



GUIDELINES ON ISSUES TO BE CONSIDERED
WHEN PREPARING FOR AND CONDUCTING
A CIVIL JURY TRIAL DURING THE PANDEMIC

Advocacy in the 21st Century Committee

Approved by the Board of Regents
February 2021

MISSION STATEMENT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.



“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

American College of Trial Lawyers
1300 Dove Street, Suite 150
Newport Beach, California 92660
Telephone: (949) 752-1801
Website: www.actl.com
Email: nationaloffice@actl.com

Copyright © 2021
American College of Trial Lawyers
All Rights Reserved.

AMERICAN COLLEGE OF TRIAL LAWYERS

CHANCELLOR-FOUNDER

Hon. Emil Gumpert
(1895-1982)

OFFICERS

RODNEY ACKER, *President*
MICHAEL L. O'DONNELL, *President-Elect*
SUSAN J. HARRIMAN, *Treasurer*
WILLIAM J. MURPHY, *Secretary*
DOUGLAS R. YOUNG, *Immediate Past President*

BOARD OF REGENTS

PETER AKMAJIAN Tucson, Arizona	LARRY H. KRANTZ New York, New York
SUSAN S. BREWER Morgantown, West Virginia	GREGORY M. LEDERER Cedar Rapids, Iowa
JOE R. CALDWELL, JR. Washington, District of Columbia	MARTIN F. MURPHY Boston, Massachusetts
JOHN A. DAY Brentwood, Tennessee	LYN P. PRUITT Little Rock, Arkansas
RICHARD H. DEANE, JR. Atlanta, Georgia	CATHERINE M. RECKER Philadelphia, Pennsylvania
MONA T. DUCKETT, Q.C. Edmonton, Alberta	MICHAEL J. SHEPARD San Francisco, California
DAN S. FOLLUO Tulsa, Oklahoma	JEFFREY E. STONE Chicago, Illinois
SANDRA A. FORBES Toronto, Ontario	

