Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic

By the ABOTA COVID-19 Task Force

American Board of Trial Advocates

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Facing an Invisible Threat

Foreward by Luther J. Battiste, III
National President

The coronavirus pandemic has posed a unique threat to the innumerable ways that America operates, and perhaps the most telling challenge for our legal system is how we will conduct trials going forward. In these difficult months, keeping citizens safe has been the primary concern for the nation. Unfortunately, the closing of each courtroom has affected thousands of people whose day in court will be delayed. COVID-19 has challenged the way we all think about the legal system. Little did any of us know that the threat to the courthouse door was going to come from an invisible force. The following white paper will address many assorted hurdles attendant to the reopening of our courts.

Dealing with COVID-19 has presented personal and professional obstacles for each of us. I want to thank the authors of this white paper, who accepted the challenge with enthusiasm and commitment, which symbolized their effort. It should also be pointed out that each member of the Task Force immediately accepted the request to serve without any hesitation. As I have found with all ABOTA members, they hold an understanding of the needs of the organization and the overarching essential requirement that the civil jury trial is key to our democracy. Simply, thank you to the Task Force and much appreciation for the willingness to place themselves in the jurors' shoes to understand the realities of what they are facing. I would like to give particular credit to Steve Quattlebaum for agreeing to chair the Task Force and for providing great leadership and demonstrating a profound understanding of the workings of the jury trial system. Additionally, I wish to thank our scientific advisors, John Swartzberg, M.D., Christopher Kuhlman, Ph.D., CIH, DABT and Paul Nony, Ph.D., CIH, CSP, who so generously devoted their time and expertise to this effort.

How did the white paper come to be? To address the multiple issues related to getting trials up and running again, ABOTA quickly formed a team dedicated to the pandemic response, known as the ABOTA COVID-19 Task Force (ACTF). The ABOTA National Executive Committee recommended this approach, believing that a small group of ABOTA members representing a cross section of lawyers was most likely to develop a creative, pragmatic way to address the problems impacting the legal profession, the judicial system and the public. The ACTF represents a balance of plaintiff and defense members who are geographically distributed across the country. It was important to have the bench represented, and lawyers who could advise on a number of different areas, including legislation and technology.

The ACTF was asked to assess the pandemic as it related to civil jury trials and take a number of action steps. Of course, with a never-ending news cycle and unforeseen problems caused by the pandemic, adjusting on the fly became a third component of the ACTF. The assembled team quickly understood that a guiding document was needed — not necessarily to serve as an authoritative how-to manual — but to offer a set of guiding principles and resources that provide the criteria for decision making going forward. While the "new normal" has become a catch phrase during the pandemic, resolving disputes by jury trial is an institution that needs to be preserved. The ACTF was needed to address the many issues — and many may be an understatement. We knew that we needed to form a hub that will constantly assess the situation as it evolves.

Finally, the ACTF understands that the nature of the pandemic will change course constantly. The white paper will serve as a way to help the courts and law firms make difficult decisions, and the authors make it clear that the current uncertainty may necessitate adapting the document as needed. Because of the nature of a pandemic, the ACTF acknowledges that it is better to err on the side of caution — especially when it comes to keeping jurors, court administrators, employees and judges healthy.

The process of reopening the courts will lead us to new actions and new adjustments. The American experiment in self-government is certainly being tested, yet we remain confident that our system will thrive. Madison reminded us of the need for "a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."

A functioning, effective civil justice system is an important element to the legal system. These are unprecedented times. The good news is that if we adopt responsive and responsible behaviors, we can protect our courtrooms . . . and we will return to civil jury trials soon. ■

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I. Introduction

The American Board of Trial Advocates (ABOTA) is committed to the preservation of the trial by jury in civil cases as guaranteed by the Seventh Amendment to the Constitution of the United States. Conducting civil jury trials in the presence of health threats and necessary restrictions caused by the novel coronavirus (COVID-19) global pandemic is a challenging undertaking for the courts. Special procedures are required to protect jurors, court employees, litigants, witnesses, lawyers and the public. This white paper focuses on these challenges and procedural alternatives and innovations that will allow civil jury trials to proceed safely.

ABOTA is an organization consisting of more than 7,600 trial lawyers from all 50 states. As such, ABOTA is particularly well-suited to assist the courts in addressing the legal, practical and technological challenges that must be addressed to conduct civil jury trials during the pandemic. To that end, ABOTA National President Luther J. Battiste, III, empaneled an ABOTA COVID-19 Task Force (ACTF) charged with the duty to prepare this white paper to serve as recommended guidelines for courts and practitioners so that civil jury trials may resume. These suggested guidelines are designed to maximize the safety of all participants in civil jury trials, while providing a fair forum for adjudication by juries as guaranteed by the Seventh Amendment.

This white paper is limited in scope to the issues related to civil jury trials. This paper is not intended to address court hearings, status and settlement conferences and non-jury trials. In many such proceedings, the participants appear though virtual video conferencing platforms, and there has been much discussion about utilizing these virtual platforms to conduct jury trials. Nor is this paper intended to address criminal jury trials, which present their own unique issues.

In this white paper, the ACTF has specifically addressed issues related to both live (in-person) appearances and virtual participation. The ACTF acknowledges that virtual appearances eliminate the risks associated with in-person attendance. However, the members are unanimous in their preference for live (in-person) trials whenever and wherever possible. In the opinion of the ACTF, live trials provide jurors with the best opportunity to evaluate witnesses, weigh the evidence and engage in robust deliberation. Therefore, while this white paper discusses virtual alternatives, such as video livestreaming, we believe that in-court, in-person jury trials are most consistent with the constitutional rights granted by the Seventh Amendment.

In preparing these guidelines, the ACTF recognized that circumstances surrounding the pandemic differ widely throughout the country. Urban areas such as New York City, Chicago, Boston, Los Angeles and Detroit have experienced many more cases of COVID-19 than other areas. Jury service in some localities requires use of public transportation, such as subways and buses, that present different risks than modes of transportation in other areas of the country. In short, circumstances vary state to state, and even among communities within each state; each court will be presented with problems specific to the jurisdiction, courthouse facility and even the type of case to be heard. Because a white paper such as this cannot anticipate or address all such circumstances, the guidance and recommendations provided herein have been prepared to address the fundamental principles involved in civil jury trials. It is the hope of the ACTF that this publication will provide our courts with information, ideas and innovations that provide a functional approach to conducting civil jury trials under these challenging circumstances.

Our white paper begins with a discussion of general principles embodied by the Seventh Amendment to the Constitution of the United States and the Federal Rules of Civil Procedure, followed by a discussion of general safety practices for courthouses. The paper then addresses specific issues that arise in the following stages of a civil jury trial:

1. Pre-trial hearings and conferences
2. Jury selection and *voir dire*
3. Opening statements and closing arguments
4. Presentation of evidence
5. Jury deliberations.

The paper concludes with a listing of resources that offer information for further consideration, such as court-issued mandates and orders related to jury trials during COVID-19 and resource services such as the National Center for State Courts and the federal courts. We have also prepared a best practices, pre-trial checklist that courts may find useful as a reference and a model order addressing proper conduct for all participants involved in civil jury trials. Additionally, there is an accompanying editorial by Judge Jerome B. Abrams, of the ACTF, pertaining to the importance of governmental funding of the courts during this crisis.

