



WASHINGTON
COURTS

Resuming Jury Trials in Washington State

Guidelines for Operations during the COVID-19 Pandemic

June 2020

Table of Contents

INTRODUCTION	5
MEDIA/MESSAGING	6
SAMPLE FREQUENTLY ASKED QUESTIONS	10
SAMPLE PRESS RELEASE	11
SAMPLE SOCIAL MEDIA POSTING	14
PRE-ASSEMBLY	15
SAMPLE JUROR QUALIFICATION / HARDSHIP FORM	18
ASSEMBLY AND SELECTION.....	19
CONDUCT OF TRIAL	33
DELIBERATIONS	36
SUGGESTED EMERGENCY JURY INSTRUCTIONS	37

RESUMPTION OF JURY TRIALS WORKGROUP

Chief Justice Debra Stephens initiated the Resumption of Jury Trials Workgroup. In coordination with the Superior Court Judges' Association (SCJA), the District and Municipal Court Judges' Association (DMCJA), the Association of Washington Superior Court Administrators (AWSCA), the District and Municipal Court Administrators (DMCMA), the Washington State Association of County Clerks (WSACC), and the Washington Administrative Office of the Courts (AOC), the following individuals were appointed to the workgroup.

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The Workgroup was supported by staff from the Washington State Administrative Office of the Courts.

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The Workgroup would also like to thank the Washington State Supreme Court, judicial officers and staff who contributed to the creation of the workgroup and development of the guidelines.

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A final thank you to Mr. Glen Patrick, Senior Epidemiologist and Deputy Director at the Washington State Department of Health, for reviewing the guidelines.

INTRODUCTION

On March 18, 2020, the Washington State Supreme Court suspended all civil and criminal jury trials as a result of the novel coronavirus (COVID-19) pandemic. COVID-19 can lead to severe illness and even death, especially in those individuals over the age of 65 and those with certain underlying health conditions. The judicial branch's leadership is essential to maintaining court functions, protecting the health and wellness of court visitors, and navigating this unprecedented time.

How the Guidelines Were Developed

The guidance contained within this document was developed over several weeks of thoughtful consideration and consultation with experts, stakeholders, and practitioners within the court community and public health sectors. The Resumption of Jury Trials Workgroup (Workgroup) was convened on May 11, 2020, with the charge of creating guidelines for trial courts as jury trials resume during the COVID-19 pandemic. The Workgroup considered current public health and safety recommendations, active executive and Supreme Court orders, and the diversity of resources available to meet the needs of trial courts across the state.

How to Use the Guidelines

This guidance document provides a series of considerations for each phase of a jury trial, beginning with encouraging jurors to serve and ending with jury deliberations. The Workgroup divided into five subcommittees: (1) Media/Messaging; (2) Pre-Assembly; (3) Assembly and Selection; (4) Conduct of Trial; and (5) Deliberation. The subcommittees developed guidance to address the following issues:

- Media/Messaging: How can courts communicate with jurors, stakeholders, and the public about the measures they are taking to make jury trials as safe as possible?
- Pre-assembly: How can courts implement a pre-assembly process for potential jurors that is both feasible and adheres to public health guidelines?
- Assembly and Selection: What accommodations are necessary to assemble and select a jury?
- Conduct of Trial: How do courts protect the health and safety of all trial participants?
- Deliberation: How can courts facilitate jury deliberations that maintain the integrity of the process?

The guidelines also contemplate ongoing coordination among stakeholders impacted by the resumption of jury trials, including but not limited to, judicial officers, courthouse staff, prosecutors, criminal defense counsel, civil trial lawyers, law enforcement, correctional facilities, and any groups that may share facilities with the court. Parties are encouraged to agree on trial protocols as much as possible, even those that differ from the guidelines here, as long as they meet or exceed the public health standards. Any such stipulations must be memorialized by the court. Courts should also maintain open communication with their local health departments and consider sharing their plans to resume jury trials.

The Washington State Supreme Court and AOC continue to monitor the public health situation and follow recommendations from the Centers for Disease Control and Prevention (CDC), Washington State Department of Health (DOH), and Washington State Department of Labor & Industries (L&I). Courts can anticipate additional support and guidance from the Court Recovery Task Force, a newly launched effort of the Board for Judicial Administration.

MEDIA/MESSAGING

Jury trials must resume in Washington courts soon, before the COVID-19 pandemic is controlled. Jury trials are a critical constitutional guarantee and vital to public trust in the justice system, and the work of the courts must move forward. Our challenge is to redesign jury service to be as safe as possible, then to communicate the resumption of jury service and its new processes in a way that will instill confidence in potential jurors and inspire their participation.

KEY COMPONENTS OF OUTREACH TO POTENTIAL JURORS:

- One outreach leader or an outreach committee — to coordinate communications about jury trial resumption and changes — should be identified at the local and state levels.
- Primary goal: To reduce juror anxiety and ensure jurors feel safe responding to summonses and reporting for jury service.
- Secondary goal: To communicate the resumption of vital jury trials to our communities, potential jurors and justice partners using as many tools as possible — media reports, web posts, social media posts, partnerships with community leaders, and ongoing messages.
- There is statewide outreach and local outreach. Both are very important. Jury service at its core is local in nature.
- Public outreach encouraging jury service should be thought of as ongoing because this situation will be with us for a while. For instance, press releases and web/social media posts can be accomplished almost immediately, while guest columns in newspapers might come a few weeks later, and public service announcement (PSA) video and print ads could come out still later. A mixture of state and local messages and documents — such as designed posters and fact sheets — can continue to be produced for posting and disseminating. This keeps the messaging in front of the public and media for an extended time.
- A toolkit for courts with outreach tips and templates for press releases, FAQ sheets, guest columns, social media posts, a designed poster, etc. will be developed by AOC for ongoing use.

KEY MESSAGES:

- **Jury trials are resuming** in Washington courts/our court.
- **Jury trials are a cornerstone of the justice system**, critical to fair hearings, and a key constitutional guarantee for all.
 - Article Three of the U.S. Constitution guarantees criminal trial by jury, and the Sixth Amendment further clarifies that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and [public trial](#), by an impartial jury.”
 - Article One Section 21 of the Washington state constitution: “The right of trial by jury shall remain inviolate.”
 - Jurors from a broad spectrum of the community are critical to just outcomes and trust in the justice process. *See resources on pg. 9.*

- **Courts are [Our court is...] taking exhaustive steps** to protect the health and safety of jurors by engaging medical experts in planning specific to jury service, and by following the directions of state, local and national health officials. Steps may include [Our steps include...] new jury screening questions to identify vulnerable persons, availability of N95 and KN95 masks and other personal protective equipment (PPE), installation of Plexiglas inside court spaces, social distancing to include jurors meeting in much larger spaces or in separate rooms, etc.
- **We will take every possible precaution** but we cannot, unfortunately, guarantee that no virus transmission could take place during conduct of a trial.
- **Jury service will look a bit different going forward**, with new processes included to maintain safety, such as smaller groups meeting in larger spaces, use of protective equipment, fewer trials being conducted simultaneously, and much more.
- **Please be patient** — new processes and new technologies will take some adjustment and refining as they are implemented, and the processes may be updated as information becomes available and the trajectory of the pandemic progresses.
- **Court staff will be available** to answer your questions and address your concerns at any time.
- **Jurors are critical to society** as the judicial branch works to protect access to courts and fair hearings, and maintain the rule of law. Jury service is a vitally important civic duty.

METHODS OF OUTREACH:

- **Statewide tools** to be used with statewide media and web sites etc. for general awareness and messaging, and can be shared at the local level:
 - **Press releases** should be planned for ongoing news and information on jury service.
 - **Video messages** from the Chief Justice or another official, can be posted to websites, shared on social media, or used as a subject of press advisories.
 - **Jury web page** of Washington Courts site needs to feature the messaging, documents such as FAQs, fact sheet, designed poster, and photos, all of it downloadable and sharable. This gives courts a location to send media and other stakeholders (such as Bar members) for materials to use as they help to spread the message.
 - **Social media outreach** on all statewide judicial branch pages for Facebook, Twitter, etc. Photos and videos of the new look of jury service will be very important.
 - **Photos/videos** of the new look of jury service in different locations. Potential jurors are already expressing anxiety over how jury service will be conducted, and these visual aids can be very important to allay fears.
 - **Outreach Toolkit** including general FAQs, fact sheets, a designed poster (that courts can print and display), speaking points, templates for press advisories, social media posts, and op-ed columns.

