

Judicature

BOLCH JUDICIAL INSTITUTE

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COPING WITH COVID: Continuity and Change in the Courts

By now, our courts, state and federal, have adapted much of their work to digital platforms. But some procedures or litigation events do not easily or obviously translate to the digital. The following is an excerpt of an episode of "Coping with COVID," a podcast and video series jointly produced by the Bolch Judicial Institute and The American Law Institute to examine the impact of COVID-19 on the legal system. In this episode — one of seven launched by press time — judges and court administrators discussed how processes that traditionally rely heavily on in-person interaction, such as jury trials or mediations, can be modified to accommodate social distancing.

This transcript has been lightly edited for length and clarity. Find the full video and transcript online at <http://judicialstudies.duke.edu/programs/copingwithcovid>.

DAVID LEVI: Mediation is often thought of as something that must be done in person and that the personal touch of the mediator is important. Judge Walker, I know you've had some experience now with virtual mediation. Tell us what you learned from that experience and how well or poorly it worked.

VAUGHN WALKER: I think the use of video conferencing in mediations is going to have three fairly long-term effects on the process. First, mediations can become more front-loaded, and I'll explain in a minute what I mean by that. Second, face-to-face mediations or all-hands mediation sessions are likely to become less important in the future than they have historically been. And third, video technology will really enhance the value that the mediator brings to the process.

Now as you know, and as you described, it's historically been thought that in order to have a successful mediation, you have to get everybody together — the lawyers on both sides of the case, possibly the clients, the insurers, and so forth. You have to fog their glasses, and grab their lapels and try to bring a little sense to the situation. That isn't always possible, people won't always see the light at these sessions. And so, frequently mediation sessions become simply the first step in a process.

The advantage of using video conferencing at the very outset is that you can begin the dialogue about the case at a much earlier stage. Ordinarily, pre-mediation conferences are simply stage settings, scheduling the submission to the mediation statements, the time and place of the mediation, and who's going to participate in all of that. But if you can bring everybody together through a video conference at the beginning, the ability to move into breakout rooms enables the mediator to have a discussion about the merits of the case in a way that historically



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is not possible in a pre-mediation telephone conference. As a result, I think you can kick off the process much earlier and more effectively.

In addition, the mediator becomes a part of the dialogue about what should be in the mediation statement. Historically the mediation statements have simply been a regurgitation of the parties' litigation positions. And that isn't always very helpful. But a robust conference video at the beginning of the mediation process, before any mediation face-to-face schedule is put in place, enables the mediator to have some real effective input in what is put in the mediation statements.

I don't think mediation sessions and all-hands meetings are going to go away. But once in a while you might actually get a settlement out of a dialogue that's kicked off at a pre-mediation conference. The ability to move people in and out of rooms and dialogue individually with the parties is an enormous benefit that remote technology brings.

Now, we're all somewhat resistant to using new technology. When this COVID situation started, I had a number of mediations immediately go off the calendar. Lawyers said, "No, no, no." They didn't want to do anything via Zoom or other technologies. Lo and behold, after a matter of a few weeks, they started coming back. And we have been having mediations in settings just like this. And it's worked extremely well. I think it's going to be accepted widely in the bar in the future. I think this is a permanent change in the process of the mediation world.

LEVI: Let's take a look at another aspect of the pre-trial phase, which is case management. Judge Rosenberg, you've been involved in a complex civil

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VAUGHN WALKER

litigation, I think you were assigned an MDL case by Judge Caldwell's panel just before the virus hit. And you made the decision to try to move it forward. Tell us how you're using virtual case management tools and how you would evaluate them.

ROBIN ROSENBERG: On or about February 6th, I was transferred the Zantac MDL. It's my first MDL, though I've been sitting on the MDL subcommittee for over a year, so I wasn't completely new to the world of MDLs. But let me just tell you that what I thought would be an impossible task has become one of the most rewarding experiences I have had. Yes, it's possible to manage a complex case such as an MDL during this COVID period. And in fact, I might say that one might even find that there are some management techniques that even work better, because we're all forced to work under unique circumstances.

Now again, this was February 6th, so we knew about COVID but it was still

very early. And included in the pretrial order of course was the status conference for March 20th. And I was going to have leadership interviews as well, maybe the day before March 20th. As things moved along, I issued a number of other orders, sort of unrelated to COVID, just to get the work moving, putting a practice and procedures team in place, putting an initial census team in place, just to get a group of people working until I was ultimately able to appoint leadership and have my initial conference. As we were getting closer to the initial conference date, I was getting increasingly concerned about the state of affairs. I think all of us were trying to manage on a day-to-day basis. What did COVID mean for bringing people into the courtroom? And had it been a conference of two, or four, or five, or 10, I may not have been as agitated as I was getting. But word was out with 68 applicants for leadership plus all of the other plaintiffs' attorneys who wanted to watch the leadership interviews, as well as ►

the defense team. We were looking at 100-plus people coming into the courtroom, and I was not comfortable with that. I was not comfortable having these attorneys fly at that point and congregate in a confined space. Even though we still weren't exactly sure what COVID meant for all of us.