DENNIS J. MAGGI, CAE, Executive Director

AMERICAN COLLEGE OF TRIAL LAWYERS

PAST PRESIDENTS

- 1950-51 EMIL GUMPERT*
Los Angeles, California
- 1951-52 C. RAY ROBINSON*
Merced, California
- 1952-53 CODY FOWLER*
Tampa, Florida
- 1953-54 E. D. BRONSON*
San Francisco, California
- 1954-55 CODY FOWLER*
Tampa, Florida
- 1955-56 WAYNE E. STICHTER*
Toledo, Ohio
- 1956-57 JESSE E. NICHOLS*
Oakland, California
- 1957-58 LEWIS C. RYAN*
Syracuse, New York
- 1958-59 ALBERT E. JENNER, JR.*
Chicago, Illinois
- 1959-60 SAMUEL P. SEARS*
Boston, Massachusetts
- 1960-61 LON HOCKER*
Woods Hole, Massachusetts
- 1961-62 LEON JAWORSKI*
Houston, Texas
- 1962-63 GRANT B. COOPER*
Los Angeles, California
- 1963-64 WHITNEY NORTH SEYMOUR*
New York, New York
- 1964-65 BERNARD G. SEGAL*
Philadelphia, Pennsylvania
- 1965-66 EDWARD L. WRIGHT*
Little Rock, Arkansas
- 1966-67 FRANK G. RAICHLE*
Buffalo, New York
- 1967-68 JOSEPH A. BALL*
Long Beach, California
- 1968-69 ROBERT W. MESERVE*
Boston, Massachusetts
- 1969-70 HON. LEWIS F. POWELL, JR.*
Washington, District of Columbia
- 1970-71 BARNABAS F. SEARS*
Chicago, Illinois
- 1971-72 HICKS EPTON*
Wewoka, Oklahoma
- 1972-73 WILLIAM H. MORRISON*
Portland, Oregon
- 1973-74 ROBERT L. CLARE, JR.*
New York, New York
- 1974- AUSTIN W. LEWIS*
New Orleans, Louisiana
- 1975-76 THOMAS E. DEACY, JR.*
Kansas City, Missouri
- 1976-77 SIMON H. RIFKIND*
New York, New York
- 1977-78 KRAFT W. EIDMAN*
Houston, Texas
- 1978-79 MARCUS MATTSON*
Los Angeles, California
- 1979-80 JAMES E. S. BAKER*
Chicago, Illinois
- 1980-81 JOHN C. ELAM*
Columbus, Ohio
- 1981-82 ALSTON JENNINGS*
Little Rock, Arkansas
- 1982-83 LEON SILVERMAN*
New York, New York
- 1983-84 GAEL MAHONY*
Boston, Massachusetts
- 1984-85 GENE W. LAFITTE*
New Orleans, Louisiana
- 1985-86 GRIFFIN B. BELL*
Atlanta, Georgia
- 1986-87 R. HARVEY CHAPPELL, JR.*
Richmond, Virginia
- 1987-88 MORRIS HARRELL*
Dallas, Texas
- 1988-89 PHILIP W. TONE*
Chicago, Illinois
- 1989-90 RALPH I. LANCASTER, JR.*
Portland, Maine
- 1990-91 CHARLES E. HANGER*
San Francisco, California
- 1991-92 ROBERT B. FISKE, JR.
New York, New York
- 1992-93 FULTON HAIGHT*
Santa Monica, California
- 1993-94 FRANK C. JONES*
Atlanta, Georgia
- 1994-95 LIVELY M. WILSON*
Louisville, Kentucky
- 1995-96 CHARLES B. RENFREW*
San Francisco, California
- 1996-97 ANDREW M. COATS
Oklahoma City, Oklahoma
- 1997-98 EDWARD BRODSKY*
New York, New York
- 1998-99 E. OSBORNE AYSCUE, JR.
Charlotte, North Carolina
- 1999-2000 MICHAEL E. MONE*
Boston, Massachusetts
- 2000-2001 EARL J. SILBERT
Washington, District of Columbia
- 2001-2002 STUART D. SHANOR
Roswell, New Mexico
- 2002-2003 WARREN B. LIGHTFOOT
Birmingham, Alabama
- 2003-2004 DAVID W. SCOTT, Q.C.*
Ottawa, Ontario
- 2004-2005 JAMES W. MORRIS, III*
Richmond, Virginia
- 2005-2006 MICHAEL A. COOPER*
New York, New York
- 2006-2007 DAVID J. BECK
Houston, Texas
- 2007-2008 MIKEL L. STOUT
Wichita, Kansas
- 2008-2009 JOHN J. (JACK) DALTON
Atlanta, Georgia
- 2009-2010 JOAN A. LUKEY
Boston, Massachusetts
- 2010-2011 GREGORY P. JOSEPH
New York, New York
- 2011-2012 THOMAS H. TONGUE
Portland, Oregon
- 2012-2013 CHILTON DAVIS VARNER
Atlanta, Georgia
- 2013-2014 ROBERT L. BYMAN
Chicago, Illinois
- 2014-2015 FRANCIS M. WIKSTROM
Salt Lake City, Utah
- 2015-2016 MICHAEL W. SMITH
Richmond, Virginia
- 2016-2017 BARTHOLOMEW J. DALTON
Wilmington, Delaware
- 2017-2018 SAMUEL H. FRANKLIN
Birmingham, Alabama
- 2018-2019 JEFFREY S. LEON, LSM
Toronto, Ontario
- 2019-2020 DOUGLAS R. YOUNG
San Francisco, California

* Deceased

ADVOCACY IN THE 21ST CENTURY COMMITTEE

CHAIR

JOHN A. DAY
Brentwood, TN

VICE CHAIR

ROSLYN J. LEVINE, Q.C.
TORONTO, ON

MEMBERS

JAMES O. BROCCOLETTI
NORFOLK, VA

JOE R. CALDWELL, JR.
WASHINGTON, DC

MONA T. DUCKETT, Q.C.
EDMONTON, AB

SANDRA A. FORBES
TORONTO, ON

NANCY GERTNER
CAMBRIDGE, MA

BRIAN J. GOVER
TORONTO, ON

JEFFERSON M. GRAY
BALTIMORE, MD

MELINDA HAAG
SAN FRANCISCO, CA

THE HON. MR. JUSTICE DAVID C. HARRIS
VANCOUVER, BC

NAN M. HORVAT
DES MOINES, IA

HON. BARBARA M. G. LYNN
DALLAS, TX

THE HON. MR. JUSTICE FRANK MARROCCO
TORONTO, ON

SHARON L. MCCARTHY
NEW YORK, NY

KATHRYN N. NESTER
SAN DIEGO, CA

CLAIRE J. RAUSCHER
CHARLOTTE, NC

CATHERINE M. RECKER
PHILADELPHIA, PA

LOU ANNA RED CORN
LEXINGTON, KY

PAUL MARK SANDLER
BALTIMORE, MD

LEON F. SPIES
IOWA CITY, IA

SYLVIA H. WALBOLT
TAMPA, FL

HON. JACK ZOUHARY
TOLEDO, OH

GUIDELINES ON ISSUES TO BE CONSIDERED WHEN PREPARING FOR AND CONDUCTING A CIVIL JURY TRIAL DURING THE PANDEMIC

The COVID-19 pandemic has largely prevented jury trials across the United States and Canada since mid-March 2020. Although many of our countries' businesses and institutions are re-opening, and vaccine development and distribution plans bring hope, the virus continues to raise legitimate health concerns. Like those who populate them, our justice systems are not immune from the effects of the novel coronavirus.

