



[8/11/20]

## **JURY TRIAL PROCEDURES (5<sup>TH</sup> DISTRICT)**

### **A. Scheduling of Jury Trials**

1. Due to the unique and substantial logistical, physical and safety considerations caused by the COVID-19 pandemic, it is essential that the scheduling of jury trials be coordinated between the Commissioner of Jurors, the Presiding Judge, the Chief Clerk, the parties and their attorneys. This coordination will likely require additional pre-trial conferences.
2. A jury trial may only be scheduled if 2 courtrooms on the same floor are available throughout the anticipated length of the trial.
3. During Terms 10 and 11 (commencing September 8, 2020), the scheduling of all jury trials shall be approved by the Administrative or Supervising Judge.

### **B. Juror Notice**

1. The Commissioner of Jurors shall send a Jury Summons to each prospective juror. The Jury Summons will contain an additional written notification, to be approved by the Administrative Judge, advising of health and safety protocols to prospective jurors in a form such as the following Sample Notice attached as Appendix A or contain a link thereto.
2. As was successfully implemented with the resumption of Grand Juries, jurors shall be provided COVID-19 supplemental jury instructions to complete that asks the following:
  - a. Relevant medical questions, including whether they or someone close to them has been diagnosed with COVID-19; when they were diagnosed with COVID-19; and whether they have recovered from COVID-19 or are caring for someone who has the illness or was tested positive.

- b. Whether they suffer from a comorbidity that would make them a higher risk [for infection] if they were to become ill and require that the condition be listed on their questionnaire.
- c. It shall be noted that answering the medical questions is solely for the purpose of determining whether a juror can serve and the answers to the questions will be filed under seal and destroyed after their service.

C. Prescreening of the Jury Questionnaires

- 1. The jury responses shall be prescreened and forwarded to the Presiding Judge by the Commissioner of Jurors when jurors have expressed an inability to serve due to COVID-19. The Presiding Judge shall schedule a pre-trial conference with counsel to review and determine service exemptions with all counsel, subject to any applicable health/privacy laws. The prescreening shall be done on the record. The only goal of the prescreening is to eliminate certain jurors with COVID-19 issues from coming into the courthouse.
- 2. The Commissioner of Jurors must plan for a lower yield from the jury pool during the pandemic similar to the recent experience with Grand Jurors. Even healthy jurors not considered particularly vulnerable to COVID-19 may hesitate to serve for a variety of reasons including the following: to avoid the risk of exposing other members of their household to the virus; to care for children who no longer have school or summer activities to attend; to care for an elderly relative or COVID vulnerable person; to look for work if they have recently lost their employment; or because they have recently returned to work and cannot afford to take leave. These reasons shall be properly considered. As always, special consideration shall be given to assure a diverse and representative panel.

D. Juror Appearance and Staggering

- 1. Commissioner of Jurors shall be advised to stagger potential jurors' appearances in reporting to jury duty in order to ensure social distancing and avoid over-crowding. The Jury Assembly location shall be pre-approved by the Administrative Judge and the Commissioner of Jurors shall make sure the room is thoroughly cleaned prior to jurors' appearances. Before entering the Courthouse, panel members shall undergo standard COVID-19 and NYS Travel Advisory questioning, be instructed to wear a face covering and shall have their temperatures taken. Anyone with a fever will be excused from service as well as anyone answering the screening questions in the affirmative.
- 2. To facilitate proper social distancing, the jurors shall be separated into small groups, with one group at a time coming into the jury/court room for voir dire at staggered times. Two courtrooms will be available at all times.