So on March 13th, I decided to issue an order canceling the initial conference. When I canceled the interviews in the status conference, quite frankly, I had no idea what I was going to do. We were very much on the cusp of learning about new technology that was available. I worked very closely with our IT department. I appointed another team at that point, called the April Deliverables Team. They went to task and were working all throughout April as I was trying to figure things out.

So initial census forms are new in the MDL world, though I'm not the first judge to use them. Once I realized that I was going to be able to get initial census data, that is data on every filed and unfiled case that all of the applicants had as well as anyone else — so anyone who had filed a case had to fill out an initial census form and any leadership applicant had to put his or her unfiled cases on an initial census form — I was able to build a wealth of information not just about the 300 or so cases that are currently pending in front of me, but all of the other ones that are kind of waiting in the wings. Appointing leadership entails, among other things, making sure you have a representative group of the different types of cases.

Ultimately, I scheduled my leadership interviews on May 6th and 7th. And it went off without any glitches. And I think it took a team effort to do that. I was nervous, and in fact I confided that to all of the attorneys who appeared before me and I have been told in feedback that that put everybody at ease,



This episode of "Coping with Covid" was recorded in late May, as courts began to grapple with the idea of reopening for business even as the pandemic showed no signs of abating.

because everybody was nervous about it. They were nervous about their interviews, and they were nervous about the technology. And it was wonderful. Sixty-two people ended up interviewing, and I have to say that it created a dynamic that I think is unlike any other interview process that may have taken place in the past, based on the feedback. Of course, it's my first MDL, so I can't speak from personal knowledge, but when you can see everyone on a screen, there is a level of connectedness and intimacy because we are so close and yet so far away.

LEVI: Let's go to what might be the elephant in our virtual room, which is the jury trial. Lawyers are concerned about what the courts are going to do or not do about jury trials. Judge Caldwell, we all appreciate these are big issues. You just completed an eight-week jury trial in the era of the COVID pandemic and we're all extremely curious to know how that went and what steps you took to keep everybody safe.

KAREN CALDWELL: Thank you, David. I think it's first of all worth mentioning that this case began on February 24th, before the COVID virus was really a problem in Kentucky. We started what we believed would be a six-week trial. And our biggest concern was seating a jury that would be available to sit for six weeks, which is difficult under any set of circumstances. And of course, it was complicated further by the rise in cases, the spike in cases here in Kentucky.

I think it's also worthy of mention that four of the defendants and two of the lawyers were from California. And they had come to Kentucky, escaping what was already a problem out there, thinking that we would get this case done. The case had been pending for two years. It was very important that we bring the case to trial. Two weeks into the case though, the coronavirus presented a problem. We spent a long time in many conversations about whether to proceed with the trial, to take a continuance and see if the numbers improved. But based on what we

had seen nationwide, we knew the numbers would only continue to grow. So, the question became: Do we continue, and if so, how?

The first thing that we thought was important was taking the jury's temperature, literally and figuratively, on this issue. With agreement of counsel, I conducted an independent voir dire of the jurors. I took it on the record of course. We thought it would be best if they just spoke with me and not with all eight lawyers who were participating in the case. I talked to them about safety measures that the court would take. I talked to them about their concerns for their family and friends and loved ones. Would they be able to concentrate on the evidence as these numbers increased? Without exception, they all wanted to stay. We impaneled 16 jurors. I asked them also to give me advice on safety measures that we might take to make them more comfortable, and, of course, I cautioned them that there was nothing that I could do to guarantee their safety throughout the trial, despite our best efforts.

So we set about using a large courtroom; we were using our ceremonial courtroom, which was very helpful. We limited access to the courthouse. We limited access to the floor on which the courtroom and jury assembly room were located. We also sealed the courtroom. Members of the public had to have permission to come into the courtroom, but we did have a live feed going down to another courtroom so that if anybody wanted to come in and hear the proceedings, they could. I reconfigured the jury area by putting a row of tables in front of the jury box with computer monitors on them. I also had another set of tables beside the jury box with computer monitors so that we could have social distancing. We were fortunate to have three

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KAREN CALDWELL

rooms available outside the courtroom so that jurors could be socially distant when they were engaged in their breaks. We basically sectioned off one side of the courtroom so that no one approached the jury. Even the witnesses would enter and walk behind my bench in order to get on the stand so that they would feel comfortable with the social distancing.