Even during a global pandemic, it is vital to our democracy that our justice system function in a manner consistent with the principles upon which it was founded. This includes the resolution of civil disputes through the means of trial by jury as guaranteed by the Seventh Amendment. As James Madison wrote in 1789, "Trial by jury in civil cases is as essential to secure the liberty of

the people as any one of the preexistent rights of nature." To the extent this guidance assists in the preservation and continuity of civil jury trials, we are pleased to have contributed to the protection of these freedoms.

II. General Principles Embodied by the Seventh Amendment of the Constitution of the United States and the Federal Rules of Civil Procedure

Rule 1 of the Federal Rules of Civil Procedure provides, "These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Rule 38 of the Federal Rules of Civil Procedure echoes the Seventh Amendment's preservation of jury trials principle and states, "The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate." Thus, it is clear that the Seventh Amendment and the Federal Rules of Civil Procedure require a construction that provides for speedy resolution of disputes, so long as it is just. While COVID-19 presents many challenges, the courts must maintain the ability to resolve civil disputes efficiently and in a just manner that does not deprive any party or participant of liberty or due process.

III. Faster Jury Trials

ABOTA, the National Center for State Courts (NCSC) and the Institute for Advancement of the American Legal System (IAALS) have a long-term commitment to the preservation of the civil jury trial and providing less expensive and time-consuming ways to achieve civil justice. In collaboration, our three organizations published *A Return to Trials: Implementing Effective Short, Summary and Expedited Civil Action Programs*, providing "How to" guidelines for presenting jury trials more efficiently.[1]

With the uncertainties our trial courts currently face, the time is right for efforts to provide the public, the bench and the bar with access to faster, shorter and expedited civil jury trials that honor the importance of trial by jury while saving precious court resources and addressing an expected backlog of civil cases.

Many jurisdictions already have procedures, rules and statutes that sanction more efficient jury trials, but they are rarely used. While varied, these rules generally encourage shorter trials through agreement, cooperation, stipulation and pre-trial rulings. Significant attributes are (1) focusing on key issues, (2) agreed or judicially-defined limits on trial presentations in terms of time, witnesses, evidence, etc. and, in some cases, (3) smaller jury panels. The parties often stipulate to modify the rules to accommodate particular case concerns. Judges, jurors and litigants favor concentration on the real issues to be decided by the jury, as well as reduced time and expense through a streamlined process that seeks to avoid redundant and unnecessary evidence. Links to jurisdictional rules and statutes can be found in the "Resources for Information – Faster, Summary and Expedited Jury Trials" section of this white paper.

IV. General Safety Practices for Courthouses

As of the publication of this paper, approximately 1.8 million individuals have been infected with the virus in the United States and more than 112,000 have died as a result. Worldwide, more than 7 million people have been infected by the virus and deaths have exceeded 407,000. The current available science indicates that the spread of the virus occurs by respiratory transmission and personal contact. Beginning around March 17, 2020, courts throughout the United States limited or closed public access to courthouses in order to avoid and minimize spread of the infection. Now, more than two months later, the country is working toward increasing in-person services. As our courts do the same, steps must be taken to identify infected individuals before entry to courthouses; maintain physical distancing and air flow when people are inside; use available personal protective equipment inside the courtroom; maintain cleanliness; and provide ongoing education about safe and hygienic practices within the courthouse.

There are general safety precautions courthouses can utilize to aid in the safe participation through all stages of a trial. Many of these depend upon the circumstances of the courthouse, courtroom, community and the duration of the case. While not specific to courthouses, details about such measures have been well considered by the Centers for Disease Control (CDC) Coronavirus 2019 Community Mitigation Strategies and have been adopted by some courts. Court publications regarding procedures and rules are referenced in the final section of this paper. Specific recommended screening requirements are published

[1] *See* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2012), https://iaals.du.edu/sites/default/files/documents/publications/a_return_to_trials_implementing_effective_short_summary_and_expedited_civil_action_programs.pdf.

Blind to Justice? A Vision of Restoring Our Courts

By the Hon. Jerome B. Abrams
Minnesota Chapter, American Board of Trial Advocates

How quickly we lose sight of what really matters to our collective well-being.

Despite the intensely sad reports of illness and death, and even the spiritually uplifting stories of selflessness from health care workers to grocery clerks — in times of this pandemic we are so overwhelmed by crisis that we don't see many other important losses. The death of loved ones, elimination of jobs, failing businesses, and limits on personal freedom easily occupy our thinking. There is no escape. In every aspect of daily life we are reminded that the spread of an invisible foe causes us to become unsettled in ways unthinkable before its arrival.

Even more anxiety producing for all of us should be how jaded we have become in our response. Those risking their lives, to prevent this evil agent from taking the lives of others don't view it as a "hoax." Nor do those who view their personal safety measured by their spiritual or economic security fully accept why all the fuss — especially when it is causing their personal ruin. Since we have no experience with any of this disruption to our "normal" lives there is no guide to our personal response.

We view the impact of the pandemic on our lives first and foremost in personal terms. A more sinister consequence of COVID-19 is how this virus attacks our institutions. The disease has produced another symptom: we have been temporarily blinded to the needs of our system of justice.

Despite the claims of cynics, there is no plan to deprive Americans of their access to justice. To the contrary, courts are carefully restoring what we can, how we can, consistent with the best advice to keep us safe while returning to "normal." The justice system struggles mightily to protect the public's rights under the law. We now have a broader view that justice — as a product of the courts — isn't confined to what happens at the courthouse. Remote hearings, video sessions, and some limited in-court hearings all temporarily bridge the gap. Yet we cannot avoid a return to the physical location where justice is arguably best served.

What we need to see with clarity is the cost, in dollars, of what it takes to operate our system of justice under the cloud of COVID-19. There are many plans to reopen courts based on sound principles invariably maximizing justice and public health. These plans must be tailored to thousands of locations nationwide, in accordance with a myriad of laws and procedural rules that insure fairness. It is neither easy nor inexpensive.

The virus has unsettled the courts in addition to the public they serve. There is more than a hint of uncertainty over court funding. We have overlooked many aspects of our return to a purported "normal" existence, including how we fund our most basic local institutions. Courts outside the Federal system, with a handful of exceptions, rely on a mix of funding sources all deeply impacted by the pandemic. Whether it's a decline in state or local revenues, user or service-related fees, courts on their own are powerless to provide for their own future needs. Despite being less than 3% of the cost of government in most states, the needed improvements for in-person resumption of service will cost more, take longer, etc. This is particularly vexing when the funding sources for these needed changes have themselves less money. Compounding the resource challenge is that most state and local funders have their own increased demands and reduced revenue, but unlike their Federal counterparts cannot operate with a deficit or borrow money.