- **Public Service Announcements (PSAs)** to local and state media about the critical importance of jury service, with some images of NEW jury service in action.
- **Local tools** – The release of tools can coincide with resumption of jury trials in specific courts and include local information on changes in jury processes to alleviate anxiety in potential jurors:
 - **FAQ sheets individualized for local courts** answering potential questions of concerned jurors, providing local information on changes to jury processes, sharing a personalized message from the county clerk or presiding judge, and including local contact phone number and/or email for questions and concerns. The Workgroup recommends these FAQ sheets be included in jury summonses to allay fears and encourage response.
 - **Press advisories to all local media** about the resumption of jury trials in your court and any new processes or safety steps taken. The Workgroup recommends the press advisories be emailed to all local media as soon as possible after jury summoning resumes. *See press release template on pgs. 11-12.*
 - **Watch for photo opportunities and consider** inviting the media in to photograph or film as Plexiglas is being installed or jury rooms are being reconfigured, or a convention center or lecture hall that is being prepared for jury activity, etc. The Workgroup recommends taking your own photos and videos of these preparation steps for your web pages, social media, to share with local media, and/or to share with AOC for statewide social media.
 - **Website postings on the web pages for your county, your county clerk and your court** (the more locations, the better), explaining and illustrating your court’s jury resumption timelines and new processes. The postings could include messages or quotes from your presiding judge or county clerk, and photos of any new jury configurations. The Workgroup recommends a detailed juror message be posted to all of these websites at the same time an initial press release is sent to the media, and that the message be maintained and occasionally updated for the duration of the pandemic. Jury service is new to each new wave of jurors, and websites are often the first location checked for basic information.
 - **Communicate directly with justice partners** – Communication leaders (whether court or county clerk staff or both) should reach out to local Bar Association, prosecuting attorney’s office, public defense office, pretrial services office, counsel for the defense, local Law and Justice Council Administrator, etc. The Workgroup recommends regular communications with these justice partners and any others you identify, providing information and updates on resumption of or changes to the conducting of jury trials.
 - **Engage local community groups to help spread the word** – The local Bar Association, local government leaders and community groups (like the Chamber of Commerce) have communication platforms and can help get the word out about the resumption of jury service and safety changes. The Workgroup recommends asking these community leaders to serve on outreach committees and/or to share messages on their social media pages, in newsletters, on websites, etc.

- **Op-ed (a guest column)** in the local newspaper, from the county clerk and/or presiding judge, court administrator or other local leader, giving key messages to the community, perhaps describing what jury service used to look like and what it has evolved to be now. The Workgroup recommends working with a local court, government, or community leader to write a guest column a few weeks or so after the resumption of jury trials, to share a message to the community on the importance of jurors and describe the new look of jury service.

RESOURCES/LINKS FOR REFERENCE: These resources and links are provided to be of assistance when questions arise about specific constitutional or state law citations, trial and jury data, research into jury issues, and other information. These can provide information for guest columns, press releases, speaking points with media and the public.

- U.S. Constitution, Article III, Judicial Branch: <https://constitutioncenter.org/interactive-constitution/article/article-iii>
- U.S. Constitution, Bill of Rights, Sixth Amendment: <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vi/interps/127>
- Washington State Constitution, Article One, Section 21, “Trial By Jury”: <http://leg.wa.gov/CodeReviser/Pages/WAConstitution.aspx>
- Washington State Supreme Court Minority and Justice Commission 2017 symposium on jury diversity, with links to state and county data, national research on jury outcomes, and more (scroll down for 2017 materials): <http://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2>



SPOKANE COUNTY COURTHOUSE

SPOKANE COUNTY

TIMOTHY W. FITZGERALD
County Clerk
Clerk of the Superior Court

May 26, 2020

Subject: [SAMPLE] Frequently Asked Questions

- 1) **Are jury trials still needed?** Yes they are. Jury trials are a cornerstone of the justice system. They are critical to fair hearings and a key constitutional guarantee (Amendment VI, U.S. Constitution) for all.
- 2) **Will jury duty be in person or via virtual means?** Jury duty will be in person. There are many reasons for this to include constitutional rights the accused, access to attorney presentations, access to evidence/exhibits and to facilitate juror discussion during deliberations.
- 3) **What if I am in the high-risk category or I am an essential worker? Can I be excused or rescheduled for jury duty?** Yes, you can. Follow the instructions on your summons to apply for these options.
- 4) **Will the courthouse be clean and safe?** Yes, the courthouse courtrooms and jury deliberations rooms will be cleaned thoroughly daily. Protecting the health and safety of the public and courthouse staff is essential.
- 5) **Will the courtroom and jury rooms adhere to the CDC precautionary measures of social distancing?** Yes the court will adhere to the CDC precautionary measures. Jury positions will be marked in the courtrooms and jury deliberation spaces.
- 6) **Will I have to bring a mask and gloves?** If you personally desire to bring and wear your own personal protective equipment you may do so. The court will also have masks available if you would like one.
- 7) **Will the courthouse have hand sanitizer dispensers and hand washing areas available?** Yes, hand sanitizers and hand washing areas will be available in the courthouse.
- 8) **What if I feel unsafe or sick after reporting to jury duty?** Contact a member of Jury Management immediately.
- 9) **What if I feel sick the day? Should I report for jury duty, or do I stay home?** If you feel sick, stay home and contact Jury Management for instructions.
- 10) **Will coffee and reading materials be available?** At this time for CDC precautionary reasons the court will not be offering coffee or reading materials. Please feel free to bring your own. Dispose of them once done.

PRESS RELEASE TIPS

- Email a press release to all local media — newspapers, TV stations, and news radio — about the same time first new jury summonses go out, so potential jurors may see or hear news reports about the same time they receive their summonses. Media outlets all have a “Contact” section on their web pages that provides email contact info or online forms for posting press releases. If a specific reporter covers courts most often, make sure to send her or him a copy as well as to the general news email address.
- Include one or more quotes from your county clerk, presiding judge or other official in your press release — about the importance of jurors, and the care taken with new safety precautions, etc., and one or two photos of reconfigured jury areas if possible. Many media outlets are short-staffed and will simply run your press release in full, and they love photos.
- Make sure to include one or two designated persons for media to contact. It is usually best to have more than one, and consider the contact person’s availability on short notice.
- Be prepared for media questions (such as the expected number of jury trials and jurors needed, what happens if jurors don’t respond, how can you guarantee safety, etc.) as well as requests to photograph or film juries in action or some other jury activity. Their photo request might not be workable (like filming jurors), but you may have alternatives to offer.
- Below is an example/template of a press release. All details and wording can be individualized as needed.

SAMPLE PRESS RELEASE

[County/court letterhead]



For immediate release

July XX, 2020

FROM: Contact person
(XXX) XXX-XXXX

Jury Trials Resuming in [County Name] County Superior/District Court Next Month

Straight news lead paragraph [County Name] Superior Court will resume jury trials in [July] after pausing them in [April] in response to the coronavirus (COVID-19) pandemic. Extensive new safety precautions have been implemented to protect juror safety and public health as trials resume.

Jury summonses are going out this week, with first potential trials planned for the third week of [July].

Quote from court official, such as, “The suspension of jury trials was needed to protect the health of court users and court staff, and it gave us the opportunity to redesign our jury processes with the input of public health officials,” said XXXXXX. “Now it is critical that we re-start jury trials, which are key to the fair administration of justice.”

New jury processes include [describe new jury trial processes, being as detailed as possible with all the steps taken and processes in place to protect juror safety.]

Additional quotes on the importance of juror safety.

Add a bit of background answering some expected questions the public may have on jury trials. Jury trials and nearly all public, in-person court activities were put on hold in April by order of the state Supreme Court to protect public health and safety. [County Name] County's last jury trial was held on [date of last jury trial].

For more information, see our FAQs and other details on our web site at [web site link].

Can add a final quote if desired that it is critical for potential jurors to respond to summonses, or the critical importance of jurors in the justice process, or your strong commitment to safety of jurors and public, or that jury service will look different but it is still vital to justice, etc.

CONTACT: [County Name] County Superior Court Administrator [Administrator Name] / Jury Administrator [Administrator Name] / County Clerk [Clerk Name] / Presiding Judge [Judge Name], EMAIL ADDRESS, PHONE NUMBER.

SOCIAL MEDIA POSTING TIPS AND EXAMPLES

- Social media is a powerful tool for communicating because posts are easily shareable, are quick, simple messages, and because so much of the community is on social media.
- If your court does not have a Facebook, Twitter, Instagram, or other social media page, it is likely your county government and County Clerk's Office do. They may be more than willing to share your jury message.
- VISUALS are very important to the success of social media posts. Facebook posts with photos, graphics, or short videos get far better readership/viewing and sharing than do posts without images.
- For example, photos or a short cellphone video of new jury assembly areas, courtrooms with yellow distancing tape, new Plexiglas installation, mock trial sessions with volunteer jurors, a new jury summons mailing, a judge wearing a mask, county clerk staff wearing masks, a volunteer having a temp taken, a court staff member using hand sanitizer, etc. could be included. Using any of these images along with a message about trials resuming, summonses going out, or extensive safety precautions implemented will get much better readership.
- Think of your Facebook or Twitter posts as laying breadcrumbs to your larger message and location; include links to your county clerk or court main page or jury page, an FAQ page, an online jury brochure, a local news story, or to the state Jury Webpage. (<http://www.courts.wa.gov/newsinfo/resources/>).
- If your page or the page hosting your message accepts public comments on posts, be sure to answer in a timely, upbeat fashion. This is an opportunity to have some dialog with the public about their concerns regarding jury service, and those answers are viewed by many people.
- Some examples of Facebook posts include (all images are borrowed from real pages):



Florida continues to operate under public health emergency orders issued by the Chief Justice. Local courts have implemented these orders with more detailed guidelines of their own designed to deal with local conditions. Copies of statewide and local orders can be found at this website: <https://www.floridasupremecourt.org/Emergency>



SAMPLE SOCIAL MEDIA POSTING

Clark County Jury Trials Resume: Clark County residents may start seeing juror summonses in their mailboxes beginning next week as the Superior Court prepares to resume jury trials. Jury trials have been paused for two months to protect public health and to make significant safety changes to the jury process. Here, Judge John Smith and Court Administrator Jim Doe examine a large conference center that will be used in jury selection to enable social distancing. Questions? See our FAQ page at www.xxxxx.wa.gov.



