

# Jury Trials During the COVID-19 Pandemic

OBSERVATIONS AND  
RECOMMENDATIONS



UNOCCUPIED  
DUE TO  
SOCIAL  
DISTANCING



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August 28, 2020

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# Executive Summary

Texas' constitutional bill of rights provides that "the right of trial by jury shall remain inviolate."<sup>1</sup> Ensuring that the right to a jury trial is available in all cases has been strained during the past six months, as the ability to gather prospective jurors and others together during the pandemic has been limited. Prior to the pandemic, Texas courts averaged 186 jury trials per week. However, since mid-March, jury trials have been suspended except for in limited cases assisted by the Office of Court Administration (OCA) through October 1. Pursuant to the Supreme Court's Emergency Orders Regarding the COVID-19 State of Disaster, OCA has reviewed 85 requests to hold jury trials from June to September, and twenty of those trials have occurred. Based upon the planning, observations, and lessons learned from those trials as noted below, OCA submits to the Supreme Court the following recommendations regarding jury proceedings:

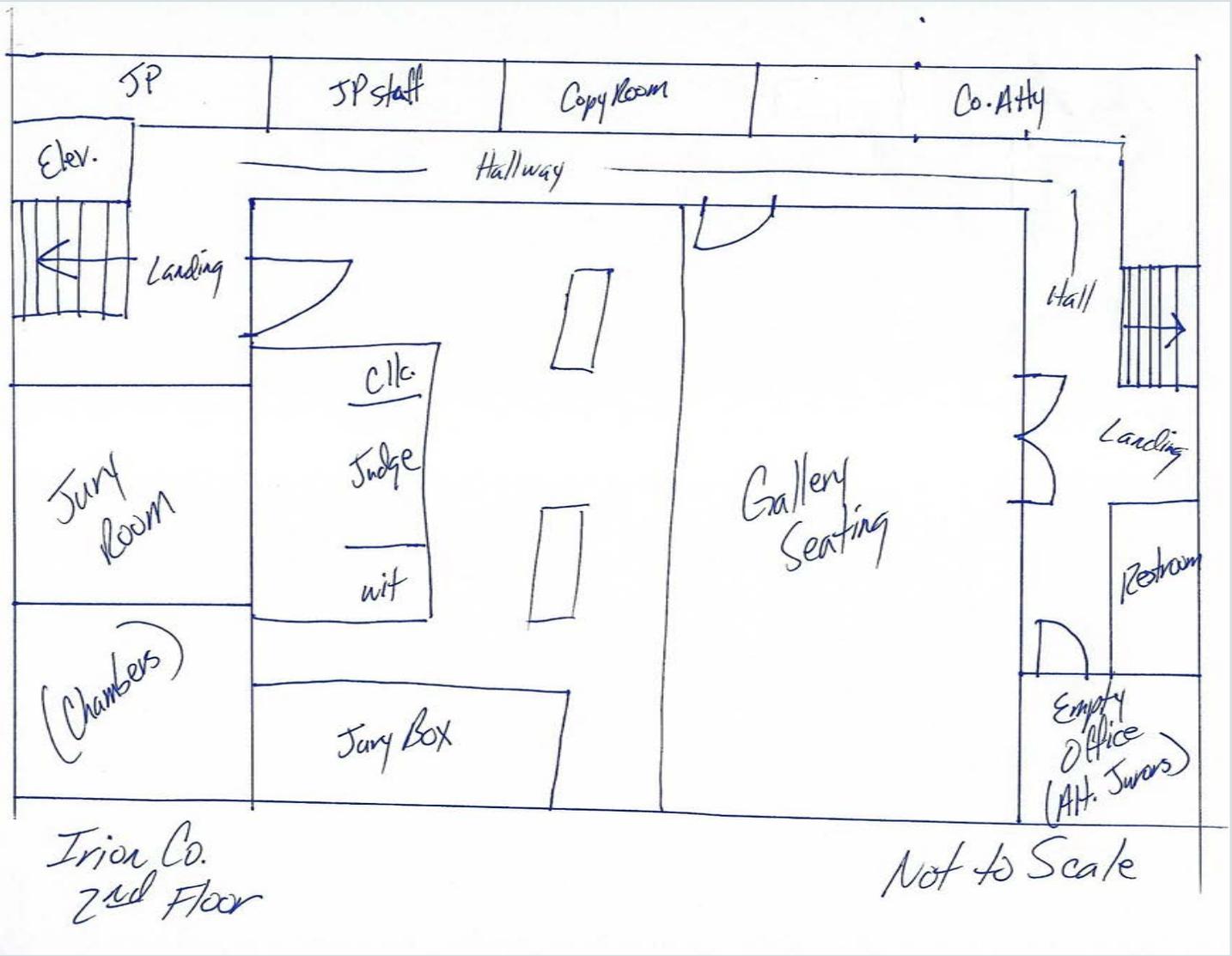
1. In-person jury proceedings should be limited to district and county courts, including statutory county courts and statutory probate courts, between October 1 and December 31.
2. All courts should be permitted to conduct virtual jury proceedings, which are allowable under the current emergency order. However, in jailable criminal jury trials, virtual jury proceedings should only occur with appropriate waivers and consent of the defendant and prosecutor made on the record. In all other virtual jury trial proceedings, consent should not be required.
3. The local administrative district judge for each county and the presiding judge of a municipal court should be required, after conferring with all judges in the county (local administrative district judges) or city (presiding judges of municipal courts) to submit a plan for conducting jury trials consistent with guidelines for conducting jury trial proceedings issued by OCA. Included in those guidelines should be:
  - a. Procedures for the summoning of jurors
  - b. Guidance on appropriate locations for jury proceedings
  - c. Requirements for screening requirements
  - d. Requirements for face coverings
  - e. Social distancing protocols
  - f. Alternate Jurors
  - g. Arrangement of Courtroom
  - h. Microphone protection protocols
  - i. Exhibit/evidence management
  - j. Vulnerable witnesses
  - k. Food precautions
  - l. Cleaning requirements

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<sup>1</sup> Texas Constitution, Article 1, Section 15.

