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# JURY TRIALS DURING THE COVID-19 PANDEMIC

## A GUIDE FOR COURTS AND LAWYERS

By Steve Quattlebaum

“Even during a global pandemic, it is vital to our democracy that our justice system function in a manner consistent with the principles upon which it was founded. This includes the resolution of civil disputes through the means of trial by jury.... As James Madison wrote in 1789, ‘Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the preexistent rights of nature.’”<sup>1</sup> The right to a trial by jury is deeply rooted in our society and one guaranteed by our Constitution for civil as well as criminal cases. “How are we going to have jury trials when we are in the midst of a global pandemic?” That was one of the questions pondered by judges and trial lawyers across the country as we struggled with the realities of stay-at-home orders, courthouse closures, and the safety considerations occasioned by the pandemic.

National President Luther Battiste of the American Board of Trial Advocates (“ABOTA”) recognized that ABOTA was well positioned to assist in the reopening of the courts for civil jury trials. President Battiste created the ABOTA COVID-19 Task Force with the request that it draft a white paper to guide courts in the best practices for conducting civil jury trials during the pandemic. The task force consisted of 12 ABOTA members from around the country representing the plaintiff and defense bars and the judiciary and was assisted by three scientific experts to advise regarding the safety issues involved. I was privileged to serve as the chair of the task force.

### **Distribution of the Covid-19 white paper**

The work product of the task force was a white paper titled “Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic.” The white paper can be found on the ABOTA website at [www.abota.org](http://www.abota.org).

Since its publication on June 9, 2020, the white paper has been widely distributed to all ABOTA members and federal and state trial judges in many jurisdictions, circulated by the National Center for State Courts, and published in the ABOTA magazine *Voir Dire*. ABOTA also sponsored a five-hour webinar on the topic on July

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ABOTA is a national organization consisting of 7,600 plaintiff and defense trial lawyers and has as its mission the preservation of the right to trial by jury in civil cases as guaranteed by the Seventh Amendment to the Constitution of the United States. It is the desire of those involved in drafting the white paper that it serve as an example of the commitment and aspirations of the American Board of Trial Advocates to be an organization of service to our profession and the judicial system and a guardian of the Seventh amendment right to trial by jury in civil cases.



“The objective was to ‘provide our courts with information, ideas and innovations that provide a functional approach to conducting jury trials under these challenging circumstances.’”



21, 2020, featuring panels of federal and state court judges, court administrators, jury consultants, scientific experts, and trial lawyers from jurisdictions throughout the country. The panelists discussed jury trials that have occurred during the pandemic; steps taken to mitigate risks to jurors, lawyers, litigants, and court personnel; and the effects of the pandemic on the composition of jury panels, as well as how the pandemic has affected jurors' attitudes and decision-making. This webinar was attended by over 800 people.

ABOTA also participated in a national survey designed to obtain data from potential jurors to evaluate their willingness to participate in jury trials and how risk-mitigation efforts by the courts impact their comfort level in serving as jurors.

The purpose of this article is to provide a summary of the recommendations contained in the white paper and some points discussed during the ABOTA webinar.

As explained in its introduction, the white paper focused on the challenges posed by the pandemic and procedural alternatives and innovations that will allow civil jury trials to proceed safely. The white paper was to provide suggested

guidelines designed to maximize the safety of all participants while providing a fair forum for adjudication as guaranteed by the Seventh Amendment. The task force also recognized the diverse circumstances that exist in various jurisdictions, and even community to community and courthouse to courthouse. It noted that the recommendations were prepared to address fundamental principles involved in civil jury trials. The objective was to “provide our courts with information, ideas and innovations that provide a functional approach to conducting jury trials under these challenging circumstances.”

The paper addresses specific issues that arise in the following stages of a civil jury trial:

1. Pre-trial hearings and conferences;
2. Jury selection and *voir dire*;
3. Opening statements and closing arguments;
4. Presentation of evidence; and
5. Jury deliberations.

The paper also includes a list of resources for additional information, including mandates and orders that have been issued by courts that have conducted or scheduled

jury trials during the pandemic, a pre-trial checklist of issues to be considered, and a model order of conduct applicable to all trial participants.