3. The Commissioner of Jurors, in consultation with the Supervising Judge or his/her Designee, shall submit a detailed physical plan in writing to the Administrative Judge or his/her designee for pre-approval. The Plan shall consider the following:
  - a. Using larger areas or rooms in your courthouse for the Jury Assembly location including the jury assembly room or large courtrooms.
  - b. How jury movement will be safely accomplished within the courthouse.
  - c. Whether in certain courthouses or cases, the Jury Assembly area could be bypassed. Instead, bring jurors directly to the courtroom, and have them processed immediately outside the courtroom. The orientation, including the Chief Judge's video, could be played inside the courtroom.
  - d. Having assigned/designated seats for jurors that accomplish social distancing.
  - e. Advising jurors to bring their own writing instruments, reading materials, water bottles, snacks, and lunches. For the health of the jurors and the court staff, the jurors should be further instructed to keep all such items separated from other jurors' similar items.
  - f. Assure that there are sufficient supplies of extra masks, face shields, hand sanitizer and paper towels present in each area where jurors will enter.

E. Preparing the Courtroom for Jury Selection and Trial

1. The Courtroom should be prepared to ensure that jurors, attorneys, witnesses, court staff and the Judge are appropriately socially distanced. The Chief Clerk and Presiding Judge shall inspect the Courtroom prior to the panel arrival for compliance with these protocols. Each juror must be seated so as to maintain social distancing. This will likely involve seating jurors throughout the Courtroom in designated seats.
2. Masks shall be worn at all times by everyone present in the Courtroom unless the Presiding Judge specifically directs otherwise. Clear face shields shall be made available to jurors and witnesses.
3. In preparing the Plan to be submitted for approval of the Administrative Judge, the Chief Clerk and Presiding Judge shall consult with the IT department regarding the placement of microphones for sidebars, juror voir dire, court reporting, the viewing of electronic evidence, and the remote presentation of proceedings. In addition, the Plan shall also:
  - a. Determine whether there are sufficient stationary microphones in the voir dire area for prospective jurors to be heard so that hand-held microphones are not being passed. Disposable microphone covers shall also be available to be switched after each individual use.

- b. If sidebars are to be conducted, consider how these will take place. If the courtroom is large enough, tape the floor for proper placement of the attorneys and the prospective juror and the judge. A court reporter can remain at his/her place at the bench rather than being exposed to the sidebar if he/she uses a microphone at the sidebar location and headphones system similar to that used by interpreters.
- c. Consider and establish methods to permit attorneys and clients to speak confidentially while in court, including, if possible, the use of headsets, computers, laptops or iPads; and providing break out rooms for counsel for attorney/client communications.
- d. Consider signage on the outside of the courtroom regarding your court's order regarding PPE and where the public may sit in the courtroom.
- e. Consider streaming the trial live in another space or unused courtroom if there is little or no room for the public, or if the trial is high profile or being closely covered.
- f. If social distancing is not possible in any area, consider using plexiglass dividers in appropriate places in the courtroom if necessary.
- g. When prospective jurors are gathering for jury selection, consider bringing smaller groups into the courtroom for voir dire to keep fewer people in the courtroom at any one given time. Consider, for example, questioning only 15 to 20 at any one time.
- h. At least 7 days before the commencement of voir dire, the Presiding Judge shall hold a Pre-Trial Conference with all counsel to discuss the physical layout of the court room and any other logistical concerns.

F. Safety Protocols and Voir Dire

1. Before voir dire begins, at the request of either party, the Court, and/or its designee, may provide each panel member a clear face shield and instruct the jurors to wear the shields throughout voir dire. This will permit the attorneys to be able to see the jurors' faces throughout jury selection. The Court will not advise the panel members as to which party requested the use of clear face shields. The Court shall provide the parties strict time limits for voir dire.
2. If necessary, the Court, counsel, and the court reporter may need to step out of the room to conduct any bench conferences and resolve any motions to strike.
3. After six or twelve jurors and any alternates are selected depending on the requirements of a civil or criminal trial, the Court or Part Clerk will immediately dismiss the remaining panel members in a staggered manner to avoid a rush toward the exits.