4. To assist with coordination of local resources and to manage capacity issues, each judge wishing to conduct a jury proceeding, including a statutory probate judge, should be required to gain approval for that trial by the local administrative district judge and regional presiding judge.
5. The local administrative district judge overseeing the conduct of an in-person jury proceeding should be required to consult with the local health authority not more than 5 days prior to the jury proceeding to verify that local health conditions and plan precautions are appropriate for the trial to proceed.
6. In all jury trial proceedings, courts should be required to consider motions or objections related to proceeding with the trial, if any, on the record at least seven days prior to the trial. If motions or objections related to proceeding with the trial are made less than seven days prior to the trial, courts should be required to consider those motions on the record as soon as practicable.
7. Courts should establish communication protocols to ensure that no court participants have tested positive for COVID-19 within the last 30 days, have symptoms of COVID-19, or have been recently exposed to COVID-19.
8. Courts wishing to conduct virtual jury trials should be required to ensure that all prospective jurors have access to technology with which to participate.
9. OCA should be required to issue detailed guidance to assist courts wishing to conduct virtual jury trials and assist those courts in conducting the trials to the greatest degree possible.
10. The regional presiding judges should be required to ensure that all courts, including the statutory probate courts, in each region are operating in full compliance with the Court's Orders and the Guidance issued by OCA related to jury trial proceedings, report to the office of the Chief Justice of the Supreme Court any jury trial proceedings that are being conducted in the regions—and the court in which the proceedings are being conducted—that are inconsistent with the Court's Orders and the Guidance issued by OCA, and assist each region's local governments and courts to ensure that courts have the ability to conduct jury proceedings.
11. OCA should coordinate with the regional presiding judges to monitor the jury trial proceedings in the state and the Department of State Health Services regarding the public health situation in the state and regions of the state and should make additional recommendations to the Supreme Court as necessary to ensure the health of all participants involved with and observers of jury proceedings.





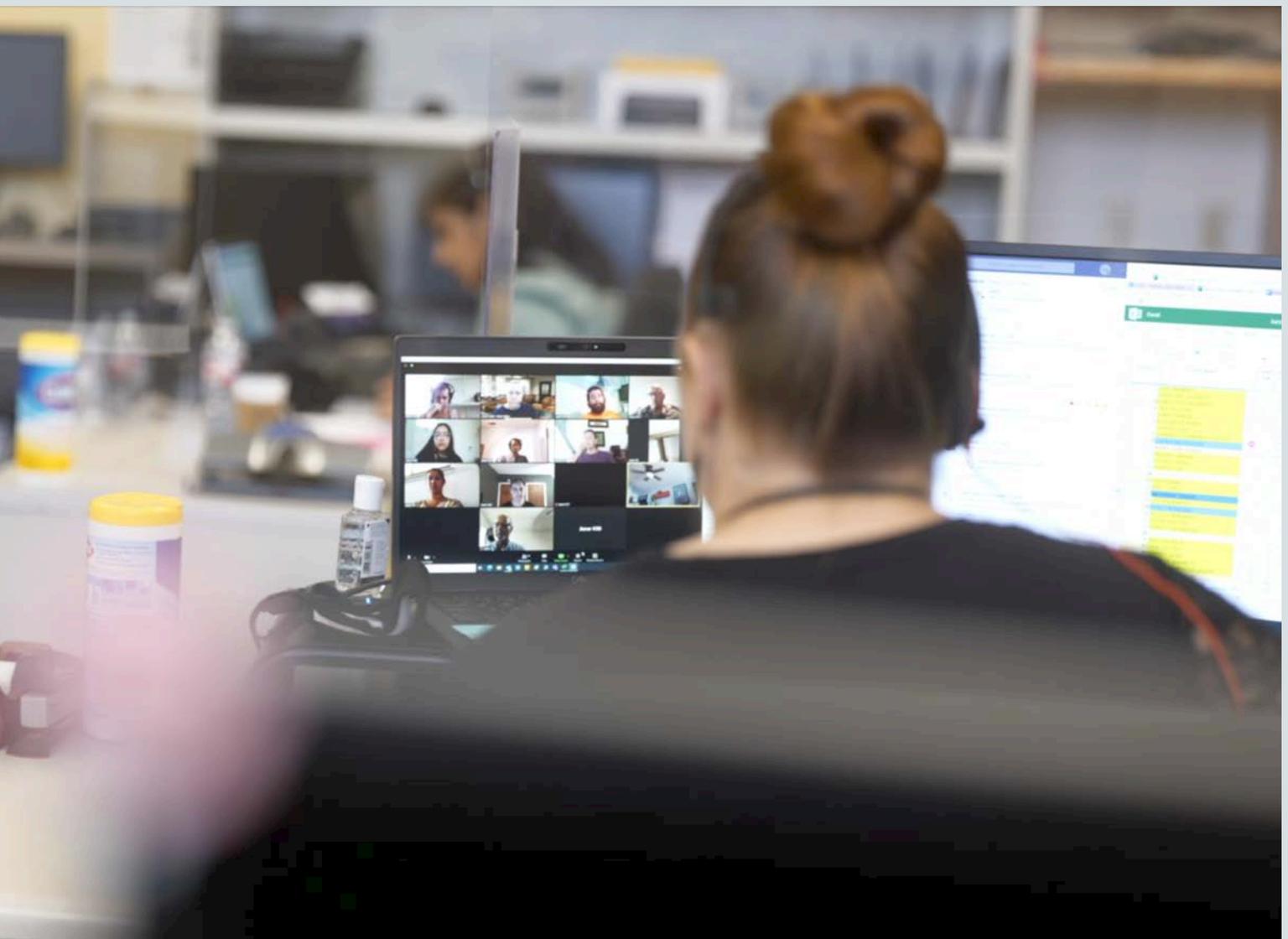
## Week 1

March 5 (1 COVID case in the state) – the Office of Court Administration (OCA) issues the first COVID-19 guidance to courts recommending that courts prepare to respond to COVID-19 cases in the state, including determining authority for decisions, determining essential functions and essential staff, preparing for teleworking and remote court proceedings, and readying communication strategies.