Civil justice is an essential commodity. Its return is not only dependent on developing a means for the safe return of our in-person processes, including civil jury trials, but will not happen in the absence of significant funding. Times are tough everywhere. Our return to "normal" may end with a vaccine — but begins with restoring our system of justice — among the many institutions that bring us a sense of order.

and regularly updated by the CDC.[2] Some of the more universal screening requirements include the following: First, before entering the courthouse, all jurors, lawyers, witnesses and staff should be screened through a series of questions regarding health and exposure. Each person's temperature should be checked for temperatures above 100.3 Fahrenheit. Further, all persons should be required to wear masks meeting the requirements of the court upon entering the courthouse. It is true for everyone. This is especially true for jurors who may be confined to tighter spaces than are lawyers and witnesses. The courtrooms should undergo sanitation each day, including but not limited to wiping down high-touch surfaces such as chairs, tables, door handles, etc., with disinfectant wipes such as those included on the EPA's List N found at https://www.epa.gov/pesticide-registration/list-n-disinfectant-use-against-sars-cov-2. The courtroom can be marked to indicate where counsel should stand when addressing the court or jury to ensure social distancing at all times. The Court may prohibit the use of a shared podium. Similarly, courts should utilize all available space in the courtroom to ensure adequate social distancing. Jurors must remain a minimum of six feet apart at all times. Finally, courthouses should prohibit attorneys from approaching witnesses, staff and the judge during all phases of the trial, absent specific leave of the Court. In all circumstances, as mentioned, a minimum social distance of six feet should be required.

These courthouse safety procedures should be discussed with the lawyers as part of a pre-trial conference so that all parties understand what conduct during trial is acceptable. The lawyers should be tasked with the duty of informing their clients and witnesses of the proper procedures. Written protocols or rules should be provided to all participants and may be in the form of a court order. An up-to-date listing of actions by individual federal courts can be found at "Judiciary Preparedness for Coronavirus."[3]

There are also specific ways courts can help limit juror exposure to contagions. Some of the following measures may be used:

1. Avoid having jurors report until actually needed. For example, if the court anticipates any other business will be conducted such as a civil settlement, guilty plea, or parole revocation, schedule jurors to arrive after such matters have concluded.

2. Limit the number of jurors assembled in one location by asking jurors to report for service on a staggered scheduled.

3. Provide hand sanitizer and masks to jurors.

4. Consider impaneling extra alternates to guard against delays or mistrials for any reason.

5. Require that jurors report directly to a courtroom as opposed to a jury assembly room.

6. To the extent possible, avoid passing exhibits between jurors (please see below).

7. Require jurors to report by phone each morning of trial confirming that the juror has not experienced any symptoms consistent with COVID-19. The manifestations of COVID-19 are protean. If a juror reports symptoms consistent with COVID-19 by phone, the juror should not be allowed to come to the courthouse. If a juror experiences symptoms consistent with COVID-19 while at the courthouse, the juror should be subject to immediate quarantine and a test administered. To walk through this: If a person becomes ill, he or she will be immediately removed from the room and courthouse, sent home and asked to contact a physician. The court cannot tell someone with symptoms to go into quarantine or get a test. The juror should be excused and, if alternates are impaneled, an alternate juror should be substituted.

8. To the extent possible, certain restrooms should be designated for juror-only use and should be cleaned with disinfectant after each break, lunch and at the end of the day. Ideally, restrooms should have an open window. If that is not possible, engineering should address the air flow in the restrooms. These places are particularly problematic as many people use restrooms and they are usually small rooms. Additionally, disinfectant wipes should be readily available in the jury room and the restroom for use throughout the day.

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[2] *See FAQs for Businesses: Reducing the Spread of COVID-19 in Workplaces*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html (last visited June 1, 2020) (providing guidance based on the question "Should we be screening employees for COVID-19 symptoms (such as temperature checks)? What is the best way to do that?").

[3] *Judiciary Preparedness for Coronavirus (COVID-19)*, UNITED STATES COURTS, https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19 (last visited June 1, 2020).

V. Pre-Trial Stage

Rule 16 provides for various issues to be addressed at pre-trial conferences. The conference should be robust in order to address as many issues as possible in advance of trial in order to maintain a physical distance of six feet and avoid community contact of exhibits. Included among the issues that should be addressed are:

1. Where lawyers will question jurors during *voir dire* and witnesses during trial such that all persons are more than six feet apart

2. The location of the court reporter (if a court reporter is present)

3. Handling as many evidentiary disputes as practicable by motions *in limine* in order to minimize bench conferences

4. Ways to eliminate or minimize exhibits being passed among lawyers, judges, witnesses, clerks, bailiffs and jurors. If possible, project the exhibits on screens so that jurors do not have to touch any items. Otherwise, attorneys should consider providing each juror with their own set of pre-marked exhibits. For unique evidence that may require handling by lawyers, jurors and others, special precautions should be taken to minimize the risk of contamination.

VI. Trial

Rule 77(a) of the Federal Rules of Civil Procedure provides, "Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom . . . ". While this rule is clear, every trial must be conducted in open court, there are various other rules (discussed in the "Presentation of Evidence: Testimony and Exhibits" section *infra*) that provide for the possibility of testimony via pre-recorded depositions (Rule 32) or real-time videoconferencing (Rule 43). Rule 77(a), however, seems to preclude the possibility of a completely online trial in which the lawyers and jurors participate from a remote location. Arguably, an online trial is a "private trial" within the meaning of Rule 77(a), unless there is public access to the trial. There is no legal precedent in support of a completely virtual (remote) trial. The following subsections set forth considerations for live civil jury trials.

A. Jury Selection and *Voir Dire*

The pandemic presents particularly difficult challenges to the process of jury selection and *voir dire*, both of which have traditionally been accomplished by mass gathering. This section is intended to provide recommendations for jury selection from the time the venire panel enters the courtroom where the trial is being conducted until the jury is sworn in. This section recognizes that this process varies from jurisdiction to jurisdiction and from state to federal courts. There are at least three ways to manage jury selection during periods of health crises including physical protections, using technology platforms, right sizing jury pools or any combination of the above.

Jury selection is governed by Rule 47 of the Federal Rules of Civil Procedure and various state rules of civil procedure. Rule 47(a) provides, "The court may permit the parties or their attorneys to examine prospective jurors or may itself do so … ." Thus, the language of this rule broadly addresses the "who" but fails to address the "how" or "where." Must jury selection take place during open court? Even absent consent by the parties, does a trial judge have the discretion to conduct jury selection online? Simply put, there is nothing in the text of Rule 47 that addresses or suggests that the examination of prospective jurors must be done in person, in open court, or that it may not be done online, through the use of technology.

There is no reported case that specifically addresses the question as to whether *voir dire* can be held online in a virtual setting. While in-person gathering is preferable during *voir dire*, the law does not prohibit other methods of questioning a jury panel. For example, federal judges have long used written initial juror questionnaires, the answers to which were obtained from jurors prior to the formation of the venire for a particular case. Rule 47(a) authorizes the court to conduct *voir dire* without any attorneys asking questions, as do the rules in some states. Closed jury selection has even been endorsed when the following criteria are met: (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.[4]

Whether the jury selection process is conducted in person or through a virtual or remote platform, it should ensure the protection of prospective jurors. Local (e.g.

[4] The Advisory Committees to the Federal Rules of Civil Procedure have commented on Fed. R. Civ. P. 47 on four occasions since its enactment: 1937, 1966, 1991 and 2007. None of those commentaries have addressed remote jury selection outside of open court or virtual jury selection in the age of technology. Relatedly, 28 U.S.C. §§ 1861-1870 contain detailed provisions concerning such matters as the manner of drawing jurors from the wheel, improper criterion for disqualifying people from the jury pool (e.g., race, religion), randomly selected venire, frequency of service and numbers of challenges. None of these provisions reference or imply a requirement that jury selection occur in open court.

county) health authorities have the prime responsibility and their dicta must be followed. They can choose to defer to the State Health Department. The CDC is only advisory.