Everyone had hand sanitizers, tissues, and Clorox wipes available to them at all times. We offered the jurors masks, but they refused them saying they wanted us to preserve them for frontline workers. Can you believe that? That shows the dedication of this jury. We also ordered them all to shelter at home, but offered to make them hotel accommodations in the event that they wanted to stay in

a hotel. None of them took advantage of that. We brought in their breakfast and their lunch with special packaging so that they could feel safe and secure in the preparation of their food. One of the concerns raised by counsel was, will the jurors grow more preoccupied or concerned as this trial moves on? So I did daily jury questionnaires in which I would invite the jurors to raise any concerns, ask them how they were doing, members of their family were doing, and so forth. And I do have copies of that available for everyone. Also, I advised all jurors and all parties that if anyone was feeling sick or symptomatic that they should not report to the courthouse, but rather should report to the jury officer. I also gave daily instructions to jurors on health and safety practices. ►

We did use technology in some regards. I had used technology throughout most of the pretrial proceedings because these lawyers and parties were in California. We used the technology successfully and minimized the number of times the Californians would have to travel to Kentucky. By the time the trial was in the sixth week, we were in the defense case. And there was a travel ban. So the defendants, the experts, could not fly from California to Kentucky. So we took their testimony via livestream. It was very, very effective. Not only did it appear on the jurors' monitors, we had a huge monitor in the witness stand. We could see both counsel and witness. Anybody who was in the gallery could also see. We had no problems with the technology. The only thing that had to be done was — some of you may know that during peak hours, the bandwidth is challenged — so we had to schedule that and reserve the time, but when you're dealing with experts, that's a little bit easier. I think we had about five witnesses appear via livestream. And in the feedback I received from jurors after the case, the jurors were very impressed and felt that they had viewed the witnesses testifying live in court.

We had to minimize bench conferences. That was probably the biggest challenge with so many lawyers. So I permitted limited speaking objections. We met before court every day, over lunch, and after court every day to try to resolve any kinds of evidentiary issues. And then I had the proponent of the objection and the defender of the objection, of course, stand closest to me whenever we were dealing with objections.

I think that going forward, one of the most difficult aspects of managing a jury trial will be selecting a jury. I already had that jury selected. But

because we had selected a jury for such a lengthy trial, many of the practices that I employed there would also apply to a jury trial during the COVID crisis. And one of the ways that we managed that was through a very thorough and exhaustive jury questionnaire.

But I will tell you this: We summoned 170 jurors to get 70. I expect that now you would probably have to summon double that to get 70. That's just a process you will have to work through with your jury officer. But I think the takeaway is that although a criminal jury trial certainly requires the most hands-on, personal experience, I do think that technology has a role if used well and planned carefully.

LEVI: Might I ask, were any of the defendants in custody?

CALDWELL: No, it was very helpful. The defendants were not in custody. The witnesses were. That's another sort of cautionary note. The bureau of prisons stopped transporting people during the trial. Luckily, we had the witnesses transported in well in advance. Judges need to be mindful that there are transportation issues for custodial defendants and witnesses.

LEVI: Judge Thumma, you're co-chair of Arizona's working group on continuity of operations, and I know that you're looking at how to keep criminal jury trials going. Can you tell us about what the working group has done and what you're looking at in this respect?

SAM THUMMA: I'd be delighted to. Our report issued on May 1; it's at www.AZCourts.gov/COVID19. My hope is that's the beginning of our continued wrestle with this beast that is the coronavirus. And to follow up on Karen's points, we're talking about managing

contagion not eliminating. Eliminating requires some medical breakthrough that we all hope for. But until that happens, I think the courts need to do a whole bunch of smaller things to see what we can do to be creative and innovate and to ensure social distancing, use technology to eliminate those traditional face-to-face hearings and those big gatherings like jury summons issues.

The changes in jury trial management on the civil side, I think, lend themselves more for creativity, given that certain doctrines don't apply. But let me focus on criminal. There are about 100,000 criminal jury trials in the state court system every year, involving probably a million jurors, give or take, and many more who are summoned. So our focus really needs to be on the new normal, that was one of the things our work group did. In this new world, how are we going to help ensure social distancing? And let me focus on just four points.

First, in this new normal, remote grand jury proceedings are using technology. There's more freedom, if you will, in the grand jury context. The Confrontation Clause doesn't apply, hearsay is admissible. And courts are doing that right now, including in our state in Arizona.