PRE-ASSEMBLY

BACKGROUND

There are a number of jury management departments throughout the state. Each department has, over time, developed a jury summons, deferral, and information dissemination practices best suited to the unique economic, technological, urban and/or rural character of its population. The COVID-19 pandemic and the shutdown of the jury trial system has had a mostly uniform impact, but restarting the system, while certainly posing challenges, should not require the departments to abandon past practices and institute new ones that the department may be incapable of adopting given its existing infrastructure.

The Workgroup had the task of developing a series of policies and supplemental questions to be reviewed by the individual jury management departments and adapted to best suit their capabilities.

The Workgroup discussed juror eligibility, present juror pre-assembly practices, various populations considered particularly vulnerable, the need for pre-screening of jurors coming to the courthouse, and the reassurance of participation in jury service.

JUROR ELIGIBILITY

Statute lists the qualifications for jury service.

RCW 2.36.070

Qualification of juror.

A person shall be competent to serve as a juror in the state of Washington unless that person:

- (1) Is less than eighteen years of age;
- (2) Is not a citizen of the United States;
- (3) Is not a resident of the county in which he or she has been summoned to serve;
- (4) Is not able to communicate in the English language; or
- (5) Has been convicted of a felony and has not had his or her civil rights restored.

Recommendation: Each jury management department grants deferrals, upon request, using data collected from the yield of the summonses issued.

Rationale: Prior to the pandemic, most jury management departments developed a process for requested deferrals. Jurors have never been reluctant to request deferral. The Workgroup is concerned about the likelihood that deferral requests could increase as jury summonses are received during the pandemic. If deferrals were to be granted liberally upon request, without regard for yield results, there is concern about the capacity to field a sufficient number of jurors to serve.

Recommendation: There should be no presumptive juror disqualification or excusal.

Rationale: Since we will recommend that there be an identification of jurors who are particularly vulnerable to the virus (an expansion of those likely to request deferral or excusal) the Workgroup recommends that no one be presumptively excused or disqualified from service merely for inclusion in an at-risk population. Nationally, many demographic groups are considered to have been disproportionately impacted by COVID-19 and health care officials are

not sure the reasons for that impact. We are concerned that presumptive excusal could create the unintended consequence of keeping many people who are able to serve safely from jury service. Additionally, many jurors, pre-COVID-19, would both pose and face potential health risks by answering a jury summons and were still able to seek and obtain excusal. We feel that a preemptive excusal, without request by the juror, would deprive an otherwise qualified juror of their constitutional right to serve.

VULNERABLE POPULATIONS

Recommendation: Identify vulnerable populations.

Rationale: While the CDC has listed several statistical anomalies regarding which populations are particularly impacted by the virus, the Workgroup recommends limiting, for the purpose of jury service, inclusion in a vulnerable population to those potential jurors who would answer affirmatively to any of the following questions:

1. Is the juror 65 years of age or older?
2. Regardless of age, are there underlying medical conditions which place the juror at risk: i.e., chronic lung disease, moderate to severe asthma, serious heart conditions, immune disorders, obesity, diabetes, pregnancy, or chronic kidney or liver disease?

It was contemplated by the Workgroup that, should a potential juror answer in the affirmative to either of these questions and request deferral, the request would be granted for anywhere from 12—24 months. If, with some documentation, the juror requested excusal for some permanent disability to serve, then the juror would be granted a permanent excusal from jury service.

SUPPLEMENTAL QUESTIONNAIRE

Recommendation: Jury management departments should disseminate a supplemental questionnaire prompting jurors to reflect whether they believe they can safely serve as a juror.

Rationale: Most jury management departments presently have a method for directing prospective jurors to a biographical questionnaire to be used for several purposes, including voir dire. The Workgroup recommends that each department develop a method to disseminate a supplemental questionnaire, including questions listed above, as well the following questions which are intended to evoke in the juror some thought about the safety of their participation and placing upon the juror the responsibility to request either a deferral or an exclusion from service. Because it is the potential juror's constitutional right to serve and jurors are typically not shy about such requests, we felt it appropriate that deferral or excusal should be requested by the juror. The following questions are intended to be illustrative and not exhaustive. Each department may wish to supplement or remove questions based upon the demographics, or other factors, particular to their area.

1. Is the juror subject to a state, federal, or local quarantine or isolation order; or living with or caring for a person who is subject to such an order?
2. Has the juror been advised by a health care provider to self-quarantine; or living with or caring for a person who has been so advised?

3. Is the juror considered “high risk” where a local health official has recommended they remain home; or living with or caring for a person who has been so advised?
4. Is the juror experiencing symptoms for and/or seeking medical diagnosis for COVID-19, or living with or caring for a person experiencing such symptoms and/or seeking a diagnosis?
5. Does the juror care for a child for whom the school or place of care of the child has been closed, or the childcare provider of such a child is unavailable due to the pandemic?
6. Would jury service at this particular time present a financial hardship that could be mitigated with a deferral?
7. Is the juror an essential worker, to include long-term care facility employees?
8. Does the juror have access to, or the capability to operate, a secure video conferencing platform if the court conducts a remote trial? (If such a question is included, be clear this is not a qualification to serve, but the information may assist in planning. See access to technology considerations on pg.23)

INFORMATIONAL/REASSURING LETTER

Recommendation: Accompanying the questionnaire the Workgroup recommends that either the presiding judge, jury management director, or some other official author a letter appraising prospective jurors of what they can expect upon reporting for service. The letter should be detailed, reassuring and include a description of facility sanitizing practices, social distancing, screening, and expectations of the juror. For example, several jurisdictions have required face coverings upon entry in the facility, and jurors should be so advised.

Rationale: Public trust is gained through transparency, consistency, and collaboration. Potential jurors will want to know that their safety is paramount. Jury management will undoubtedly field juror questions and concerns about appearing, and information about measures taken should be shared that reflect the department is being proactive. We imagine that departments will modify their safety measures as more is learned, and this should be shared on websites, letters, and PSAs. Jurors will want to know the cleaning schedules, facility modifications, and that sufficient PPE will be available and that all will be expected to use it.

IN SUMMARY

The Workgroup recommends that jurisdictions make these additions to their present jury assembly system for a variety of reasons already listed. To significantly alter the present juror summons process would potentially create a great deal of additional work and expense that may have to be undone whenever the pandemic is over.

Therefore, a supplemental questionnaire should be included along with an informational letter developed by the local bench and jury management department explaining in detail the safety measures in place to protect people coming to the courthouse, or wherever the jury trial will take place, wishing to fulfill their civic duty.

Finally, each department may have unique factors that must be considered in determining its ability to summons, evaluate, and safely protect jurors. Therefore, the decision to grant deferral upon request should be left to the determination of the jury management director and hardship requests made by the prospective juror in a form similar to the sample Juror Qualification/Hardship Form on page 18.

JUROR QUALIFICATION / HARDSHIP FORM (SAMPLE)

Please respond below or through the online portal. Submissions through the online portal will receive responses by email/text message usually within two working days. Response not made through the portal will be answered by mail.

I am not legally qualified to serve as a juror with [County Name] Superior Court because:

- I am not a citizen of the United States.
- On the date of the summons I will be less than 18 years of age.
- I am unable to communicate in the English language or ASL.
- I am no longer a resident of [County Name] County and have updated my address with the Department of Licensing to reflect an address outside of [County Name] and have cancelled any [County Name] voter registration.
- I have been convicted of a felony and am currently incarcerated or under DOC supervision.

If you are permanently unable to serve due to a medical/physical/psychological condition, please provide a letter from your doctor supporting excusal from this obligation.

- I am the fulltime stay-at-home parent of a child younger than 7 years old.
- I am the fulltime caregiver for a family member who is unable to care for her/his self.
- I am a first responder or a doctor/nurse providing critical hospital care.
- I am an essential employee of a long-term healthcare facility.

Jury selection can take 1—3 days. If you feel it would be an undue hardship for you to report to the courthouse to take part in jury selection, please explain below. **Documents can be mailed or uploaded via the online portal.**

I HEREBY CERTIFY UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I AM THE PERSON NAMED ON THE SUMMONS AND THAT THE INFORMATION I PROVIDE IS TRUE AND ACCURATE.

Printed Name _____

Signature _____

Juror Badge/ID Number _____

ASSEMBLY AND SELECTION

Each jurisdiction or court will need to decide how best to assemble jury panels during the COVID-19 pandemic and while physical distancing recommendations remain in place.