If *voir dire* is conducted in person, the court must provide for the considerations discussed in Section IV, as well as social distancing, appropriate hygiene and disinfection protocols, temperature/symptom checks, use of face masks and gloves, plexiglass dividers and use of non-courthouse facilities when available, such as auditoriums, theaters and large meeting facilities.

In order to minimize the amount of time that jurors must spend in person, hardship challenges could be handled in writing or by telephone request before the prospective jurors report for service. For example, the jury summons can be fashioned to direct prospective jurors to call or email the court on a certain date and time. The judge can rule on the request prior to reporting in person. In order to minimize the number of people occupying the same space during *voir dire*, the court may limit the number of prospective jurors called at a time.

Despite these protective measures, there are a series of limitations and challenges with jury selection during the pandemic, including but not limited to the following: physical barriers that may impact the efficiency of the jury selection process; a reduction in the diversity of prospective jurors appearing for jury service due to transportation issues (mass transport has been limited or unavailable during the pandemic); fears of contracting COVID-19 resulting in a "chilling" effect on jury participation; in the case of remote jury selection, difficulty in effectively assessing a prospective juror's reactions, body language and non-verbal affect and assuring the quality and veracity of responses by potential jurors since they are not participating in person; and limitations based upon technology not being available to all socio-economic groups.

Jury selection using a virtual platform may be an option for some courts. The process for jury selection might include the following concepts. First, the jury summons would inquire of prospective jurors whether they have a working computer with a camera and internet access. If the requisite technology is unavailable, they would be directed to a government center to complete the process on a computer with the necessary amenities to complete the process in a safe environment. Second, an online jury questionnaire would be completed following remote administration of the oath by the presiding judge. Then, completed juror questionnaires would be available for review and discussion/determinations as to disqualification for cause, hardship, etc. Jury selection could proceed with the venire panel logging into a portal (ex. Zoom or Microsoft Teams) for oral *voir dire* to be conducted. The court could also schedule *voir dire* of limited groups or even oral individual questioning via virtual or live appearances.

Judges will have to be mindful about reminding jurors to participate in the jury selection in a private location, away from distractions including others who live in their household. Some inappropriate conduct may not be visible to judges, e.g., if a prospective juror is searching the internet, watching a film or reading other documents during the *voir dire*. Such conduct may be particularly harmful if the prospective juror is investigating the case during the *voir dire*. Judges will need to remind the prospective jurors of their oath, but there may not be any way for the judges to be alerted to such conduct.

Other challenges include the ability to assure the veracity of the prospective jurors' responses because they are not physically present before their peers, attorneys and the judge; the ability to evaluate the prospective jurors due to limitations in registering non-verbal communication and making direct eye contact; and the lack of diverse prospective jurors due to unavailability and access to technology.

B. Opening Statements and Closing Arguments

Once an appropriate forum is selected for an in-person jury trial, opening statements and closing arguments can proceed in accordance with the general health safety recommendations stated in Section IV, including seating jurors in the gallery. Because of physical distancing requirements, challenges that may arise include logistical issues with the jurors being able to see and hear the evidence and the witnesses. For auditory issues, the courtroom may need to be equipped with microphones and speakers. If exhibits are being displayed during opening and closing arguments, parties may need to use multiple screens. Regular breaks should be taken to maintain air flow in the forum. Courts may also elect to install plexiglass shields in front of and to the sides of jurors and the witness box to provide additional protection.[5]

Some courts have discussed the possibility of having sworn jurors watch the proceedings through a closed-circuit television from a separate room, away from the attorneys, court reporter, clerk staff and judge. This is not ideal, but it would permit the court to control the sworn jurors' environment and allow the jurors to see the dynamic between the parties and the witness. Having more than one camera view of the courtroom would be helpful to the finders of fact. Additionally, the court would

[5] The scientific advisors to the ACTF wish to make clear that plexiglass shields and barriers should be used in addition to, and not in lieu of, proper face masks and coverings.

need a camera and television screen in order to see the jurors and be assured that they are attentive and able to ask questions or make requests, as well as compliant with jury instructions and health and safety rules. Alternatively, an authorized court agent could be present with the jurors and alternates to monitor and assist with any juror request.

C. Presentation of Evidence: Testimony and Exhibits

There are two parts to this section. First, there is a discussion of ways courts can ensure adequate presentation of testimony. Second, there is a discussion of ways to present exhibits to reduce or eliminate the physical handling and transfer of exhibits between courtroom participants and controlled movement in the courtroom.

1. Presentation of Witness Testimony

a. Testimony Taken in Open Court

Under Rule 43, witness testimony must be taken in open court. The fundamental role of the jury is to determine the facts by judging the credibility of witnesses and weighing the evidence introduced at trial. In order to execute its main function, seeing and hearing the witness in person is critical. The Legislature recognized that "[t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."[6] Every jurisdiction has specific jury instructions for judging witness credibility. Uniform in the instructions is the judgment of the manner in which the witness testified — how the witness looked, acted and spoke during testimony. Actions that affect credibility include looking at documents, counsel, or other persons in the courtroom during testimony. A fulsome opportunity to assess all aspects of the demeanor of witnesses is vital to the process of weighing credibility.

Rule 43 also recognizes that compelling circumstances may warrant remote testimony, but that appropriate safeguards to promote truth and veracity must be present.[7] The Advisory Committee instructed: "Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured." It also instructed that "[r]emote transmission must be approached cautiously."[8] Further, depositions are preferred over remote live transmission: "Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying."[9]

In deciding whether to permit testimony in open court by contemporaneous transmission from a different location, courts have relied heavily on the comments to Rule 43.[10] The following notes are informative: "The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other — and perhaps more important — witnesses might not be available at a later time."[11] Further, "[g]ood cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial."[12]

If the court permits remote testimony, the initial safeguard considerations include:

1. Verifying the identity of the witness.

2. Assuring that the remote technology will work.

3. Identifying evidentiary objections prior to testimony.

4. Identifying any documents or exhibits to be used with the witness during testimony.

5. Providing such exhibits to the witness.

[6] FED. R. CIV. P. 43, Notes of the Advisory Committee (1996).

[7] FED. R. CIV. P. 43.

[8] FED. R. CIV. P. 43, Notes of the Advisory Committee (1996).

[9] *Id*.

[10] *See e.g., Nexen Petroleum U.S.A., Inc. v. Ensco Offshore Co*., No. 6:13-00604, 2015 WL 6511879, at *9–10 (W.D. La. Oct. 27, 2015).

[11] FED. R. CIV. P. 43, Notes of the Advisory Committee (1996).

[12] *Id*.

6. Ensuring that the witness will be alone and has only the approved exhibits in that room during the testimony.

7. Ensuring that the witness does not access the internet or have contact with outside parties during the testimony. In order to fulfill these requirements, the Court may order the witness to report to a secure location with an authorized court agent, such as a notary public or law enforcement officer. This can be accomplished at a remote federal courthouse or other government building. The authorized court agent will verify the identity of the witness and monitor the witness throughout the testimony. If the witness engages in any inappropriate conduct, the authorized court agent will report to the court immediately.[13] There is legal authority for ordering that the party requesting remote testimony pay for the costs associated with it.[14]

b. Deposition Testimony

Depositions are addressed because they are such a key part of the discovery process and frequently are the means by which testimony is presented at trial. Under Federal Rule of Civil Procedure 32, depositions are an alternate means of presenting testimony at trial.

i. Taking Depositions by Remote Means

When the witness, the lawyers and the court reporter cannot be in the same room due to the pandemic or another reason, there are practical and legal issues. The first is administering the oath.