Second, speedy trial rights. The constitutional speedy trial issues, the *Barker v. Wingo* (407 U.S. 514 (1972)) factors, I think things are going to have to be really pretty bad for a lot longer before that would kick in. But there's also state and local law, statutory and local rule speedy trial rights as well. Arizona can exclude time, for example, based on extraordinary circumstances (Rule 8.4(a)(4); 8.5(b)). And just yesterday, our Chief Justice Robert Brutinel issued Administrative Order 2020-75 that does just that through August 1. So

we have sort of the flexibility to be able to have those times waived.

The third point is reducing or eliminating peremptory strikes. Our chief justice's administrative order did that, reduced it from six to two per side in criminal cases and for serious and other cases as well. For serious criminal cases, that reduces by about 30 percent the number of qualified jurors that you need to pick a jury, which in turn has a ripple effect in the number of potential jurors that you need to get in the courtroom.

The final issue, and I'd love to tell you I have an answer and I don't, is the Confrontation Clause. Of course, the accused has the right to confront the witnesses against him or her. But let me toss this out: What if a jury trial involved the defendant, counsel, the judge, and witnesses in the courtroom, socially distant of course, but remote jurors who perhaps never physically were in the courtroom? Does that create a Confrontation Clause issue? Again, I don't have an answer. But the purpose of the Confrontation Clause, of course, is to rigorously test testimony and evidence, recognizing that when the defendant is in the room, witnesses may testify differently. Is that function really negated if the trial jury is remote? Does the Confrontation Clause direct that the jury has to be physically present? What testimonial evidence as set forth in *Crawford* is compromised by using a remote jury? And then again, even if the Confrontation Clause applied with full force, *Maryland v. Craig* (497 U.S. 836, 845 (1990)) has some exceptions.

Let me offer just two stray cases that I ran into for food for thought, and then a couple of resources, including some that Mark's colleagues have pulled together. *State ex rel Montgomery v. Kemp*, 239 Ariz. 332, 371 P.3d 660 (Ariz.

In this day and age where jurors have to get into a car, drive to a courthouse, pay for expensive parking, we have to pay the mileage in some cases — would it actually be cheaper to do virtual juries? All the court would need to do is to make sure there's a level playing field on the technology, that every juror had the same technology to be able to see and hear the witnesses and deliberate.

MARK DRUMMOND

Ct. App. 2016) — it's an Arizona case so forgive me on that. A medically fragile victim was allowed to testify remotely from another state via two-way video under *Maryland v. Craig*. Now again, that's a post-*Crawford* case. It was decided in 2016, but it also implicated victim's rights under our state constitution. So neither of these cases are on all fours.

Another case that was fascinating is *Harrell v. State*, 689 So.2d 400 (Fla. Ct. App. 1997). It's a pre-*Crawford* case where two victims testified by satellite, a generation ago, right, from Argentina. And the Court of Appeals rejected defendant's Confrontation Clause objection. The court of appeals said, "we could conduct satellite trials in a virtual courtroom while the jury deliberates in a secure cyber chatroom. Unfortunately, the Constitution does not address this specific issue." Now, the Florida Supreme Court affirmed, but pulled back a little bit; significantly

as well, the Eleventh Circuit on appeal denied habeas relief a few years later.

LEVI: Mark, you direct a civil jury project, and you're looking at trying to preserve the civil jury. Tell us about the issues you're seeing.

MARK DRUMMOND: So, the issue with virtual trials is this: Will the virtual trial give us the same level of justice as the in-person trial? What can we do to make sure they do? Judge Thumma talked about the constitutional considerations and the Confrontation Clause. Civil cases are easier; if the two attorneys agree to do a virtual trial, there's no problem. The issue is whether one side objects to the virtual trial and whether courts will say that a virtual trial passes constitutional muster. I believe that civil cases are turning to mediation and arbitration. If they're agreed, we can certainly do a civil jury case. But if there's disagreement, will ►

the public courts say, “No, you were offered a trial, it was a virtual trial, but that is good enough in the civil arena.”

Judge Thumma also talked about breaking off parts of the trial to satisfy constitutional muster for criminal cases. And that’s exactly what we’re doing at the Civil Jury Project. We have trial lawyers, trial judges, and academics working on 1) jury selection, 2) protocols for the actual trial, and 3) jury deliberations. Jury selection is done virtually on a platform, and then instead of having 100 potential jurors come to the courthouse, you only have those who are chosen. They would hear the trial in-person, whether it’s civil or criminal. But in civil they could also hear it virtually, in my opinion. And then they retire to their homes to deliberate on the verdict. I think probably if you just want to break one piece off in the criminal setting, jury selection would be the easiest to break off. There are some studies about how the dynamic of being in the jury room helps them arrive at verdicts.

In addition, in this day and age where jurors have to get into a car, drive to a courthouse, pay for expensive parking, we have to pay the mileage in some cases — would it actually be cheaper to do virtual juries? All the court would need to do is to make sure there’s a level playing field on the technology, that every juror had the same technology to be able to see and hear the witnesses and deliberate.