Even achieving the goal of mass coronavirus vaccinations and true herd immunity to COVID-19 will not necessarily bring an end to concerns about spread of infectious disease. Under the best-case scenario, the coronavirus will be a threat into the Summer of 2021. Second, the virus has heightened our awareness of the spread of infectious disease, meaning one likely consequence of the pandemic is an increased concern about the spread of disease in public places, particularly during the winter months traditionally associated with the flu. Thus, it is reasonably foreseeable that courts will have to address public health concerns more than they have previously, even after the present threat ends.

Likewise, the end of the pandemic will leave us with the challenge of resolving the cases deferred because of the pandemic. To illustrate the point, assume a jurisdiction averaged 500 civil jury trials a year for the past five years. If no jury trials had taken place for fifteen months, the pandemic would have created a backlog of 625 cases. The courts must then take these 625 civil disputes and work them into the resolution of its normal caseload.

Assume further that before the pandemic, the jurisdiction was operating at 80 percent capacity for jury trials (*i.e.*, the jurisdiction could handle another 100 jury trials per year with existing resources). Under those assumptions and absent additional resources,¹ it would take six years and three months to eliminate the backlog caused by the pandemic.² Why? Because under our assumptions, the system can try only 8.33 additional jury trials per month (100 per year). In the same way that only so much fluid can go through a pipe of a given size, only so many jury trials can be tried in a judicial system with today's funding. This admittedly simple example illustrates that the end of the pandemic will not be the end of the problems created by the novel coronavirus.

Many of the issues discussed below do not concern the trial itself but the availability of adequate facilities, personnel, and equipment to safely conduct a civil jury trial. In Canada, those functions are largely carried out by the executive branch of the provincial governments, with varying degrees of input from the judicial branch.

¹ For example, the addition of judges, other court personnel, and courtrooms will increase the capacity of the judicial system to try more jury trials.

² One may argue that the number of civil jury trials that will actually need to be conducted may be less because cases will be resolved by settlement as parties grow tired of waiting for a trial date. Perhaps that will be so. Conversely, however, there may be certain parties who would have otherwise settled cases because of the threat of an upcoming trial date who decided to test their adversary's resolve by deferring settlement. Those cases may be more likely to be tried.

These guidelines should be shared with those responsible for providing adequate facilities, personnel, and equipment, to ensure that trials, including jury trials, can be conducted as safely as reasonably possible.

Courts, trial lawyers and legislators must respond to this challenge and take responsible steps to conduct jury trials safely. Abolishing civil jury trials entirely, as one jurisdiction has proposed, is no answer.

Confronting the risk presented by jury trials in open court during a pandemic is complicated by numerous factors:

- First, the availability of adequate premises to conduct jury trials, and meaningfully reduce the risk of transmission of the coronavirus and to mitigate its spread to trial participants;
- Second, the availability of a sufficient number of appropriately trained personnel to implement a plan designed to reduce the risk of transmission meaningfully;
- Third, the availability of products (plexiglass barriers, face shields, masks, disinfectants, etc.) that can be used to reduce that risk;
- Fourth, the financial resources necessary to procure the facilities, personnel, and available products to help minimize the risks; and
- Finally, there is one other material, complicating factor – no one can design a single, one-size-fits-all plan for jury trials in a state or province, much less an entire nation. Why? Each of the factors stated impacts the decision to conduct a jury trial, or not, and the way such a trial should be conducted, as does the prevalence of the novel coronavirus and the view of its seriousness in the locale of the jury pool and other trial participants.

The precautions taken (at the time of this writing) for a jury trial in California will have to be different from those for a jury trial conducted in Newfoundland. That a low rate of infections occur does not mean that a judge in Newfoundland should assume the coronavirus presents no risk to participants in a jury trial. But it does mean that it is impossible to ignore the increased risk of harm presented by a jury trial in California. Additional measures must be taken in some forums to reduce the risk of viral transmission in a jury trial, as well as potential jurors' fears about coming to the courthouse and participating in a trial and jury deliberations.

The College acknowledges that at the time these guidelines are published, the pandemic is still ongoing. As the pandemic wanes, assumedly due in part to the prevalence of vaccinations, the impact and response to vaccination will raise further questions and issues. These issues will require modified or different protocols and plans for civil jury trials, to eliminate remaining risks. For example, should (or could) the courts require all potential jurors and parties to be vaccinated before the proceeding begins? The College will consider these continually developing issues in additional papers and guidelines in the coming months and years.

In this evolving context, the College urges judges and lawyers to consider the following points when creating a plan for a nonjury trial which includes the use of remote video. The College acknowledges that, given the differences in the civil justice systems between Canada and the United States, not all points discussed are applicable to Canada.

