



COVID-19 GUIDELINES FOR PENNSYLVANIA'S JUDICIARY:

# RESUMING JURY TRIALS

**AOPC**

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS

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## INTRODUCTION

On March 16, 2020, the Supreme Court of Pennsylvania declared a statewide judicial emergency because of the public health crisis caused by the COVID-19 pandemic. The Supreme Court clarified and extended the statewide judicial emergency by subsequent Orders dated March 18, March 24, April 1, and April 28, 2020. As part of its directives, the Supreme Court suspended jury trials in all judicial districts through June 1, 2020. On May 27, 2020, the Supreme Court directed that the statewide judicial emergency would end on June 1, 2020. The Supreme Court authorized President Judges either to resume jury trials or to continue suspending jury trials “until such time that they can be conducted consistent with prevailing health and safety norms.”

On May 11, 2020, the Administrative Office of Pennsylvania Courts (AOPC) in conjunction with the Pennsylvania Conference of State Trial Judges, created a Jury Trial Working Group to identify issues and to provide best practice recommendations for resuming jury trials while ensuring public health and safety. The Working Group focused on the following four areas: (1) preparing courthouses for the return of staff, jurors, and other members of the public in the wake of COVID-19; (2) summoning prospective jurors, notifying them of new protocols to promote their safety, and obtaining relevant COVID-19 information that may impact their ability to serve as jurors; (3) selecting juries, both in-person and virtually through advanced communication technology (ACT); and (4) conducting jury trials. On June 25, 2020, the Working Group issued these recommendations based upon currently-available public health information, with the expectation that these recommendations may be revised or supplemented as circumstances change. The Working Group gratefully acknowledges the invaluable assistance provided by the National Center for State Courts, particularly its Director of the Center for Jury Studies, Paula Hannaford-Agor; Kevin Hoffman, Esquire, of the Pennsylvania Department of Health (DOH); the AOPC’s Judicial Education Administrator, Darren M. Breslin, Esquire; and Judicial Services Administrator, Nicholene F. DiPasquale.

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## **I. PREPARING THE COURTHOUSE FOR THE RESUMPTION OF JURY TRIALS**

Before resuming jury trials, each court must ensure that the courthouse and court facilities are open and prepared for business in the post-COVID-19 environment. Courts must also ensure that court personnel, as well as related offices and staff, are properly prepared to resume operations. This section addresses steps court leaders should take to prepare for resuming jury trials.

Importantly, in its May 27, 2020 Order, the Supreme Court authorized president judges in each judicial district to declare judicial emergencies and to enter necessary orders pursuant to Rule of Judicial Administration 1952 (B)(2). Order available at <http://www.pacourts.us/assets/files/page-1305/file-9376.pdf>

### **PRELIMINARY CONSIDERATIONS**

Establish or participate in a working group of stakeholders, including the county governing authority, health department, emergency management services, District Attorney, Public Defender, local law enforcement, local bar association, and other relevant entities or organizations.

Monitor your community's COVID-19 statistics, including the availability of testing and the sufficiency of resources for treatment. This information may require changes regarding when you enter or retreat from phases as established by the executive branch. Information can be obtained from the DOH or local health department.

### **CARE OF YOUR EMPLOYEES**

Identify who can work remotely and who must be at the facility to perform job functions. Under current conditions, anyone who can work remotely should continue to do so as long as feasible.

Certain employees may be at increased risk for COVID-19. Per current Centers for Disease Control and Prevention (CDC) and DOH guidance, the at-risk category includes persons over the age of 65 and those who have any of the following medical conditions:

- chronic lung diseases or moderate to severe asthma;
- serious heart conditions;
- immune systems that are compromised from diseases such as cancer or AIDS, and from medications that compromise immunity;
- severe obesity (BMI of 40 or higher);
- chronic kidney disease, liver disease, and diabetes.

Courts cannot, ask employees to identify what medical condition they have that makes them particularly vulnerable. Courts can, however, provide an explanation of who is at risk and advise all employees the court will consider requests for flexibility or reasonable accommodations on an individualized basis.

Courts may permit employees who are at increased risk to work remotely, if possible. When working remotely is not possible because of job duties, consider other reasonable accommodations including locating the worker away from the public, providing medical grade PPE, and increasing social distancing. If you have concerns about what you may require of higher-risk employees, consult your human resources (HR) department and/or the AOPC.

Determine if any employee has tested positive for or had recent close contact with someone who has COVID-19. The CDC defines close contact as being within six feet of the infected person for fifteen minutes or more.

