



Statement of Bruce Stern, President

Oversight Hearing on “Federal Courts During the Covid-19 Pandemic: Best Practices,
Opportunities for Innovation, and Lessons for the Future”

Courts, Intellectual Property, and the Internet Subcommittee

House Committee on the Judiciary

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The American Association for Justice (AAJ) thanks Chairman Johnson and ranking member Roby for holding this hearing and submits this statement for inclusion in the record. AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured or killed, or whose rights have been violated. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly use the federal rules in their practice. AAJ members continue to litigate cases during the current COVID-19 pandemic, including wrongful death cases caused by police violence and egregious misconduct.

During national emergencies, it is vital that the courts continue to manage their civil dockets and move toward resolutions without undue influence or delay. While emergencies, such as the COVID-19 pandemic, call for flexibility, there must also be a commitment to moving cases forward. And as courts look to reopening and resuming operations, jurors and potential jurors along with witnesses, court personnel, attorneys, and their clients deserve clearly communicated information about enhanced safety protocols and cleaning measures.

I. Moving Cases Forward

We now know much more about adapting to online technology than we did at the start of the COVID-19 pandemic, and both courts and parties are working more effectively with available technology, such as virtual hearings and depositions. Since some states are in different phases of reopening than others¹ and it simply may be unsafe for some people to travel and risk exposure, it may be necessary to continue to use technology to conduct business until there is a cure or a vaccine for COVID-19.

¹ Additional closures may also be necessary as confirmed cases of COVID-19 are again rising in some states.

A. Technology use should be encouraged during a national emergency

During a national emergency, technology can contribute greatly to ensuring continued court functions. To ensure the health and safety of the court, parties, and jurors, points of direct, in-person contact may need to be reduced. A provision in the CARES Act, Pub L. No. 116-136 §15002(b), 134 Stat. 281, 527 (2020), provided the authority to use video and telephone conferencing for certain proceedings in criminal cases and directed the Judicial Conference to develop emergency measures for the courts. Section 15003(b)(6) provides:

NATIONAL EMERGENCIES GENERALLY.---The Judicial Conference of the United States and the Supreme Court of the United States shall consider rule amendments under chapter 131 of title 28, United States Code (commonly known as the “Rules Enabling Act”), that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act (50 U.S.C. 1601 et seq.).

While AAJ believes that direction should not have been limited to criminal cases, we applaud the Committee on Practice and Procedure for quickly seeking input from the bar and other interested parties to ensure that existing rules do not hamper parties’ continued progress towards resolving civil cases. Civil rule changes should be made to simplify e-filing and the use of electronic signatures. Similarly, video conferencing technology should be encouraged, and not stymied or hampered by the federal rules. While not exhaustive, AAJ suggestions include:

1. Whether additional methods of service should be added to accommodate restrictions on travel, telework, and other limitations on movement that present additional challenges for service of process.
2. Addressing local rules that permit nonelectronic filing or other practices presenting unnecessary contact. Local rules permitting nonelectronic filing, as well as specific rules issued by certain judges requiring non-electronic filing, should be prohibited.
3. The use of videoconferencing should be considered routine and resources should be provided to courts who need to upgrade hardware or software platforms as well as security protocols. The civil rules currently provide that parties may stipulate, or a court may order, that a deposition be taken by telephone or other remote means. These types of rules need to be adapted so that its use is automatic or routine. For example, virtual hearings and motions should be considered as routine, especially during an emergency declaration.² Discovery should not be held up during an emergency event unless a witness is unavailable for good cause.³

² See Fed. R. Civ. P. 12; 16.

³ See, e.g., Fed. R. Civ. P. 37, which should be adapted to compel discovery and avoid unnecessary delays during a national emergency situation.