> Rule 28(a)(1) provides,
> a deposition must be taken before: (A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or (B) a person appointed by the court where the action is pending to administer oaths and take testimony.

Must the officer administering the oath be in the same room as the witness? The traditional answer is yes unless the parties consent otherwise.[15] Rule 29 allows parties to consent to taking depositions in any manner they choose.

Rule 30(b) allows parties to video record depositions and, either on consent or by court order, for depositions to be taken by remote means. These methods have become very important in this COVID-19 era. Under Rule 30(b)(4), depositions by remote means are presumptively valid forms of discovery and the movant need only show a legitimate reason for proceeding in this manner, such as financial hardship; thus a pandemic should suffice. The burden then shifts to the party opposing the deposition by remote means.[16]

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[13] In *Alcalá v. Hernández*, No. 4:14-cv-04176-RBH-TER, 2015 WL 1893291, at *3 (D.S.C. Apr. 27, 2015), the District Court of South Carolina laid out several safeguards that would ensure the witnesses were appropriately identified and prevented from outside influence. First, the court required the petitioner and witness to report to a local government office in his native Mexico. Second, upon arrival, the petitioner and the witness would provide documentation to verify their identities with the court prior to their testimony. Third, the court staff then helped the petitioner and witness troubleshoot their technology in advance of the trial. Fourth, the petitioner and witness were ordered to testify separately, in a closed room, free of any outside influence. Fifth, any documentary evidence presented to the petitioner and witness was pre-marked and provided to them to facilitate their testimony. Finally, the court ordered the petitioner (through counsel) to pay any costs associated with the remote testimony. *See In re RFC & ResCap Liquidating Tr. Action,* No. 0:13-cv-3451 (SRN/HB), 2020 WL 1280931, at *3–4 (D. Minn. Mar. 13, 2020) (In light of the coronavirus, the court stated it would conduct the final two days of trial remotely at a future date. The Court was advised by IT that the most reliable and secure video link would be obtained at other federal courthouses, and thus directed the parties to conduct cross-examinations from a local federal courthouse of their choice. The parties were ordered to identify the courthouse and the lead IT videoconferencing person from each courthouse so that IT could communicate with them promptly.); *see also Ji v. Jling Inc*., No. 15-CV-4194 (SIL), 2017 WL 6501865, at *3 (E.D.N.Y. Dec. 19, 2017) (The court directed that, with the exception of a videographer with no knowledge of the substantive facts of the case, the witness be alone in the room where he was to testify unless the court directed otherwise, and he may not converse with anyone about his testimony during the course of his testimony.); *Lopez v. Miller*, 915 F. Supp. 2d 373, 396 n.9 (E.D.N.Y. 2013) (stating that "everyone in the courtroom was able to see and hear [the witness] and the people with him"); *Flores v. Alvarado*, No. 3:17-cv-514-RJC-DSC, 2018 WL 1697314, at *2 (W.D.N.C. Apr. 6, 2018) (In a case involving a minor witness in El Salvador, the court found video conferencing was appropriate, but required that the petitioner testify from a private room, free from outside influence, and that petitioner's counsel be responsible for making sure the technological steps were in place to make the remote videoconference feasible, and may work with courthouse staff to accomplish that objective.); *In re Rand Int'l Leisure Prods., LLC*, No. 10-71497-ast, 2010 Bankr. LEXIS 1986, at *14 (E.D.N.Y. June 16, 2010) (limiting who could be present during remote testimony to an attorney who was prohibited from conferring with the witness, a videoconference operator, and a translator, if necessary); *Mission Capital Works, Inc. v. SC Rests., Inc*., No. C-07-1807, 2008 WL 5100313, at *1 n.12 (W.D. Wash. Dec. 3, 2008); *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 501 (2010) (approving as a reasonable safeguard the requirement that no one other than the witness be present during remote testimony and provide documentary evidence in advance).

[14] *Monserrate v. K .K. Mach. Co*., No. 10–3732, 2013 WL 1412194, at *4 (E.D.N.Y. Apr. 8, 2013).

[15] *See Aquino v. Auto. Serv. Indus. Ass'n*, 93 F. Supp. 2d 922, 923–24 (N.D. Ill. 2000) ("The most logical and obvious construction of these rules requires the notary or court reporter to be in the presence of the deponent during the telephonic deposition, rather than in the presence of the attorneys conducting the examination."); *see also United States v. Ruiz-Castro,* 92 F.3d 1519, 1533 (10th Cir. 1966) (overruled on other grounds); *Kaufman v. Equifax LLC,* CV 14-148-BLG-DLC-CSO, 2015 U.S. Dist. Lexis 141815 (D. Mont. Oct. 16, 2015); *Menovcik v. BASF Corp*., No. 09-12096, 2010 WL 4867408 (E.D. Mich. Nov. 23, 2010); *Phye v. Thill,* No. 06-1309-MLB, 2007 WL 2681106, at *1 (D. Kan. Sept. 7, 2007).

[16] *See Anguile v. Gerhart*, No. 93-934, 1993 WL 414665, at *2 (D.N.J. Oct. 7, 1993) (quoting *Jahr v. IU Intern. Corp*., 109 F.R.D. 429, 430-431 (M.D.N.C. 1986)) ("The Court finds that Rule 30(b)(7) [now Rule 31, Deposition by Written Questions] should be construed *in para materia* with subsection (b)(4). Both have a joint purpose of reducing the cost of federal litigation by providing alternatives to traditional stenographic depositions. The courts have not required a showing of extraordinary circumstances before granting Rule 30(b)(4) motions. . . . Thus, upon giving a legitimate reason for taking a deposition telephonically, the movant need not further show an extraordinary need for the deposition. Rather, the burden is on the opposing party to establish why the deposition should not be conducted telephonically.").

In the past two months, there have been abundant federal trial court decisions adjudicating disputes about whether depositions should be postponed because lawyers cannot be in the room with the witness or whether those should proceed by remote means. The courts have most often sided with the parties wishing to proceed remotely.[17] While it might be preferable to be present with the witness, sacrificing that is a small price to pay for continuing to move a case toward its necessary prompt disposition by trial or otherwise. Courts have noted that the end is not in sight or assured when it comes to the pandemic. The ACTF strongly encourages the use of remote means for depositions if to do otherwise would result in any delay in taking depositions.

ii. Admission of Deposition Testimony at Trial

Rule 32 does not provide a means for a party to offer into evidence at trial its own witness's deposition testimony without a showing of "unavailability." Rule 32(a)(4) provides:

> A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: (A) that the witness is dead; (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or (E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

It seems likely that the circumstances of a pandemic would warrant a finding that a witness is "unavailable" within the meaning of this rule, but there are no reported cases on that point yet. A person at significant risk to acquire the virus or to suffer serious complications from the virus likely constitutes one who "cannot attend" under sub-paragraph (C). The courts freely allow the use of depositions under Rule 32(a)(4)(C) when there is appropriate documentation from a physician advising against travel.[18] A pandemic could also constitute "exceptional circumstances" under sub-paragraph (E). During a pandemic-generated national emergency and for 30 days thereafter, the answer is probably yes.[19] Beyond that, it likely depends on local conditions and the circumstances of the witness. The trial judge will be afforded broad discretion.