For most courts, these decisions will fall into some combination of three general categories: (1) jury assembly/voir dire **off-site**; (2) jury assembly/voir dire **virtually or remotely**; and (3) **modifying existing court facilities and practices** to allow jury assembly/voir dire to take place at the courthouse.

Additionally, in any venue, certain health considerations and practices must be considered.

1. OFF-SITE ASSEMBLY / VOIR DIRE

- a) Identify possible locations
 - Convention center;
 - Theatre;
 - Grange;
 - Fairgrounds;
 - College;
 - High school;
 - Bank;
 - Fire station;
 - Hotel

- b) Practical issues to consider
 - Parking;
 - Accessibility by public transportation;
 - ADA accessible;
 - Square footage/capacity with distancing requirements;
 - Entry/access: choke points or issues for physical distancing;
 - Chairs and other equipment needed: On-site? Rent? Transport?
 - Restrooms: sufficient given distancing requirements?
 - Internet availability

- c) Check-in issues
 - Equipment needed: On-site? Rent? Transport?
 - Reduce congestion:
 - Stagger check-in times;
 - Ropes/cones/markers on floor for distancing

- d) Security
 - Screening space/equipment;
 - Additional personnel;
 - Secure holding space for in-custody defendants out of sight of jurors;
 - Consider *public health recommendations and procedures addressed on pgs. 31-32.*

- e) Technology considerations
 - Appropriate technology for juror orientation videos and other material that may be shown during jury selection.
 - Appropriate amplification:
 - Stand-up microphone that no one touches;
 - Microphones placed throughout facility;
 - Sharing/passing mics is not appropriate.
 - Listening assistive devices: if so, appropriate sanitizing is needed.
 - Computers/internet needed for judge, clerk, others.

- f) Creating the record
 - Recording equipment/capacity;
 - Court reporter;
 - Microphones at correct locations;
 - Dual recording at courthouse and at off-site location.

- g) Open court / public access
 - Is there adequate seating for the public while maintaining social distancing and appropriate buffer between jurors and public?
 - Post policies/rules and consider assigning seating at appropriate distancing.
 - If there is not adequate space for the public to attend in-person, or if the space is limited such that only a limited number of the public may attend:
 - Is livestreaming available?
 - Consider limitations on individuals' access to online-only streaming and the potential need to stream to another meeting room or courtroom to observe.
 - Call in to listen by phone: is this sufficient public access if it is the only available alternative?
 - Plan to “move” the public if the court “moves” to another room for motions, objections, GR 37 argument, etc., unless a clear sidebar.
 - Ensure jurors are not left unsupervised in the presence of the public during breaks, etc.
 - Consider *open court legal analysis on pgs. 28-31*.

- h) Side-bars / Individual questioning of jurors / breaks
 - Consider blue tooth microphones/ear pieces or other technology to allow side bars with appropriate distancing.
 - Separate rooms available of appropriate size for panel to be excused or for judge/attorneys/parties to be excused?
 - Ensure jurors are not left in the presence of the public unsupervised during breaks, etc.
 - Consider *open court legal analysis on pgs. 28-31*.
 - Plan to “move” the public if the court “moves” to another room – for motions, objections, GR 37 argument, etc., *unless a clear sidebar*.
 - In the case of true sidebars, ensure contemporaneous recording or making a record at the next available break.

- i) Public relations
 - Publicize location and process;
 - Send specific information with summons about location;
 - Provide directions, parking, and other location information on website.

- j) Staffing issues
 - Increased court staff needed for various processes?
 - Can/should off-site venue staff assist, and if so, in what aspects?
 - Increased security: initial entry into building, in the off-site courtroom, for in-custody defendants, other aspects?

- k) Possibility of having only panel off-site and judge/parties/lawyers in court
 - Assumption that everyone needs to see and hear each other simultaneously. Conduct factual and legal analysis if that will not be the case.
 - Technology to connect off-site and in court:
 - Location/size of screens in both locations;
 - Location and number of video cameras in both locations;
 - Location and number of microphones in both locations:
 - Consider jurors coming to central microphone/camera for answering questions to allow clear transmission.
 - Audio considerations: transmitting and recording.
 - Where is recording of record taking place and who is responsible for ensuring an accurate record?
 - How will the process be open to the public?
 - Consider *open court legal analysis on pgs. 28-31*.
 - Physical access at the court?
 - Streaming video and audio?
 - Consider issues specific to off-site and on-site modifications, as both will apply.
 - Ensure sufficient staff at off-site location to supervise and separate panel.

- l) Legal issues to consider related to *off-site* assembly
 - **Need to locate and conduct “court” in county seat** or seek permission from the Washington Supreme Court Chief Justice and the governing body of the county. See RCW 2.08.030; *Thurston County ex rel. Bd. Of County Com’rs v. City of Olympia*, 151 Wn.2d 171, 86 P.3d 151 (2004).
 - The trial court’s management decisions are reviewed for abuse of discretion, including those necessary to maintain order and prevent injury. *State v. Hartzog*, 96 Wash.2d 383, 400, 635 P.2d 694 (1981).
 - Generally, the judge has discretion to relocate court proceedings as necessary, and **“court” is where the judge and parties are**. *State v. Brown*, 31 Wn.2d 475, 489, 197 P.2d 590 (1948), *adhered to on rehearing*, 31 Wn.2d 505, 202 P.2d 461 (1949) (affirming a trial judge’s decision to move a portion of the trial to a courtyard to allow the viewing of a relevant vehicle, and holding that “a properly constituted court, where all proper and necessary persons are in attendance, may be conducted at such places as convenience dictates. . . . The court as such is where the judge presides, and, within reason, the court has discretion in determining the place.”)

- However, the courts should carefully consider any modifications to the traditional courtroom setting as to the potential to jeopardize the presumption of innocence to which the defendant is entitled.
 - “Because the courtroom setting itself is essential to a trial's integrity, we should be wary of a setting that impermissibly influences a jury's decision-making process and jeopardizes the presumption of innocence.” *State v. Jaime*, 168 Wn. 2d 857, 862, 233 P.3d 554, 556 (2010), *as amended on denial of reconsideration* (Sept. 30, 2010). “Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” *Id.* at 862 (internal quotations and citations omitted).
 - Holding trial in a jailhouse courtroom jeopardized the presumption of innocence. *State v. Jaime*, 168 Wn. 2d 857, 233 P.3d 554, 556 (2010).
 - Consider making a record in each trial of what modifications have been made, why, and any inherent balancing that the court has conducted.
- m) Changes to rules/statutes/instructions related to *off-site* assembly?
- Need to locate and conduct “court” in county seat or seek permission by the Chief Justice of the Washington Supreme Court and county governing body. RCW 2.08.030.
 - Instructions:
 - Consider modifying your general instructions created based on WPIC 1.01 for jury selection and WPIC 4.61 regarding recesses to provide specific guidance related to the facilities and physical distancing requirements.

2. REMOTE JURY ASSEMBLY / VOIR DIRE

- a) Technology needs & considerations
- Virtual meeting software, app subscription, or license needed — sufficient to include all necessary staff.
 - Will the judge/attorneys/parties or members of the public be in the courtroom?
 - If so, sufficient screens, cameras or devices are needed to allow viewing of all respective participants.
 - If all participants are remotely connected, consider any additional technology needs.
 - Consider type and placement of microphones for web broadcast.
 - Does your court’s platform have livestream capabilities to YouTube/Facebook/etc.?
 - Does your location/jurisdiction have sufficient internet bandwidth if multiple courtrooms are using this technology and having dozens of potential jurors connected remotely at one time?
 - Does your jurisdiction generally have reliable internet coverage to make this a reasonable option for potential jurors?
 - Disable chat functions so jurors/attorneys have no avenue for private chat amongst themselves.
 - Use Dropbox links for exhibits as appropriate (mostly relevant for deliberation via video).

- b) Access to technology — will the panel be representative — how to make technology available?
 - Requiring technology, including a device with a video camera, to participate in jury duty will affect which potential jurors are willing and able to serve, potentially disparately impacting groups including those based on economic status and age.
 - However, allowing service at even initial stages remotely may also increase some jurors’ comfort level and willingness to participate, particularly without the same physical restrictions and requirements as being in-person.
 - Consider potential options to combat the disparate impact of requiring technology:
 - Map Wi-Fi hotspots in respective communities;
 - Courts with resources for spacing could provide:
 - Cubicles with tablets/laptops;
 - Empty courtrooms or government meeting spaces with tablets/laptops.
 - Loan tablets/laptops;
 - Partner with libraries, family resource centers, or other applicable non-profits to loan tablets/laptops or other devices for jury duty.

- c) Consider virtual/remote assembly as one option to be used in conjunction with in-person assembly.
 - This could be done *sequentially*, with preliminary questions and hardship excusals done remotely, or *simultaneously*, with a group participating remotely while others are present in-person.
 - Inquire about available technology and willingness to use that technology in a modified summons or general questionnaire sent with the summons.
 - If simultaneous, have the remote potential jurors on a large screen(s) in the physical jury assembly space used.
 - If appropriate, also consider having cameras on the in-person panel for streaming so that both groups can see one another and all participants.
 - Court should allow for travel time for virtually present jurors to travel to in-person trials if empaneled.
 - Consider challenges in audio/hearing when only some participants are remote.
 - Consider making a clear record of the combination you are using for the particular phase, who can see/hear each other, and how those determinations were made.