### Screening protocols

Some of the more universal screening requirements include the following:

First, before entering the courthouse, all jurors, lawyers, witnesses and staff should be screened through a series of questions regarding health and exposure. Each person's temperature should be checked for temperatures above 100.3 Fahrenheit. Further, all persons should be required to wear masks meeting the requirements of the court upon entering the courthouse. It is true for everyone. This is especially true for jurors who may be confined to tighter spaces than are lawyers and witnesses. The courtrooms should undergo sanitation each day, including but not limited to wiping down high-touch surfaces such as chairs, tables, door handles, etc., with disinfectant wipes such as those included on the EPA's List N found at <https://www.epa.gov/pesticide-registration/list-n-disinfectant-use-against-sars-cov-2>. The courtroom can be marked to indicate where counsel should stand when addressing the court or jury to

ensure social distancing at all times. The Court may prohibit the use of a shared podium. Similarly, all available space in the courtroom should be utilized to ensure adequate social distancing. Jurors must remain a minimum of six feet apart at all times. Finally, courthouses should prohibit attorneys from approaching witnesses, staff and the judge during all phases of the trial, absent specific leave of the Court. In all circumstances, as mentioned, a minimum social distance of six feet should be required.

### Safety practices

The recommended safety practices specifically designed to provide extra protection for jurors include:

1. Avoid having jurors report until actually needed. For example, if the Court anticipates any other business will be conducted, such as a civil settlement, guilty plea, or parole revocation, schedule jurors to arrive after such matters have concluded.
2. Limit the number of jurors assembled in one location by asking jurors to report for service on a staggered schedule.
3. Provide hand sanitizer and masks to jurors.
4. Consider impaneling extra alternates to guard against delays or mistrials for any reason.
5. Require that jurors report directly to a courtroom as opposed to a jury assembly room.
6. To the extent possible, avoid passing exhibits between jurors (please see below).
7. Require jurors to report by phone each morning of trial, confirming that the juror has not experienced any symptoms consistent with COVID-19. The manifestations of COVID-19 are protean. If a juror reports symptoms consistent with COVID-19 by phone, the juror should not be allowed to come to the courthouse. If a juror experiences symptoms consistent with COVID-19 while at the courthouse, the juror should be subject to immediate quarantine and a test administered. To walk through this: If a person becomes ill, he or she will be immediately removed from the room and courthouse, sent home and asked to contact a physician. The Court cannot tell someone with symptoms to go into quarantine or get a test. The juror should be

excused and, if alternates are impaneled, an alternate juror should be substituted.

8. To the extent possible, certain restrooms should be designated for juror-only use and should be cleaned with disinfectant after each break, lunch and at the end of the day. Ideally, restrooms should have an open window. If that is not possible, engineering should address the air flow in the restrooms. These places are particularly problematic as many people use restrooms and they are usually small rooms. Additionally, disinfectant wipes should be readily available in the jury room and the restroom for use throughout the day.

### A robust pretrial conference

A robust and comprehensive pre-trial hearing is vital to avoiding cumbersome and unnecessary delays during the trial caused by bench conferences or sidebars. Courts should establish clear rules about the designated location for each participant in the trial, including court personnel, to maintain proper social distancing. The handling of exhibits is also important. To the extent possible, documentary exhibits should be displayed electronically to avoid touching. To the extent physical exhibits must be handled, precautions should be taken to sanitize the exhibits between handlings. Of course, the rules regarding the use of face coverings, movement about the courtroom, podium or document presenter (Elmo) use, and questioning from counsel table should be clearly communicated at the pretrial. Observation of the trial by the public must also be considered by the Court, and one possibility is allowing a section of the gallery to be designated for the public or providing for livestream video in another room of the courthouse.