And finally, the perception considerations. I wear one hat as the director of the Civil Jury Project, but my other hat is as a program director for the National Institute for Trial Advocacy. And we’re trying to address the issues of how to be an effective advocate through a computer screen. Judging credibility is harder on the screen. Ironically there’s more on the screen

We are building a virtual voir dire program. Jurors will be randomly assigned to a panel, and they will be sent a court-hosted Webex link. They will log into that and sit in a virtual assembly room until the judge and the attorneys are ready for them in the courtroom. And then the judge has the ability to move the entire panel or small pieces of the panel over to the courtroom at a time.

SHERRI CARTER

and also less on the screen. In person, you see how the person walks into the courtroom. You can see how hesitant they are to get onto the stand. You see their whole body, perhaps fingers drumming on the bench in front of them or perhaps a knee shaking. [Video] is myopic, you only see their face. In addition, there are problems with the platforms. For example, training witnesses as to where to look. I am trying to look into the camera so I can look you in the eye. But if the witness is on the stand and their attorney is in the lower corner, they’re not looking the jury in the eye. Video affects information. You just need to go to television and Hollywood. They usually do shoots with a three-camera setup. One is pointing from above, one is straight on, and one is from below. And all you need to do is do a search on camera angle and how that affects perception on metrics

such as believability, trustworthiness, vulnerability — it matters.

LEVI: Winston Churchill said, “We shape our buildings; thereafter they shape us.” The same might be true here with technology. We’ve had a very vivid demonstration of this in the Supreme Court arguments. The telephonic arguments were very different than they were before, very different from the kind of free-for-all that we’ve become accustomed to the last 20 years or so. It will be a great area for social science research in the future.

Sherri, you’re in Los Angeles County, one of the largest judicial operations that we have in the nation. I think there are as many judges in Los Angeles County as there are in the entire federal system. And so you have a very, very big job. You’ve got to bring in jury panels. How’s it going?

SHERRI CARTER: Well, there are a few challenges. Let me talk a little bit about jury trials. There are two big challenges with jury trials. The first is ensuring enough jurors will actually show up to my 313 courtrooms and 39 courthouses throughout the county. Before the pandemic, we had less than a 41 percent yield in our jurors. In 2019, we summoned 1.8 million jurors and of those, 744,000 were qualified. After excuses for hardships, 546,000 were ready to serve.

When we open our doors for jury trials, we need to ensure that we issue enough summonses, recognizing that many of those potential jurors will not get on buses or trains. And if they rely on public transportation, that's going to be a problem. We are collecting data now on our qualified jurors for 2019 to determine how many of them were 65 and older, because we're going to have to keep that in mind when we determine how many jurors to summon for June and July and beyond.

A second concern is, if we get enough, how do we manage them due to the social distancing requirements? That's particularly difficult in urban high-rise courthouses, because the lobbies and the hallways can get crowded, and many of our elevators will only fit four at a time. And so it will take a long time to get jurors up to those courtrooms that are up on the higher floors. None of our courtrooms — well very few, there might be a handful — are large enough for a standard jury panel of 35 or 40 to get there at one time. And we have to be worried about jury deliberation rooms because they're also too small, once you have your jury panel selected.

So what are we doing about some of those challenges? We're moving to a virtual jury service. We have three options I'm going to talk to you about that we're working on. We are going

to have a virtual jury assembly room. Jurors will no longer come to jury assembly rooms. They will receive jury orientation 100 percent either online, telephonically, or in writing. We currently have a My Jury Portal, where jurors can go online and request extensions in their jury service and so on. We are going to enhance that to allow us to send reminders, to send pre-screening questionnaires, notices, and confirmation about their trial dates. For those people who are either unable or uncomfortable with technology, we will have a live jury call center where a juror can call and actually get assistance.

Once we have the dates of those trials, we are going to randomly assign panels to the courtrooms. And we're going to do that in waves, or in sub panels at designated times during the day. It's going to be dependent on the size of those individual courtrooms. I have facility staff now measuring all 580 courtrooms throughout our county. But for the 313 that do jury trials, civil or criminal, part of that is to tell us how many jurors can show up in a wave. In some courtrooms it might be 10, in other courtrooms it might be 12. Our system is being programmed so that once you're randomly assigned to a panel and you know you're going to go to Department Five in this particular courthouse, you might be at the 8:30 wave, and then there will be 10 more at the 10:30 wave, and so on. And so we're going to try to reduce the number that we send to the courtrooms, which will not be efficient for the judges and the attorneys, but that is really one of the only ways we can talk about trying to get jury panels going through jury impanelment.