March 6 – Chief Justice Nathan L. Hecht assigns 31 district judges to hear emergency requests for quarantine orders under Chapter 81 of the Texas Health and Safety Code.

# Timeline of Texas Judiciary Response to Pandemic

As many Texans were celebrating the dawn of a new decade on December 31, 2019, the original cluster of cases of the COVID-19 disease (“COVID-19”) was identified in China. Less than three weeks later, the first diagnosed case of COVID-19 was identified in the United States. While Texas would not see its first diagnosed case of COVID-19 until March 4, the Texas judiciary began its involvement with the state’s COVID-19 response by participating in a preparedness briefing to Governor Greg Abbott on February 27. Based upon the information gathered at that briefing, the Texas judiciary activated its response plan and actions occurred as noted in the margins.



# Remote Hearings

After the Supreme Court’s First Emergency Order was issued, OCA explored various technology platforms to enable judges to conduct proceedings remotely with all participants. Key to this decision was the user-friendliness of the platform, features to promote participation by all participants, and security. After evaluating several platforms, OCA determined that Zoom would be the best platform for the Texas judiciary. To test this determination, OCA requested twenty judges test the platform with remote hearings during the week of March 16-20. Almost 100 proceedings were conducted during that week, with judges providing very positive feedback about the platform’s utility for remote hearings. With this feedback, OCA procured enough licenses for every judge in Texas to have a license so that the full features and security of the Zoom platform would be available to those judges. Texas judges quickly embraced the technology as shown in the graphs below, with an estimated 440,000 remote hearings in every case type and type of proceeding, including bench and jury trials, with 1.3 million participants lasting almost 1 million hours held in the 6-month period.

## Week 2

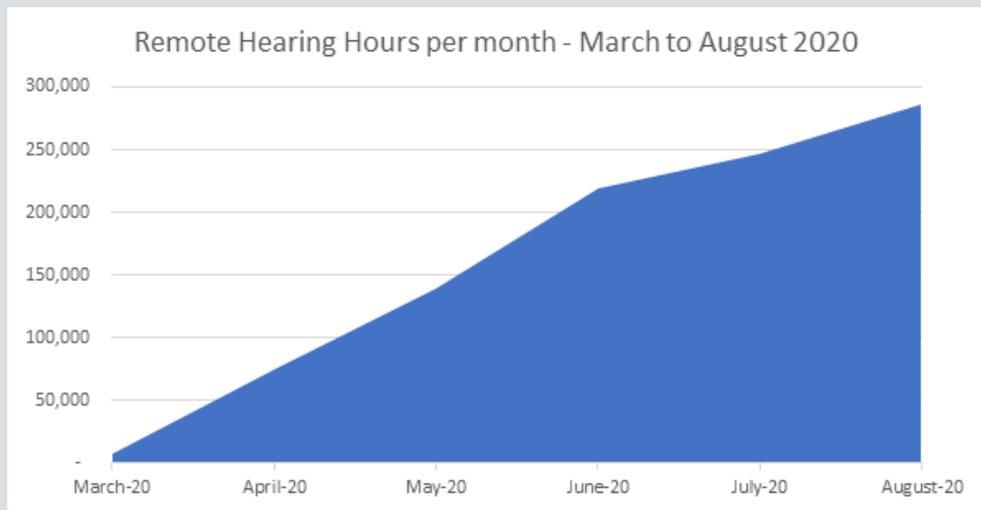
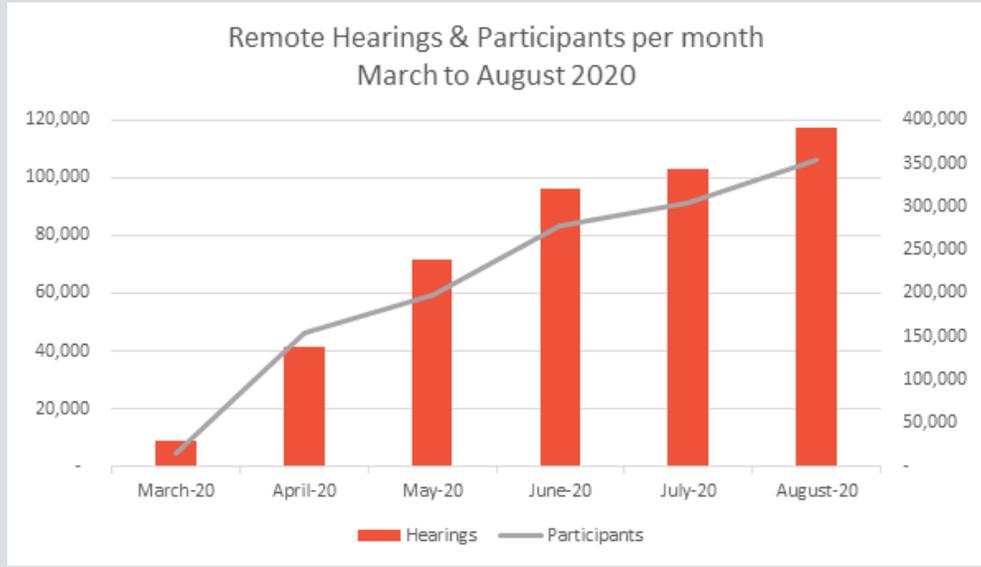
March 12 (25 COVID cases in the state) – OCA issues the second Guidance on Court Procedures during the pandemic, recommending that courts delay or conduct remotely all non-essential court proceedings until at least April 1. OCA recommends that courts suspend all jury trials and large docket calls until at least April 1.

