as much as possible," she said. "So use what you're comfortable with."