Available at <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

If so, an employee who tested positive should not be permitted to return to a shared workspace until the employee has been self-quarantined for at least ten days and fever free for seventy-two hours. An employee who had recent close contact with someone who has COVID-19 should not be permitted to return to a shared workspace until the employee has been self-quarantined for four-teen days or as CDC policy dictates at the time.

Diminish risk to your employees by minimizing their interaction with each other. This report addresses court facilities below, but you can also use creative steps such as rotating employees in and out of the workspace or using shifts so all are not present at the same time.

Draft and publish policies to address the safety of your employees. Require employees to report if they have experienced symptoms of COVID-19 in the preceding three days, including, but not limited to:

- fever of 100.4 or higher that day or in the preceding 3 days;
- chills, fatigue, vomiting, diarrhea and nausea;
- muscle and body aches;
- headache;
- sore throat;
- cough, chest tightness, or shortness of breath;
- new loss of taste or smell;
- any updated symptoms outlined on the Pennsylvania DOH website as information develops on COVID-19.

Courts may consider the need for a disciplinary consequence if an employee disregards the policy and comes to the workplace while ill. The policy also should provide that, if an employee has reason to believe they are experiencing COVID-19 symptoms while in the workplace, the employee should report this per court procedure, be permitted to return home, and advised to seek immediate medical attention.

The court should establish a written policy that employees must report if someone they live with or have been in close contact with in the last fourteen days tests positive for COVID-19. Courts should send the employee home, either on leave or to work remotely for as long as medically indicated.

All employees should consider the wisdom and risk of travel, both for business and pleasure. If employees travel out of the country, either for business or pleasure, they should not return to work without self-quarantining for a period guided by the state or local department of health.

## SAFETY PROVISIONS FOR EMPLOYEES

Courts should consider the following measures to ensure safety for employees:

- maintain six feet of distance between workstations;
- mark one-way hallway and stairway patterns;
- establish elevator limits;
- install Plexiglas;
- prop open doors, where security is not a concern, to minimize touch points;
- rotate staff so people in adjacent areas are not working on the same day or at the same time.

Courts should establish and post written policies directing employees to use good hygiene in the workplace, including:

- wash hands with soap and water or with alcohol-based sanitizer;
- wear face shields, mask or cloth face coverings that cover the nose and mouth
- avoid touching the face;
- sneeze or cough into a tissue or the arm;
- frequently disinfect used items and surfaces;
- maintain six feet of social distance.

The Pennsylvania Department of Health and Department of General Services have developed signs for your use.

Available at <https://www.dgs.pa.gov/about/pages/covid-19.aspx>.

The court should consider moving from desktop computers to laptops to facilitate employees working from home when necessary. Courts should direct employees not to share computers or other office equipment whenever possible. For equipment that must be shared, such as copiers, the court should either assign the equipment to one person or require sanitization with each use. The court should close shared breakrooms and evaluate common snack areas for changes to minimize contact between users.

## WHAT TO DO WHEN YOU HAVE A CONFIRMED COVID-19 CASE

If the court learns an employee has been diagnosed with COVID-19, the court has a responsibility to inform other employees who had close contact with the infected employee. However, the employee's name may not be revealed. If the notification necessarily causes other persons to identify the infected employee, this is not a violation of the Americans with Disabilities Act (ADA). The public health emergency requires that persons be warned who have been in close contact with anyone with COVID-19. Equal Employment Opportunity Commission and Department of Labor guidance states that, because of the pandemic, employers should inform all those who have had close contact even though the caution may allow others to discern who has the illness. The only restriction is not to state or confirm the name of the employee without the employee's specific permission. This notification will permit the health department to conduct "contact tracing," which is an important tool in fighting the COVID-19 virus and stopping its spread.

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA) applies to the court and its employees. It provides for leave, in varying amounts, depending on how COVID-19 is affecting the employee. If you have a question about the applicability of this law, contact your HR Department and/or the AOPC's HR or Legal Department. AOPC/Legal provided specific guidance on the FFCRA to president judges and district court administrators in April.

## PREPARATION OF THE PHYSICAL FACILITIES

Courts should intensify cleaning protocols for courtrooms and court offices consistent with DOH / CDC guidelines before resuming non-emergency operations. Consult with county emergency management and health department on changes that can be made to the building to minimize transmission of disease (one-way traffic, new non-touch door handles, etc.)

Ensure that the county's cleaning policy will be adequate when the courtroom and offices are reopened.

Determine the safe handling of all mail, especially mail from prisons. It is suggested that the person or persons in each office handling the mail be provided gloves and be required to wear a face covering during the task.