March 13 – Approximately four hours after Governor Abbott issued a disaster declaration and public health emergency declaration for the state, the Supreme Court, joined by the Court of Criminal Appeals, uses its emergency powers under Section 22.0035(b), Texas Government Code, to issue the First Emergency Order Regarding the COVID-19 State of Disaster. The order permitted all courts in all cases, without a participant’s consent, to modify or suspend deadlines, allow or require remote participation by anyone involved in a hearing or proceeding (except jurors), conduct proceedings away from the court’s usual location, and permitted courts to extend the statute of limitations.

March 13 – Chief Justice Nathan L. Hecht assigns 21 justices of the courts of appeals to hear appellate proceedings in cases filed under Chapter 81 of the Texas Health and Safety Code (quarantine).

## Week 3

March 17 – 9:13 am – District Judge Emily Miskel holds the first fully remote hearing in the state in a family law temporary restraining order proceeding, a hearing that lasts just over one hour with 7 participants. The proceeding is streamed live on Judge Miskel’s court YouTube channel.



### Week 3

March 17 – The Supreme Court issues the Second Emergency Order to clarify child possession schedules.

March 19 – OCA procures 3,100 Zoom licenses to permit all courts in Texas to conduct remote proceedings.

March 19 – The Supreme Court issues the Third Emergency Order that amends and clarifies the First Emergency Order. The order prohibits courts from conducting non-essential proceedings in person contrary to local, state, or national directives regarding maximum group size.

March 19 – The Supreme Court issues the Fourth Emergency Order that suspends trials, hearings, and other proceedings in most eviction cases until April 19.

March 19 (143 COVID cases in the state) – OCA issues its third Guidance on Court Procedures to courts, recommending that courts delay non-essential proceedings to at least May 1, including jury trials. OCA invites all judges to sign up for Zoom licenses at no cost to the court and schedules training webinar for March 23.

March 20 – The Supreme Court issues the Fifth Emergency Order that tolls deadlines in attorney disciplinary and disability proceedings.



### Week 4

March 22 – The Supreme Court issues the Sixth Emergency Order to permit online voting in the 2020 State Bar elections.

*451st District Court, Kendall Co., Judge Kirsten Cahoon*

# Limited Jury Trial Approval Process

In its Seventeenth Emergency Order Regarding the COVID-19 State of Disaster issued on May 27, the Supreme Court prohibited courts from holding jury proceedings, including jury selection or a jury trial, prior to August 1. In addition, the Court required OCA to coordinate with the Regional Presiding Judges and local administrative judges to assist trial courts in conducting a limited number of jury proceedings. In the May 27 order, the Court required consent from all parties to proceed with the limit jury trials, but the consent requirement was removed in the Eighteenth Emergency Order on June 29. The Court required OCA to submit a report to the Court outlining its observations regarding those jury proceedings and making recommendations regarding procedures for jury proceedings. In subsequent emergency orders, the Court further delayed jury proceedings until October 1.

Prior to reviewing any jury proceeding requests, OCA consulted with infectious disease experts at the Texas Department of State Health Services (DSHS). Those meetings resulted in several best practices and answered questions that greatly assisted OCA in its efforts. DSHS staff have remained available to OCA staff throughout the spring and summer to assist with providing advice on matters affecting public health. This includes reviewing the local COVID case data in each county several days before the trial is scheduled to begin and relaying any concerns about moving forward.

In order to assist trial courts in conducting a limited number of jury proceedings, OCA requested that courts interested in conducting either in-person or remote jury proceedings coordinate with their local administrative judges and regional presiding judges and to make a request to proceed to OCA. OCA would then schedule a remote webconference meeting to discuss the judge's plan for the jury proceeding. At those meetings, the various aspects of the trial were reviewed and feedback was provided. When issues arose about certain protocols of the trial that might affect public health, OCA consulted with infectious disease experts at DSHS.

Since the Supreme Court's Seventeenth Order was issued, OCA has reviewed 85 requests to conduct a jury trial. Of those requests, OCA approved 84 requests, and one request was withdrawn.

## Week 4

March 23 – Chief Justice Nathan L. Hecht assigned additional duties to the Regional Presiding Judges to ensure that all courts in their regions comply with executive directives and the Courts' orders, including not conducting in-person proceedings inconsistent with the Courts' orders or OCA Guidance.

March 23 – OCA conducts webinar to train judges on the use of Zoom for remote proceedings. This marks the official start of the use of Zoom in Texas for remote proceedings.

March 24 – The Supreme Court issues the Seventh Emergency Order to clarify child possession schedules during the pandemic in light of shelter-in-place orders.

March 25 – District Judge Emily Miskel conducts the first fully virtual contested bench trial using Zoom.

March 26 (1,396 COVID cases in the state) – OCA issues its fourth Guidance on Court Procedures to courts, recommending that courts delay all in-person proceedings to at least May 8, holding essential proceedings only if holding the proceeding remotely is not possible or feasible and only if 10 or less people are in the courtroom or in areas around the courtroom, and that no non-essential proceedings should be held in-person.

## Week 5

March 31 – Governor Abbott issues statewide stay-at-home order from April 2 to April 30.

April 1 – The Supreme Court issues the Eighth Emergency Order amending the tolling of the statute of limitations in civil cases.