Thus, what follows is a list of factors to consider when determining whether to hold a civil jury trial, and how, during the pandemic.

1. Understand the orders and regulations in the locale where the trial will occur.

Virtually all state, provincial, and local governments, continue to issue orders or regulations that may impact whether and how a trial can be conducted. These orders and regulations often are amended or supplanted as the number of positive coronavirus test results, hospitalization rates, and death rates fluctuate.

Likewise, national, provincial, and state courts have issued orders or directives on court operations during the pandemic.

A court and lawyers preparing for a jury trial should monitor and comply with the applicable orders, regulations and directives.

2. Understand the status of the pandemic in the locale.

As mentioned above, the measures that should be undertaken to conduct a jury trial during the pandemic depend in part on the extent of the threat of contracting the coronavirus. Those responsible for providing adequate facilities should consider local infection and hospitalization rates to determine how serious the threat the coronavirus is in the immediate future.

This is not to suggest that judges and lawyers should undertake the work of epidemiologists or immunologists in determining whether and how to conduct a jury trial. Rather, a review of information on health department websites will give some guidance of the extent of the threat and corresponding severity of the risk.

Health department guidance and other science-based recommendations concerning effective methods of reducing the transmission when groups of people congregate also should be consulted. Their recommendations should be adopted to the extent required or, if not required, reasonably possible, and potential jurors should be advised that such measure will be in place.

3. Consider the alternative methods of conducting a civil jury trial during the pandemic.

The experience of the last twelve months has taught us that some judges are experimenting with alterations to the traditional approach to conducting a civil jury trial, *i.e.* a trial in which all participants are all physically present in the courtroom for the entirety of the trial, other than for jury deliberations. While the traditional jury trial remains the preferred method to resolve disputes to be tried to a jury, different courts are approaching the issues presented by the pandemic in different ways:

Here are the alternative approaches:

(a) Many, and probably most, judges are not conducting civil trials at all. The civil justice system in many locales has ground to a halt, adversely impacting plaintiffs and defendants and creating a backlog that will wreak havoc on the administration of justice long after the pandemic is over.

(b) Some judges are conducting jury trials in the traditional way but using social distancing and sterilization techniques to increase the level of safety for participants and jurors. The number of such trials will ebb and flow depending on severity of the threat in the locale. When those trials occur over several days, there is a risk that one or more trial participants may be in contact with an infected person or become infected themselves, which increases the risk of a mistrial.

(c) Some judges are conducting part or all the jury selection process via remote video and then holding the remainder of the trial in the traditional way. Remote jury selection decreases risk for jurors and trial participants because many people are not present in the courthouse at the same time for in-person jury selection. That said, remote jury selection is still rare and may be a step too far for many judges and lawyers.

(d) Some judges are permitting one or more witnesses to appear at trial via remote video even though most of the trial is held in-person.

(e) Very few judges are trying an entire case – jury selection through jury deliberations – via remote video.

(f) To avoid declaring a mistrial in the event one or more trial participants become ill or exposed to the virus, some judges may convert a traditional trial to a remote video trial. Alternatively, in the event one or more participants become infected with the novel coronavirus, a judge may declare the trial in recess until the immediate threat has expired.

Thus, the “new normal” in the short-term is not a world in which we have a civil jury trial or we do not. Instead, the question today is how we can fairly, safely, and efficiently conduct a civil jury trial, given the issues in the case, the venue, the coronavirus threat in the venue, and the availability of technology to reduce the threat. Because of the backlog of civil jury trials created by the pandemic, this issue will dominate the conversation of court administrators, judges, and lawyers for several years.

4. Determine the availability of a location to qualify the jury pool before conducting jury selection in each case.

Many (but certainly not all) jurisdictions have historically summoned all jurors for a given jury panel to the courthouse to (a) confirm their qualifications to serve as jurors; and (b) educate them on the court system generally and the jury selection process in particular. In some jurisdictions, this call for service may include well over 100 people for a given trial or many more people for multiple trials scheduled to begin that day or during a given week.

The mere act of gathering people to check-in for jury duty creates a risk of transmission of the coronavirus. If physical distancing continues to be necessary, most jurisdictions will not have the capability to continue this court practice because they lack an adequate space in the courthouse to maintain the requisite physical distance between each person.

Here are options various courts utilize to reduce the risk of spreading the coronavirus during the jury selection process:

(a) The use of a pre-jury selection questionnaire to identify jurors who have a valid coronavirus-related reason or other good reason not to serve as a juror at the time. Some jurors are at high risk for Covid-19 infection. Some live with people who are high-risk. Some have young children engaged in remote learning because their school has been closed, making it difficult for them to attend a trial. Some potential jurors may have tested positive for the coronavirus and continue to present a risk to others. Still other questions may readily establish – without dispute or the need for further inquiry – for cause challenges. A pre-jury selection questionnaire allows those who are likely to be excused from service to be identified and released, reducing the number of people who must physically appear for jury selection.