Measure the courtroom to determine how many people may safely be in each area. Determine if additional safety measures, such as a Plexiglas barrier around the court reporter, witness box, or jury box, should be installed. Consider taping or painting areas to mark six-foot distances, particularly if people will be congregating or waiting in line. Consider if furniture should be removed, or benches replaced with seats to accommodate social distancing, particularly in the juror area.

Enlist the key personnel who will be in the courtroom, such as the prosecuting attorney, defense counsel, and child services, to determine what changes need to be made to ensure social distancing.

## PREPARATION FOR PUBLIC ENTRY

Meet with the Sheriff to make a plan for screening the public when the court facilities reopen while protecting the security personnel.

Arrange for either security personnel or staff at building entrances to:

- have a checklist to ask visitors if they have had specific symptoms of COVID-19 or recent close contact with infected persons;
- have masks available if a person appears without a mask;
- take temperatures;
- consider using a sign-in sheet at courthouse security check points, including the name and office visited, which may be useful if health officials need to perform contact tracing;
- consider ADA accommodations for court users who cannot wear masks because of a medical condition and how security will handle the situation.

Create a protocol to follow if someone has a disqualifying temperature or any of the other disqualifying factors, i.e., notify the appropriate courtroom personnel.

## PREPARATION FOR TRIALS

Each court should determine the priority of in-person jury trials, giving high priority to trials that cannot be held remotely.

For high-volume courts, stagger the docket to minimize contact and provide for social distancing. Consider recommending mediation, arbitration, or settlement negotiations prior to setting any trial to reduce the number of proceedings the court must conduct.

Ensure the continued and regular sanitizing of all doors, handles, restrooms and other parts of the facility at least twice per day.

## IN THE COURTROOM

Face coverings or masks that cover the nose and mouth should be required for all the personnel and the public. The court should consult with counsel for parties about how to handle the wearing of masks by witnesses while testifying and the jurors during voir dire. The court may want to consider the use of clear protective masks, so facial expressions and demeanor may be evaluated.

Hand sanitizer should be present upon entrance to courtroom and on each counsel desk. Extra bottles of sanitizer, masks, and gloves should be available for anyone in the courtroom or court offices. Tissues and trashcans should be at each counsel table and be available for jurors.

Arrange with the Department of Corrections and the Sheriff for offenders and jail inmates to appear remotely through ACT if appropriate.

## **II. SUMMONING POTENTIAL JURORS AND NEW SAFETY MEASURES**

The information in this section may be useful for summoning jurors, informing them of courthouse safety protocols, and determining whether individuals may be excused for cause before bringing them to the court facility.

### **SAMPLE NOTICE TO PROSPECTIVE JURORS**

You have been summoned for jury service during a most extraordinary time. Jury duty is important because it safeguards one of the most crucial rights of the American legal system. As trials continue to take place, the court must continue to rely on civic-minded jurors like you for help in ensuring fairness and providing impartial viewpoints in cases.

Operating a judicial system during a worldwide pandemic requires sacrifice, collaboration, and creativity. The constitutional right to a jury trial doesn't end with a pandemic, and trials cannot happen without jurors. Your potential role as a juror could not be more critical.

The court recognizes that your ability to serve may be impacted by the pandemic. Please appear as directed in your summons unless you have already been deferred or excused, you are ill, or you have a high-risk condition.

Please know that, in conjunction with state and local medical experts and the Pennsylvania Department of Health, the court implemented many precautions to ensure your safety and security while you serve, including the following:

*[Insert all of the following safety protocols that apply to your jurisdiction, and other measures your court has taken, for example]:*

- pre-screen jurors remotely;
- pre-screen jurors through questionnaires;
- screen jurors upon entry through questioning and temperature checks (100.4 F. or higher);
- stagger jury reporting and break times;
- require jurors to report directly to courtrooms or larger jury pool rooms;
- limit the number of jurors and other persons in courtrooms and during jury selection;
- conduct individual voir dire, if necessary;
- expedite check-ins;

- provide separate entry and sole access to certain hallways, elevators, steps, restrooms, and rooms;
- provide additional staff to assist with concerns and directives;
- disinfect all areas where the jury will have access; jurors will not be asked to touch any surfaces, documents, or objects that have been previously touched by another person without being sanitized;
- provide face masks and gloves if requested/needed;
- require appropriate physical distancing; provide widely-available hand sanitizer;
- facilitate frequent use of the restrooms for hand washing if requested; jurors should be able to sanitize or wash their hands as often as they feel necessary;
- provide sanitizing stations;
- disinfect and wipe down high-touch areas;
- establish courtroom rules for counsel and staff such as separate exhibit copies for jurors;
- provide courtroom distancing/protective measures such as Plexiglas shielding, fans, open windows for fresh air, etc;
- separate water, snacks, coffee for jurors;
- encourage jurors to share any concerns with the Court Administrator, judge, and/or tipstaff.