- d) Create clear requirements for any potential jurors participating remotely:
 - Access to quiet, private/confidential space for duration of the phase (whether assembly, full voir dire, trial, deliberations, or all of the above).
 - Access to Wi-Fi with a video-capable device for duration of phase.
 - Agreement to have video function engaged for duration of phase.
 - Agree to not record proceedings.
 - Agree to all applicable oaths and instructions from the court, as modified specifically for remote participation.
 - Will these requirements be by written instruction? Oath? Other?

- e) Side-bars / breakout space for questioning / recesses
 - Certain platforms offer confidential breakout rooms, such as Zoom.
 - Consider the purpose for the breakout and whether the public has a right to observe. *See open court legal analysis on pgs. 28-31.*
 - Consider that the jury panel is broken out into a confidential room and the parties/attorneys/judge stay in the public room that is accessible to the public.

- f) Open court / public access
 - Will remote assembly be livestreamed to the public?
 - Consider limitations on individuals' access to online-only streaming and the potential need to stream to another meeting room or courtroom to observe.
 - If some participants are physically located at the court, will there be space in the courtroom for the public to observe?
 - Ensure that screens are placed to allow the public to also observe the remote participants.
 - Could the court limit the courtroom space to case-related individuals and satisfy the public access requirements via livestream?
 - *See open court legal analysis on pgs. 28-31.*
 - Consider conducting a limited *Bone-Club* analysis on the record to explain and justify any limitations on public access.

- g) GR 37 issues?
 - It will be important to ensure that all participants have video cameras engaged during the entire process.
 - Consider attorney concerns that body language of jurors appearing virtually will be hard to interpret.
 - If some jurors will appear in person and some remotely, consider any potential issues related to GR 37 and potential reasons given for peremptory challenges.
 - What will happen if only in-person jurors have masks on, obscuring views of their faces?

- h) Staffing issues
 - Judges, clerks, and other staff should share responsibility of coordination of technology.
 - Assign tasks based on comfort and skill with technology, depending on phase.
 - Consider training session or mock trial for assembly and voir dire.
 - Utilize local youth courts for mock-jurors.

3. MODIFYING EXISTING FACILITIES AT COURTHOUSE FOR ASSEMBLY / VOIR DIRE

- a) Physical modifications to court
 - Remove benches/barriers to create more open spaces to spread out?
 - Add Plexiglas dividers to allow closer spacing?
 - Place panel throughout courtroom with marked spaces to ensure required distancing?
 - Modifications to reduce chokepoints as groups enter and exit?

- Prop doors open?
- b) Sharing courtrooms
- Consider using different courtrooms for assembly, trial, recesses, and/or deliberations.
 - Requires coordinating between courts to use appropriate size courtrooms for different phases and fewer trials at any one time.
 - Consider having limited jurisdiction courts use superior court courtrooms for assembly given the smaller size panels needed.
- c) Sharing spaces with other government offices or conference rooms
- Depending on purpose of space being used, consider the same off-site considerations set forth above.
- d) Voir dire in phases / rounds
- “It is well settled that trial courts have discretion in determining how best to conduct voir dire. . . . The trial court’s exercise of discretion is limited only when the record reveals that the court abused its discretion and thus prejudiced the defendant’s right to a fair trial by an impartial jury.” *State v. Davis*, 141 Wn.2d 798, 825-26, 10 P.3d 977 (2000).
 - However, it is important that the framework be determined prior to commencing voir dire and remain consistent. *See State v. Brady*, 116 Wn. App. 143, 147- 48, 64 P.3d 1258 (2003) (abuse of discretion found where trial court changed the planned questioning in the middle of voir dire by eliminating a second round.)
 - Consider rounds of voir dire in groups of small enough size to allow distancing in courtroom.
 - Determine how many people fit with appropriate distancing in one round.
 - Consider scheduling fixed times, such as morning and afternoon for successive rounds.
 - Consider having the second or third rounds of jurors on standby to appear only if and when called/text messaged.
 - In criminal trials, an orientation must be given to each panel when they report for duty. CrRLJ 6.2; CrR 6.2.
 - Consider having the judge’s introduction and summary of the case recorded to ensure that each round of potential jurors receives identical information.
 - Consider the possibility of individual questioning depending on the size of panel and space limitations.
 - Changes in style/practice of voir dire needed to eliminate “Donahue” method of questioning groups of jurors.
 - Communication and collaboration with attorneys will be important so that they understand these changes in practice.
 - There is no statutory or constitutional right to this style of voir dire.
 - Time limits are important to ensure prompt moving between jurors or rounds.
 - Exercise all for cause challenges at the end of each round of voir dire.

- Consider requiring a certain number of peremptory challenges to be exercised at each round while jurors are present.
 - Consider any reduction in peremptory challenges necessary to reduce the size of jury pool. *See peremptory discussion on pgs. 27-28.*
- e) Sidebars / breakout space for questioning / recesses
- Is there adequate space for the panel to leave the courtroom?
 - If not, consider judge/attorneys/parties exiting the courtroom and jury remaining in place to allow continued physical distancing of panel.
 - Consider carefully the purpose for which the judge/attorneys/parties are exiting and the location they exit to, such as the adjacent jury room, hallway, or smaller courtroom.
 - Is there a space for the public to observe in the smaller room?
 - If no room for the public, analyze any potential **court closure** issue. *See open court legal analysis on pgs. 28-31.*
 - In the case of true sidebars, ensure contemporaneous recording or making a record and the next available break.
 - Consider the availability of a Bluetooth microphone and earpiece to allow court reporter or recording system to record.
 - Other technology to assist?
- f) Open court / public access issues for the entire voir dire
- Are spaces for the public to observe physically available? If so, mark them to ensure adequate spacing.
 - Are there significant limitations on the number of spaces available?
 - Is it possible to live stream video and/or audio?
 - Consider limitations on individuals' access to online-only streaming and the potential need to stream to another meeting room or courtroom to observe.
 - Is calling in to listen by phone sufficient public access if it is the only available alternative?
 - *See open court legal analysis on pgs. 28-31.*
 - Consider articulating on the record an abbreviated *Bone-Club* analysis, including the means of public access available, where the information is posted, what balancing the court used to determine, and why any limits imposed are least restrictive given the circumstances and competing inferences.
- g) GR 37 issues?
- If voir dire is conducted in rounds or by individual questioning, the judge should ensure that they take notes as to the make-up of the panel, as well as the perceived race/ethnicity/nationality/gender and other relevant characteristics of individual potential jurors in the event that peremptory challenges are exercised only at the end after all rounds of questioning.
 - It may be prudent to remind attorneys that under GR 37(i) they must give notice of reliance on body language/conduct for a peremptory challenge in order to allow it to be verified and addressed in a timely manner, rather than waiting until after all rounds of voir dire and the subject juror no longer being present.

- Consider attorney request for photos of potential jurors in the event that peremptory challenges will only be exercised at the end of all rounds. While this allows everyone to picture the individual who answered questions, it also raises serious concerns about increased ability for express or implicit bias in exercising challenges. Would jurors object?
- h) Related legal issues to consider
- As to any physical modifications to the courtroom, consider whether there is likely any prejudice to the defendant.
 - Trial management decisions are reviewed for abuse of discretion. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).
 - In order to preserve a defendant's presumption of innocence before a jury, the defendant is entitled to the physical indicia of innocence that includes the right to be brought before the court with the appearance, dignity, and self-respect of a free and innocent person. Any measures that single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial. *State v. Jaime*, 168 Wn. 2d 857, 861–62, 233 P.3d 554, 556 (2010), *as amended on denial of reconsideration* (Sept. 30, 2010).
 - However, measures designed to target pandemic concerns should not be prejudicial if applied broadly, particularly with appropriate education to the jurors of the reasons and reliance on public health recommendations.
- i) Changes to rules/statutes/instructions
- Instructions:
 - Consider modifying your general instructions created based on WPIC 1.01 for jury selection and WPIC 4.61 regarding recesses to provide specific guidance related to the facilities and physical distancing requirements.