(b) The use of an “app” designed to permit jurors to check-in for jury selection via their cell phone. Use of such an app reduces exposure to the coronavirus while waiting in line for the traditional check-in for jury duty. Jurors uncomfortable with using an app or without the means to use the app can check-in in-person. That said, the use of such an app does not eliminate the need for a room where potential jurors can ultimately gather with appropriate social distancing.

(c) Rather than using a courthouse to gather potential jurors and conduct jury selection, some courts use another venue (perhaps a convention center, National Guard armory, movie theater or local school’s gymnasium). The use of a larger physical location permits social distancing.

(d) Some courts are using questionnaires to reduce the number of potential jurors who must physically attend *voir dire* and then using the largest room in the courthouse (often the jury assembly room) to conduct *voir dire*. Depending on the size of the room, questioning by lawyers may have to occur in two or more stages.

(e) As mentioned above, some judges are now conducting *voir dire* (or the trial itself) via remote video to reduce the coronavirus’s risk of transmission. There are several potential problems with this approach, as discussed below.

5. Determine the availability and suitability of physical location(s) to conduct the trial and jury deliberations.

If the coronavirus threat means that physical distancing is required or recommended in the venue, selecting the location(s) for trial activities becomes challenging. How can physical distancing and cleanliness be always maintained and in all spaces? Risks are presented not only in the jury assembly room and the courtroom, but also in the courthouse hallways or elevator, juror waiting room, during breaks and hearings outside the jury’s presence, in restrooms, and during jury deliberations.

Some judges are now seating jurors in the gallery rather than the jury box, maintaining an appropriate distance between jurors, or putting some jurors in the jury box and others in the gallery. Doing so, however, frequently leads to a change in the orientation of the balance of the courtroom, *e.g.* changing the orientation of the lawyer's podium, while keeping in mind that the lawyers, judges and any witnesses need to see and hear events as they occur.

The traditional jury deliberation room is often too small to permit required or recommended social distancing. Consequently, a different room will be required to allow the jury to gather during the trial and for its deliberations. In many parts of our countries, the only room large enough to hold twelve people and maintain social distancing is another courtroom, which in turn impacts another judge's ability to use that courtroom to conduct another trial or other in-court proceedings.

The need for social distancing is a concern not only for jurors. During the remainder of the pandemic, one must consider maintaining appropriate distancing between all trial participants: the judge, other court personnel, parties, and counsel.

The court may wish to consider looking outside the courthouse for available appropriate facilities for the trial itself, consistent with applicable regulations. The local government may have meeting rooms that fill the need. Perhaps a local school or college has available facilities.

The bottom line is this: if physical distancing is necessary, much thought must be given to (1) the movement of jurors and other participants; (2) the availability and appropriate use of facilities that permit an adequate distance between participants; and (3) how altering those facilities from traditional use impacts the participants' ability to hear and see witnesses and other participants. Planning not only reduces risk but also will minimize stress, delays, and disruption of the trial process.

6. Consider what changes, if any, need to be made to the place where the trial will be held.

As mentioned briefly above, the judge and counsel will need to consider whether the layout of the courtroom needs to be altered to maintain physical distancing and allow all participants to hear and see the evidence. This may be as easy as moving furniture around the room, or it may be more complicated (and expensive).

For instance, moving counsel tables or the lawyer's podium to maintain an appropriate distance may impact the judge's and witness's ability to see and hear counsel. Thus, modifications to the sound system in the courtroom (if one exists) may be required or, if no sound system exists, one may need to be added. The installation of plexiglass partitions between trial participants may be required. For example, should there be a plexiglass partition between the judge and the witness box? Or between the jurors and the remainder of the courtroom? If the gallery is not available for the jury, should plexiglass dividers be used in the jury box between jurors? How does the use of plexiglass impact the ability to hear and see other participants? How do plexiglass dividers impact the flow of air in the courtroom?

Are any existing video display units in the courtroom visible to those who need to see them in the newly configured courtroom? Must one or more monitors and speakers be added to allow the jury and the judge to see and hear evidence as it is presented?

Budget constraints will limit the possible alterations to the courtroom to allow safe jury trials during the pandemic, particularly in the short run. That said, judges and court administrators will need to consider available options and whether such budget constraints will prevent a safe and fair trial.

7. Develop a process to select a representative jury, taking into consideration hardships and legitimate health concerns caused by the coronavirus.