B. Discovery should not be delayed during an emergency

Discovery is an essential part to civil litigation and most key aspects of discovery can proceed electronically without issue. In the COVID-19 emergency, AAJ members have anecdotally reported issues where defendants have used discovery to engage in unjustified and significant delay tactics. Regrettably, many defendants have used the pandemic as a default excuse for slowing or halting discovery altogether. Given the duration of the pandemic and potential for reasonable accommodation to proceed virtually, additional tools may be necessary to ensure that most discovery can and does proceed. For example, a pandemic or other emergency may require some additional time to complete discovery, but it should not be a bar to completion. Moreover, significant extensions of timelines in the current rules are unnecessary. The rules already provide for different timelines (see Fed. R. Civ. P. 26(a)(1)(D)), and because discovery can be done electronically, specific extensions of deadlines by rule would only invite delay and are not necessary to include in emergency rulemaking. Moreover, courts may employ Fed. R. Civ. P. 16 to mandate more frequent discovery reports from the parties to ensure that discovery remains on track and the purpose of Fed. R. Civ. P. 1 (“to secure the just, speedy, and inexpensive determination of every action and proceeding”) is not frustrated.

II. Protecting Juries and Witnesses

The Seventh Amendment to the United States Constitution provides a constitutional right to a trial by a jury of peers.⁴ This right is fundamental, and courts should prioritize rules and safety protocols that allow jurors, witnesses, and parties to feel safe and at ease with participation. This includes creating a safe, virtual environment for court operations. When jury trials resume, courts need to reassure in clear, careful communication that they have addressed social distancing guidelines throughout the trial process, including jury selection, seating, and deliberation, and that similar considerations have been made and communicated to parties and witnesses.

A. Ensuring the safety of jurors. Courts must provide easy-to-understand communications to prospective jurors about the courts’ procedures, including cleaning protocols during COVID-19. It is not enough for the court to include an updated sheet of information to prospective jurors relating to COVID-19; all information relevant to a prospective juror must be clearly communicated in one document. This means that there is not simply a COVID-19 update to an existing prospective juror document; it means that jurors must be provided relevant information in a concise, easy to understand format. Jurors should be told:

1. Whether any health screening questions will be asked upon arrival at the courthouse.
2. What items to bring with them and what will be provided by the court. For example, if jurors are required to wear masks, can they bring their own? Do they need to bring their own snacks and beverages? Will the court be providing wipes and hand sanitizer? Even if cleaning protocols are explained to jurors, some may prefer to clean their own space.

⁴ U.S. Const. amend. VII.

3. What can they expect at the security screening? What cleaning protocols are being used to clean common spaces in the courthouse? If floor markers or elevator spots are being used, it can be helpful to alert people ahead of time to expect additional direction.
4. If jurors are seated for a multi-day trial, can their seat be designated or reserved for them for the duration of the trial?
5. Many screening protocols can be implemented ahead of jurors' arrival at the courthouse. While "fear" of the pandemic cannot become a new excuse for jurors not to serve, excuses from jury service may look very different during a pandemic and its aftermath than it did before. For example, there is limited childcare available right now, and schools face uncertainty for the fall with some schools operating on limited schedules. People with underlying health issues or living with or caring for loved ones with compromised immune systems and other health issues cannot risk exposure. Hospital and other health care workers may need to defer jury service generally. Not only does this require additional flexibility, but it also requires courts to consider ahead of time what constitutes a reasonable number of alternate jurors.

B. Provide space for witnesses. Courts should consider providing private conference spaces with secure internet access for witnesses and/or parties who need to be deposed or interviewed remotely, but who do not have adequate online access to do so. These rooms should be disinfected between uses and provide a means for witnesses without stable internet or electronic resources to be securely interviewed or deposed. With juries in need of larger conference spaces to accommodate social distancing, it may be possible that space could now be considered. It is vital that witnesses and parties who do not have internet access should not be disadvantaged or have their safety put at risk as a result.

C. Provide for remote appearances. During emergency operations or to ensure social distancing, the courts should encourage remote appearances whenever it makes sense to do so. AAJ has received anecdotal information from AAJ members that some judges are scheduling in-person appearances before their clients are comfortable traveling for hearings that could instead easily be conducted remotely. During a public health emergency, witnesses who are high-risk, with pre-existing conditions, disabilities, or other barriers, should not be subjected to unneeded adverse health risks due to travel. To that end, parties and courts should work together to determine the appropriate way to proceed to ensure the safety of witnesses while still protecting the rights of all parties.