4. SIZE OF JURY & CHANGES TO PEREMPTORY CHALLENGES

- a) Definition – RCW 4.44.140 – defines peremptory challenges generally.
- b) Civil Cases
- The number of peremptory challenges for civil cases is set by **statute** at three. RCW 4.44.130; *see also* CR 47; CRLJ 38 (both referencing RCW 4.44.130).
 - Allowing additional peremptory challenges where there is more than one party per side is discretionary. CR 47; CRLJ 38; RCW 4.44.130.
 - Additional peremptory challenges are required when alternates are empaneled; however, the number of alternates is discretionary. CR47(b); CRLJ 38(e).
- c) Criminal Cases
- The number of peremptory challenges in criminal cases is set by court rule. CrR 6.4(e); CrRLJ 6.4(e).
 - Capital offenses – N/A;

- Where offense punishable by imprisonment by DOC – 6 peremptory challenges each;
 - All other criminal offenses – 3 peremptory challenges each;
 - Peremptory challenges exercised after prospective jurors passed for cause and alternately first by the prosecution, until all exhausted or the jury is accepted. CrR 6.4(e)(2)/CrRLJ 6.4(e)(2).
 - For *each* alternate empaneled in a criminal case, additional peremptory challenges are required. CrR 6.5; CrRLJ 6.5.
- d) Statewide changes recommended by the Workgroup:
 - This Workgroup recommends reducing peremptory challenges in all criminal cases to three per side, such that only three peremptory challenges would be available in civil cases, criminal misdemeanor and gross misdemeanor cases, and criminal felony cases. In cases with multiple defendants, each co-defendant would still be entitled to one additional peremptory challenge. This Workgroup likewise recommends eliminating the right to any additional peremptory challenges for alternate jurors. These recommendations are intended to reduce the number of potential jurors needed for jury selection given the concerns about having sufficient jurors respond as well as physical space limitations for required distancing.
- e) Is it necessary to empanel a jury of 12 in Superior Court?
 - Parties in civil cases can stipulate to a jury of fewer than 12. CR 48.
 - A criminal defendant in superior court has a constitutional right to be tried by 12 jurors. Wash. Const. art. 1, § 21; CrR 6.1(b); *State v. Lane*, 40 Wn.2d 734, 736-37, 246 P.2d 474 (1952).
 - This right, however, may be waived by the defendant in noncapital cases, so that a trial may be held with as few as six jurors. See CrR 6.1(b); *Lane*, 246 P.2d at 736-37.
 - CrR 6.1(b) provides: “If prior to trial on a noncapital case all defendants so elect, the case shall be tried by a jury of not less than six, or by the court.”
 - Waiver of the right to a 12-person jury is constitutionally valid only if knowing, intelligent and voluntary, and on a showing of either (1) a personal statement from the defendant expressly agreeing to the waiver, or (2) an indication that the trial judge or defense counsel has discussed the issue with the defendant prior to the attorney’s own waiver. *State v. Stegall*, 124 Wn.2d 719, 729, 881 P.2d 979 (1994). However, the court is not required to conduct a colloquy with the defendant on the record regarding the consequences of such waiver.

5. OPEN COURT ISSUES TO CONSIDER IN ANY VENUE

- a) Right to Public Trial/Open Court
 - The right to a public trial is protected by the Washington Constitution art. I, § 22, which guarantees a criminal defendant a right to a “public trial by an impartial jury;” and art. I, § 10, which provides that “[j]ustice in all cases shall be

administered openly.” *State v. Frawley*, 181 Wn.2d 452, 458-59, 334 P.3d 1022 (2014) (plurality opinion).

- “While the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances.” *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009).

b) Inquire Whether Closure

- The court should engage in a three-part inquiry: (1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? (3) if so, was the closure justified?” *State v. Smith*, 181 Wn. 2d 508, 521, 334 P.3d 1049 (2014).
- To determine whether the public trial right attaches to a particular proceeding, the courts apply the “experience and logic” test, considering whether the proceeding at issue has historically been open to the public. *Smith*, 181 Wn.2d at 511.

c) Conduct a *Bone-Club* analysis as to Whether Closure is Justified:

- The *Bone-Club* factors: 1) The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right; 2) Anyone present when the closure motion is made must be given an opportunity to object to the closure; 3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; 4) The court must weigh the competing interests of the proponent of closure and the public; and 5) The order must be no broader in its application or duration than necessary to serve its purpose. *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995).

d) Limitations on Numbers of Members of Public Present

- Trial judges have broad discretion in courtroom operations.
- Exclusion of the public in its entirety was justified during the Spanish flu pandemic in Ohio. The appellate court noted the trial court considered the local conditions (schools and churches closed, right of public assemblage prohibited) and appropriately acted for the public welfare. *Colletti v. State*, 12 Ohio App. 104, 122-23, 31 C.A. 81 (1919). Also of significance was that counsel for the accused consented to the exclusion. *Washington, however, holds a defendant cannot waive the public’s right to open proceedings. Strode*, 167 Wn.2d at 229.
- It is well-settled by Washington case law that allowing no space for spectators would constitute a closure and require a *Bone-Club* analysis. *See State v. Wise*, 176 Wn.2d 1, 12, 288 P.3d 1113 (2012).
- **Attendance may be limited without effecting a closure.** *See State v. Njonge*, 181 Wn.2d 546, 557-58, 334 P.3d 1068 (2014) (the size of the courtroom alone did not effect a closure); *State v. Lormor*, 172 Wn.2d 85, 92-93, 257 P.3d 624 (2011) (removal of a single spectator was not a closure); *State v. Collins*, 50 Wn.2d 740, 745–46, 314 P.2d 660 (1957) (observing that where members of the public were present during trial, the exclusion of additional spectators was within the trial court's discretion to manage the courtroom). *See also United States v. Shyrock*, 342 F.3d 948, 974 (9th Cir. 2003) (rejecting defendant’s argument that limited

audience seating amounted to a de facto closed courtroom in violation of the right to a public trial where defendant’s family and general public were “allowed to use the available seating.”). **However**, exclusion of spectators during voir dire was an impermissible closure where the cited compelling interest was “the limitation of space” and the record did not reflect any consideration of calling in a smaller number of jurors or dividing the venire panel. *In re Orange*, 152 Wn.2d 795, 809-10, 100 P.3d 291 (2004) (prohibiting all spectators due to space).

- Is it possible to livestream the audio/video online or to an adjoining courtroom or other large room?
 - “Courts are obligated to take every reasonable measure to accommodate public attendance at trials.” *Presley v. Georgia*, 558 U.S. 209, 215, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).

e) Sidebars

- The Court has held that “proper” **sidebars** do not implicate the public trial right under the experience and logic test because sidebars have not historically been open to the public and because allowing public access would play no positive role in the proceedings. *Smith*, 181 Wn.2d at 511.
- The Court defined “proper sidebars” as proceedings that “deal with mundane issues implicating little public interest” “done only to avoid disrupting the flow of trial” and are either “on the record or . . . promptly memorialized in the record.” *Smith*, 181 Wn.2d at 516 & n.10. The Court specifically held that legal challenges and evidentiary rulings during the course of trial fit this description. *Id.* at 518-19.
- In *Smith*, the Court considered the fact that sidebars occurred in a public hallway outside the courtroom and were contemporaneously recorded.
- Unpublished cases have confirmed that unrecorded, *but promptly memorialized*, sidebars do not implicate the public trial right. *See, e.g., State v. Eyle*, No. 78010-7-I, 2019 WL 4418222, at *2 (Wash. Ct. App. Div. 1, Sept. 16, 2019).

f) Individual Questioning of a Juror

- Individual questioning of a juror would not qualify as a traditional sidebar conference and therefore would either have to be open to the public or the court would need to determine whether there was a closure and whether the closure was justified under *Bone-Club*. *See, e.g., State v. Shearer*, 181 Wn.2d 564, 568, 334 P.3d 1078 (2014) (court closure where private questioning of juror in chambers); *State v. Leyerle*, 158 Wn. App. 474, 242 P.3d 921 (2012) (finding reversible error where there was no *Bone-Club* analysis before the judge, attorneys and one juror stepped into a hallway for questioning after the juror indicated he could not be impartial, even though the discussion was recorded).

g) Challenges of Jurors

- “Unlike administrative or hardship excusals, for cause and peremptory challenges can raise questions about a juror’s neutrality and a party’s motivation for excusing the juror that implicate the core purpose of the right, and questioning jurors in open court is critical to protect that right.” *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841, 844–45 (2015).

- Challenges of jurors generally should be done in open court, at least in view of the public; however, peremptory challenges need not be exercised aloud so long as the written record is filed with the court. *See State v. Love*, 183 Wn.2d 598, 354 P.3d 841 (2015) (holding counsels' exercise of for cause challenges orally at the bench where they were recorded by the court reporter and exercise of peremptory challenges silently by exchanging a list of jurors and alternatively striking names from it, both done in full view of any observer in the courtroom, did not constitute a closure).
- h) Argument on a GR 37 Challenge
 - GR 37 challenges and argument would not qualify as a traditional sidebar and therefore would have to be open to the public or the court would need to determine whether there was a closure and whether the closure was justified under *Bone-Club*. *See State v. Whitlock*, 188 Wn.2d 511, 520, 396 P.3d 310 (2017) (holding that an unrecorded 10-minute discussion in chambers about the scope of cross-examination of a confidential informant during a bench trial was a matter of substantial public interest rather than a subject of a traditional sidebar conference and therefore was an intentional courtroom closure).