Also, please know that during your service, the court will be making every effort to comply with CDC guidelines and recommendations. The overall number of people inside the courthouse and courtroom will be restricted. Nobody who has tested positive for coronavirus or exhibits any symptoms will be permitted in the courthouse or onto the jury. Please review the court website and if you have any questions, please call the court administrator's office.

Remember that we take the health and safety of our jurors very seriously. If you are ill or experiencing symptoms such as a fever, cough or shortness of breath or other symptoms of COVID-19 infection, please do not report for service. If you have been exposed to someone who is ill or have been exposed to anyone who is experiencing similar symptoms, please do not report for service.

## SAMPLE CONFIDENTIAL COVID-19 JUROR QUESTIONNAIRE

1. Are you an essential healthcare worker? If yes, where are you employed and in what capacity?
2. Have you been exposed to COVID-19? If so, what is the approximate date of your exposure?
3. Have you tested positive for COVID-19? If yes, please give the approximate date of the test.
4. Are you currently experiencing any symptoms of COVID-19 and have been directed to quarantine? If yes, on what date were you told to quarantine?
5. Are you experiencing any symptoms of COVID-19? If so, what symptoms do you have and for how long have you been experiencing these symptoms?
6. Are you considered to be an individual in a vulnerable COVID-19 population due to age or health condition? If so, and if you are willing, please describe.
7. Do you have any other concerns related to COVID-19 that might impact your ability to serve on the jury? If so, and if you are willing, please explain.
8. Are you an individual who has been financially impacted by the pandemic such that jury service would impose a substantial financial burden on you or your family? If so, please explain.
9. Are you responsible for caretaking of children or others such as an ill relative, such that jury service would impose a substantial burden on you, your children, or another? If so, please explain.
10. Do you have a working computer (i.e., desktop, laptop, tablet, or smart phone) with internet access, and working audio and video functionality?
11. Do you have a cell phone? Please provide your cell phone number so the court can contact you with information and updates.
12. If you have a cell phone, can you receive text messages on it?

I hereby certify that the answers on this form are true and correct. I understand that false answers provided herein subject me to penalties under 18 Pa.C.S.A. Section 4904 relating to Unsworn Falsification to Authorities.

## RESPONSES THAT MAY TRIGGER FOR CAUSE RECUSALS

Written responses received from the voir dire to the Sample Confidential COVID-19 juror questionnaire may establish a basis for "For Cause" recusals, such as:

- An affirmative response to any of questions 1 through 9 on the sample confidential COVID-19 juror questionnaire.
- Travel outside of the country within the last 30 days.
- Inability to serve the required number of days for the trial because of a hardship.
- Fever, cough, shortness of breath, or other symptoms of COVID-19 infection over the last few days.
- Positive COVID-19 antibody test.
- Inability to wear a mask or engage in social distancing.
- Inability to sit for at least 90 minutes at a time, especially if enclosed in Plexiglas juror booth.
- Persons over 65.
- Persons with preexisting medical conditions.
- Health care professionals.
- Persons caring for another ill individual.
- Single parents caring for children.
- Transportation difficulties requiring public transport.
- Person(s) who recently returned to work after furlough or layoff.

Courts should determine whether specific medical documentation is required as proof of vulnerability, inability to serve, or inability to wear a mask or other personal protective equipment.

### **III. JURY SELECTION ALTERNATIVES**

This section will address alternatives for jury selection. Whether selection occurs in-person or remotely, some items are worth highlighting at the outset.