We will also have jurors on call who have consented to be on call and who are agreeing that they will get

to a courthouse within 90 minutes of receiving a text or an email. So that if a judge by 2 o'clock sees that there's going to be a problem getting the number of jurors they need, there will be the ability where we can send out text messages or emails to get jurors to show up for maybe a 3 o'clock wave. So that they can try to get that panel finished by the end of the day.

Now the second thing we're doing, which really is more for the civil side, is we are building a virtual voir dire program. Jurors will be randomly assigned to a panel, and they will be sent a court-hosted Webex link. They will log into that and sit in a virtual assembly room until the judge and the attorneys are ready for them in the courtroom. And then the judge has the ability to move the entire panel or small pieces of the panel over to the courtroom at a time. It allows the judge or the judge and attorneys to talk with one or more jurors privately, away from the other jurors. So if there are jurors who receive the invitation to participate this way and they are uncomfortable, they will have the ability to call the jury calling center that has live people to reserve a seat in the courtroom because again, we want to limit the number of people that go to courtrooms. So they would be able to show up and be part of one of the waves, but they will reserve a seat in the courtroom. Once the final panel is selected, the 12 plus any alternates, then those jurors would be directed to the courtroom at that time because they'll be easier to manage.

I have to admit at this point that the civil lawyers are not overly excited about this program. We are going to continue to build it, because if there is in fact a spike in the pandemic in the fall or in the winter, it may be the only way we can impanel jurors in a civil case. So we will have it ready, and ►

we're happy to share it with anyone who would like to see how it works.

And then the last thing that we're looking at for physical jury impanelment is we are looking at large venues that are within walking distance from courthouses — music centers, convention centers, and some courtrooms, where we will have the judge and the courtroom staff come [so we can] impanel jurors from one location where we can spread out more jurors. So the randomly assigned panels will go to that larger venue. And the judge and the courtroom staff will be down on the stage with an appropriately spaced jury box, and we will impanel numerous panels from that one location. And then the bailiff can walk them back to the courtroom once they've been selected. So those are a few things that we're doing to help with the jury impanelment problems.

LEVI: I'd be interested to know whether the courthouses that you sit in or others that you're aware of have started to prioritize certain proceedings over other proceedings. Are the criminal cases and the criminal jury trials going to displace other activities, some of which maybe can go on hold? But others of which like a custody dispute or something of the sort involve very pressing issues for people, how are we going to deal with this?

THUMMA: David, our work group addressed exactly that, and the administrative order reflects it as well. We split things into three priorities. First is the motion, or the petition, or the request within a case that has priority. Ordered protection for example, things like that, child removal orders. So those kind of stand on their own. But within general case types and then within criminal, I'll share with you

what our work group ended up with — prioritizing the following, starting with criminal, followed by juvenile, then mental health, then family court — and that really turns on whether there are children involved or not, if there are minor children, a higher priority. Probate and then civil and administrative matters. Now again, our Superior Court's a court of general jurisdiction, so they cover everything. And within criminal, an in-custody defendant awaiting trial has priority, then out-of-custody defendants facing felony charges, and then out-of-custody defendants facing misdemeanor charges.

LEVI: And will you be reassigning judicial officers from division to division based on those priorities?

THUMMA: The recommendation is yes, and again, our superior courts are split family, juvenile, civil, criminal. It's a rotational system, or in our smaller counties, we have counties with one judge, the courthouse is open and everything is there. But the recommendation is to expand capacity and ensure social distancing by temporarily reassigning judges to account for specific needs and enlist retired judges, judges pro tem. Focus on particularly scheduling interpreters and court reporters, a limited resource, and then consider staggered reporting and extended hours, including perhaps weekends and evenings, and maybe even temporary staff. Now that gets into fiscal issues, which the next fiscal year I don't necessarily want to think about yet, but that absolutely is a work in progress and is not going to be a delightful topic I think.

LEVI: Will there be any kind of similar reshuffling in the federal system?

Is that under consideration? May I ask our federal judges if they've heard of any such thing?

CALDWELL: Director James Duff [of the Administrative Office of the United States Courts] has impaneled a jury trial working group [which has now issued guidance to assist federal judges in managing trial dockets and courtroom proceedings]. It's interesting, as was pointed out earlier, the civil docket gives you a lot more flexibility in what you can do and how you can encourage the lawyers. The lawyers can work remotely on their civil cases, and I have been spending a lot of time trying to dedicate at least two days a week to my civil docket in terms of getting the cases back on track, seeing what we can do to keep them moving. I think we just have a lot more tools available to be creative in moving those civil dockets. And again, I can't emphasize enough the importance of mediation in keeping those cases moving along and the role of our magistrate judges or private mediators in the federal system.