6. PROCEDURES/PPE BASED ON PUBLIC HEALTH PROFESSIONAL RECOMMENDATIONS

- a) Ensure updated recommendations from state or local public health officials are followed. In addition to this document, courts should consult the Department of Health guidance prepared for resuming jury trials, as well as applicable guidance from L&I.
- b) Health screenings
 - Follow recommended screening or self-screening protocols as appropriate to various categories of court users or court personnel.
 - This likely depends on the prevalence of COVID-19 in the county/community.
- c) Security screening modifications
 - Maintain appropriate distances;
 - Ensure security staff wear recommended face coverings;
 - Mark physical spacing on floor in line;
 - Consider purchasing disposable/recyclable paper baskets (i.e. lightweight fast food containers) for individuals to place items on conveyor belt.
- d) Consider not using reusable juror badges and use disposable stickers instead.
- e) Remove magazines, coffee pots, and other shared supplies from assembly room.
- f) Sanitizing
 - Sanitize surfaces as frequently as necessary to prevent possible transmission between cohorts or individuals such as witnesses.
 - Ensure products used are appropriate to kill COVID-19 and that method of application is consistent with manufacturer recommendations. Reference the use of EPA approved COVID-19 disinfection products.

- g) Face coverings
 - o Have a written policy, specifying when required or encouraged. Under current guidance, face coverings are required for all employed staff and highly recommended for all others when people are congregating. Note that jurors have been regarded as employees during jury service for purposes of L&I coverage. See *Bolin v. King County*, 114 Wn.2d 70, 785 P.2d 805 (1990).
 - o Ensure compliance with state and local public health orders.
 - o Notify jurors of any requirement ahead of time.
 - o Policy must be posted and allow for medical and other accommodations.
 - o Determine how the requirement will be enforced and by whom.
 - o Ensure your court has disposable facemasks available to distribute if you will require face coverings and a juror does not bring their own. AOC may be able to supply KN95 masks for jurors and court employees. Current L&I guidance does not require special training and testing protocols for the use of KN95 masks, and they offer greater protection over cloth or paper face coverings.
 - o If objection raised based on observing juror demeanor, consider alternatives such as individual questioning with Plexiglas barrier or social distancing.
 - See *City of Seattle v. Erickson*, 188 Wn.2d 721, 735, 398 P.3d 1124 (2017) (A trial court’s “in person examination of the credibility and demeanor of the... jury is essential in a *Batson* analysis.”)
 - *Recent interpretation by L&I equates witnesses with media correspondents, concluding that witnesses do not need to have a face covering when speaking, as long as all others within their vicinity are wearing a face covering. Similar consideration may be given to jurors under questioning.*
- h) Bathrooms: policies for number of persons at a time, sanitizing during the day, etc.
- i) Hand washing and sanitizer available at key locations. Sanitizer should also be made readily available at all workstations, seating areas, etc., so that court participants have access following sneezes and coughs when hands could become contaminated.
- j) Posted policies and instructions wherever possible, and translated into the most common languages.

7. POSSIBLE CHANGES TO JURY INSTRUCTIONS

- a) Modify your court’s general instructions created based on WPIC 1.01 for jury selection given your specific modifications to the process, including if off-site, in different location than the judge, remote, or in rounds of voir dire.
- b) Modify WPIC 4.61 regarding recesses to provide specific guidance related to the facilities and physical distancing requirements.
- c) Consider the suggested emergency jury instructions beginning on pg.37.

CONDUCT OF TRIAL

PROTECTING HEALTH AND SAFETY IN THE COURTROOM

The primary public health goal is to reduce the introduction and possible transmission of COVID-19 through person-to-person contact. To that end, Governor Inslee entered a Stay at Home order through the end of May, followed by a phased “Safe Start” reopening plan. The Second Revised and Extended Order Regarding Court Operations (issued by the Washington Supreme Court on April 29, 2020) directs courts considering reopening to “...follow the most protective public health guidance applicable in their jurisdiction”.

The CDC believes that COVID-19 is spread mainly through close contact (within about 6 feet) from person-to-person.¹ Respiratory droplets produced when an infected person coughs, sneezes, or talks can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Some people without symptoms may be able to spread the virus.

Though it is not thought to be the main way the virus spreads, it may also be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.²

Each court must determine the best strategies for reinstating jury operations in their unique environments to ensure conformance with social distancing, public health guidance and L&I workplace requirements.

Prepare the trial venue:

- Enlist the key personnel who will be in the courtroom, such as the prosecuting attorney, defense counsel, and clerk, to determine what changes need to be made to ensure social distancing.
- Measure the courtroom to determine how many people may safely be in each area.
- Consider taping or painting to mark six-foot distances. A minimum of three foot distancing is allowed when six-foot distancing is not possible and use of PPE and other safeguards are practiced.
- Consider alterations to the physical courtroom to increase space.
- Consider additional safety measures such as Plexiglas barriers around the court reporter, witness stand, counsel table or jury box.
- Establish cleaning protocol for the courtroom especially high-volume workspaces, common touch points and surfaces. including writing implements in accordance with health guidance.³
- Consider alternative facilities such as gymnasiums, warehouses, armories, community centers, convention centers, performing arts centers and other government buildings when physical distancing cannot be maintained.
- Identify and label entrance and exit paths for jurors and other case participants to promote one-way people movement patterns and make necessary adjustments to ensure appropriate social distances can be maintained.

¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

² Id.

³ https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Reopening_America_Guidance.pdf; https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening_America_Cleaning_Disinfection_Decision_Tool.pdf

- Establish a plan for food for the jurors.

During the trial:

- The court should provide jurors information ahead of time on what is and is not available, so they can come prepared (for example, whether water, vending machines, etc., will be available).
- The court should provide instruction as to the procedures in place for the trial.
- Face coverings of all court participants may be required in accordance with L&I and public health recommendations⁴
 - The court should consider whether to require all persons to wear facemasks or coverings.
 - Courts should be prepared to supply masks for persons whose presence is compelled, such as witnesses, jurors, and criminal defendants.
 - The court should ensure proper instruction is provided to jurors or others who are provided masks on the correct way to utilize them.
 - The court should have a plan for safely collecting, cleaning, and/or disposing of masks or shields.
- Hand sanitizer should be readily available for all participants in the trial.
- The court should coordinate with counsel and court clerks in advance to develop a procedure to handle exhibits in a way that minimizes contacts.
- To the extent possible, avoid the direct exchange of documents in the courtroom including with jurors. This includes exhibits, instructions and verdict forms. If direct exchange is unavoidable, persons exchanging documents, including jurors, may wear gloves.⁵
- Set times for bench decisions on motions and other matters that will reduce the time jurors are together.
- Confrontation issues:⁶
 - Ensure jury can properly observe witness testimony.
 - Consider Plexiglas around the witness stand.
 - Consider transparent masks during testimony, or mask removal with social distancing. *Recent interpretation by L&I equates witnesses with media correspondents, concluding that witnesses do not need to have a face covering when speaking, as long as all others within their vicinity are wearing a face covering.*
 - Consider amplification methods so witnesses can be easily heard.
 - Develop procedure for cleaning the witness stand following the testimony of each witness.
- When and if possible consider remote testimony.
- Encourage counsel to pursue stipulations on uncontested issues to reduce trial time.

General considerations:

⁴ Physical distancing is effective against BRIEF indoor exposures but highly recommends mask wearing to reduce risk when subject to more prolonged exposure (e.g. a trial). Dr. Erin Bromage, “The Risks – Know Them – Avoid Them,” available at <https://www.erinbromage.com/post/the-risks-know-them-avoid-them>.

⁵ According to the results of a March 2020 study conducted by the National Institutes of Health, the virus commonly known as COVID-19 can be detected up to 72 hours after application to plastic and stainless steel. On cardboard, “viable” virus was detected up to 24 hours after application. See https://www.nejm.org/doi/full/10.1056/NEJMc2004973?query=featured_home.

Limiting close contact with other persons would appear to be the primary goal when handling evidentiary exhibits during a jury trial. Reducing the handling of exhibits by multiple persons should be encouraged as well.

⁶ See, Washington Association of Prosecuting Attorneys memo, “Courtrooms and Cloth Face Masks,” May 18, 2020, <https://defensenet.org/wp-content/uploads/2020/05/WAPA-Mask-Memo.pdf>

- Jurors should be instructed to report immediately any feelings of ill health. If the juror becomes sick during the day, they should be sent home immediately. Surfaces should be cleaned and disinfected. Information on persons who had contact with the ill juror during the time the juror had symptoms and 2 days prior to symptoms should be compiled. Others at the facility with close contact within 6 feet of the juror during this time would be considered exposed. See cleaning, <https://www.cdc.gov/coronavirus/2019-ncov/community/clean-disinfect/index.html>
- Consider whether the court should declare a mistrial when one of the jurors, courts staff, attorneys or other case participant gets sick and cannot continue, based on consultation with public health guidance.
- Consider a mock trial to test your plan and make appropriate changes.
- Review Phase 2 of Professional Services state re-opening plan. See <https://www.governor.wa.gov/sites/default/files/COVID19Phase2ProfessionalServicesGuidance.pdf>
- Review the recent Appellate Court decision related to remote testimony. See https://www.courts.wa.gov/opinions/pdf/360601_pub.pdf

DELIBERATIONS

- 1) When determining if jurors can be separated during jury deliberations, courts should consider the language of:

RCW [4.44.300](#) Care of jury while deliberating.

During deliberations, the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury. Unless the members of a deliberating jury are allowed to separate, they must be kept together in a room provided for them, **or some other convenient place** under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his or her ability, keep the jury separate from other persons. The officer shall not allow any communication to be made to them, nor make any himself or herself, unless by order of the court, except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on (*emphasis added*).