- Courts should remain mindful that any jury called must be “from a representative cross section of the eligible population of the county.” 42 Pa.C.S. §4501. See Duren v. Missouri, 439 U.S. 357 (1979) and Commonwealth v. Martin, 5 A.3d 177 (Pa. 2010).
- 42 Pa.C.S. §4503(a)(3) (Exemptions from jury duty) states: “Persons demonstrating to the court undue hardship or extreme inconvenience may be excused permanently or for such period as the court determines is necessary, and if excused for a limited period shall, at the end of the period, be assigned to the next jury array.”
  - This section appears to give courts the ability to excuse jurors under the present circumstances if they show hardships such as ill health, just back to work, etc. This could be gleaned from answers to a special questionnaire that would permit jurors to be excused and not called in, thereby eliminating many of these questions from voir dire and limiting the number of people to be questioned to those not experiencing such hardships.
- In both civil and criminal cases, background information, such as the first eight questions set forth in Pa.R.C.P. NO. 220.3(b) and the information called for in Pa.R.Crim.P. 632, can be obtained by counsel’s review of the jury questionnaires.
  - Use of the information from a COVID-19 juror questionnaire noted above may enable challenges for cause and/or agreements to strike jurors between counsel and the court even before the selection process begins pursuant to 42 Pa. C.S. §4503(a)(3) (as discussed above). This would allow counsel and the court, in the remote questioning, to focus upon the voir dire questions in civil cases set forth in Pa.R.C.P. 220.3(9)-(17) and in the voir dire process provided for in Pa.R.C.P. 631(D) in criminal cases, along with any special voir dire questions permitted by the court in either type of case.
- The requirements for and numbers of peremptory challenges would still be governed by Pa.R.C.P. 221 and Pa.R.Crim.P. 634. Increased “for cause” dismissals of summoned jurors for COVID-19-related reasons likely will result in fewer prospective jurors reporting for jury selection. For that reason, the Jury Trial Working Group recommends, on a temporary basis, a reduction in the number of peremptory challenges in criminal and civil cases.

- Article I, Section 6 of the Pennsylvania Constitution entitles a party to a twelve-person jury if the party demands a jury of twelve persons. Blum v. Merrell Dow Pharmaceuticals, Inc., 626 A.2d 537, 548-549 (Pa. 1993).
  - A civil litigant may waive the right to a jury of 12 and proceed forward with fewer than 12 jurors. Gianni v. William G. Phillips, Inc., 933 A.2d 114, 116-117 (Pa. Super. 2007), *app. denied*, 597 Pa. 732, 952 A.2d 677 (2008); Ottavio v. Fibreboard Corp., 617 A.2d 1296, 1299 (Pa. Super. 1992) (*en banc*).
  - In criminal cases, a defendant *may* agree to proceed with fewer than 12 jurors only "after a jury of 12 is initially sworn and before verdict," i.e., one of the original 12 is no longer able to serve. See Pa. R.Crim.P. 641.
- The deferral of jury trials during the COVID-19 health crisis and resulting statewide judicial emergency has significantly increased the pending inventory of cases awaiting trial. As a consequence, courts anticipate that a higher number of cases will require jury selection from a finite pool of available jurors. For this reason, courts may consider giving priority consideration to civil litigants who stipulate to proceed with juries of six or eight jurors.
- During in-person jury selection, courts should not only limit the number of people reporting at a given time, but also limit the amount of time that individuals are present as a group for questioning.
  - Pa. R.C.P. No. 220.3(c) authorizes "the use of a written questionnaire" in connection with voir dire, provided there is also "the opportunity for oral examination by the court or counsel." If the court issues summonses for a specific case, the judge should consider sending the venire a case-specific questionnaire to complete and return before jury selection. Counsel for the parties should submit proposed voir dire questions for the judge's approval. Obtaining relevant information from prospective jurors prior to jury selection will reduce the time needed for oral examination during jury selection.

## IN-PERSON JURY SELECTION - FACILITY

The court should consider handling all or part of jury selection using Advanced Communication Technology (ACT).

If courts conduct the entire jury reporting and selection process in-person, courthouse space limitations may present insurmountable challenges in gathering large numbers of potential jurors while adhering to the CDC and DOH social distancing recommendations. In that event, judges should consider using non-courthouse facilities such as hotel ballrooms, school gymnasiums, convention

centers, banquet halls, empty retail buildings, and comparable sites to gather the venire and conduct jury selection while observing social distancing. Only empaneled jurors must thereafter report to the courthouse for their jury service, thereby reducing the number of jurors entering the courthouse and enhancing the control of contagion transmission.

For in-person jury selection, the court should consider the following protocols:

### PRIOR TO IN-PERSON JURY SELECTION

Keep the public informed that the courts take public health and safety seriously and that they have implemented policies to prevent the risk of infection from COVID-19. This information should be widely communicated to prospective jurors, court staff, and the public through one or more of the following outlets:

- public Service Announcements (PSAs), media advisories, and press releases;
- court websites and social medial platforms;
- juror robo-calls or call-in messages;
- courthouse signage;
- other technologies, including text messaging and email.

Publicly acknowledge that jurors are critically important participants in the administration of justice.

Send prospective jurors safety information with their juror summonses. This may include a brochure, a link to a PSA video, or a YouTube or Facebook video that addresses the following:

- parking information;
- bussing and transportation protocols from the parking facility to the Courthouse;
- walk-through of jury selection process from front door to jury room
- health precautions taken in compliance with local, state, and national guidelines (cleaning and disinfecting courtrooms and jury selection areas, social distancing measures, availability of hand sanitizer, use of Plexiglas partitions (when applicable), etc.);
- requirement to wear masks;
- available amenities (for example, water, vending machines, cafeteria food) and what the jurors should bring with them to be prepared.