**Week 5**

April 2 (4,669 COVID cases in the state) – OCA issues its fifth Guidance on Court Procedures to courts, providing updates on the situation but leaving the guidance from March 26 unchanged.

**Week 6**

April 6 – Chief Justice Hecht issues the Ninth Emergency Order, extending the suspension of eviction proceedings until after April 30.

April 8 – The Supreme Court holds the first fully virtual oral arguments of any nine-member court in the nation.

April 9 – The Supreme Court issues the Tenth Emergency Order to suspend certain debt collection proceedings under April 30.

April 9 – The Supreme Court issues the Eleventh Emergency Order to extend deadlines in disciplinary proceedings before the Judicial Branch Certification Commission.

April 9 (10,230 COVID cases in the state) – OCA issues its sixth Guidance on Court Procedures to courts, providing updates on the situation but leaving the guidance from March 26 unchanged.

**Week 7**

April 17 (16,455 COVID cases in the state) – OCA issues its seventh Guidance on Court Procedures to courts, recommending that in-person proceedings be delayed until at least June 1 and encouraging courts to have any participants in in-person proceedings wear face coverings.

City/County	Judge	Trial Date	Case Type	Outcome
Houston Mun	Elaine Marshall	1-Jun	Traffic	Withdrawn
Bowie Co	Bill Miller	18-Jun	Aggravated Robbery	Conducted
Scurry Co	Ernie Armstrong	29-Jun	Aggravated Robbery	Conducted
Bowie Co	John Tidwell	29-Jun	Aggravated Sexual Assault - Child	Conducted
Cameron Co	Janet Leal	20-Jul	Felon in possession of firearm	Continued
Williamson Co	Doug Arnold	20-Jul	Assault – Family Violence	Pled
Randall Co	Ana Estevez	20-Jul	Aggravated Robbery	Pled
Henderson Co	Dan Moore	23-Jul	Aggravated Robbery	Continued
Comal Co	Dib Waldrip	23-Jul	Homeowners' Association dispute	Conducted
Harris Co	Donna Roth	27-Jul	Fraud/Breach of Fiduciary Duty	Settled
Brown Co	Steve Ellis	27-Jul	Sexual Assault - Child; Continuous Sexual Abuse of Child - Punishment	Pled
Brazos Co	Steve Smith	3-Aug	Aggravated Assault - Deadly Weapon	Conducted
Harris Co	Latosha Payne	5-Aug	Products Liability	Continued
Brazos Co	Kyle Hawthorne	10-Aug	Juvenile delinquency case	Continued
Brazos Co	Steve Smith	10-Aug	Civil case	Continued
Brazos Co	Travis Bryan	10-Aug	Criminal competency trial	Continued
Brown Co	Steve Ellis	10-Aug	Assault – Family Violence	Conducted
Tarrant Co	Chris Wolfe	10-Aug	Capital Murder – Death	Continued
Irion Co	Carmen Dusek	10-Aug	Possession of Child Pornography	Continued
Travis Co	Nicholas Chu	11-Aug	Class C - Speeding in Construction Zone - virtual	Conducted virtually
Bowie Co	Jeff Addison	11-Aug	Sexual assault	Pled

City/County	Judge	Trial Date	Case Type	Outcome
Tarrant Co	Bob Brotherton	12-Aug	Civil Commitment (H&S Code Ch. 841)	Conducted
Brazos Co	Kyle Hawthorne	17-Aug	Continuous Family Violence Assault	Conducted; mistrial
Collin Co	Andrea Thompson	17-Aug	Aggravated Sexual Assault - Child	Continued
Montgomery Co	Claudia Laird	17-Aug	Eviction Appeal	Conducted
Brazos Co	Steve Smith	17-Aug	Burglary - 3rd degree	Conducted
Bowie Co	Bill Miller	17-Aug	Possession of Controlled Substance	Continued
Bowie Co	John Tidwell	17-Aug	Capital Murder - Non-Death	Conducted
Fort Bend Co	Jim Shoemake	18-Aug	Assault – Family Violence	Conducted
Tarrant Co	Elizabeth Berry	18-Aug	Capital Murder – Death	Continued
Bexar Co	Antonia Arteaga	19-Aug	Personal Injury civil trial - virtual	Jury qualified; continued
Scurry Co	Ernie Armstrong	20-Aug	Tax Appraisal challenge	Conducted
El Paso Co	Patrick Garcia	21-Aug	Civil Commitment (H&S Code Ch. 841)	Dft waived jury trial
Randall Co	Ana Estevez	24-Aug	Aggravated Assault – Deadly Weapon	Conducted
Harris Co	Beau Miller	24-Aug	Personal Injury - Auto	Conducted
Kendall Co	Kirsten Cohoon	24-Aug	Aggravated Assault – Deadly Weapon	Conducted
Mills Co	Steve Ellis	24-Aug	DWI - 3rd	Pled
Nolan Co	Glen Harrison	25-Aug	Civil Commitment (H&S Code Ch. 841)	Conducted
El Paso Co	Maria Salas Mendoza	28-Aug	Aggravated Assault – Deadly Weapon	Continued
Harris Co	Daryl Moore	31-Aug	MDL injury case	Settled
Brazos Co	Kyle Hawthorne	31-Aug	Possession of Controlled Substance	
Brazos Co	Steve Smith	31-Aug	Family – custody	

### Week 9

April 27 - Chief Justice Nathan L. Hecht issues the Twelfth Emergency Order extending the provisions of several emergency orders and permitting grand jurors to participate remotely, prohibiting courts from having in-person proceedings contrary to guidance issued by OCA, and requiring courts to use all reasonable efforts to conduct proceedings remotely. The order also prohibits eviction proceedings until at least May 18.

April 27 (25,297 COVID cases in the state) – OCA issues its eighth Guidance on Court Procedures to courts, providing updates on the situation but leaving the guidance from April 17 unchanged.

