



Issues to be Considered When Preparing for and Conducting a Civil Jury Trial During the Pandemic

INTERIM GUIDELINES

This document was developed in response to the COVID-19 pandemic. It is meant to contribute to the ultimate development of “best practices” as courts and advocates adapt in an effort to ensure that Justice in the courtrooms of our two countries does not become a victim of the current economic and health crisis. Readers are (a) encouraged to provide feedback about their experiences with these and other ideas for addressing the issues identified in the Interim Guideline; and (b) continue to visit the College website to see the latest version of the document. Please email comments, orders, rules, etc. on this topic to advocacy@actl.com.

Task Force on Advocacy in the 21st Century

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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.

Task Force on Advocacy in the 21st Century

The purpose of the Task Force on Advocacy in the 21st Century is to develop and make available the College's expertise on the issues that will confront the administration of justice in a post-pandemic world, in particular those issues that impact the discovery component and trial of civil and criminal cases and oral arguments before appellate courts.

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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, 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.

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 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.

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

It is important that courts, trial lawyers and legislators 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 transmitting the coronavirus and to mitigate the risk of it spreading;

Second, a lack of a sufficient number of appropriately trained personnel to implement a plan designed to meaningfully reduce the risk of transmission;

Third, a lack of availability of products (plexiglass barriers, face shields, masks, disinfectants, etc.) that can be used to reduce that risk;

Fourth, the lack of financial resources necessary to procure the facilities, personnel, and available products to help minimize the risks; and

Finally, 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? The factors stated above impact the decision to conduct a jury trial, or not, and the way 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 which should be taken (at the time of this writing) for a jury trial in Florida will have to be different than those for a jury trial conducted in Newfoundland. This 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 Florida. 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.

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

Understand the orders and regulations in the locale where the trial will be held.

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.

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.

Determine the availability of a place 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 confirm their qualifications to serve as jurors and to 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.

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. Another venue (perhaps a convention center, National Guard armory, or local school's gymnasium) will be needed or perhaps remote video can be employed to accomplish this task.

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

If physical distancing is required or recommended in the venue, selecting the location(s) for trial activities becomes a challenge. How can physical distancing and cleanliness be maintained at all times and in all spaces? Where jurors check-in for service? In the courthouse hallways or elevator? In the juror waiting room? During jury selection? During the trial itself? During breaks and hearings outside the jury's presence? In restrooms? During jury deliberations?

Some United States courts are beginning to conduct jury selection in a room other than the courtroom. Some judges are conducting *voir dire* with smaller-than-usual panels. The size of the panel is determined by the number of people, appropriately distanced from one another, that an available room can hold, in an effort to assure social distancing. Some are increasing the use and breadth of questionnaires to reduce the length of lawyer questioning during *voir dire*.¹

Once a jury is selected, some judges are now seating jurors in the gallery rather than the jury box, maintaining an appropriate distance between jurors. Doing so would, however, frequently lead 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.

Other courts are experimenting with sending a video feed of the trial to jurors in another room – each juror appropriately distanced from one another. Such a plan brings significant expense and deprives the lawyers of in-person observation of the jurors' response to testimony and other courtroom events.

The traditional jury deliberation room is often too small to permit required or recommended social distancing. Consequently, some other room will be required to allow the jury to gather during the trial and to deliberate. In many parts of our countries, the only room large enough to hold twelve people and maintain social distancing is another courtroom, which impacts the ability of another judge to use that courtroom.

We should not forget that the traditional distancing requirements will always remain: distancing between the jurors and the witnesses, the parties and their counsel; distancing between the parties, and distancing between the parties and the judge.

¹ Civil jury trials in Canada are relatively rare and do not include *voir dire* conducted by lawyers.

The court may wish to consider looking outside the courthouse for available appropriate facilities, consistent with applicable regulations. The local government may have meeting rooms that fill the need. Perhaps a local school or college has available facilities. It may be necessary to call on other institutions to assist.

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. Advance planning not only reduces risk but also will minimize stress, delays, and disruption of the trial process.

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

Consider whether the layout of the courtroom may need to be altered to maintain physical distancing. 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 may impact the judge's and witness's ability to see and hear one another. Modifications to the sound system may be required. The installation of plexiglass partitions may be required. Consider whether there should 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 between jurors? How does the use of plexiglass impact the ability to hear and see other participants? How does it impact the flow of air in the courtroom?

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

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.

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.² 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 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 jurors who then 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 the means to do so may wish to consider making technology and internet access available to potential jurors who cannot afford it.

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.

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

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

Efforts to reduce jurors' exposure to the coronavirus means 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 urged to report COVID-19 symptoms, both their own and household members. 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.

² 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.

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 issues with the layout of the courtroom.³ 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.

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.

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

³ As mentioned on Page 1, this recommendation is altered for our Canadian colleagues.

to examine the witness effectively. Other measures can and should be put in place to assure this important part of the trial process.

Consider whether the judge, lawyers and parties will be required to wear face masks or shields.

Setting aside constitutional issues, but not in any way minimizing them, a decision must be made 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.

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.

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 conference⁴ during the proceedings.

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.

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. 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 continual use should be encouraged.

⁴ “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..

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 actually 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.

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.

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.

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.