Courts may want to conduct further analysis on whether Zoom can be considered to be “some other convenient place” when allowing jurors to be separated.

- 2) An alternate should be selected for all trials that will last more than one day in case a juror becomes ill.
- 3) Jurors should have their own copies of the jury instructions to avoid having to pass paper back and forth. An original set should go back with the jury with one copy of the verdict forms for the presiding juror to use when the jury has reached its verdict.
- 4) Provide jurors with public health-appropriate instructions for handling evidence. OR, as an alternative, provide jurors with individual iPads/tablets to review exhibits.
- 5) Have jurors deliberate in an empty courtroom or a room large enough to allow them to maintain social distancing.
- 6) Judges should try to anticipate all juror deliberation issues involving health and safety before the selection process begins, and discuss these issues with counsel in advance.
- 7) Live streaming may be helpful or necessary to maintain the open nature of courts. Jurisdictions that live-stream court proceedings need to advise jurors ahead of time.

The Workgroup proposes new jury instructions to address mask-wearing, remote testimony and appearances, and open courts, in both criminal and civil contexts.

Suggested Emergency Jury Instructions

SUGGESTED EMERGENCY CRIMINAL INSTRUCTION NO. 1
OPEN COURTS

Our state constitution requires that our courts be open to the public. To accomplish having our court open while also maintaining social distancing, these proceedings may be live-streamed to the public [on a channel such as YouTube] [at another location in the courthouse]. This will allow anyone to observe as if they were present in the courtroom. The court will not retain this live-streamed video at the conclusion of these proceedings. [The court will not be able to prevent members of the public from copying the proceedings during the live-streaming or maintaining their own copies].

NOTE ON USE

Use this suggested instruction if the court proceedings are going to be live-streamed to the public in another location in the courthouse or over the Internet. This instruction, if used, should be given at the same time as WPIC 1.01 (Advance Oral Instruction—Beginning of Proceedings).

Bracketed language should be used as applicable. The last bracketed sentence should be used whenever the court is unable to control access to or copying of the proceedings. This includes all cases in which the proceedings will be accessible via the Internet.

COMMENT

This suggested instruction was adopted by the WPI Committee to be used in the event that the trial proceedings are going to be live-streamed for purposes of allowing public access while maintaining social distancing pursuant to applicable health safety guidelines. The committee recommends that this instruction be given along with the advance oral instruction, so that the jury is aware of this during jury selection.

Live streaming of judicial proceedings may be helpful for increasing the opportunity for public scrutiny. Courts should be aware, however, that a total exclusion of spectators may not satisfy constitutional requirements, even if the proceedings are live-streamed.

SUGGESTED EMERGENCY CRIMINAL INSTRUCTION NO. 2
WEARING OF MASKS

[During this trial the parties, attorneys, witnesses, court staff and the judge may wear protective safety masks.] [The judge has directed participants to wear safety masks during this trial.] Do not concern yourself with the reasons why a participant may or may not have worn a mask. You should not draw any conclusions or prejudice any party in any way solely based on whether someone wears a protective safety mask during this trial.

NOTE ON USE

Use this suggested instruction if some or all participants in a trial have appeared wearing masks. This instruction, if used, should be given at the same time as WPIC 1.01 (Advance Oral Instruction—Beginning of Proceedings) or WPIC 1.02 (Conclusion of Trial—Introductory Instruction) or both, as appropriate. Use bracketed language as applicable

COMMENT

This suggested instruction was adopted by the WPI Committee to be used in the event parties, attorneys, witnesses, and/or the judge are appearing at the trial wearing protective masks pursuant to applicable health safety guidelines.

In deciding whether to require or allow witnesses to wear masks, courts should consider whether this would interfere with the ability of jurors to assess the witnesses' credibility. Under some circumstances, having a witness masked may infringe on the defendant's right of confrontation. See, e.g., *People v. Sammons*, 191 Mich. App. 351, 478 N.W.2d 901 (1991). Cases involving remote testimony may also be instructive. See *State v. Sweidan*, ___ Wn. App.2d___, ___ P.3d___ (2020). *Sweidan* adopts the test set forth by the United State Supreme Court in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 2d 666 (1990): "The trial court must render a case-specific finding that (1) excusing the presence of the witness necessarily furthers an important public policy, and (2) the procedure otherwise assures the reliability of the testimony." *Sweidan*, at ____.

Finally, the wearing of masks may impact in-court identifications. If there is going to be an in-court identification of a defendant, care must be taken to ensure that the process does not unfairly prejudice the defendant.

SUGGESTED EMERGENCY CRIMINAL INSTRUCTION 3
PARTICIPATING REMOTELY

Witnesses, parties, and/or attorneys may [appear] [have appeared] remotely by video or telephone. You should not draw any conclusions or prejudice a party in any way based solely on the fact of a remote appearance. Insofar as possible, you must consider this form of participation, including testimony, in the same way that you consider the participation and testimony of persons who are present in the courtroom.

NOTE ON USE

Use this suggested instruction if any participant in a trial has appeared remotely. Use bracketed language as applicable.

COMMENT

This suggested instruction was adopted by the WPI Committee to be used in the event parties, attorneys, witnesses, and/or the judge are appearing at the trial remotely pursuant to applicable health safety guidelines.

If remote testimony is being offered by a party, the court must conduct an analysis as to whether such testimony should be allowed pursuant to CR 43(a)(1) (which applies in the absence of an applicable criminal rule) and the Confrontation Clauses of the United States Constitution and the Washington State Constitution. The recent case of *State v. Sweidan*, ___ Wn.App.2d ___, ___ P.3d ___ (2020) has an extensive discussion of these issues. The Sweidan court adopted the test set forth by the United States Supreme Court in *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990): “The trial court must render a case-specific finding that (1) excusing the presence of the witness necessarily furthers an important public policy, and (2) the procedure otherwise assures the reliability of the testimony.” Sweidan, at ___.

SUGGESTED EMERGENCY CIVIL INSTRUCTION 1
OPEN COURTS

Our state constitution requires that our courts be open to the public. To accomplish having our court open while also maintaining social distancing, these proceedings may be live-streamed to the public [on a channel such as YouTube] [at another location in the courthouse]. This will allow anyone to observe as if they were present in the courtroom. The court will not retain this live-streamed video at the conclusion of these proceedings. [The court will not be able to prevent members of the public from copying the proceedings during the live-streaming or maintaining their own copies].

NOTE ON USE

Use this suggested instruction if the court proceedings are going to be live-streamed to another location in the courthouse or to the public. This instruction, if used, should be given at the same time as WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

Bracketed language should be used as applicable. The last bracketed sentence should be used whenever the court is unable to control access to or copying of the proceedings. This includes all cases in which the proceedings will be accessible via the Internet.

COMMENT

This suggested instruction was adopted by the WPI Committee to be used in the event that the trial proceedings are going to be live-streamed for purposes of allowing public access while maintaining social distancing pursuant to applicable health safety guidelines. The committee recommends that this instruction be given along with the advance oral instruction, so that the jury is aware of this during jury selection.

Live streaming of judicial proceedings may be helpful for increasing the opportunity for public scrutiny. Courts should be aware, however, that a total exclusion of spectators may not satisfy constitutional requirements, even if the proceedings are live-streamed.

SUGGESTED EMERGENCY CIVIL INSTRUCTION NO. 2

WEARING OF MASKS

[During this trial the parties, attorneys, witnesses, court staff and the judge may wear protective safety masks.] [The judge has directed participants to wear safety masks during this trial.] Do not concern yourself with the reasons why a party or a witness may or may not have worn a mask. You should not draw any conclusions or prejudice any party in any way solely based on whether someone wears a protective safety mask during this trial.

NOTE ON USE

Use this suggested instruction if some or all participants in a trial have appeared wearing masks. This instruction, if used, should be given at the same time as WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings) or WPI 1.02 (Conclusion of Trial—Introductory Instruction) or both, as appropriate. Use bracketed language as applicable.

COMMENT

This suggested instruction was adopted by the WPI Committee to be used in the event that parties, attorneys, witnesses, and/or the judge are appearing at the trial wearing protective masks pursuant to applicable health safety guidelines.

In deciding whether to require or allow witnesses to wear masks, courts should consider whether this would interfere with the ability of jurors to assess the witnesses' credibility.

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PARTICIPATING REMOTELY

Witnesses, parties, and/or attorneys may [appear] [have appeared] remotely by video or telephone. You should not draw any conclusions or prejudice a party in any way based solely on the fact of a remote appearance. Insofar as possible, you must consider this form of participation, including testimony, in the same way that you consider the participation and testimony of persons who are present in the courtroom.

NOTE ON USE

Use this suggested instruction if any participant in a trial has appeared remotely. Use bracketed language as appropriate.

COMMENT

This suggested instruction was adopted by the WPI Committee to be used in the event that parties, attorneys, witnesses, and/or the judge are appearing at the trial remotely pursuant to applicable health safety guidelines.

If remote testimony is being offered by a party, the court should conduct an analysis as to whether such testimony should be allowed pursuant to CR 43(a)(1).