April 29 – The Supreme Court issues the Thirteenth Emergency Order adding a second in-person bar exam in September.

### Week 10

April 29 – Chief Justice Nathan L. Hecht issues the Fourteenth Emergency Order, extending the Tenth Emergency Order’s provisions suspending certain consumer debt proceedings until May 18.

May 4 – OCA issues its ninth Guidance on Court Procedures to courts, laying out guidance to courts holding in-person proceedings on or after June 1 and requiring courts to develop local plans prior to resumption of in-person proceedings. The guidance prohibits jury trials until further notice.

May 8 – District Judge Emily Miskel oversees the first fully virtual jury trial in the nation, a non-binding summary jury trial in an insurance dispute. The jury selection is livestreamed to the court’s YouTube channel.

**11 Week**

May 14 – The Supreme Court issues the Fifteenth Emergency Order, permitting the resumption of eviction proceedings on May 19 with certain requirements.

May 14 – The Supreme Court issues the Sixteenth Emergency Order, permitting the resumption of consumer debt proceedings with certain requirements.

**Week 13**

May 26 – The Supreme Court issues the Sixteenth Emergency Order, prohibiting jury trials prior to August 1, except for a limited number of proceedings conducted in conjunction with OCA.

May 27 – OCA issues its tenth Guidance on Court Procedures to courts, leaving unchanged its previously issued guidance on in-person proceedings issued on May 4.

**Week 14**

June 5 – OCA issues its eleventh Guidance on Court Procedures to courts, approving a template procedure for grand jury empanelment to be used by all district courts and inviting judges to propose in-person and virtual jury trials under the Supreme Court's May 27 order.

**Week 16**

June 16 – OCA issues its twelfth Guidance on Court Procedures to courts, providing a model grand jury summons form and grand jury COVID questionnaire to send with grand jury summonses.

City/County	Judge	Trial Date	Case Type	Outcome
Brazos Co	Travis Bryan	31-Aug	Criminal Competency trial	
Gregg Co	Alfonso Charles	31-Aug	Aggravated Assault	
Gregg Co	Vincent Dulweber	31-Aug	Civil - car wreck	
Brazoria Co	Terri Holder	8-Sep	Civil - tort case	
Harris Co	Donna Roth	8-Sep	Civil case	
Harris Co	Rabeea Sultan Collier	8-Sep	Civil case	
Harris Co	Steven Kirkland	8-Sep	Civil – tort case	
Midland Co	Jody Gilles	8-Sep	Civil Commitment (H&S Code Ch. 841)	
Harris Co	Andrew Wright	11-Sep	Criminal case	
Jones Co	Brooks Hagler	14-Sep	Indecency with a Child	Continued
Dewitt Co	Jack Marr	14-Sep	Criminal case	
Matagorda Co	Craig Estlinbaum	14-Sep	Possession of Controlled Substance	
Harris Co	Kelli Johnson	14-Sep	Felon in Possession, Aggravated Sexual Assault	
Harris Co	Sonya Heath	14-Sep	Family – custody	
Robertson Co	Bryan Russ	15-Sep	Assault – Family Violence	
Harris Co	Beau Miller	15-Sep	Civil case	
Harris Co	Amy Martin	15-Sep	Intoxication Assault – Serious Bodily Injury	
Harris Co	Brian Warren	18-Sep	Civil Commitment (H&S Code Ch. 841)	
Harris Co	Belinda Hill	21-Sep	Continuation of Arkema Trial	
Brazoria Co	Terri Holder	21-Sep	Criminal case	
Galveston Co	Jared Robinson	21-Sep	Criminal case	

City/County	Judge	Trial Date	Case Type	Outcome
Harris Co	Donna Roth	21-Sep	Civil case - property dispute	
Harris Co	Kelli Johnson	21-Sep	Aggravated Robbery	
Harris Co	Sonya Heath	21-Sep	Family - Modification of Custody	
Kaufman Co	Casey Blair	21-Sep	Murder	
Midland Co	David Lindemood	21-Sep	Civil Commitment (H&S Code Ch. 841)	
Brown Co	Steve Ellis	21-Sep	Organized Crime	
Harris Co	Beau Miller	22-Sep	Civil case	
Harris Co	Andrew Wright	25-Sep	DWI, Assault – Family Violence	
Harris Co	David Singer	25-Sep	Assault – Family Violence	
Harris Co	Hilary Unger	25-Sep	Aggravated Assault	
Matagorda Co	Craig Estlinbaum	28-Sep	Criminal case	
Brazoria Co	Justin Gilbert	28-Sep	Murder	
Galveston Co	Lonnie Cox	28-Sep	Aggravated Robbery	
Harris Co	Angela Graves-Harrington	28-Sep	Family	
Harris Co	Kelli Johnson	28-Sep	Continuous Sexual Assault	
Midland Co	Jeff Robnett	28-Sep	Civil Commitment (H&S Code Ch. 841)	
Victoria Co	Eli Garza	28-Sep	Murder	
Harris Co	Beau Miller	29-Sep	Civil case	
Harris Co	Natalia Oakes	TBD	Juvenile trial - determinate murder	

As the table above shows, between June and August 28, a total of 20 jury trials were conducted where the jury was qualified. The outcome of those jury selections is listed below:

- thirteen reached a verdict;
- one resulted in a mistrial;
- one resulted in a plea after the jury was qualified; and
- five are ongoing as of August 28.

### Week 18

June 18 – District Judge Bill Miller conducts the first in-person jury trial in Texas since March in an aggravated robbery case.

June 29 – The Supreme Court issues the Eighteenth Emergency Order, renewing several emergency orders and prohibiting jury trials prior to September 1 except for limited trials conducted in conjunction with OCA.