Consider remote options for prescreening jurors for hardship and for cause conflicts.

Consider mailing more jury summonses than usual because of anticipated changes in juror response rates resulting from COVID-19.

Stagger reporting times for prospective jurors to minimize the number of people present at one time. Courts should comply with local and state occupancy limitations.

Train court staff on the proper use of personal protective equipment (PPE), such as gloves and face masks, to avoid cross-contamination.

## IN-PERSON JURY SELECTION

Courts should consider implementing the following safety measures for in-person jury selection:

- Screen all persons entering the courthouse for COVID-19.
- Require all persons entering the courthouse to wear face coverings at all times, except as noted below.
- Avoid the direct exchange of documents with jurors, including during the check-in process. If direct exchange is unavoidable, court staff and jurors should wear gloves.
- Restrict access to common areas, where social distancing may not be feasible.
- Instruct jurors to report directly to a designated courtroom instead of a single jury assembly room.
- Consider paging and texting technology to communicate with jurors regarding the time and designated location where they should report.  
*(This would be similar to the technology used by restaurants to notify patrons that their table is ready.)*
- Assemble smaller jury panels to report to the courtrooms for voir dire.
- Maintain social distancing for jurors at all times. This includes seating jurors in a cordoned-off section of the courtroom gallery instead of the jury box.
- Consult with counsel and/or self-represented parties to determine whether prospective jurors should wear masks during voir dire.
- Establish where sidebar discussions will occur to allow for both privacy and social distancing.
- Set times for bench decisions to reduce waiting times for jurors.

- Determine safe methods to handle food and beverages for jurors.
- Frequently clean and disinfect jury assembly areas (whether traditional assembly rooms, courtrooms, or other spaces). This includes wiping down essential workspaces (desks, counters, tables, armchairs, doorknobs, etc.) frequently during the day and at night.
- Remove courtesy amenities from jury areas that could contribute to the spread of the virus. These items include coffee and beverages, microwaves, refrigerators, puzzles, games, books, magazines, etc.

## REMOTE JURY SELECTION

This section addresses remote jury selection using ACT, either as the sole means of jury selection, or in combination with in-person methods. Part I addresses jury selection, and Part II sets forth potential advantages and disadvantages of a shift to remote jury selection.

The use of remote technology for the jury selection process, even if the trial itself remains live, can be a positive step toward the reopening of jury trials throughout the Commonwealth.

- Include a supplement with the juror questionnaire mailed to prospective jurors. See Sample Confidential COVID-19 Juror Questionnaire.
- Use a modified individual voir dire instead of a general mass call of prospective jurors. Summon jurors in smaller groups, and schedule them to appear in blocks.
- Provide the prospective jurors appearing by remote access an outline of the process, then randomly move them into a breakout room one at a time with the judge and the attorneys for questioning.
  - This could be done via a prerecorded video, to be viewed by the prospective jurors while they are waiting to be brought in to the remote meeting. For efficiency, the group of jurors could be called ten minutes early, while the voir dire of the prior group is still occurring, to view the video and receive any other orientation materials needed.
  - Depending on the remote technology used, court assistants may be able to use a breakout room, or just have the juror unmuted.
- After the court and counsel question each block of prospective jurors, the attorneys would make challenges for cause and exercise their peremptory challenges.
- Selected jurors would remain in the remote meeting, and eliminated ones would be dismissed.

The selected jurors would be given an outline of the next steps by the judge (i.e., when the trial will occur, when to report, what to expect, etc.) and then be dismissed as well. If the first block has not produced a full jury, selection would move on to the next block, and so on, until a full panel has been selected.

For prospective jurors who do not have the ability to access remote technology, the court could establish locations in the courthouse from which they could appear, and their participation in jury selection would otherwise be the same as for those appearing remotely.

Similarly, community partners such as schools, libraries, community centers, etc., could be encouraged or engaged to assist prospective jurors in accessing remote technology from their locations.

## ADVANTAGES AND DISADVANTAGES TO REMOTE JURY SELECTION:

### ADVANTAGES

- Reduces the risk of jurors, attorneys, and court staff contracting or spreading COVID-19 by personal contact and interaction with others.
- Reduces or eliminates the need for access to extra space in courthouses that would be necessary for proper social distancing and general infection control under current guidelines if conducting juror selection in person.
- Eliminates the need for extra staff necessary to conduct jury selection in person under current social distancing and infection control guidelines.
- Eliminates extensive cleaning and sanitizing necessary to allow prospective jurors access to the courthouse under current social distancing and infection control guidelines.
- Preserves the ability of the court and counsel to observe a prospective juror's demeanor in response to questions on video.
- Permits/preserves ability of the court and counsel to speak outside presence of prospective jurors in making rulings.