Courts have considered a number of factors when determining whether exceptional circumstances warrant the use of deposition testimony in lieu of live testimony at trial, including: substantial delay caused by witness's travel, travel expenses,[21] the importance of assessing the witness's credibility,[22] and the opposing party's ability to

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[17] *See e.g., Jae Props., Inc. v. Amtax Holdings 2001-XX, LLC*, No. 19cv2075-JAH-LL, 2020 U.S. Dist. LEXIS 83418 (S.D. Cal. May 12, 2020); *Djurdjevich v. Flat Rate Movers, Ltd.*, No. 17-CV-261 (AJN) (BCM), 2020 U.S. Dist. LEXIS 82428 (S.D.N.Y. May 8, 2020); *United States ex rel. Chen v. K.O.O. Constr., Inc.*, No. 17-CV-261, 2020 WL 2319119 (S.D.N.Y. May 8, 2020); *Cavanaugh v. Cty. of San Diego*, No. 18cv2557-BEN-LL, 2020 U.S. Dist. LEXIS 80792 (S.D. Cal. May 7, 2020); *Moncreiff v. San Diego Unified Sch. Dist.*, No. 19cv1030-GPC-LL, 2020 U.S. Dist. LEXIS 76393 (Apr. 30, 2020); *Grano v. Sodexo Mgmt.*, No. 18cv1818-GPC(BM), 2020 U.S. Dist. LEXIS 72862 (S.D. Cal. Apr. 24, 2020).

[18] *See, e.g., Scarfarotti v. Bache & Co., Inc.*, 438 F. Supp. 199, 202 (S.D.N.Y. 1977) ("We find Carzo's deposition testimony admissible . . . . Carzo became ill and upon doctor's advice did not make the trip from Utica, N.Y. to Manhattan. Nothing to the contrary was advanced. We accept the explanation. We receive this witness' testimony by way of deposition (plaintiffs had full opportunity to question him at that time.)").

[19] *Cf.* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, Section 15002.

[20] *See, e.g. Bickel v. Korean Air Lines Co., Ltd.*, 96 F.3d 151, 155 (6th Cir. 1996) ("While, in retrospect, it appears that the two experts could have wound up their testimony in Washington, caught an evening flight to Detroit, and been available to testify there the following morning, we must review the district court's decision with an appreciation for the difficulties of ensuring the smooth progression of the proceedings in its court. When the court initially decided to allow the videotaped testimony, it did not know that the experts would finish their testimony in Washington in time to appear in Detroit. Once [the party opposing the use of the depositions] informed the court [of that fact], the plaintiff was already in the middle of offering the videotaped testimony. Ordering the plaintiff to produce one or both of the witnesses for live testimony could have resulted in a substantial delay. Considering that the testimony that the experts would have given 'live' was substantially the same as the testimony on videotape, and that the videotaped testimony occurred at a prior trial in this same case, we are not 'firmly convinced' that the district court erred in allowing the videotaped testimony to continue.").

[21] *See Robinson v. Food Serv. of Belton, Inc.*, 415 F. Supp. 2d 1232, 1238–39 (D. Kan. 2005) ("[Plaintiff] claimed damages in the amount of roughly $500.00. In all likelihood, it would have cost [her] more than that to travel to Kansas City to attend trial, including airfare and hotel expenses. This fact weighs in favor of permitting [Plaintiff] to present her testimony via deposition."); *Borchardt v. United States*, 133 F.R.D. 547 (E.D.Wis.1991) (Cost differential of $375 for deposition testimony of witness and between $1,000 and 1,250 for live testimony of witness was "exceptional circumstance" under Rule 32(a)(3)(E) where plaintiff's total claim was only $12,402.); *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471 (D. Md. 2010) (addressing the analogous issue of whether witnesses should be permitted to testify via videoconferencing at trial pursuant to Rule 43, discussed below—Plaintiffs demonstrated good cause to use videoconferencing in lieu of live testimony at trial in Maryland for those laborers who resided in Honduras, where Honduran workers made less than $7,000 a year, forcing them to travel to the United States would impose substantial hardship, and defendant would not be prejudiced since each witness would testify in open court, under oath and face cross-examination.).

[22] *See Robinson*, 415 F. Supp. 2d at 1237–39 ("In other words, unlike many cases where the key factual issues turn on the credibility and demeanor of the plaintiff, in this case the jury was able to resolve those factual issues irrespective of [Plaintiff's] testimony, as numerous other plaintiffs testified to the same core facts."); *Compare Garcia–Martinez, v. City and County of Denver* 392 F.3d 1187, 1191 (10th Cir. 2004) ("When the 'key factual issues' at trial turn on the 'credibility' and 'demeanor' of the witness, we prefer the finder of fact to observe live testimony of the witness.").

have fully cross-examined the witness at deposition.[23] A showing of prejudice resulting from the exclusion of the deposition testimony is not enough to prove exceptional circumstances.[24] Nor is the fact that a witness may assert his Fifth Amendment privilege.[25] And, not surprisingly, the substitution of videotaped deposition testimony will not be allowed if it appears it is being requested for tactical reasons.[26] Note, however, this rule explicitly recognizes "the importance of live testimony in open court."[27]

2. Presentation of Exhibits

Many of the issues that arise with regard to the presentation of exhibits are discussed elsewhere in this paper. However, there are some main points to note. First, each juror should have available his or her own set of paper exhibits to the extent the number of exhibits is not so great as to make this impractical. Alternatively, each juror should be able to view the exhibits on a screen or handheld tablet device. For tangible exhibits, jurors and other participants should not ordinarily be allowed to touch the exhibit. If jurors are allowed to touch exhibits, they should be instructed on proper hand sanitization and provided with sanitizer. Disposable gloves may also be provided, but the science advisors to the ACTF discourage the use of gloves because it is recognized that gloves provide a false sense of security. Thus, if gloves are provided, jurors should be carefully instructed regarding their proper use and hand sanitization, especially after removing the gloves (this is when hands often get contaminated from the gloves). Moreover, courts should take proper precautions regarding the use of foam board exhibits, as well as paper flip charts and white boards. Finally, as noted in the pre-trial section above, courts should discourage side bar or bench conferences and discussions that must take place outside the presence of the jury due to the difficulties of maintaining proper distancing as well as delays.

D. Jury Deliberations

The discussion in this section contemplates that sworn jurors and alternates are gathered in person. Jury deliberation is of the upmost importance because it is the time for the jury to think together, discuss the evidence, reason and make a collective and informed decision. Providing an appropriate setting for this process is key to retaining the civil jury trial as the truly democratic, bedrock component of our judicial system. There are various concerns regarding the deliberation room. First, the court should ensure that the deliberation room is large enough to accommodate all deliberating jurors with designated positions identified and located at least six feet apart. All jurors must be able to see, hear, listen, reason with one another, debate and deliberate together without outside interruptions. There should not be any outside presence in the deliberation room. The sanctity of the deliberation process must be protected in all situations.

A cardinal principle of jury deliberations is that they shall remain private and secret to protect deliberations from improper influence.[28] Second, all jurors should wear masks while in the deliberation room and should be required to use hand sanitizer upon entry and exit.

While deliberating, the court should provide the equipment required for the projection on a large screen of all exhibits and jury instructions, assuming local practice provides for access to exhibits and jury instructions during deliberations. If the hardware is available, jurors should be provided with individual sets of the exhibits or tablets with electronic copies of all exhibits and access to all physical exhibits, such as products and examples. Alternatively, admitted physical exhibits could be placed on a central table with protective measures to allow for disinfection to prevent contamination. These measures might include a protocol to utilize hand sanitizer and air drying before handling an exhibit. Finally, copies of the verdict forms should be provided to each juror. It is also important that there be adequate court staff available to respond to juror questions and requests.