Jury section and *voir dire* present particularly difficult challenges because of the number of potential jurors on the panel. The use of video conferencing platforms like Zoom are being utilized by some courts, but difficulties arise with that option. Maintaining control over those on the panel, adequately identifying those who respond to the *voir dire* questions, handling jurors speaking over each other, and such issues are likely to require more time and much more interaction with the court than live *voir dire* would involve. A probing jury

### Pre-Trial Checklist

- ☐ Requirement of personal protective equipment (masks, shields, gloves, sanitizer, plexiglass dividers)
- ☐ Screening of all participants for temperature, exposure risks, other symptoms
- ☐ Procedure for jury orientation
- ☐ Procedure for jury screening
- ☐ Seating of the jury panel
- ☐ *Voir dire* procedure and the use of jury questionnaires
- ☐ Communication of for-cause strikes
- ☐ Communication of preemptory strikes
- ☐ Seating of jury
- ☐ Public access
- ☐ Seating of counsel
- ☐ Whether movement in the courtroom and use of the podium is allowed
- ☐ Procedure for use and disinfection of common equipment such as white board, document presenter (Elmo), enlarged exhibits and physical exhibits or demonstratives
- ☐ Presentation of documentary exhibits (paper or electronic)
- ☐ Handling of documentary exhibits
- ☐ Jury breaks and bathroom protocol and disinfecting facilities
- ☐ Anticipation of objections
- ☐ Procedure for side bar conferences with court
- ☐ Disclosure of exhibits in advance for direct and cross-examination
- ☐ Breaks and protocol during breaks
- ☐ Number of cleanings (wipe downs) of the courtroom that will occur each day
- ☐ Sanitary storage of jury exhibit books, notebooks and other items at night
- ☐ Consequences of positive testing or symptomology of any participant during trial (mistrial, adjournment, testing of all participants exposed?)
- ☐ Bathroom protocol and cleaning

questionnaire is a mechanism for reducing questioning of jurors and minimizing the likelihood of something occurring that could jeopardize the trial. Conducting hardship challenges and even some general *voir dire* by video to reduce the panel to a manageable size is another option. Finally, bringing in qualified jurors in groups small enough to assure proper distancing in the courtroom is a step that should assist in balancing safety and efficiency.

When the jury is selected, the Court should consider having sufficient alternate jurors in case someone fails the prescreening mid-trial. Seating jurors should be accomplished utilizing as much of the courtroom as necessary to assure proper social distancing. Some courts have also provided plexiglass partitions separating jurors. The jurors should be afforded a jury room that is adequate to allow for social distancing. A second courtroom may be necessary for doing so, depending on the circumstances of the particular courthouse. Some courts are also looking to facilities like auditoriums and theaters to use for *voir dire* or even the entire trial. Chief Judge Barbara Lynn of the United States District Court for the Northern District of Texas noted during the ABOTA webinar that she is considering a trial outdoors at a nearby law school when weather permits.

There may be challenges getting witnesses to appear live at trial based on government-mandated travel restrictions or a witness's medical condition. Courts may elect to utilize live video presentation of witnesses by Zoom, or a similar platform, or require that the testimony be preserved by deposition.

Jury deliberation is of the utmost importance because it is the time for the jury to work together, evaluate the evidence, and reach an informed decision. Thus, it is especially important that the jury be allowed to congregate in person; have access to the jury instructions, verdict forms, and exhibits (preferably digitally or with a set in a binder for each juror); and be in a location where they feel comfortable and can maintain proper distance from one another.

The white paper covers other considerations and contains more detailed recommendations. The references at the end of the paper also provide valuable information sure to be of assistance to

courts and counsel considering jury trials during the pandemic.

### Adapting to the challenges

The trial by jury in civil cases has been a hallmark among the guarantees provided by our Constitution. We have made many adjustments and adaptations to the circumstances peculiar to the exigencies of the time. We must do so during this pandemic, as well. As ABOTA National President Battiste noted in the foreword to the white paper:

The American experiment in self-government is certainly being tested, yet we remain confident that our system will thrive. Madison reminded us of the need for a “chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

We must balance the desire to resolve civil disputes in a manner consistent with our guaranteed rights with the need to maximize the safety of all trial participants. With the recommended safeguards set forth in the white paper and being utilized by forward-looking courts throughout the country, we hope jury trials can be conducted during these turbulent and challenging times in a safe and effective manner.

