

Jury Trial during a pandemic guidance and objections

Steps:

1. Ascertain the courts proposed process for:
 - a. how they will compile a jury pool;
 - b. where and how voir dire will be conducted;
 - c. how the court will abide by the CJO and Gov. Brown's Stay Home Order throughout the process;
 - d. where and how the trial will occur;
 - e. how the court will position the jurors and parties;
 - f. will the court require and/or allow PPE;
 - g. where will the jury deliberate; and
 - h. what special jury instructions will the court give.

2. Fully advise and counsel your client on a trial during the pandemic
 - a. ORPC 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
 - b. ORPC 1.2: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."
 - c. Generally, responsible to counsel (2.1), advise (2.1), and diligently communicate (1.4) with client.
 - d. Duty to withdraw if you cannot competently represent the client and/or for physical/health reasons you cannot ethically represent client at a trial. (1.7)
 - e. If the attorney concludes they cannot competently represent client at a trial and/or cannot attend a trial due to physical/health reasons, then the attorney should seek other internal MPD counsel or move to withdraw.

3. Pre-trial Motions
 - a. Release pursuant to speedy trial statute and that our client cannot receive a constitutionally adequate trial during a pandemic

 - b. Challenge the jury pool compilation/summons process
 - i. Not a cross-section of the community
 - ii. Large portion can opt out based on Court website/info for jurors
 - iii. Arguably violates Gov. Brown's Stay Home Order to compile jury panels (also the spirit of CJO) because jurors are not employees of essential businesses and are not appearing voluntarily

- iv. Racial disparities for black (nationally) and latino (Oregon per OSH) communities in mortality and contraction rates (respectively); therefore, jury pools will have racial disparities
 - v. Hostile juror pools: jurors health will be compromised to have trials, which will result in hostile jurors
 - vi. Are clients waiving their constitutional right to a jury trial, and electing a bench trial, because they do not believe they can get a fair trial with a jury?
- c. Challenge venue
- i. Public trials guaranteed by Oregon Constitution, Art. 1, Sec. 10; gatherings of 10 or more people prohibited; unconstitutional to exclude the public, which is not waivable by the parties
 - ii. Objection to a non-courtroom setting
 - iii. Objection to socially-distanced courtroom, as jurors will not be able to view evidence and hear from witnesses, and assess demeanor and credibility, if they are not in the jury box close to the testifying witness
- d. Challenge impartiality of the Court
- i. The majority of judges are not currently coming to the courthouse
 - ii. judges generally are going to be biased and upset about having a trial, and will equate it to our clients not waiving their statutory rights, rather than the fact that they do not want to abide by the statute and release our client (or find good cause to delay the trial)
- e. Challenge ability to present a defense
- i. Inability to present a full defense due to missing witnesses, inability to fully investigate cases (lack of access to witnesses, businesses being closed etc.), and lack of access to our incarcerated clients (particularly preparation to testify)
 - ii. Argue missing witnesses that the State is obligated to present, which we would advance our defense theory through cross-examination
 - iii. If the Court requires client and counsel to be 6 feet apart, or attorney believes it is necessary, this prevents confidential communication throughout the trial
 - 1. Also, prevents a meaningful attorney client relationship during the trial
 - 2. It may lead to the need to take breaks during the trial so that we can confer with our client, which would become obvious to the jury it is at our request, and will hold against the defense for delaying the process
 - 3. The physical separation counteracts our job to humanize our client to the jury, and perpetuates the belief our client is “scary” etc.
- f. Challenge the infringement upon the presumption of innocence

- i. Jurors will hold trials against our clients
 - ii. Jurors will know our clients are incarcerated, otherwise, there would not be a trial
 - iii. Excessive security and/or shackling due to social distancing
 - iv. Jurors will not want to risk their health, and will want to speed through deliberations
- g. Challenge the Voir Dire process
 - i. Motion for individual or group voir dire
 - ii. Motion for the court to provide preliminary instructions on the pandemic, court procedure and process. But possibly not a preliminary instruction that the jury cannot hold the trial against the parties because you want to flesh that out during voir dire, rather than a prospective juror being able to say they will follow the court's instructions...
 - iii. Motion for additional strikes and/or expansion of what constitutes for cause in anticipation of jurors being fearful of having to serve and biased against the parties/client
- h. Due process challenge regarding presentation of witnesses and evidence
 - i. Will witnesses be allowed and/or required to wear masks? If so, this practice is contrary to the jury instruction that jurors are to assess witness demeanor, facial expressions, body language etc. which is at least hindered if the jurors cannot see the witnesses lower half of their face
 - 1. Same argument during voir dire if prospective jurors can cover their face; how could you make a complete assessment whether to use a preemptory challenge?
 - ii. Inability to view the witness and/or evidence based on location in the room
 - iii. Inability for the parties to view jurors and reactions depending on location
 - 1. Jurors may be seated behind the parties: how can you assess if they are paying attention, their reaction to witnesses/evidence?
 - iv. Again, missing witnesses and/or evidence
 - v. Actual presentation of the witness: witnesses will also likely be frustrated and scared for having to come to court, which will effect their testimony
 - vi. How will exhibits be presented and distributed? Who will approach the jurors with a physical exhibit?
- i. Motions for special jury instructions
 - i. At least a jury instruction that the court required the trial and the jury cannot hold the trial against the parties

- ii. Additional special jury instructions will depend upon how the actual trial was conducted, possibly around how to evaluate evidence, or a missing witness, or missing evidence

j. Challenge Juror deliberations

- i. Location
- ii. Process for viewing evidence and exhibits
- iii. Again, jurors must be instructed to not speed through deliberations