### DISADVANTAGES

- ACT has proven to be susceptible to hackers, who may be able to hack into the process and interrupt it and/or steal personal and identity information if the proceedings are not conducted properly and on a secure site.
- Not all individuals have the necessary electronic means to engage in ACT.

- The court will need to provide a remote and secure means for those without electronic devices to participate in the process or to have them come to the courthouse in person, which reintroduces a risk factor to the process.
- Video may not provide the best means to observe the prospective juror's demeanor in response to questions. There are limitations on the court's ability to control jurors' conduct, such as their ability to step away from the screen, have "connection issues," etc. Security for prospective jurors could also be an issue (possible jury tampering/juror intimidation, because of the lack of a physical security presence, if someone obtains a juror's home address).
- There are also limitations on the court's ability to control jurors' access to and possible reliance upon outside sources, which may not be observed on screen, in answering questions.
- There is an increased need for court staff time and technology resources to operate remotely, which may increase court costs.

## **IV. CONDUCTING JURY TRIALS DURING THE COVID-19 PANDEMIC**

### SUGGESTED WELLNESS MEASURES PLAN FOR COURTROOM PREPARATION AND CLEANING

- Develop written guidelines regarding steps court staff should take to properly sanitize.
- Establish clear directives regarding who bears responsibility for cleaning and sanitization.
- Clean and sanitize each courtroom daily in accordance with CDC guidelines
- Ensure that multiple cleanings occur throughout each day in accordance with CDC guidelines.
- Sanitize each seat occupied by any individual after single use.
- Sanitize clipboards or other non-disposable equipment after each individual use.
- Use disposable stickers for juror identification badges or sanitize reusable badges after each use.
- Pay particular sanitization attention to “high-touch” areas.
- Clean and sanitize all public restroom areas frequently, with emphasis on high-contact surfaces.
- Consider the frequency of air filter replacements and HVAC systems cleaning to facilitate maximum fresh air exchange where possible.

### ADMINISTRATION OF JURIES

- Courts should provide jurors selected for trial face masks and daily disposable jury badges.
- Trial jurors should maintain social distancing in the courtroom.
- Courts should determine the maximum number of jurors that can be assigned seats in the jury box using CDC Social Distancing Guidelines. The remainder of the jurors should be assigned seats in the gallery of the courtroom where they are at least six feet apart from other jurors, lawyers, and litigants in the courtroom.

- In addition to the Pennsylvania suggested jury instructions, preliminary instructions to the jurors should begin with:
  - a description of the efforts the Court has made to sanitize the courtroom and ongoing efforts to sanitize the courtroom as the trial proceeds;
  - an instruction for the jurors to wear their masks at all times during the trial for the duration of the CDC guidelines requiring masks;
  - a direction to strictly maintain six-feet of social distancing from fellow jurors, court personnel, lawyers, and others in and around the courtroom;
  - a reminder of the maximum occupancy of the restrooms.
- Bottled water should be provided to the jury during the trial.
- The court should devise a plan for lunch during the trial and during deliberations.
- The jury should deliberate in the courtroom from their assigned seats or another location in the courthouse with enough space to allow for social distancing.
- The judge should determine if allowing jurors to retain their phones to text tipstaff with questions/concerns they may have during the trial or deliberations would be feasible.
- Jurors should be given notebooks and pens if appropriate and directed to leave their notebooks and pens on their assigned seats when not in use. Jurors should be directed not to share their notebooks and pens with any other juror.

## OPENINGS, CLOSINGS, TAKING TESTIMONY INTRODUCTION OF EVIDENCE

- The judge should determine the persons essential to the conduct of the trial and prioritize the seating of those persons in the courtroom. After essential participants are seated, the judge can determine if the courtroom can safely accommodate attendance by the families of the defendant(s) and victim(s), and by spectators. Only counsel, party representatives, and projection assistants are permitted in the courtroom for the entire trial.
- Counsel should wear face masks at all times unless given permission to remove.
- Openings and closings should be given from counsel table or another location which is a minimum of six feet from any jurors.