III. Review Safety Protocols and Update as Necessary

AAJ believes it is vital to resume jury trials as soon as possible, yet there are many issues that should be addressed prior to any juror setting foot in a courthouse. While AAJ applauds the

federal judiciary for quickly issuing a report⁵ to provide suggestions for courts regarding restarting jury trials, the report falls short in a couple of key areas. First, while designed to provide for maximum flexibility to individual courts by only providing suggestions, the report fails to “suggest” that courts explain why they are issuing guidance or safety protocols. There is no suggestion that court protocols be welcoming and reassuring in tone. While the report states that jurors must be comfortable in order to participate in trial, there is no suggestion that the courts communicate that they care about the wellbeing of everyone who needs to step foot in a courthouse and that protocols are in place to ensure the safety and health of jurors serving in their constitutionally-mandated role. This is a missed opportunity to encourage participation when potential jurors may already be feeling generally more anxious.

Second, the report has several recommendations that either are inconsistent within the same topic, or are unnecessarily complicated, and in at least one case, unsafe. Here are a few examples:

- A. Unsafe suggestion:** On p. 15, Subpoint B suggests or implies that in order to ensure that no one overhear jurors, who may need to speak louder due to social distancing: “Consider posting a CSO outside the courtroom door and locking the door.” The statement implies that the Community Service Officer lock the jurors into the room. While many federal buildings now allow rooms to be locked from the inside, it is very dangerous, in the event of fire or other emergency to even imply that a room should be locked from the outside and that jurors must knock to get out.
- B. Missing the obvious:** AAJ applauds efforts by the courts to consider the impact of COVID-19 safety protocols and social distancing measures on people who are disabled. On p. 13, Subpoint 5 addresses hearing impaired staff and defendants and thus is located under a “Section L. Defendants in Criminal Trials”, but the report itself has no mention of ADA compliance generally and to locate the suggestion for deaf or hearing-impaired persons participating in courtroom proceedings as a subpoint under “Defendants in Criminal Trials” not only makes the suggestion hard to find, it also makes the suggestion seem unimportant. The suggestion itself then provides “consider providing participants with clear face coverings or clear face shields to allow the mouth to be visible.” Courts should also consider providing a qualified sign language interpreter or a transcription service, such as CART, which converts spoken words instantly into text.⁶
- C. Too many cooks in the kitchen:** The report contains references to lunch and snacks in four different sections. While some of these recommendations are pre- and post-jury selection, the recommendations are at times thorough, but may not work well together. Additionally, some of the recommendations are often beside the point and may be inconsistent with other safety protocols.

The report includes these references to lunch and snacks:

⁵ *Conducting Jury Trials and Convening Grand Juries in the Age of COVID-19*, published by the US Courts on June 10, 2020, <https://www.uscourts.gov/news/2020/06/10/judiciary-issues-report-restarting-jury-trials>

⁶ The U.S. Department of Justice has issued regulations to enforce the Americans with Disabilities Act. 28 C.F.R. 35, 56 Fed. Reg. 35694 (June 26, 1991).

1. On p. 7, Subpoint F under X, “Consider advising jurors to bring their own writing instruments, reading materials, water bottles, snacks, and lunches.” The point goes on to say that jurors should be instructed to keep their items separated from other jurors’ similar items.⁷
2. On p. 8, Subpoint L under XI, “Decide how prospective jurors will eat lunch. Analyze the risks of allowing outside food, the use of the cafeteria, and allowing jurors to leave and return.....”. If your court permits the use of vending machines, consider providing disposable gloves and add signage regarding the use of the gloves.”⁸
3. On p. 14, Subpoint 3 at the bottom, “Consider a protocol for the use of the refrigerator and microwave in the jury room, such as clearly marked individual containers or bags and the use of gloves to access the refrigerator and microwave.”⁹
4. On p. 15, Subpoint D, “Lunch/snacks: Consider having lunch delivered to jurors at their expense in order to avoid leaving the courthouse. Only if a judge enters an order that the jurors are to be sequestered for their safety because the virus is not contained in that community, may the lunch be charged to the juror fee appropriation.”