4. At the end of each day, the Courtroom shall be thoroughly cleaned and disinfected.

G. Trial: Courtroom Setup, Juror and Witness Seating

1. During trial, the jurors shall at all times sit throughout the Courtroom at least six feet from one another in a seating arrangement approved by the Supervising or Administrative Judge.
2. Jurors shall wear face masks at all times. A juror may also request a face shield in addition.
3. The parties, including counsel, will sit facing as much as possible the Presiding Judge and Jury, and will wear masks at all times. An attorney may make application to the Presiding Judge, outside the presence of the jury, to wear a face shield during voir dire, Opening Statement and/or Summation.
4. Witnesses shall testify from a designated location per the approved Plan and will wear masks unless the Presiding Judge determines there is a need to remove the mask. The Court shall then direct the witness to wear a face shield.
5. The Presiding Judge shall make sure that Court personnel clean the witness chair between witness testimony.
6. If necessary, bench conferences may be moved to robing rooms or chambers. If available, the Court will allow counsel to use their muted computers, iPads or phones in the courtroom to communicate with their client while maintaining adequate distance between one another.
7. For larger courthouses, only one trial per floor shall be scheduled to minimize movement.
8. If necessary, consider seating jurors in designated spaces in the gallery section in a manner that assures appropriate social distancing. To maintain appropriate social distance, as jurors arrive in the courtroom, consider seating them in the room front to back, left to right, row by row. Exit jurors in reverse for break or lunch. Care should be taken to be sure no one else sits in the immediate vicinity of the jurors.

H. Audio and Record Taking

1. Consider placing microphones on each side of the bar entrance and direct that the juror being questioned speak from there. Consider marking the standing location on the floor.

2. Consider using "shotgun" microphones for jurors, which will allow jurors to keep a safe distance from the microphone. For the lawyers and judge, some disposable covering (such as a small Ziploc bag) shall be placed over the head of the microphone which should be changed between use.
3. As determined by the Presiding Judge, the court reporter shall take the record remotely from outside the courtroom, remain at the usual station with appropriate social distancing, or move to a different location as warranted.

I. Court Interpreting

The use of remote interpretation, generally by video, continues to gain popularity and may continue as the primary source of interpreting services for a while. Enhanced awareness is suggested from the parties, as the system may lag at times, speech may be choppy, and sound quality may not be optimal. The attorneys shall notify the Court as soon as possible regarding the need for an Interpreter.

J. Evidence Presentation - Exhibits

The following protocols are established solely for the health and safety of all trial participants in an attempt to try and reduce the need to physically handle exhibits and to avoid passing them back and forth between individuals. It is understood that the uncertainty of litigation will likely result in additional exhibits being identified and offered at trial (in addition to the right of a criminal defendant to only determine if it wishes to put forth any evidence after the People have rested). Nothing in these protocols is intended to change substantive law and the Presiding Judge shall have sole discretion to determine the admissibility of exhibits.

1. All Exhibits proffered by the Plaintiff/Prosecution should be provided digitally to the Court Clerk five (5) business days prior to the Final Pre-Trial Conference which shall be held with the Presiding Judge no later than ten days before jury selection is scheduled. Defendant's proffered Exhibits shall be digitally provided three (3) business days prior to the Final Pre-Trial Conference.
2. The proposed Exhibits (other than those used for impeachment) shall be produced digitally and pre-marked at the Final Pre-Trial Conference. Immediately following the Final Pre-Trial Conference, the Court shall hold a Trial Exhibit Hearing at which the attorneys shall on the record, starting with the Plaintiff, offer their Trial Exhibits into evidence. Opposing counsel shall raise any objection at that time and the Court shall rule on admissibility, subject to authentication or connection. At the conclusion of the Exhibit Hearing, the admissibility of the received Trial Exhibits shall be established. No other Exhibits (other than those used for impeachment) shall be received at Trial unless the Presiding Judge finds good cause exists as to why the Exhibit could not have been produced at the Exhibit Hearing.