June 29 – OCA issues its thirteenth Guidance on Court Procedures to courts, providing updates and leaving unchanged its previously issued guidance on in-person proceedings issued on May 4.

July 3 - The Supreme Court issues the Nineteenth Emergency Order, cancelling the July bar exam and adding an online bar exam in October.

### Week 21

July 21 - The Supreme Court issues the Twentieth Emergency Order, requiring certain information in eviction pleadings.

July 21 – OCA issues its fourteenth Guidance on Court Procedures to courts, providing updates and leaving unchanged its previously issued guidance on in-person proceedings issued on May 4.

### Week 22

July 31 - The Supreme Court issues the Twenty-First Emergency Order, extending the statute of limitations for certain cases until September 15.

## Week 23

August 6 - The Supreme Court issues the Twenty-Second Emergency Order, extending several provisions from the Eighteenth Emergency Order and prohibiting jury trials prior to October 1 except for limited trials conducted in conjunction with OCA.

August 6 – OCA issues its fifteenth Guidance on Court Procedures to courts, providing updates and leaving unchanged its previously issued guidance on in-person proceedings issued on May 4.

August 7 - The Supreme Court issues the Twenty-Third Emergency Order, delaying the deadline for State Bar membership fees to October 31.

## Week 24

August 11 – Justice Court Judge Nicholas Chu conducts the first fully virtual criminal jury trial in the nation. The proceeding in a Class C traffic case is livestreamed on the court's YouTube Channel. OCA provides iPads with cell service to four prospective jurors without appropriate technology, one of which is used by the foreperson of the jury to participate in the proceeding.

## Week 25

August 19 – District Judge Antonia Arteaga conducts the first fully virtual jury selection in a civil case in Texas. The jurors are sworn and told to report back in September for the trial. OCA-issued iPads are utilized by fourteen prospective jurors.

August 21 - The Supreme Court issues the Twenty-Fourth Emergency Order, renewing as amended the Twentieth Emergency Order provisions requiring certain information in eviction pleadings.

Of the other jury proceedings that have been approved to proceed:

- fourteen were continued;
- seven settled or pled before trial; and
- forty-four are scheduled to occur between now and the end of September.

## Grand Jury Proceedings

Grand juries are generally empaneled to serve for a single term of court, which for most counties is January to June and July to December. While courts are permitted during a disaster to extend the term of a grand jury to a timeframe set by the regional presiding judge<sup>2</sup> or to reassemble discharged grand juries,<sup>3</sup> some courts wished to empanel new grand juries. Empaneling grand juries is less complicated than a petit jury proceeding since fewer jurors are required to be summoned and less time is required to pick the grand jurors. Therefore, OCA issued a grand jury empanelment template procedure and advised judges that they could proceed without further approval if they followed the empanelment template procedure. OCA required that judges who used the procedure submit a report of the grand jury empanelment proceeding. To date, 40 grand juries have been empaneled using the template procedure. No grand juries have been empaneled using any other procedure.



*Maude Cobb Convention Center in Longview, Texas preparing for jury selection.*

2. See Section 24.0125, Texas Government Code.

3. See Article 19.41, Texas Code of Criminal Procedure.

# Observations from Limited Jury Trials

## *Plans*

OCA commends the trial court judges, local administrative judges, and regional presiding judges for the diligent efforts they made in proposing protocols to conduct in-person and virtual jury trials. Conducting both in-person and virtual jury trials during the pandemic requires extensive planning and preparation. All of the judges who proposed jury trials had prepared detailed plans for the jury trial, which will be necessary for all jury trials going forward.

## *Cases Needing Jury Trials*

During the last fiscal year, Texas courts tried an average of 186 jury trials per week, as shown below. Jury trials represented 0.11% of all dispositions, meaning that 99.89% of all cases were disposed in a method other than jury trial.

Court	Case Type	# of Jury Trials	% of Total Jury Trials
District Court	Criminal	2,695	27.84%
	Civil	1,554	16.05%
	Family	167	1.72%
	Juvenile	4	0.04%
County Court at Law	Criminal	1,376	14.21%
	Civil	532	5.49%
	Family	30	0.31%
	Juvenile	3	0.03%
County Court	Criminal	39	0.40%
	Civil	11	0.11%
	Juvenile	1	0.01%
Justice Court	Criminal	768	7.93%
	Civil	608	6.28%
Municipal Court	Criminal	1,891	19.5%
	Civil	4	0.04%
<b>TOTAL</b>	<b>9,683</b>		

Jury Trials by Case Type – Fiscal Year 2019

As the table shows, the primary use of jury trials is in criminal cases involvingailable offenses (42%). Last fiscal year, an average of 78 jury trials were conducted each week in these cases, meaning that Texas courts would typically have tried almost 1,900ailable criminal cases since the jury trial suspension in March. Because of the inability to conduct widespread jury trials since March, a significant population of criminal defendants are awaiting trial, many of whom are still in jail. OCA saw the primary source of requests for jury trials coming from these cases, and OCA expects there to be a significant backlog of criminal jury trials inailable criminal cases.

## *Motions/Objections to Proceeding*

When OCA first began working on requests to conduct limited jury trials, the Court's order required consent to proceed. Very few judges were able to obtain consent to proceed (only 3 jury trials were

proposed during that time). However, OCA discussed with each judge the need to consider any objections or motions relating to proceeding with the jury trial. In each case, judges committed to hearing motions or objections to proceeding at a scheduled hearing, on the record, and in sufficient time before the trial to permit counsel to pursue appellate options if desired. In at least three cases, counsel filed petitions for writs of mandamus in the appellate courts.<sup>4</sup>

### *Summoning Jurors*

Almost all of the courts who proceeded with jury trials included with their summons a letter from the judge describing the precautionary measures the court had taken to protect the health of the prospective jurors. This was done to improve the appearance rates. Most courts saw about a 5-10% drop in the normal appearance rate prior to the pandemic.

