

# COVID-19

## Prosecutor Working Group Results Jury Trial Concerns and Considerations



As states reopen following closures due to the COVID-19 pandemic, prosecutors from across the nation are facing new challenges in resuming jury trials. Recently, prosecutors from across the country volunteered to participate in a working group with CNA and the National District Attorneys Association (NDAA) to discuss concerns for conducting jury trials during the pandemic. The participants at the July 2, 2020 represented a diversity of large urban, suburban, and rural jurisdictions.

This document summarizes the critical concerns expressed by prosecutors at the working group meeting and offers some considerations for prosecutorial leaders and staff in responding to these concerns.

### CRITICAL CONCERNS

#### **CONDUCTING JURY TRIALS IN A WAY THAT MAINTAINS HEALTH SAFETY STANDARDS FOR BOTH JURORS AND ATTORNEYS.**

Although jurisdictions are beginning to schedule jury trials, prosecutors remain hesitant to conduct them. Working group participants expressed concern over their ability to maintain health safety standards, especially in smaller courtrooms. During the discussion, none of the participants indicated that their offices have resumed jury trials. Although a few participants noted that there are jury trials scheduled in the near future, they were unsure whether these trials would proceed as scheduled and, once scheduled, were also unsure of the safety measures that would be put in place.

#### **ENSURING THAT POTENTIAL JURORS FEEL SECURE IN RESPONDING TO THEIR SUMMONS.**

This concern varied throughout jurisdictions and regions. Some participants expressed concern over losing certain groups of the population in jury panels because they are vulnerable to COVID-19. Yet other participants were less concerned about juror representativeness of the local community; as an example, one participant indicated that their jurisdiction has not seen any problems with individuals responding to summons for grand jury duty.

#### **ENSURING THAT, ONCE JURIES ARE SEATED, TRIALS DO NOT END IN A MISTRIAL.**

Participants were concerned about an increased risk of mistrial due to the possibility of mid-trial COVID-19 cases. One participant noted that during a grand jury session, an employee tested positive for COVID-19 and they had to contact all of the grand juries to inform them. While none of the grand jurors tested positive, this became a concern in the prosecutor's office. Participants also indicated that when a witness testifies from a remote setting, there is no way to ensure that they are not being influenced or coached by an outside party. Also, when witnesses are providing testimony remotely, there is no way to determine whether they are reviewing trial documents that they have not been asked to review. Either of these circumstances could lead to a mistrial.

#### **ASSESSING WITNESS CREDIBILITY WHEN WITNESSES ARE WEARING MASKS.**

Participants noted that masks and remote testimony limit their and juries' ability to assess the credibility of witnesses. Emotional testimony (e.g., in sexual assault cases) may not have the same impact on juries when witnesses are wearing masks during their testimony.

#### **PRIORITIZING CASES.**

Participants noted that prioritizing cases for jury trials will be challenging, especially given the lack of guidance. Although some states have tolled statutory speedy trial times, this does not ensure the constitutionality of suspending all jury trials.



### **CONSIDERATIONS FOR MAINTAINING HEALTH SAFETY DURING JURY TRIALS**

- “Shop around” for larger courtrooms that would allow for social distancing during in-person jury trials. If available, larger courtrooms could allow jurors to sit in the gallery and maintain proper social distancing.
- Consider using multiple courtrooms on the same floor and using technology to connect these courtrooms. For example, the jury could be present in one courtroom and the judge, defense attorney, and prosecutor could be located in an adjoining courtroom.
- With agreement from all parties, explore using alternative locations that allow for increased social distancing. Some jurisdictions have been making use of government-owned buildings, such as local civic centers. Other jurisdictions have suggested making use of nongovernmental facilities, such as movie theaters. Maintaining the appropriate level of security at alternative locations is crucial, and jurisdictions that are considering such alternative locations have been working with their local law enforcement agencies to provide the necessary security.
- When conducting trials with in-person juries, implement multiple health safety measures. Some measures agencies are using include larger spaces to ensure social distancing, plastic barriers between jurors, masking during proceedings, and limits on the number of witnesses.
- Communicate with office staff to ensure that their concerns and preferences are known. Some prosecutors may prefer resuming conventional jury trials than moving to virtual jury trials. However, other prosecutors may remain concerned for their health safety and may prefer exploring virtual trials.
- Consider the removal of interior walls in local courthouses to create fewer, larger courtrooms.
- Although many courthouses are in need of major technological and architectural changes, prosecutors should acknowledge the fact that physical infrastructure is slow and hard to change and should consider ways technology can overcome these impediments.
- Work with local governments to create sustainable, long-term solutions that are appropriate to your jurisdiction, in terms of both needs and budgets.

### **CONSIDERATIONS FOR ENSURING THAT JURORS REPORT FOR JURY DUTY**

- Explore screening jurors prior to their scheduled appearance. Such screenings could take place via email, survey, or telephone and would screen for individuals who may be unable or unwilling to respond to their jury summons.
- Consider excusing individuals who are considered high-risk, such as jurors over the age of 65 or jurors with preexisting health conditions.
- Keep records for jurors who have been excused, including their reasons for excusal, to ensure accurate information for any future appellate issues.

### **CONSIDERATIONS FOR ENSURING THAT JURY TRIALS DO NOT RESULT IN A MISTRIAL**

- As agencies move back into normal trial operations, parties should discuss in advance the possible impacts of individuals testing positive for COVID-19 and possible mitigation efforts, risks, or responses. Explore options before trial operations begin (such as anticipating a prolonged recess from the trial or ensuring that there are sufficient alternate jurors).
- Be proactive in creating contingent scenarios that could arise during the jury trial and obtain agreement for such contingencies from all parties prior to starting trials.
- Attempt to shorten the length of trials (when feasible). For example, in some cases, evidence could be stipulated to in advance to decrease the time spent in courtrooms. This will need to be a collaborative effort among all parties.
- Make clear records for any witnesses testifying remotely. Ensure that all discussions are memorialized in writing or on video and create a record of the defendant’s knowingly consenting to virtual proceedings.



- Consider ways to ensure on the record that remote witnesses are alone and not being influenced by or accessing outside resources. For example, one jurisdiction requires that remote witnesses show the participants the space around them to ensure that they are alone.
- Be prepared with arguments that address concerns about the defendant's right to confront witnesses and ensure that appropriate records are made for potential appeals.

### **CONSIDERATIONS FOR ASSESSING WITNESS CREDIBILITY**

- Consider trainings for prosecutors who are concerned about their ability to select a jury while potential jurors are wearing masks. These trainings can focus on reading body language as cues or consist simply of practicing voir dire with masked volunteers.
- Focus credibility assessment on body language and what is being said instead of facial expressions.
- Install acrylic panels or sheets around the witness stand, which could allow witnesses to remove masks while giving testimony.
- Make use of larger courtrooms, if available, to allow for enough distance so witnesses can remove masks during testimony.

### **CONSIDERATIONS FOR PRIORITIZING CASES**

- Create an officewide system to ensure that cases are being prioritized in a manner that is consistent with local laws and office policies.
- Provide clear guidance for line prosecutors as to which cases should be heard in person and which cases should be tried first.
- Consider focusing on trying cases where witnesses are not required to travel far distances, as this may reduce potential interruptions.
- Serious cases need to be prioritized. But until problems that may lead to mistrials are resolved, consider trying less serious or shorter cases first. This may help reduce more serious or lengthy cases being overturned on appeal because of a technicality.

**FOR QUESTIONS, CONTACT US AT [COVID19\\_COURTS@CNA.ORG](mailto:COVID19_COURTS@CNA.ORG).**