These combined recommendations do not make jury service more enticing; if anything, they suggest that the court has not thought enough about disinfecting and cares more about saving money than being safe. For example, telling jurors that they will have to pay for their own lunches, and it will be delivered to them, is not encouraging of jury service. If courts decide that food delivery is the safest option, perhaps the federal courts should ask for a small additional appropriation to pay for it. Further, the safety protocols of asking jurors to pay for lunch are not explored in this guidance. Will the court require electronic payment? Is requiring a payment putting court personnel at risk by increasing interaction with jurors? Is this a disincentive towards ensuring a diverse jury pool that represents the community? Finally, some of the most obvious potential solutions are not mentioned, such as guidance recommending that jurors bring food and snacks from home, but that vending machines (or perhaps a cafeteria) is available to purchase coffee and other beverages. For people selected to serve on juries, it may be helpful to provide individual cubbies

⁷ This would make sense to also reference storage of personal items, yet the report fails to do this. Nor is any mention made regarding what jurors should do with other practical items such as umbrellas or coats for when weather in more Northern climates turns chilly.

⁸ If the courts are going to allow the use of vending machines, the recommendation might include providing hand sanitizer or wipes next to the vending machines. Jurors may be more likely to use these products and disinfecting wipes would be a better choice than gloves, allowing the jurors to wipe their hands, wipe the vending keypad, and the outside packaging of the food or beverage dispensed.

⁹ The suggestion for the use of the refrigerator and the microwave needs more specific detail. If courts are going to allow refrigerator and microwave use, the refrigerator must be large enough to accommodate lunches without jurors touching other jurors’ lunches. Many people are not comfortable with others touching their food, even if it is wrapped. The same is true with the microwave. What if food is splattered in the microwave before lunch is over? Will someone be cleaning the lunch area or are jurors left to fend for themselves?

or storage areas for each juror to isolate their belongings for the duration of the trial. These storage areas could be potentially rented by the courts if permanent installation is not desired, and jurors could either be assigned to a space or assured of cleaning protocols that are used.

D. Masking issues: Courts need to diminish the culture war surrounding the use of masks, not contribute to it. The purpose of a mask is to prevent the wearer from spreading germs, yet several points in the guidance contribute to issues that are either not based on CDC guidance or current medical information. For example, suggestion III(B) asks each court to review whether it will provide PPE or whether the court will allow jurors to bring their own PPE, recognizing the risks involved in outside PPE such as contaminated PPE or controversial or inciteful personalized masks. So long as only the person handling the PPE is the mask wearer it should work to prevent the spread of COVID-19. If court personnel are concerned about a message displayed on a mask, a designated person can ask the wearer to switch to court provided PPE. This same request could be made or offered to anyone forgetting a mask or in need of a fresh one. The option of a fresh mask should be sufficient in most instances. The more important issue is whether the courts *will require that masks be worn and who must wear them*. Suggestion III(C) asks courts to consider if face coverings will be used during proceedings, whether all parties must agree to their use or if use will be a court-wide policy. If the jury is required to wear masks, but not all parties in the courtroom are required to do the same, the reasons for that policy must be explained to the jury. The courts should avoid any perception that the burden to avoid the spread of COVID-19 falls on the jury or that members of the jury may be bringing the virus to the courtroom, while courtroom personnel are permitted to work unmasked. Finally, on p. 13, suggestion L(3) is a reminder that a defendant in custody should not be seen in shackles, handcuffs, etc. Similarly, and regardless of whether the defendant appears in the courtroom or remotely, the defendant should not be the only person in the proceeding wearing a mask.