ROSENBERG: I want to echo just for a moment what Judge Caldwell is saying because I think it's really, really important. I think it's critical that we focus on how we are going to get back to trials, whether they're virtual or not, whether they're in the civil or criminal arena. Without a doubt, that's a part of our job as judges, state and federal. But the truth is that trials themselves are not all that we as judges do. In the federal system now here in the Southern District of Florida, we do happen to have a lot of trials, maybe more so than in other districts. But nevertheless, the majority of our time is working on cases, on motions, status conferences, and so I think this is a wonderful opportunity for judges to become even more

engaged, more engaged with lawyers and their cases and case management. We have more time in many respects. Even though some of us are incredibly busy, but a lot of us have time that we didn't have before to hold status conferences. Zoom is easy, or whatever platform is available. I think we've gotten past those first few months when we were all scared, and we didn't know, and things have settled a bit.

Safety and health come first always. And I think that when an attorney needs to be heard about safety and self-preservation, at least in my view that comes first. But those who have gotten beyond that and have settled into the new norm, they want to actually keep busy. We can have more status conferences, especially we as federal judges are not known for bringing lawyers into the courtroom. Now is our opportunity to do it. We can give continuances and extensions, but I don't grant them just, "you want 90 days, okay, no explanation." I want to know why do you need the 90 days? What can't you do now that you [were] able to do before? Let's talk about video depositions. Let's talk about the virtual mediation. These are all viable tools. And even though maybe we're not at the point where we can bring lawyers into court to have a live trial, or we're not ready for the virtual trials, when the day comes when we are, those cases should be ready to go. Otherwise we as judges are going to suffer, the litigants will suffer, the lawyers will suffer. And we are back-ending problems that I think we have an obligation to manage on the front end.

And I'll just say one more thing: This is an opportunity to train young lawyers. So whether the young lawyers are appearing on Zoom or not, I know when I had my two days of interviews, there were, I was told by a few of the

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ROBIN ROSENBERG

applicants, a whole group of staff members, paralegals, secretaries, lawyers, and associates were sitting able to watch the attorney present. How often does the team who actually does a lot of the work behind the scenes get the opportunity to at least see the associate or their partner at work in a courtroom, virtually so to speak, presenting to a judge? I think we as judges and more senior attorneys, all of us in the legal profession have an obligation to look after the next generation. And I think this is a perfect opportunity, maybe even a better opportunity than we've had before.

LEVI: Are we going to see a new era here when we can be just so much more efficient even if we have in-person trials, will we have learned a lot from these digital tools that we can preserve going forward?

WALKER: I think the world of mediation is going to be forever changed. Mediation of course is probably the easiest of the various processes we've been talking about to adapt to this technology. Because it's a consensual process in the first place. And so the hurdle or the obstacle to the use of technology in mediation is primarily the reluctance of lawyers, and parties to a lesser degree, to use these tools. But because we've been forced to use these tools as a result of the COVID pandemic, then just as how once you learn to ride a bike, you never forget how to ride a bike, so once you learn these technologies, you'll never be without those capabilities. So I think this is a permanent change in the whole structure of mediation, and, of course, in arbitration it's even easier to use video conferencing. Because you can certainly set arbitrators up in remote locations from the witnesses and the lawyers and so forth. It's going ►

to make all the difference in the world and these alternative dispute resolution processes.

CARTER: In a state court system, we've used court-hosted remote technology in a lot of areas that I hope will remain following the pandemic, because it means you don't have to move people as much. We've got all of our dependency courtrooms now using remote technology, delinquency courtrooms for the matters permitted by law, probate conservatorships, mental health courts allowing the treating physicians to appear remotely for competency hearings, all of our criminal arraignments are now handling in 32 arraignment courtrooms from our police departments and sheriff substations. And when our civil courtrooms come back up for law and motion, they will be doing it remotely as well. So I hope that we can keep all those in place because it's just a lot more efficient. It will help reduce the number of people coming into the courthouses.

And then I just want to say one thing that's not directly related to what we've talked about, but 92 percent of my 46,000 employees are teleworking. And what we've found is many of those position classifications are just as efficient or more efficient working from a remote location. So I would like to keep that going rather than have them sit on a Los Angeles freeway for two hours to get down to the courthouse.

THUMMA: I also think there's a real public service aspect to this as well. When I was in juvenile court, I'd hear sometimes 30 or 35 matters in a day. And I needed at least four attorneys and a case worker and the parties before I could call the case. And there were eight other courtrooms that needed the same attorneys. And so sometimes for

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SAM THUMMA

an 8:30 hearing, I couldn't call until 11. Well that's not very fair to anybody. The parties particularly who we've asked to have stable housing, and stable employment, and go to drug testing, and go to visitation, and go to counseling, and go to services. Oh, and then come to court and wait to see a judge who can't see him or her for two hours after their scheduled appointment. I think they're real opportunities. I was dealing with a service provider yesterday. They were busy, they said, "Hey we'll call you back when we can talk to you." And they did it and that was an hour and a half later. And that was okay, 'cause I could do other things. So maybe this is an opportunity to enhance public service along the way too.

