

TRIALS DURING THE TIME OF COVID-19

We are all experiencing challenges that most of us could not have imagined a year ago. This document will provide resources to assist in working through those issues. It will be updated as new materials become available.

General information (pages 1-2)

Issues to consider- organizational reports and overviews (pages 2-3)

Specific issues (pages 3-6)

1. General information

- a. [https://www.fd.org/program-materials/not-guilty-first-federal-criminal-trial-june-](https://www.fd.org/program-materials/not-guilty-first-federal-criminal-trial-june-1)

[1](https://www.fd.org/program-materials/not-guilty-first-federal-criminal-trial-june-1) (This seminar is accessible by CJA attorneys and staff of the federal defender's office and is the discussion of the first federal trial held during the pandemic in TX-N.)

- b. Standing order of the Eastern District of Tennessee

<https://www.tned.uscourts.gov/sites/tned/files/SO-20-13.pdf>

- c. Guidance provided by the Jury Subgroup of the COVID-19 Judicial Task

Force of the Administrative Office of the U.S. Courts

https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_d oc_6.10.20.pdf

This report contained preliminary suggestions for courts in holding jury trials.

It covers communicating to the public, PPE, jury questionnaires, space preparation, and jury selection. The report suggests considering motions to continue more favorably. (page 3 of the report)

d. Letter from Judge Travis McDonough (Attached at page 8)

2. Issues to consider-overviews and reports

a. NACDL's report on court reopening

<https://nacdl.org/Document/CriminalCourtReopeningAndCOVID-19>

This report suggests that jury trials are not safe. Following is a summary of some of the recommendations:

- I. Reopening Must Be Based on Science, Must Be Made Under Independent Medical Supervision, and Must Be Limited to the Duration of the Pandemic (Principles 1, 2, and 3).
 - a. Jury trials present grave risk to all participants; having would undermine truth seeking purpose of trials given fear on part of participants, can't ensure that juries reflect a fair cross section of the community
- II. Measures Designed to Facilitate Reopening Cannot Be Implemented Unless Conditions Are Restored for Defense Counsel to Fulfill Their Sixth Amendment Functions (Principles 4 and 5).
 - a. Currently have little or no opportunity to meet privately with clients, must be able to conduct pretrial investigations which including spending time with client,

- III. Measures Designed to Facilitate Reopening Must Not Abridge Fundamental Constitutional, Statutory, or Customary Rights (Principles 6, 7, and 8).
 - a. Right of confrontation and due process and effective assistance rights;
 - b. right to confront and right to be present, can't do voir dire virtually;
 - c. alters psychology of jurors; proximity affects empathy;
 - d. can't get cross section- curtails vulnerable subsets including underrepresentation of women
- IV. Measures Designed to Facilitate Reopening Must Not Exacerbate the Historic Failures of the Criminal Legal System (Principles 9 and 10).

- b. National Association of Public Defenders

https://www.publicdefenders.us/files/NAPD%20Virtual%20Court%20State%20ment%208_1.pdf

This report sets out guiding values, constitutional considerations (including the right to counsel, the right to cross-examine and confront witnesses, compulsory process, and the right to a public trial), and the minimum requirements for implementation.

3. Specific issues

- a. Who will jurors be?

www.DecisionQuest.com survey cross section of community. See

[https://www.newsday.com/news/health/coronavirus/coronavirus-jury-selection-long-](https://www.newsday.com/news/health/coronavirus/coronavirus-jury-selection-long-island-1.43927317)

[island-1.43927317](https://www.newsday.com/news/health/coronavirus/coronavirus-jury-selection-long-island-1.43927317) *The survey found a large majority of participants had high levels of concern about becoming infected, with 51% saying they were “very concerned” and 33% “somewhat concerned.” The pattern was essentially the same across locations, genders, education levels, family incomes and ethnic groups, according to survey, which also found older participants were slightly more concerned about contracting coronavirus than younger ones.*

Survey of potential jurors: 48% willing, 27% afraid, 25% other

Willing vs. afraid: White 72%, AA 58%, Hispanic 50%, Asian 41%

86% of those who strongly disagreed that people of color are being hit harder when company make staffing cuts due to pandemic also said they were willing to serve

- b. Example of a jury questionnaire or voir dire questions (Attached)
- c. Motions to continue and related documents
 - i. Texas-N (Attached)
 - ii. Knox County, Tennessee (Attached)
- d. Dangers of continuing videoconferencing for court and to visit clients
 - i. See NACDL report above
 - ii. Policy of the Judicial Conference is that meetings with clients should be in person
 - i. Strategy 6: Federal defenders and panel attorneys should meet in person with their clients to establish and to maintain the

attorney-client relationship of trust and confidence necessary to provide quality representation.

ii. Comment: Experience has shown that telephone contact and/or videoconferencing cannot substitute for face-to-face meetings with clients. Discovery material, court pleadings, plea agreements, and presentence reports are examples of documents that are best reviewed with clients at in-person meetings. There may be extraordinary circumstances where, presentencing, defense counsel determines that it is in the best interest of the client to communicate via telephone or videoconference. Telephone and videoconferencing contacts should be rare and limited only to those circumstances where it would not diminish the quality of representation or adversely impact the attorney-client relationship.

iii. Ethical rules and client/attorney relationship

1. Ethical rules- require that there be sufficient opportunities

for client and counsel to confer; several rule implicated:

1.1 competence, 1.6 confidentiality, 1.4 lawyer-client communication, 1.3 diligence, 1.7 conflict of interest

e. Studies finding other disadvantages of appearing in court virtually

i. Chicago study of bail hearings: when defendant appeared via videoconferencing, defendants were significantly disadvantaged- study Diamond, Shari, et al., Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. Crim. L. & Criminology 869, 898 (Summer 2010) (available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>)

ii. Analyzing over 500,000 asylum cases, a study found that use of a videoconference hearing “roughly doubles to a statistically

significant degree the likelihood that an applicant will be denied asylum” as compared with an in-person hearing. ▪ Walsh, Frank and Walsh Edward, Effective Processing or Assembly-Line Justice The Use of Teleconferencing in Asylum Removal Hearings, 22 Geo. Immigr. L.J. 259 (2007-2008)

- iii. Trials where children testified via closed-circuit television were less likely to result in a guilty verdict than those in which children testified in court.
- iv. Videoconferencing could affect assessments of demeanor and nonverbal cues (e.g., eye contact, body language) in ways that lessen the speaker's ability to connect emotionally with listeners and that reduce the speaker's perceived credibility (No study cited.)
- v. British survey: 74% of respondents believed video had particularly negative impact on unrepresented defendants and defendants who did not speak English ▪ 58% felt video had a negative impact on defendants' ability to participate ▪ 72% felt it had a negative impact on defendants' ability to communicate with attorneys and judges ▪ 70% felt it was difficult to recognize on video if someone had a disability ▪ Gibbs, Penelope, Defendants on video—conveyor belt justice or a revolution in access? TRANSFORM JUSTICE, Oct. 2017 (available at <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/DisconnectedThumbnail-2.pdf>)