

# RESOLVING CIVIL CASES WHILE EMERGING FROM A PANDEMIC – A ROUNDTABLE DISCUSSION August 12, 2020

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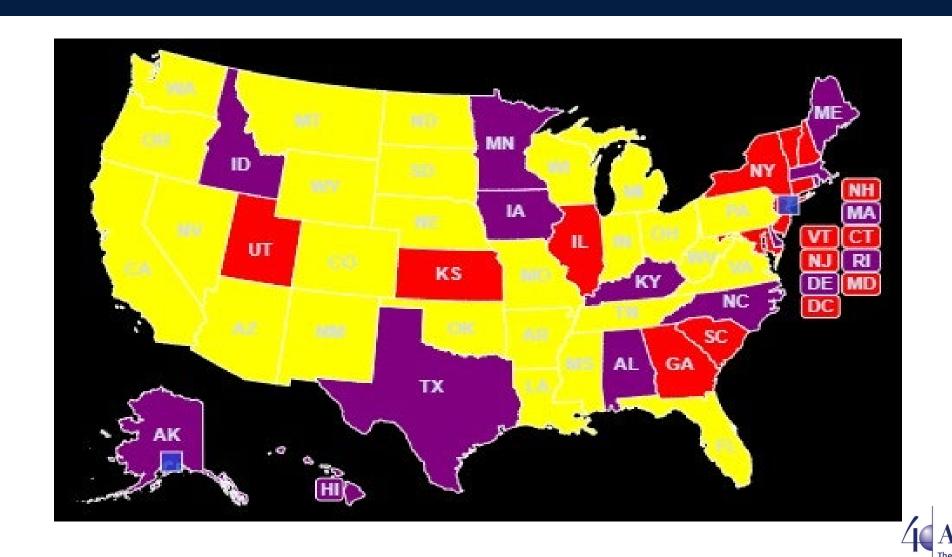
### LIMITATIONS ON JURY TRIALS AND THE ALTERNATIVES

### A ROUNDTABLE DISCUSSION

- I. STATUS OF CIVIL JURY TRIALS
- II. BENCH TRIALS AS AN ALTERNATIVE- PROS AND CONS
- III. ALTERNATIVE DISPUTE RESOLUTION
   VIRTUAL OR IN-PERSON MEDIATION



### STATUS OF CIVIL JURY TRIALS IN THE UNITED STATES



Celebrating 40 Years

### LOCAL CONTROL OVER COURT FACILITIES AND OPERATIONS

- There are **3,141** counties and county equivalents in the 50 States and the District of Columbia:
- 3,007 entities named "County"
- 16 Boroughs in Alaska and 11 Census Areas in Alaska (for areas not organized into Boroughs by the State)
- 64 Parishes in Louisiana
- 42 Independent Cities (1 in Maryland, 1 in Missouri, 1 in Nevada, and the remainder in Virginia) and the Federal District or District of Columbia
- In addition, there are 663 Article III U. S. District Court Judges



### EXAMPLE OF LOCAL VARIATION IN COURT OPENINGS

#### **MISSOURI COURTS**

**COVID-19 Operational Phases (Color coded)** 

Phase Zero: Most in-person proceedings suspended

Access to courthouse greatly limited

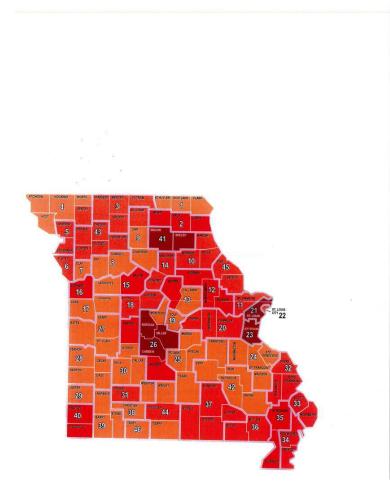
**Phase One:** Critical proceedings may resume

Courtrooms and other public spaces limited to no more than 10 people if possible

**Phase Two:** Additional proceedings may resume

Courtrooms and other public spaces limited to no more than 25 people if possible

**Phase Three:** Resume proceedings in compliance with local social distancing and occupancy limit protocols





### ARE VIRTUAL TRIALS A REALISTIC ALTERNATIVE?

In a test case, Collin County, Texas jury renders verdict on Zoom for the first time; too risky for a full trial?

The one-day, nonbinding decision marked a small step forward as courthouses struggle to find safe ways to restart jury trials

Source: Dallas News





### MIAMI-DADE ZOOM TRIAL

Jury selection via Zoom: First Miami-Dade case is a glimpse of court in the coronavirus era

Miami-Dade's 11th Judicial Circuit of Florida is the first of five judicial circuits in the state chosen by the Florida Supreme Court to test out using remote video technology. A report on the success of the pilot programs from the courts is due in October.