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[23] *See Robinson*, 415 F. Supp. 2d at 1238–39 ("Finally, defendants do not suggest that they were unable to cross-examine [Plaintiff] fully. In fact, defendants were aware at the start of [her] deposition that [she] might be called to basic training and that the possibility existed that [she] might not be present at trial. Defendants do not suggest any particularized reason for preferring the live testimony of [Plaintiff]. They do not, for example, suggest that her demeanor at the deposition cast doubt on her credibility or any other reason to prefer [her] live testimony.").

[24] *Griman v. Makousky*, 76 F.3d 151, 153–54 (7th Cir. 1996) ("Even 'serious prejudice' from the exclusion of a deposition has been held not to be an exceptional circumstance in and of itself. *Angelo v. Armstrong World Industries, Inc*., 11 F.3d 957, 963–64 (10th Cir.1993); *see also Allgeier v. United States*, 909 F.2d 869, 876 (6th Cir.1990) . . . . [I]t is not only a party's need for the evidence in the deposition, but also the nature of the circumstances that have made the deponent unavailable to testify, that determines whether the circumstances can be thought exceptional. Indeed, if harm were all that mattered, there would be no need for any of the other subsections. Even in *Huff v. Marine Tank Testing Corp*., 631 F.2d 1140, 1142–43 (4th Cir.1980), the case that goes furthest in interpreting 'exceptional circumstances' in Rule 32(a)(3)(E) liberally, the unexpected disappearance of the key witnesses was an exceptional, and in the circumstances exceptionally harmful, event . . . . The release and subsequent disappearance of a jail inmate [here] are not an exceptional combination of events.").

[25] *Banks v. Yokemick*, 144 F. Supp. 2d 272, 288–89 (S.D.N.Y. 2001).

[26] *In re Vioxx Products Liability Litigation*, 439 F. Supp. 2d 640, 643 (E.D. La. 2006).

[27] Fed. R. Civ. P. 32(a)(4)(E); *see also Griman v. Makousky,* 76 F.3d 151, 153–54 (7th Cir. 1996) (noting the "strong preference of Anglo-American courts for live testimony, especially in a case that turns on the credibility of testimony contradicted by other witnesses").

[28] *United States v. Virginia Erection Corp*., 335 F.2d 868, 872 (4th Cir. 1964).

VII. Conclusion

It is important, even in the midst of a global pandemic, that our justice system function in a manner consistent with those principles upon which our country was founded. Due to the complexities and challenges presented by COVID-19, it is now more important than ever that those involved in the judicial process take every possible step to ensure the preservation of civil trial by jury as guaranteed by the Seventh Amendment. By the utilization of these and other measures and safeguards, it is eminently feasible that civil jury trials can be conducted in a safe and effective manner.

VIII. Resources for Information

Trial Lawyer Associations

ABOTA COVID-19 Task Force Announcement

ABOTA COVID-19 Task Force Committee

ABOTA COVID-19 Task Force Charge

American College of Trial Lawyers Task Force on Advocacy in the 21st Century
Statement of Purpose, April 10, 2020

A Return to Trials: Implementing Effective Short, Summary, and Expedited Civil Action Programs

BYU Law Review, Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs

California ABOTA Chapter Letter to Judge Joyce Hindrichs Re: CAL-ABOTA's Call to Improve Accessibility to the Courts During the Pandemic, May 15, 2020

Federal Rules of Civil Procedure
ABOTA COVID-19 Task Force

Foundation Funding Request from Miami Chapter

Jurisdictions with Faster, Summary or Expedited Jury Trials Rules and Statutes

Recommended Best Practices for Jury Trials
ABOTA Ohio Chapter, May 8, 2020

Orders and Advisories Issued by Various Courts

Amended Court Order Regarding Procedures in the Conduct of Courtroom Proceedings During Coronavirus Emergency Period
Lake County Common Pleas Court
General Division

Best Practices Memorandum
Supreme Court of Florida, May 11, 2020

Corrected Order Regarding Illinois Courts Response to COVID-19 Emergency/Impact on Discovery, Supreme Court of Illinois, M.R.30370

Face Covering Order
United States Court of Appeals for the Seventh Circuit, United States District Court for the Northern District of Illinois

First Amended Bexar County Civil District Courts COVID-19 Court Operations Plan
The District Courts of Bexar County

Jury Letter Regarding Upcoming Jury Service in the Era of Coronavirus, United States District Court Eastern District of Texas, May 6, 2020

Massachusetts Court Update, Supreme Judicial Court Appeals Court, and Trial Court, May 14, 2020

Memo Regarding Court Operations During the Next Six Weeks, The Supreme Court of South Carolina, April 24, 2020

Order No. 2020-4 Regarding Court Operations During the COVID-19 Pandemic
United States District Court, Western District of Arkansas

Order Five Regarding Court Operations During the COVID-19 Pandemic
United States District Court for The Eastern District of Arkansas

Order Regarding Illinois Courts Response to COVID-19 Emergency/Impact on Discovery
Supreme Court of Illinois

Order Regarding Pretrial Procedures in Civil Cases
United States District Court for The Eastern District of Texas

Order Regarding Temporary Order Regarding Civil Litigation and Rules of Civil Procedure in Circuit Court, Supreme Court of Appeals of West Virginia, Docket No. 20-Rules-04

Per Curiam Order Regarding Response to the COVID-19 Pandemic Eviction Filings
Supreme Court of Arkansas, 2020 Ark. 187

Press Release Regarding Court Reopening
Superior Court of California
County of Contra Costa, May 13, 2020

Response to the COVID-19 Pandemic
Supreme Court Arkansas

Temporary Order Regarding Civil Litigation and Rules of Civil Procedure in Circuit Court Docket No. 20-Rules-04, Supreme Court of Appeals of West Virginia

Response to the COVID-19 Pandemic Supreme Court Arkansas

Temporary Order Regarding Civil Litigation and Rules of Civil Procedure in Circuit Court Docket No. 20-Rules-04, Supreme Court of Appeals of West Virginia

Voir Dire During COVID-19 Ohio Order, Lake County Common Pleas Court, General Division

Use of Personal Protective Equipment in County Court Facilities (Supreme Ct. of South Carolina May 26, 2020)

Court Administration

Federal Judiciary COVID-19 Recovery Guidelines United States Courts, April 24, 2020

Remote Participation in Bankruptcy Court Proceedings Federal Judicial Center

Minutes Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19

Pandemic Influenza Bench Book for Virginia's Court System by Supreme Court of Virginia's Pandemic Flu Preparedness Commission Revised July 2017

Articles of Interest

@TheCenter: Will Remote Hearings Improve Appearance Rates? By NCSC

Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic By Matt Reynolds May 11, 2020, ABA Journal

COVID Task Force Regarding Opening Witness Exam and Closing

Draft Communications Plan NCSC COVID-19 Juror Outreach Project

Managing Juries and Jury trials During COVID-19 NCSC Center for Jury Studies

'Most Troublesome' Issue: Experiment Tests Remote Jury Trial with COVID-19 Around By Catherine Wilson, Daily Business Review May 14, 2020

