

*EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION*

TIPS FOR SUCCESSFUL PRETRIAL CONFERENCES IN THE COVID-19 ERA

As of September 2, 2020

The COVID-19 epidemic has required courts and litigants to consider virus mitigation as part of jury trial planning and process. And, as was the case before COVID-19, each judge does things a little differently. Because of the rapidly changing COVID-19 situation—new information about how the virus spreads and its impacts on infected individuals comes out almost daily—court policies and procedures are changing and evolving. These conditions make detailed pretrial conferences more important than ever. The following tips for including COVID-19 logistics in the process of preparing for jury trials were prepared by committees of judges, court staff and practitioners. They are subject to revision as new information becomes available about virus transmission and spread.

I. Scheduling

* While judges should think about scheduling pretrial conferences earlier than they have in the past, lawyers also may request earlier pretrial conferences, or multiple pretrial conferences, to address COVID-related logistical issues.

* Lawyers should consider asking for a virtual pretrial conference so that all trial participants—lead counsel, support counsel, paralegals, IT support, parties—may attend.

* Before the conference, counsel should discuss with *all* members of the trial preparation team scheduling issues that might require more preparation time in advance of trial.

--Do any team members need extra time to arrange for childcare?

--Are any team members responsible for caring for elderly persons or people with underlying health conditions?

--Do any team members have specific COVID concerns—underlying health conditions, family members who are at increased risk?

* Lawyers should consider asking the judge to issue a detailed pretrial order memorializing all the COVID-related logistical decisions made at the pretrial conference, to avoid misunderstandings or problems at trial.

* The following sections list COVID-related logistical topics for discussion at status and pretrial conferences:

II. Mask Policy

- Whether the judge will require lawyers/witnesses/jurors to wear masks or other face coverings;
- Whether the judge will wear a mask or face covering;
- Whether and when a person may remove or lower their mask or face covering;
- What constitutes a “mask”—paper mask, cloth mask, bandana, other?

III. Jury Selection

Jury selection is one of the biggest challenges of holding jury trials during the pandemic. Jury selection requires the court to gather anywhere from twenty (civil trials) to forty or fifty (criminal trials) people. There are few courtrooms large enough to allow a gathering that size with proper social distancing. Getting that number of people to upper floors, where the district court courtrooms are, poses problems at “pinch points” such as elevators and stairwells, where social distancing requires limiting the number of people who can use them at a time. Lawyers should discuss with the presiding judge issues such as:

- Whether the judge will allow supplemental questionnaires on the subject matter of the case to pare down the *venire* prior to the first day of trial;
- Where jury selection will take place. There are options:
 1. Conduct *voir dire* remotely, via video (assumes all potential jurors have a device which would allow them to participate via video).
 2. Seat *venire*, socially distanced, in the atrium. Lawyers question subsets of the *venire* in Room 190, while the rest of the *venire* waits in the atrium.
 3. *Venire* members could be placed in several different rooms on the first floor, socially distanced, and the lawyers, court staff and judges could travel from room to room, conducting the *voir dire* in each room. At least one bankruptcy judge has offered the use of her courtroom, and Room 190 is an option. (This could cause logistical problems in cases with in-custody defendants, requiring the USMS to accompany the defendant from room to room.)
- How jury selection will take place. In the past, jurors answered *voir dire* questions using a hand mic that was handed from person to person, something that is not advisable given the virus. There are

options:

1. Conducting *voir dire* in Room 190, which now is equipped with a permanent sound system and boom mics.
 2. Jurors answer questions in writing in a prequestionnaire, with counsel compiling the results in a spreadsheet.
 3. If jurors are questioned in a smaller room other than 190, they could be questioned in smaller groups and asked to speak loudly (assuming they are masked).
- Health experts strongly recommend social distancing combined with masks/face coverings when people are together in a group, especially if there is a lot of talking. On the other hand, there are those who argue that seeing the jurors' whole face is critical. **Each judge will decide how to handle this, possibly on a case-by-case basis.** There are options:
 1. Having all jurors wear masks/face coverings all the time (unless they have a health excuse).
 2. Allow jurors to pull down masks/face coverings while answering questions.
 3. Have jurors come to a podium, equipped with Plexiglas, to answer questions unmasked (will slow the process considerably).
 - Concerns about obtaining a representative venire (will concerns about COVID-19 result in fewer potential jurors from certain age groups, races or ethnic groups, or fewer potential jurors with school-aged children, *etc.*); and
 - Selection of alternates (should the possibility that a juror might test positive or become ill during trial result in the selection of more alternates than usual).

IV. The Trial

- The physical layout of the courtroom and any logistical issues presented by social distancing (including sight lines for presentation of electronic exhibits);
- How many lawyers/representatives each side may have present at counsel table;

- How many support staff (paralegals, IT staff, law clerks/interns) each side may have present in the courtroom;
- Where witnesses will wait and how to maintain their social distancing;
- How the court will accommodate public viewing of the trial while maintaining social distancing (broadcast via YouTube; post Zoom link on courtroom door; remote viewing room set up in Room 398);
- Staggering arrival times for parties and for the jury;
- How to handle breaks and the location of restrooms. There are options:
 1. Take more than one break each morning/afternoon; allow half of the jurors to go at one time and half to go at the other.
 2. Make use of several different nearby courtrooms/ chambers/conference rooms, so that multiple restrooms are available, and have jurors go three or four at a time.
 3. Assure that all restrooms have cleaning supplies for wiping down surfaces after use, and signage re: wearing masks and closing lids before flushing.

- How to handle exhibits to reduce contact with paper. Possible options:
 1. Judge requires that all evidence be presented electronically.
 2. Judge requires parties to pre-mark exhibits.
 3. Witnesses view exhibits electronically, not the paper version.
 4. Lawyers and witnesses handling paper documents wear gloves (concerns with proper use of gloves, making sure not to touch face with gloved fingers).
 5. Providing jurors with exhibits during deliberations—provide laptop and disc for reviewing electronic exhibits? (May address sightline issues created by having jurors scattered all over the courtroom.) Give jurors paper exhibits and gloves. (Gloves raise concerns—many people touch their faces with their gloved hands, and the virus can be transmitted from the glove to the person that way).
 6. Give lawyers the option of bringing their own laptops and screens.
 7. Password-protect rebuttal documents.

- How jurors will be able to take notes. There are options:
 1. Have jurors mark notebooks and pens with their names. The court could have plastic bins for each juror; at day's end, they could place their notebooks and pens in the bins. The court could supply bottled water and hand sanitizer in the bins, as well.

2. Provide jurors with electronic tablets, on which they could view evidence and take notes.
- How the judge will handle sidebars. There are options:
 1. The judge and counsel can move into a different, larger room to confer, or out in the hallway.
 2. Judges and lawyers can be provided with the closed loop listening devices that the courts are using to allow criminal defendants to speak with their attorneys, in conjunction with white noise available on all court sound systems.
 3. Use of a special Plexiglas barrier to separate participants in a sidebar, but this would be difficult in cases involving more than two lawyers.
 - Whether lawyers and witnesses will have any cleaning responsibilities (wiping down the witness chair, wiping down counsel tables, *etc.*);
 - How lawyers may communicate with each other and with their clients (pass notes, closed-loop listening devices, allowing lawyers to text);
 - Possible options if a lawyer/witness/party/juror/judge tests positive or becomes ill during the trial.
 1. Terminate the trial?
 2. Release the juror and continue with remaining jurors?
 3. Contact tracing?