Source: Miami Herald 7/15/20





### EFFORTS MADE TO PROTECT ALL PARTICIPANTS

- Prescreening of prospective jurors
  - Broader questionnaire
  - Virtual voir dire as an option
- Physical barriers separating jurors, witnesses, lawyers
- Use of masks clear masks
- Use of non-traditional space (auditoriums, gymnasiums)
- Use of multiple courtrooms
- Confidence in safe environment a priority

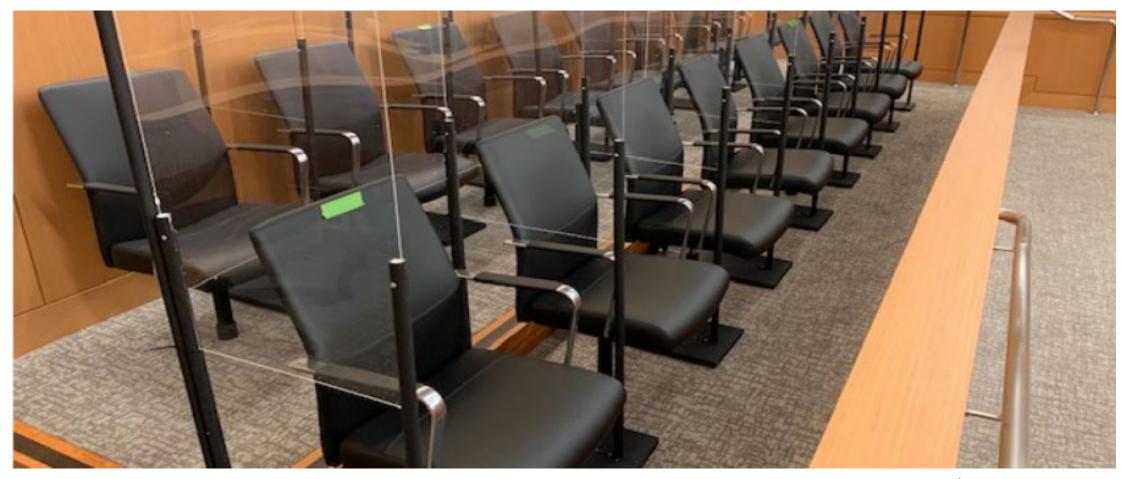


### EXAMPLES OF QUESTIONS ON FEDERAL JURY QUESTIONNAIRE

- 1. If selected,
  - a. \_\_\_\_ I will want to wear protective face covering
  - b. \_\_\_\_ I will not want to wear protective face covering
  - c. \_\_\_\_ I have no opinion regarding a protective face covering and will wear one if asked
- 2. Should wearing a mask in public be something that is a personal choice? Why or why not?



### SAN DIEGO COURTROOM



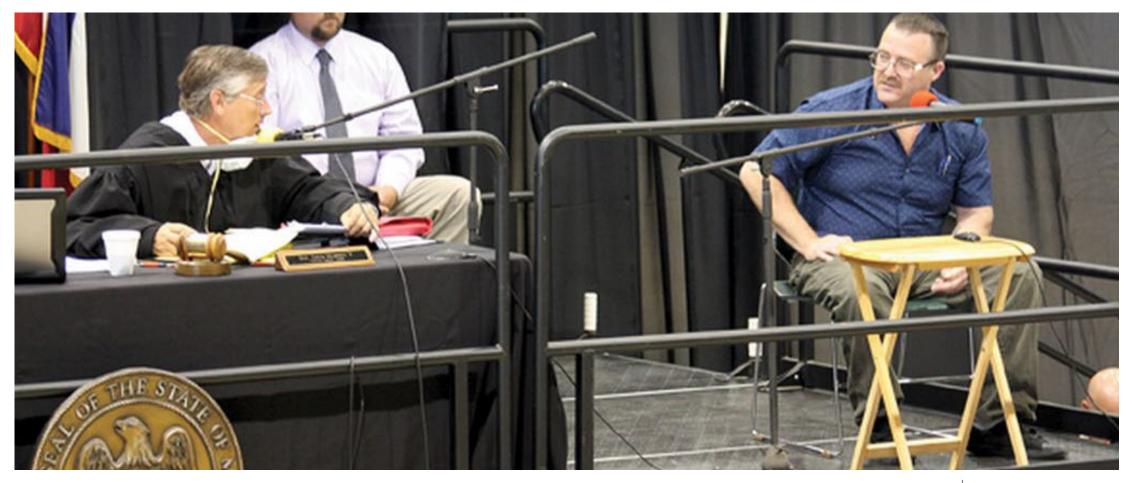


### USE OF GYMNASIUM IN MISSISSIPPI





### EXAMPLE OF ANOTHER GYMNASIUM USE IN MISSISSIPPI





### CLEAR FACE MASKS NECESSARY FOR THOSE SPEAKING

- Due to the COVID-19 pandemic, the ClearMask™ is currently available for use in hospitals and by healthcare providers without objection from the FDA.
- The ClearMask™ is a face mask that may be used when FDAcleared masks are unavailable.
- Per the FDA, use of these masks in a surgical setting, or where significant exposure to liquid bodily or other hazardous fluids may be expected, is not recommended