A representative jury is not only required by law but is important to give trial participants and the community a sense that justice will be done. Undeniably, however, the coronavirus impacts certain demographics more than others. We must work to have a representative jury that can fulfill its responsibilities but, at the same time, we must not create an automatic excuse to avoid jury service simply because a potential juror expresses fear of contracting the coronavirus.

As mentioned above, one option is to use pretrial questionnaires sent with the summons to the jurors, or before the date of jury selection, to identify those potential jurors who have a legitimate coronavirus hardship. Before the trial, the completed forms can be shared with counsel for the parties, who can work with the court to determine which jurors should be excused for health reasons or other good cause from participating in *voir dire*. That will reduce the number of people who will need to attend jury selection, thereby minimizing health risks.³ At the same time, this will allow the court and lawyers to determine whether a proper representative jury pool remains.

The prospective jurors who are required to come to court and participate in the *voir dire* process will need guidance on where to come and how to maintain physical distancing. It might be prudent to ask each prospective juror about recent exposure to someone who has tested positive for the coronavirus and recent travel and to take his or her temperature before coming to court. The prospective jurors temperature should also be taken at the courthouse before the start of *voir dire*.

Some judges may experiment with jury selection via remote video. However, absent the parties' consent, the College recommends against such a practice. Setting aside any potential constitutional and statutory limitations on such practice, the jury selection process is too important to rely on remote video.

At the same time, remote video possibly could be used in lieu of a questionnaire for the initial screening of the jury panel, permitted those with legitimate health or other issues to be excused. The remaining members of the panel would be summoned to the courthouse for an in-person *voir dire*. In many parts of the United States and Canada, however, many people do not have reliable internet access and using remote video to “qualify” a jury may result in a nonrepresentative jury. Courts with

³ The Canadian process for summoning jurors to the courtroom is much different than most courts in the United States and involves the local sheriff. Canadian judges are encouraged to work with local officials to identify those at a particular health risk by undertaking jury service and work together to find a way to minimize inconvenience and protect health.

the means to do so may wish to consider making technology and internet access available to potential jurors who cannot afford it. Some courts have provided potential jurors with computers formatted to permit access only to Zoom or another platform used by the court. Jurors are also provided a hotspot to gain temporary internet access. The devices are returned at the end of the proceedings.

The ability to have a stable connection to the internet is not the only concern that arises when jurors (or potential jurors) participate in a trial remotely. Jurors need to focus on the case, not be caring for children or other adults, cleaning house, watching television, feeding the dog, or reading work emails during the proceedings. Thus, to the extent that jurors are participating in any aspect of the civil trial process, jurors not only need the equipment to reliably access the internet, but they must also be in an environment where they can reliably perform their function as jurors. That may be impossible for some jurors; perhaps courts will require these jurors to be physically present in the courthouse or a public library to participate in the proceedings.

Finally, the court should consider whether the coronavirus issues require one or more additional alternate jurors than would normally be empaneled for a case of that type.

8. Develop a plan for juror assembly and movement during the trial.

Potential jurors also need to be reassured that the courtroom and other public facilities will be made reasonably safe for their use during jury selection and trial. Some courts are sending letters to potential jurors explaining the measures they are using to keep trial participants safe. Others are producing videos on the subject. There are several ways to accomplish this, but all agree that prospective jurors' participation will increase if they are advised of safety precautions.

Jurors who will be physically present will need a place to stay during the trial when court is in recess. Likewise, a plan must be in place to reduce their exposure to the coronavirus when they are moving from location to location, including to and from (and while inside) restrooms.

Efforts to reduce jurors' exposure to the coronavirus mean little, however, if jurors do not exercise caution during the lunch hour and after they leave the courtroom for the day. It may be prudent to require jurors to bring their lunch to reduce the risk of exposure in restaurants. Jurors should be advised of safe practices to follow, both in and outside the courthouse, during the trial. Each juror should be required to report COVID-19 symptoms, both their own and household members, and should be required to submit to daily temperature checks. Jurors should be encouraged to limit their contact with others during the trial. Judges may wish to obtain agreement by potential jurors that, if selected to serve, they will follow recommended practices throughout the trial.⁴

9. Consider the use of multiple pretrial conferences to reduce the likelihood of issues arising during the trial.

Courts should consider involving the parties' lawyers in the planning for a jury trial during the pandemic. Lawyers can help design the questionnaire(s), winnow (with court supervision) the number of jurors that need to be called to the courthouse for jury selection, and help address

⁴ Similar measures should apply to all trial participants.

issues with the layout of the courtroom.⁵ Judges also should secure a commitment from lawyers that they, their clients, and the witnesses over whom they have control will follow recommended practices during the trial.

Witnesses outside the control of a party will also need to be reminded of recommended practices before they come to the courthouse to give testimony, and the lawyer who has the court issue a subpoena for such jurors needs to anticipate a potential objection to personal attendance. This issue should be explored at the pretrial conference.