### Endnote:

1. Guidance for Conducting Civil Jury Trials During the Covid-19 Pandemic, page 5.

## General Order Regarding Rules of Conduct for Trial Participants

The court hereby issues the following order regarding conduct applicable to all trial participants in this Court, including but not limited to lawyers, clients, witnesses, client representatives, members of the jury, court reporters, law clerks, and security personnel:

1. All entrances to the courthouse must be well marked with restrictions.
2. Start times must be altered to allow for slower admission of persons into the courthouse.
3. All persons entering the courthouse will be screened. This screening will include a non-invasive temperature check for temperature exceeding 100.3 and a series of questions regarding known exposure circumstances, recent illnesses and travel. Any persons who have traveled to a high-risk area in the preceding 14 days will be denied entry to the courthouse.
4. All persons in the courthouse must stay a minimum of six feet away from all other persons at all times. Exceptions to this rule may only be granted by the trial judge. For example, counsel may be permitted to approach a testifying witness for limited purposes. In this instance, the court may direct that counsel and the witness must cease speaking and wear their respective face masks. The Court may also require other measures to avoid encroachment within six feet, such as leaving an exhibit on a table to be retrieved by the witness.
5. All persons in the courthouse must wear an approved mask at all times unless an exception is granted by the presiding judge. (Specifications for masks may be designated by the Court). Due to difficulty of hearing speakers with masks, people may be permitted by the Court to speak and testify free from obstruction (i.e. without a mask or through the use of a transparent facial mask, face shield, or Plexiglass partitioning).
6. Personnel in the courtroom will be limited to as few as possible as determined by the Court.
7. Media may require remote viewing options to reduce the number of persons in the courtroom.

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8. Witnesses must be on call or scheduled for their appearance to reduce exposure and unnecessary waiting.

9. The jury will only be brought to the courtroom for trial. Waiting pools of jurors are discouraged.

10. The use of shared podiums found in courtrooms will only be allowed by permission of the court.

11. Counsel, along with their clients and client representatives, must stay at their designated counsel table at all times except when speaking. Breaks will be liberally given to allow counsel to speak to their clients without the risk of being overheard.

12. Sidebar conferences are not permitted absent specific approval of the court. Participants may need to remove themselves from the courtroom and use a room that allows for proper social distancing.

13. When counsel is speaking, he or she should stay at his or her designated counsel table, or alternatively, must remain on the designated mark in the courtroom.

14. Physical handling and transfer of exhibits

is discouraged. All exhibits, with the exception of tangible exhibits that cannot be reproduced for the purpose of trial, must be shown electronically. All trial participants must have adequate viewing of the electronic exhibits either by shared screen in the courtroom or individual screens or tablets.

15. If a tangible exhibit must be passed among jurors, they will be provided hand sanitizer, instructed on the proper hand hygiene and offered court-supplied, disposable gloves. Further, jurors will be instructed to avoid touching of the face, eyes and mouth. Court personnel will assist in the proper handling and disinfecting of exhibits.

16. Each juror will be given his or her own copy of exhibits unless the volume or other characteristics of the exhibit render individual copies impracticable. In such cases, precautions will be taken to protect against transfer of contamination.

17. During breaks or deliberations, jurors will be taken into a jury room where there is adequate space to maintain a minimum distance between one another of six feet. Before entering the deliberation room, jurors will be required to use hand sanitizer. Upon exiting the deliberation

room, jurors will be required to use hand sanitizer. As previously stated, jurors must wear masks at all times, including when speaking in the deliberation room.

18. Breaks generally will be longer to allow for staggered trips to the restroom.

19. Courthouse cleaning crews will be responsible for ensuring that each courtroom undergoes cleaning each day, including but not limited to wiping down all chairs, tables, door handles, etc. with disinfectant solution or wipes.

20. Bathrooms designated for jurors' use will be cleaned and disinfected by court personnel after the morning and afternoon breaks, lunch and close of court business for the day. Disinfectant wipes will be available for use by jurors in the jury room and bathrooms.

21. Courthouse security is empowered to enforce social distancing and other orders including the removal of persons showing signs of COVID-19.

The foregoing rules have been recognized by this Court as necessary to ensure adequate protection of all trial participants. Failure to comply with these rules of conduct constitutes a violation of a court order. IT IS SO ORDERED.



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