### CONCERNS ABOUT JURY TRIALS DURING PANDEMIC

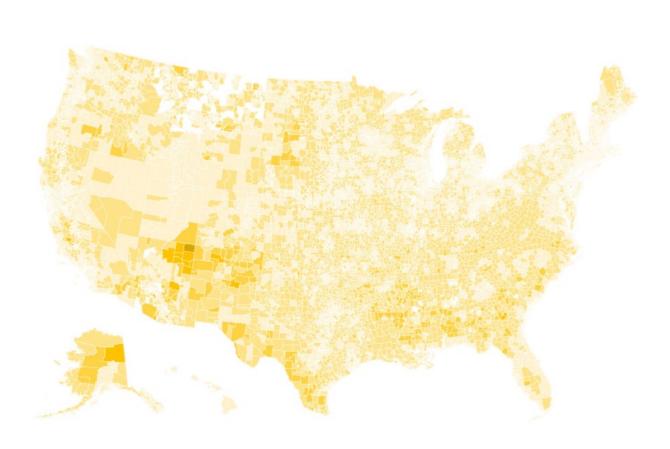
- Impact on composition of jury
- Impact on availability of witnesses
- Impact on time allowed for the trial
- Was the case prepared in a manner conducive to presentation under the new environment?

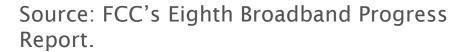


## IMPACT OF DISPARITY IN BROADBAND INTERNET ACCESS ON JURY SELECTION AND COMPOSITION

- Approximately 19 million Americans

   6 percent of the population—still lack access to fixed broadband service at threshold speeds
- In rural areas, nearly one-fourth of the population —14.5 million people—lack access to this service
- In tribal areas, nearly one-third of the population lacks access
- Even in areas where broadband is available, approximately 100 million Americans still do not subscribe







### JURY SIZE AS A POTENTIAL FACTOR ON DECISIONS

- There are 20 States that routinely conduct civil jury trials with a panel of less than 12 members
- Many additional States allow parties to agree to less than 12
- Easier to use existing facilities and processes with smaller venire and jury panel



### PROS AND CONS OF BENCH TRIALS

- A bench trial typically takes less time since there is no jury selection or instruction process
- If your civil matter is unusually complex, a judge is probably better able to understand the nuances than a jury made up of laypersons
- You can know and predict your judge, but not your jury
- A jury may ignore the judge's instruction and make a decision based on subjective rather than legal factors
- Wrong judge for your case can dictate the outcome
- No opportunity for a hung jury if case goes south
- Impact of elected rather than appointed judges



### POP UP QUESTION

#### What small Southern town/county is ALL of the following:

- A. The location of the Unclaimed Baggage Center the nation's only retailer of lost luggage
- B. The location of a 102 year old Trade Day
- C. The location of a new \$600 million data center being constructed by Google
- D. The location of a sole practitioner who successfully argued to the U.S. Supreme Court that the Constitution's guarantee of equal protection bars the exclusion of potential jurors on the basis of their sex, just as it bars exclusion on the basis of race.(J.E.B. v. Alabama)
- E. The location of the trial of landmark United States Supreme Court decision (Powell v. Alabama) reversing the convictions of nine young black men for allegedly raping two white women on a freight train





### MEDIATIONS DURING A PANDEMIC





### ARE ZOOM MEDIATIONS AS GOOD AS IN PERSON MEDIATIONS?

- In person is always preferable, but the platform is not an impediment
- Discussion of use of Zoom for mediation
- Get familiar with technology



### MEDIATION TIPS

- Keep doing what you usually do: prepare, prepare, prepare
  - Prepare your client
  - Prepare the mediator
- Learn how to use documents and screen sharing
- Remember where to look at the camera!
- Continue to do your mediations as you normally would, openings addressing the opposing party
- Not a time to argue, but a time to listen to the other side and present your view of the case in a respectful way



### FUTURE OF VIRTUAL MEDIATIONS

- The technology is here to stay and may be a way for altering rules in certain jurisdictions currently requiring physical attendance of participants
- Makes mediation more efficient for all participants





# SHOULD WE RETHINK CASE PREPARATIONS/STRATEGY?





### IMPACT OF WAITING FOR JURY TRIAL RATHER THAN USING ALTERNATIVE

- Will it create greater expense for defendants?
  - Loss reserves carried
  - Litigation expense
- Will it create greater opportunity to resolve a case?
  - Dispositive Motions more important? Heard earlier?
  - Impatient Plaintiffs and attorneys
  - Mediations may be mandatory before can have trial



### THANK YOU! IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT ONE OF THE PRESENTERS



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