10. Consider how witnesses will participate in the trial.

The presence of the pandemic increases the risk that one or more witnesses will not or should not be present at trial, or who will attempt to avoid attendance claiming fear of the coronavirus. A process needs to be adopted to (a) determine if a witness is ill and cannot attend trial and, if so, what can be done, within the bounds of the constitution and law, to have the trial proceed without the witness' physical presence, or with the witness appearing remotely; (b) determine how to evaluate a witness's assertion that, while not ill, he or she fears exposure to the virus and the effect it will have on the witness's health or that of a family member or other loved one with whom he or she has regular contact.

Applicable constitutional or statutory law may require the witness to be present in the courtroom so that, if he or she cannot be, the trial date must be continued. If applicable constitutional or statutory law does not require that result, or if the parties agree that the physical presence of the witness is not required, it must be determined whether the witness can testify by taped video, remote video or by telephone. If that occurs, steps must be taken to have appropriate, functioning equipment in place so that the witness can be heard and seen by all in the courtroom and a reliable record made of the testimony.⁶

If the witness is healthy and present in the courtroom, unless government regulations require otherwise, the College recommends that the witness not be required to wear a mask while testifying; rather, alternative measures should be established to minimize the risk of coronavirus exposure to or from the witness. While the need to evaluate the credibility of every witness may not exist, it does for many witnesses and (a) credibility determinations are extremely difficult when the witness is wearing a mask; (b) the presence of a mask interferes with one's speech and the ability of others to hear it; and (c) the absence of facial expressions impacts the ability of a lawyer to examine the witness effectively. Other measures can and should be put in place to assure this important part of the trial process.

11. Consider whether the judge, lawyers and parties will be required to wear face masks or shields and under what circumstances they can be removed.

Setting aside constitutional issues, but not in any way minimizing them, the judge

5 As mentioned on Page 1, this recommendation is altered for our Canadian colleagues.

6 This topic of witness testimony by remote video is discussed in more detail in another paper, "[Guidelines for Conducting a Nonjury Trial by Remote Video](#)."

must decide whether the judge (and other court personnel), the lawyers, and the parties must wear face masks or shields during the trial. Unless the courtroom is unusually large and spacing between every person is at least six feet, it may be necessary to require all people entering the courtroom during the proceedings to wear a mask or face shield. This recommendation is especially apt for the judge; his or her conduct sets the tone for precautions during the trial and all participants in it.

The fact remains, though, that masks impede credibility determinations and can impede the ability of others to hear the mask-wearing speaker. Masks make it difficult, if not impossible, to read facial expressions and observe lip movement, which aids in a comprehensive assessment of the speaker and his or her interaction with the listener. It is essential that counsel be able to gauge the reaction of the jurors, judge, witnesses, and others to the events unfolding in the courtroom.

The use of masks will increase the need for microphones, which may not be available in the courtroom. A mask requirement also affects real or perceived individual rights of those who do not believe masks are necessary and contravenes their civil rights and thus, once again, may result in a nonrepresentative jury. Consideration should be given to whether the use of a face shield could minimize those issues.

Some judges are requiring everyone to wear a mask or face shield unless they are speaking. Thus, in those courtrooms, the examining lawyer and witness may take their masks/face shields off during the witness examination, but put them back on when the examination is complete.

12. Develop a plan for handling exhibits.

There was no uniform way to handle exhibits in trials in the United States and Canada before the pandemic, and, likely, there will be no uniform way to do so during the pandemic. Today, however, a new and legitimate concern exists that the coronavirus can be transferred from one person to another via a physical object, such as a piece of paper or other physical evidence.

Thus, unless a specific protocol exists for handling exhibits generally, which also respects social distancing mandates, a plan will have to be developed for the way to safely (a) present a proposed exhibit to the witness; (b) present copies of the exhibit to opposing counsel, the court reporter, and the court; (c) if admitted into evidence, publish the exhibit to the jury; and (4) provide access to the exhibits to the jury during its deliberations.

The use of gloves can reduce the risk of handling exhibits. If all the exhibits are documents, the documents can be displayed on one or more monitors or screens during the trial; if a computer is available, the jury can access document exhibits via computer during its deliberations.

Non-document exhibits are more problematic. Depending on the nature of the item and the need to publish it to the jury, developing a plan to do this, while reducing the risk of exposure, will be necessary.

13. Develop a plan for communications between lawyer and client, the lawyers themselves, and the lawyers and the judge.

Lawyers commonly need to speak with the client during the trial, talk with opposing counsel, and communicate with the judge in a sidebar conference⁷ during the proceedings.

Traditionally, such conversations are often whispered or in a very low voice, to avoid being heard by others. But the proximity required for such conversations is inconsistent with physical distancing and can present a health risk.