3. The received Exhibits should not be passed to the jury during the Trial but may be displayed on screens throughout the courtroom or provided in individual binders to each juror. During deliberations, the Jury will be provided with a digital means of reviewing and examining the received Exhibits to avoid any hand-to-hand exchanges.
4. Attorneys, for good cause, may raise any legal or practical issues specific to conducting a trial during a pandemic, on notice, to the Presiding Judge at least 10 days prior to the Final Pre-Trial Conference. The sole intent is to address any issues that might result in an adjournment of the trial early enough to avoid unnecessarily bringing potential jurors into the Courthouse.
5. Disposable gloves should be available in the Courtroom to anyone asked to physically handle an exhibit.

K. Counsel

1. Counsel tables shall be located so as to allow visual observation of the Judge, Jurors and witness, at all times maintaining social distance. Each table shall have hand sanitizer and paper towels available.
2. Counsel shall address the court and argue to the jury from counsel tables or podiums placed at approved locations in the Courtroom.
3. Floor signage and other markings shall be used to restrict and direct movement in the courtroom for all trial participants.
4. Parties must present evidence electronically, using a computer or document camera (no handing paper back and forth to the witness).
5. The Presiding Judge should caution counsel not to approach the witness, opposing counsel or the Court any closer than six feet.

L. Special Considerations for Defendants in Criminal Cases

1. The Presiding Judge must insure at all times a defendant's rights to consult with his attorney and confront witnesses while using the protective measures necessitated by COVID-19.
2. Consider specific guidance and develop reasonable accommodations to allow for socially distanced attorney-client conferences during trial. Possibilities include dedicated secure text-messaging capability to allow counsel and client to communicate midtrial, establishing separate secure and adequate space for such conferences to be held outside the courtroom setting if necessary or other technological options to be approved by the Presiding Judge.

3. If defendant is in custody, make certain that the new configuration of the courtroom does not reveal his/her in-custody status. Take the same precautions you would in the past to prevent the jury from seeing/hearing shackles, handcuffs, prison garb, etc.
4. Plan for objections from counsel based on an inability to read jurors' expressions in response to testimony, evidence, objections, and judges' rulings, among others. Address the courtroom layout and the courtroom rules in the Final Pre-Trial Conference so that the attorneys can raise objections at that time.
5. Have prosecution and defense counsel accept on the record the setup for the courtroom once the issues are briefed by the parties and established by the Presiding Judge.
6. When deaf/hearing-impaired staff, defendants, or others are involved in a proceeding, consider providing participants with clear face coverings or clear face shields to allow the mouth to be visible. Create a plan for cleaning each night the court-provided individual hearing devices and microphones used by lawyers, witnesses, or jurors.

M. Spectator Seating

1. If the courtroom does not have sufficient space to seat spectators and the jury with appropriate social distancing, spectators shall be provided the opportunity to watch trial proceedings remotely in the jury assembly room or other unused courtroom with masks and appropriate spacing.

N. Witnesses

1. If the witnesses are to be sworn in on a Bible or other book, consider placing the book on or near the witness stand, under clear, single-use plastic covering to avoid handling. It shall be cleaned before each witness use.
2. Depending on the setup of the Courtroom, witnesses may sit below the bench facing the Presiding Judge and Jury at a table or witness box with presentation equipment. Any location should be considered to improve social distancing and limit movement within the well of the courtroom.
3. Witnesses shall wait in attorney conference rooms or other designated rooms as necessary to maintain social distance.
4. Consider issues of credibility determination by the jury if the witness is wearing a mask during testimony. A face shield in place of a mask may be permitted in the discretion of the Presiding Judge.



5. Consider issues of procedures for in-court identification by witnesses when all participants are wearing masks. Have the parties brief before the Final Pre-Trial Conference whether they intend to have an in-court identification and, if so, how that will be performed to be certain that the Confrontation Clause is protected.
6. Consider allowing testimony from witnesses through live video streaming, if allowed by statute, rule or the Constitution or with consent of the parties.
7. Consider allowing recorded trial testimony from witnesses if allowed by statute, rule or the Constitution or with consent of the parties.