E. Health Questionnaires: Balancing the interests of health and privacy are complicated and require ongoing reflection. It is relevant for courts to review with potential and seated jurors whether they have or are experiencing any COVID-19 symptoms or have been exposed to someone with a COVID-19 diagnosis or to someone who has been asked to self-quarantine. However, asking detailed personal health questions in a supplemental jury survey needs to be carefully considered. In its attempt to keep jurors and court personnel safe, the jury questionnaire may deter potential jurors from service and may put sensitive health information at risk of public exposure.

1. Potential jurors may not feel comfortable providing medical information in a survey format, especially if the survey is unclear about who is reviewing the information, how the information is stored, and whether third parties

have access to it. Courts should not be asking for more medical information than a patient would need to answer in scheduling a routine medical visit.¹⁰

2. Explicitly asking questions on co-morbidity is especially insensitive,¹¹ and the answers, or even the implied inference that jury service may be harmful to persons with underlying health conditions may result in a potential jury pool that excludes Black people or other racial minorities, who are more likely to have an underlying health condition compared to the general population.¹²

IV. Federal Courts Should Ask Congress for Additional Resources

The COVID-19 pandemic has drastically impacted traditional court proceedings, necessitating technology adaptation, personal protective equipment (PPE), enhanced cleaning protocols, and even retrofitting of some courthouses to accommodate social distancing. The COVID-19 Judicial Task Force report on jury trials mentions funding and alludes to the fact that courts should use their existing traditional funding to pay for any necessary technology, PPE, or other reforms. However, this is a serious miscalculation and a failure to fully comprehend the new hardships now facing federal courts. It is imperative that the Administrative Office of the Courts request targeted and increased funding for federal courts to effectively address the issues created by the pandemic to ensure the courts can provide as close to normal operations as possible.

V. Public Access to Courts

Fundamental to our system of justice is open and public access to courts. Even in an emergency, the press must be able to access and report on important decisions, trials, and work of the courts for the public good. The press plays an important role in the institution of the court system because it “offers a view of the functioning of the institution with an eye, though it be asleep at times, toward ensuring proper conduct -- the watchdog role.”¹³ In fact, “the missions of the court system and the media are different but not incompatible,” instead “the two institutions depend one on the other. Trials will only be fair so long as the press is free. Both have huge stakes in the status quo.”¹⁴ Without the press delivering an accurate account of court proceedings, and watching for potential misconduct, the public cannot rely on the third branch of government to deliver justice. Because of social

¹⁰ The questions used by physicians to schedule routine medical appointments generally ask whether the patient or someone in the patient’s household are experiencing any symptoms of fever, cough, etc. or if the patient or a household member has been diagnosed with COVID-19. https://www.cdc.gov/coronavirus/2019-ncov/hcp/steps-to-prepare.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fsteps-to-prepare.html.

¹¹ On p. 3, Suggestion IV(C), “...’Consider asking whether they suffer from a comorbidity that would make them a higher risk for infection if they were to become ill and require that condition be listed on their questionnaire.”

¹² Just examining CDC guidance alone, there is a staggering amount of information to digest and consider, including COVID-19 hospital rates for members of racial and ethnic groups, how existing health disparities make members of many racial and ethnic minority groups especially vulnerable; and how racial and ethnic minorities are overrepresented in prisons and detention centers. See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

¹³ Steven Helle, *Publicity Does Not Equal Prejudice*, 85 Ill. B.J. 16, 21 (1997).

¹⁴ *Id.*

distancing requirements, it may be necessary to seat the press in an adjacent room or provide for remote access to trials. The technological capabilities of courtrooms must provide or adapt for this.

AAJ thanks Chairman Johnson and members of the Committee for holding this hearing. AAJ members have continued to represent their clients during the COVID-19 pandemic, working virtually to provide remedies and justice for those who are injured. As stakeholders, AAJ and its members will continue to work cooperatively with Congress and the courts to resume jury trials as soon as its safe to do so while taking all necessary precautions to protect those entering the courthouse.