Thus, a plan needs to be in place to conduct such communications. It is impractical, and indeed a health risk is presented, to have the jury leave the room during every such communication. Perhaps counsel should be permitted to communicate via text or email with her client during the trial, with the jury instructed to draw no adverse inference from such communication, although a concern exists whether such communications can be truly confidential.

The same plan could be established for communications between counsel, or even counsel and the court. Communications via text or email could take the place of sidebar conferences. Because some sidebar communications need to be “on the record,” those communications could be printed and included as an exhibit to the record (but not for consideration of the jury).

All of this presupposes that counsel, the judge, and the parties have a phone or computer available and are comfortable using the devices to effectively communicate. Otherwise, alternative plans will have to be made. If texting or email is used as a method of intra-trial communication, it would be important for the judge to inform that jury that such will occur. Otherwise, jurors may think that judges, lawyers and parties are attending to personal matters during trial if those persons appear to be texting during trial.

Some judges have experimented with ear buds and audio transmitters to allow the lawyers, judge and court reporter to have a sidebar conference without approaching the bench. The response to the use of this technology is mixed, and care must be taken to ensure that jurors cannot overhear some or all such conversations.

14. Develop a plan for disinfection.

Objects touched by jurors and others will have to be regularly wiped down by court personnel. Microphones will need to be covered, and the covers changed when different people use the microphones. Plexiglass partitions, if used, will have to be disinfected. Some courts are using a separate podium for each lawyer to avoid frequent disinfecting. Consideration should be given to having the trial participants wear gloves to reduce the chance of transmission.

Hand sanitizer should be readily available for all jurors and other trial participants, and its frequent use should be encouraged.

⁷ “Sidebar conferences,” where the judge and counsel for the parties meet privately with the judge in the courtroom during the trial to discuss matters out of hearing of the jury and others, are not part of the trial of cases in Canada.

15. Monitoring trial participants for signs of illness.

From the time the trial participants (court personnel, prospective jurors, actual jurors, parties, witnesses, participating lawyers and those supporting them) enter the courthouse they should be required to report signs of any symptoms similar to those arising with COVID-19, and if they have had recent physical contact, with any person (including a member of their household) who is experiencing such symptoms. Temperatures should also be monitored during the trial. If coronavirus symptoms or contact are reported, the participant should be immediately quarantined, and appropriate testing performed. Depending on the circumstances, testing some or all other trial participants also may be prudent. The court may have to briefly continue the trial pending the receipt of test results.

What should the judge do if a trial participant (or a member of the participant's household) appears to have coronavirus symptoms or contracts COVID -19 during jury selection or the trial? The answer depends on the circumstances. Without knowing the relevant facts, one cannot say whether the case should proceed, be temporarily adjourned, or a mistrial declared. It would be prudent to discuss this issue at the pretrial conference, but given the current state of medical knowledge and the lack of sufficient real-world experience with the issues in the setting of a courtroom, it is difficult at this time to have any firm rule on what should happen when a trial participant (or members of the participant's household) develop symptoms or test positive for the coronavirus. Obviously, the safety of the participants must be given priority. Consideration also should be given to the infected person's privacy and HIPAA interests.

16. Develop a plan for transparency.

The need to restructure the usual arrangement of the courtroom may eliminate any available seating for family members of the parties or preclude the press from being physically present in the courtroom. There are obvious constitutional and statutory issues presented in such circumstances, and the judge will need to develop a plan to address the need for transparency. Some courtrooms and governments have the means to video the court proceedings and broadcast them to another courtroom where members of the press and others can observe in real-time. Others may be able to live-stream the proceedings via YouTube or some other internet site. It remains to be seen whether such efforts will comply with constitutional and statutory requirements, but it is quite certain that some plan for transparency must exist.

17. Assess the need for and availability of additional personnel.

A jury trial in the time of a pandemic will undoubtedly require more court or administrative personnel. Thus, before jury trials are scheduled, the court needs to evaluate what additional personnel will be needed, at which point during the proceedings, and confirm their availability to participate. Once again, this is a budget issue, particularly in the short run. Courts must determine what resources they can employ, within current financial limitations, to proceed with effective and adequate civil jury trials.

Courts that have tried jury cases since the pandemic have uniformly indicated that such trials required more resources (personnel and space) than traditional trials.

18. Maintain a knowledge database and share with others.

Although the experience of a judge conducting jury trials in a rural Tennessee courthouse will not be identical to that of a judge doing so in Manhattan, each can benefit from understanding what works and does not work in different communities. Judges are encouraged to document and share their experiences in the hope that, with time, best practices can be developed to conduct civil jury trials during this pandemic or similar future circumstances.

American College of Trial Lawyers
Phone: 949-752-1801
Website: www.actl.com
Email: nationaloffice@actl.com