O. Breaks in Proceedings

1. Consider the best manner in which bathroom breaks may proceed with proper social distancing.
2. Consider where the jury can meet on breaks with proper social distancing and whether they should bring their materials with them.
3. Recognize that a significant component of jury collaboration comes from their interactions with each other outside the presence of the judge and the attorneys as they gather and take breaks. Take care not to separate the jury on these breaks because factions and coalitions could unwittingly be forming.

P. Additional Considerations

1. Consider placing individual supply bags on jurors' assigned seats before they arrive in the courthouse. Such supply bags should include hand sanitizer wipes or individual hand sanitizers, Trial Exhibit binders and individual trial notebooks.
2. Designate a place in the jury room (label with individual's name) for storing individual personal belongings and for juror notebooks so that they are not comingled.
3. Consider a protocol for the use of the refrigerator, microwave or coffee machine in the jury room, if applicable, such as clearly marked individual containers or bags and the use of gloves to access the refrigerator, microwave or coffee machine.

Q. Deliberations

1. Consider having the jury deliberate in a vacant courtroom or other large space, such as a jury assembly room, to allow greater social distancing.
2. Ensure that no one is able to stand outside the doors and overhear jurors during deliberations, as they will presumably be talking louder than usual because of social distancing.

3. Notetaking/Questions:

- a. Direct the jury to tell the Court Officer waiting outside the deliberation room when they have questions or a verdict.
- b. Have only the jury foreperson write jury questions and complete the verdict form.
- c. Have a large supply of single-use notebooks and pens on hand.
- d. Have jurors store their own notebooks and pens at the end of the trial day in the jury room. Consider providing each juror a large envelope or plastic bag for individual storage.

R. COVID Exposure During Trial

If at any time during the trial, a juror or other trial participant who has had contact with jurors, experiences symptoms consistent with COVID-19 or is directly exposed to an individual diagnosed with COVID-19:

1. The Presiding Judge shall immediately cease trial proceedings, dismiss the jurors for a period of at least 14 days (the “quarantine period”), and direct that jurors be notified that trial proceedings have been stopped because an attendee notified the Court that the person experienced symptoms consistent with COVID-19 or was exposed to an individual diagnosed with COVID-19. It is anticipated that some parties may ask for a mistrial at that point.
2. The Clerk shall contact each juror individually and instruct each juror to notify the Clerk immediately if he or she experiences symptoms consistent with COVID-19 or is exposed to an individual diagnosed with COVID-19 during the quarantine period.
3. The Presiding Judge shall decide, after consultation with counsel, whether the trial may be resumed after the quarantine period or whether a mistrial shall be declared.
4. In light of the above, all parties are strongly encouraged to stipulate and arrange for out-of-town witnesses and expert witnesses to appear virtually or video tape their testimony prior to trial.

## APPENDIX A (Sample)

The NYS Unified Court System would like to assure you that your health and safety remain a top priority for us as we resume essential court operations, including jury service.

As jury service resumes around the State, please be aware that enhanced cleaning and safety protocols have been implemented at our courthouses.

For information on safety and cleaning protocols you can expect during your jury service in your local county please visit: [www.nyjuror.gov](http://www.nyjuror.gov) and select your county from the drop down in the center of the screen.

If you have been summoned for jury duty, please follow the instructions on Section C of your summons to determine when and where you need to appear.

Please DO NOT appear at the courthouse if:

- You are currently experiencing flu like symptoms (fever, cough or shortness of breath)
- You have been diagnosed with COVID-19 in the last 30 days
- You have been directed to quarantine/self-monitor for COVID-19 by a medical authority or employer
- You are the caregiver for/have had close contact with a person diagnosed with COVID-19 in the last 30 days

If any of the above apply, please, call or email your local Commissioner of Jurors Office to discuss rescheduling your service. The phone number and email address can be found on their county information page. To visit your county information page, select your county from the drop down on [www.nyjuror.gov](http://www.nyjuror.gov). **Jurors shall notify the Commissioner of Jurors by telephone or email advising whether they believe they are unavailable to participate because of COVID-19 related concerns.** The Court may excuse jurors who seek to be excused based on COVID-19 related concerns.