- Witnesses will be automatically sequestered in a remote location and called one at a time to the courtroom to testify.
- Each witness will be excused following testimony to either leave the courtroom or go to a remote location, subject to recall.
- To the extent possible, all exhibits should be pre-marked and should be presented on a screen.
- If paper is necessary, the judge's copy should be placed on the bench prior to the trial.
- If paper is necessary, each witnesses' exhibits should be placed on the witness stand prior to the witness taking the stand.
- Approaching the witness should no longer be permitted.
- Exhibits should not be permitted to be published to the jury.
- Consideration should be given to having twelve (12) or more copies of the exhibits (one for each juror or alternate juror) so they do not have to pass/share exhibits during deliberations. If only one copy of exhibits is available for the jurors during deliberations, the jurors should be provided with gloves.
- Consideration should be given to handling sidebars virtually. Counsel could advise the judge and court reporter of the need for a sidebar by oral request, via e-mail, or text. The judge could "hear" the issue and rule via e-mail or text. The court reporter would be copied on all communications for the record. If virtual sidebars are not possible, then the judge should determine another way to hold a socially-distant sidebar outside the hearing of the jury.
- Courts should explore alternatives to cloth and medical-grade facemasks for witnesses during trial. In addition to maintaining appropriate social distancing, courts should consider using either Plexiglas barriers or clear face masks to prevent obscuring a witness's face and features. To the extent these alternatives are not feasible, the judge should have discretion to determine whether a witness's use of a face mask is appropriate. In making this determination, presiding judges should be guided by the test set forth by the United States Supreme Court in Maryland v. Craig, 497 U.S. 836 (1990).

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

- Verifying the identity of the witness.
- Assuring that the remote technology will work.
- Identifying evidentiary objections prior to testimony.
- Identifying any documents or exhibits to be used with the witness during testimony.

- Providing such exhibits to the witness.
- Ensuring that the witness will be alone and has only the approved exhibits in that room during the testimony.
- Ensuring that the witness does not access the internet or have contact with outside parties during the testimony.
  - 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 facility. 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. There is legal authority for ordering that the party requesting remote testimony pay for the costs associated with it.
- Until the COVID-19 pandemic ends, court reporters should be authorized to swear in witnesses remotely by ACT from a location within the Commonwealth, provided they can positively identify the witness.

## MULTI-DEFENDANT CRIMINAL JURY TRIALS: A Logistical Challenge

The judge should evaluate the size of the courtroom, keeping in mind that:

- multiple defendants require multiple attorneys, extra layers of security (especially if defendants are incarcerated), increased leaning/sanitizing needs more space for confidential communications between attorneys and clients, and, of course;
- the now ever-present social distancing norms—all of which require more elbow room;
- alternative facilities may be more appropriate for jury selection.

Regarding criminal trials, consider Pretrial Conference Topics – Pa.R. Crim.P. 570:

- emphasize stipulations to shorten length of trial;
- resolve evidentiary issues and other pretrial matters;
- set "order of march" for openings, closings, cross examinations, defense case(s)-in-chief, etc;
- consider time limits on openings, closings, lengths of cross examinations, etc. Best if set prior to trial;

- determine seating of parties and jurors in the courtroom;
- establish protocol for sequestration of witnesses;
- permit virtual/video testimony of witnesses unable/unwilling to attend trial (Pa.R.Crim.P. 500 and 501);
- accommodate attendance of families of victims and defendants, media, and spectators, if space permits;
- establish protocol for sidebars. Limit to recesses, lunch breaks, pre- and post- courtroom sessions as much as possible;
- establish protocol for presentation/handling of exhibits;
- establish protocol for masks, gloves, etc;
- establish protocol for prisoner transport outside of jury view;
- provide hand-held or lavalier microphones for counsel.

## APPENDIX

### CONSTITUTIONAL PROVISIONS RELEVANT TO JURY TRIALS

#### United States Constitution

##### **Sixth Amendment**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

#### Pennsylvania Constitution

##### **Article I, Section 6 - Trial by jury.**

Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. Furthermore, in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.

##### **Article I, Section 9 – Rights of accused in criminal prosecutions**

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

## **Article V, Section 25 (Schedule) – Dispensing with trial by jury.**

Until otherwise provided by law, the parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.

**Suspension by Statute.** Section 25 was superseded and suspended by section 26(b) of the act of July 9, 1976 (P.L.586, No.142), known as the Judiciary Act of 1976, effective upon the date upon which the provision is or was suspended by general rule.

**Partial Suspension by Court Rule.** Section 25 was suspended November 5, 1975, by Pennsylvania Rule of Appellate Procedure No. 5105(g), effective July 1, 1976, insofar as inconsistent with the Rules of Appellate Procedure. By amendment of December 11, 1978, effective December 30, 1978, the former provisions of Rule No. 5105(g) are now contained in Rule No. 5101(d).