ROSENBERG: I think also to promote civility. We all have our local rules that require meet-and-confer. But what does meet-and-confer really come down to these days? You'll get a filing at 5 o'clock p.m. and they'll say at 4:58, "I sent an email to opposing counsel, and I couldn't reach them, so we couldn't confer." Judges can now put in their orders, required meet-and-confer by Zoom. It is much harder to be disrespectful to somebody when you are looking at them, albeit virtually, in

the eyes by Zoom, than shooting off a text or an email. This is an opportunity for people to communicate better and be more engaged, and be held accountable for their actions.

CARTER: The makeup of the jury, I think is going to be very different. And that worries me because the jury challenges are against the statutory jury commissioner, which is me. I don't know if the make-up will completely exclude people 65 and older, because they're going to request an excuse because they're at risk. We're gathering that data now. I don't know what number we'll lose because of public transportation being a scary way to travel. And I can't even imagine in New York because you need public transportation in New York.

DRUMMOND: I was working with a New Mexico defense bar yesterday on a webinar. And a lot of their defendants are Hispanic or Native American. And the Native American tribal leaders will not allow people off the reservation. So you're going to cut that group out of jury service. And since the pandemic has disproportionately affected Blacks and Hispanics, they have a legitimate reason to not want to come down to the courthouse. And that's going to

upset the balance on a representative jury pool.

CARTER: So if we go to a virtual world and don't give them options — which is why we're trying really hard to have live calling centers and different ways to reserve a seat in the courtroom — we'll lose people. Because if they don't have internet or high-speed internet, it won't work anyway.

LEVI: There are just so many issues. You're going to see some crazy cases, too, where either with or without the court's involvement, somebody thought they were in one of these chat-rooms where nobody else could hear and then it turned out that the judge or somebody didn't hit the right button, and everybody heard a confidential communication.

ROSENBERG: I do think chat can be a little confusing because if you're chatting somebody and then someone else chats you, you're thinking you're responding to the other person, but you're not. If you could have another tablet next to you and do it on Skype; so for example when I had a sentencing, I was communicating with a probation officer on a different tablet, on my iPad, which I have right here when I'm on my laptop.

DRUMMOND: We've been urging that attorneys enter into stipulations, and to actually change the code of professional responsibility, where you say to the judge before you start the trial or the hearing, "Your honor, we've stipulated that we have a professional responsibility that if there is a mistake made" — and it's going to be by the judge, who mutes and doesn't mute — "and if we overhear a conversation by the other attorney, or by you, we will

notify the court immediately. And we will mute ourselves immediately." And I think courts ought to pass administrative orders. And I think smart attorneys will offer that stipulation.

THUMMA: Embrace change. We're not always as good about that as we should be, and I'm looking internally for that more than anything else. Be creative. The ideal, the perfect should be our goal. But if something's pretty good, let's not discard it as not being perfect. How can we innovate and use technology to do things that we just couldn't before? And then really look to the new normal, not for how we get back to how we used to do things six months ago. To me that's essential for a couple reasons. One, we're not going to fix this gap until we get that big medical fix, if we're trying to look at how we did things last fall. And then secondly, even after that comes — and man I hope that comes soon — but we're going to lose opportunities to improve what we've been doing, time-worn issues looked at through new eyes with new perspective. We can improve in the long run, even after that medical fix comes.

WALKER: What having to use these new tools does for us, is it makes us focus on what is really essential and important in the processes. And that I think is the lesson that will come out of this. We will learn what we can do without, and we will learn what we must have in order to make the system work properly. And I think that discipline that is forced upon us now is in the long run going to be very helpful.

CALDWELL: I think the role of public servants has never been greater. And judges, courthouse staff, lawyers, and other participants must recognize the importance of their service to our system of justice and its preservation.

LEVI: You're a very creative, wise, and forward-looking group. You are working in unprecedented times and doing so with vision, understanding that the courts are essential to our democracy and that we have to find ways to continue to operate while doing the best that we can to protect public health and safety. Thank you all so much, for taking the time to talk with me today, and with one another.

The Bolch Judicial Institute is maintaining a frequently updated resource page containing links to judicial orders, best practices, and other resources for courts on returning to full capacity and considerations for remote and in-person operations:

**[judicialstudies.duke.edu/
covidresources](https://judicialstudies.duke.edu/covidresources)**