Online Jury Trial Considerations Prepared by the OCP Task Force

Proposed Changes to FRCP 30 Regarding Remote Depositions from Bruce R. Pfaff

Remote Courtrooms Here to Stay as Judges Tackle Backlogs by Aebra Coe, Law360

Cases Cited

Feng Wang v. A & W Travel, Inc. 130 A.D.3d 974, 14 N.Y.S.3d 459 (2015)

Gabriel v. Johnston's L.P. Gas Service, Inc. 98 A.D.3d 168, 947 N.Y.S.2d 716 (2012)

William A. Brewer, III v. Lennox Hearth Products, LLC, et al. Consolidated Brief filed May 8, 2020, No. 18-0426 Supreme Court of Texas

Wygocki v. Milford Plaza Hotel 38 A.D.3d 237, 831 N.Y.S.2d 381 (2007)

Yu Hui Chen v. Chen Li Zhi 81 A.D.3d 818, 916 N.Y.S.2d 525 (2011)

Other

Congressional Research Service, Federal Jury Trial and Covid-19

116th Congress Key Person Contact List May 2020

Pre-Trial Checklist

- ☐ Requirement of personal protective equipment (masks, shields, gloves, sanitizer, plexiglass dividers)
- ☐ Screening of all participants for temperature, exposure risks, other symptoms
- ☐ Procedure for jury orientation
- ☐ Procedure for jury screening
- ☐ Seating of the jury panel
- ☐ *Voir dire* procedure and the use of jury questionnaires
- ☐ Communication of for-cause strikes
- ☐ Communication of preemptory strikes
- ☐ Seating of jury
- ☐ Public access
- ☐ Seating of counsel
- ☐ Whether movement in the courtroom and use of the podium is allowed
- ☐ Procedure for use and disinfection of common equipment such as white board, document presenter (Elmo), enlarged exhibits and physical exhibits or demonstratives
- ☐ Presentation of documentary exhibits (paper or electronic)
- ☐ Handling of documentary exhibits
- ☐ Jury breaks and bathroom protocol and disinfecting facilities
- ☐ Anticipation of objections
- ☐ Procedure for side bar conferences with court
- ☐ Disclosure of exhibits in advance for direct and cross-examination
- ☐ Breaks and protocol during breaks
- ☐ Number of cleanings (wipe downs) of the courtroom that will occur each day
- ☐ Sanitary storage of jury exhibit books, notebooks and other items at night
- ☐ Consequences of positive testing or symptomology of any participant during trial (mistrial, adjournment, testing of all participants exposed?)
- ☐ Bathroom protocol and cleaning

General Order Regarding Rules of Conduct for Trial Participants

The court hereby issues the following order regarding conduct applicable to all trial participants in this Court, including but not limited to lawyers, clients, witnesses, client representatives, members of the jury, court reporters, law clerks, and security personnel:

1. All entrances to the courthouse must be well marked with restrictions.

2. Start times must be altered to allow for slower admission of persons into the courthouse.

3. All persons entering the courthouse will be screened. This screening will include a non-invasive temperature check for temperature exceeding 100.3 and a series of questions regarding known exposure circumstances, recent illnesses and travel. Any persons who have traveled to a high-risk area in the preceding fourteen (14) days will be denied entry to the courthouse.

4. All persons in the courthouse must stay a minimum of six feet away from all other persons at all times. Exceptions to this rule may only be granted by the trial judge. For example, counsel may be permitted to approach a testifying witness for limited purposes. In this instance, the court may direct that counsel and the witness must cease speaking and wear their respective face masks. The Court may also require other measures to avoid encroachment within six feet, such as leaving an exhibit on a table to be retrieved by the witness.

5. All persons in the courthouse must wear an approved mask at all times unless an exception is granted by the presiding judge. (Specifications for masks may be designated by the Court). Due to difficulty of hearing speakers with masks, people may be permitted by the Court to speak and testify free from obstruction (i.e. without a mask or through the use of a transparent facial mask, face shield, or Plexiglass partitioning).

6. Personnel in the courtroom will be limited to as few as possible as determined by the Court.

7. Media may require remote viewing options to reduce the number of persons in the courtroom.

8. Witnesses must be on call or scheduled for their appearance to reduce exposure and unnecessary waiting.

9. The jury will only be brought to the courtroom for trial. Waiting pools of jurors are discouraged.

10. The use of shared podiums found in courtrooms will only be allowed by permission of the court.

11. Counsel, along with their clients and client representatives, must stay at their designated counsel table at all times except when speaking. Breaks will be liberally given to allow counsel to speak to their clients without the risk of being overheard.

12. Sidebar conferences are not permitted absent specific approval of the court. Participants may need to remove themselves from the courtroom and use a room that allows for proper social distancing.

13. When counsel is speaking, he or she should stay at his or her designated counsel table, or alternatively, must remain on the designated mark in the courtroom.

14. Physical handling and transfer of exhibits is discouraged. All exhibits, with the exception of tangible exhibits that cannot be reproduced for the purpose of trial, must be shown electronically. All trial participants must have adequate viewing of the electronic exhibits either by shared screen in the courtroom or individual screens or tablets.

15. If a tangible exhibit must be passed among jurors, they will be provided hand sanitizer, instructed on the proper hand hygiene and offered court-supplied, disposable gloves. Further, jurors will be instructed to avoid touching of the face, eyes and mouth. Court personnel will assist in the proper handling and disinfecting of exhibits.

16. Each juror will be given his or her own copy of exhibits unless the volume or other characteristics of the exhibit render individual copies impracticable. In such cases, precautions will be taken to protect against transfer of contamination.

17. During breaks or deliberations, jurors will be taken into a jury room where there is adequate space to maintain a minimum distance between one another of six feet. Before entering the deliberation room, jurors will be required to use hand sanitizer. Upon exiting the deliberation room, jurors will be required to use hand sanitizer. As previously stated, jurors must wear masks at all times, including when speaking in the deliberation room.

18. Breaks generally will be longer to allow for staggered trips to the restroom.

19. Courthouse cleaning crews will be responsible for ensuring that each courtroom undergoes cleaning each day, including but not limited to wiping down all chairs, tables, door handles, etc. with disinfectant solution or wipes.

20. Bathrooms designated for jurors' use will be cleaned and disinfected by court personnel after the morning and afternoon breaks, lunch and close of court business for the day. Disinfectant wipes will be available for use by jurors in the jury room and bathrooms.

21. Courthouse security is empowered to enforce social distancing and other orders including the removal of persons showing signs of COVID-19.

The foregoing rules have been recognized by this Court as necessary to ensure adequate protection of all trial participants. Failure to comply with these rules of conduct constitutes a violation of a court order.

IT IS SO ORDERED.

DATED this _____ day of _____ , _____.

_____
Name of judge

_____
Name of court

ABOTA has a Rapid Response email which is dedicated to COVID-19 efforts.

Should you have any questions or issues that you would like to have addressed, please send us an email at **RapidResponse@abota.org**.

SAVE OUR JURIES™

It's Your Constitutional Right

Save Our Juries is a public awareness campaign sponsored by the American Board of Trial Advocates. Save Our Juries educates and mobilizes citizens in the fight to save our disappearing Seventh Amendment right. ABOTA's mission is to protect and preserve the civil jury system. Please explore saveourjuries.org and follow Save Our Juries on Twitter @ saveourjuries.

American Board of Trial Advocates™