In addition to the letter from the judge, courts included with their summons a “COVID questionnaire.” The questionnaire solicited from the jurors information about their symptoms, exposure to COVID, and vulnerability to COVID and suggested that those jurors responding affirmatively to those questions contact the court for rescheduling or excusal from jury duty. On average, about 10% of the summoned jurors requested a COVID-related excuse or to be rescheduled. Judges were liberal in granting excuses or rescheduling jurors for these reasons.

### *Locations for Jury Proceedings*

Due to space limitations, most courts were unable to conduct the qualification and voir dire process in courthouse facilities and instead needed to obtain auxiliary space in other buildings in the county. The most common spaces that were used were gymnasiums, theaters, and ballrooms. Issues with acoustics, lighting, security, and availability were the most common impediments in these facilities. Most judges were able to move to a courtroom once a jury was selected.

None of the courts have been able to use existing jury deliberation rooms, as the size of the rooms do not permit adequate social distancing. Rather, almost all courts have utilized nearby courtrooms or the courtroom in which the case is being tried as the jury deliberation room.

### *Screening*

All courts conducting in-person jury trials established screening protocols that involved temperature checks and questions about potential symptoms or exposure. Prospective jurors who exhibited or reported symptoms or exposure were excused. All other observers and participants in the trial were subject to the same screening. Courts using auxiliary facilities also established security screening protocols at those facilities.

### *Face Coverings*

All courts conducting in-person jury trials encouraged or required facial coverings. Trials in June occurred prior to Governor Abbott’s executive order requiring facial coverings. All trials since the executive order have required facial coverings. Courts reported some issues with obtaining compliance

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4. See *In re Kinder Morgan Production Company, LLC* (11-20-00190-CV, 11th Court of Appeals; 20-0634, Supreme Court of Texas); *In re Meg Brewer* (09-20-00193-CV, 9th Court of Appeals); *In re Ryan Carter Lemon* (10-20-00231-CR).

with the facial covering requirement, and counsel in jury cases reported concerns with facial coverings worn by witnesses or prospective jurors who were speaking during voir dire. To accommodate those concerns and protect public health, OCA consulted with the Department of State Health Services to obtain an alternative that has been used in subsequent trials. The alternate involves the use of both facial coverings and face shields. When a witness or prospective juror is speaking and immobile, a face shield has been donned and the facial covering lowered while the individual is speaking. As soon as the individual has finished speaking and before the person becomes mobile, the individual raises the facial covering. Face shields have been provided by the courts and have not been collected from participants at the end of the proceeding.

### *Social Distancing*

All courts conducting in-person jury trials have arranged facilities and courtrooms in such a way to permit at least six feet of distancing between all participants and observers. Some criminal defense counsel and their clients have maintained less than six feet of distance for consultation purposes.

### *Breaks*

While courts were able to maintain social distancing at most times, a particular concern was raised with individuals failing to socially distance at breaks, particularly when exiting the courtroom or facility being used. Therefore, OCA recommended that bailiffs dismiss persons “funeral-style” with single rows starting at the back exiting first. Courts reported that this method seemed to resolve the issue.

### *Alternates*

All courts chose alternate jurors for the proceedings. This step was taken to ensure that the jury size could be maintained if non-COVID-related issues with a juror arose.<sup>5</sup>

### *Arrangement of the Courtroom*

Most of the courts conducting in-person jury trials have inadequate space in their jury boxes to ensure adequate social distancing. In these situations, the courts have used the gallery of the courtroom or a combination of the jury box/gallery to seat the jury. This has required some other rearrangement of the courtroom to include turning counsel tables to face the jury, moving the witnesses closer to the jury (often in the jury box), and providing televisions closer to the jury for viewing digital evidence that is being displayed.

Some courts with larger jury boxes have been able to place the jury in the normal jury box with the addition of plexiglass and some other alterations in the seating arrangement.

### *Public Access to Trials*

Since most courts have placed jurors in the gallery and with limited gallery capacity to ensure social distancing, seating for the public has been limited. Most courts have been able to provide some seating for the public in the courtroom, but some courts have had to broadcast the proceeding to another

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5. Courts knew that a COVID-related exposure would likely mean that the jury trial would be unable to continue.

courtroom for the public to observe. In this situation, up to 3 courtrooms may be required for the jury proceeding (1 for the trial, 1 for the jury deliberation room, and 1 for the public viewing area).

When the public is placed in the gallery of the courtroom and the jury is also in the gallery, courts have taken special steps to ensure separation of the jury from the public.

### *Microphones*

Most courtrooms used microphones for witnesses and other participants. Some courts that used auxiliary spaces with acoustics concerns also required microphones. Due to the design of microphones (with holes) and the method of transmission of COVID, OCA sought advice from the Department of State Health Services on how to reduce transmission from the microphone. Courts were advised to utilize disposable microphone covers designed to keep the microphones clean and to change the covers between users of the microphone.

### *Sidebars*

With the use of face coverings and face shields, most courts were able to accomplish side bar conversations by moving to a larger area of the courtroom and maintaining social distancing. However, some courts purchased headsets with earphones and microphones that could be worn by all participants in a sidebar conversation so that the conversation could occur without the need for participants to move.

### *Exhibits/Evidence*

All courts encouraged the use of digital exhibits/evidence where feasible to reduce the exchange of paper or physical exhibits/evidence in the courtroom. When physical or paper exhibits/evidence were used, courts used gloves to handle the exhibit/evidence. Because of the potential for cross-contamination and transmission, gloves were used and then immediately discarded rather than being continuously worn. Since most courts were using courtrooms or other large rooms for jury deliberation, most courts placed the exhibits/evidence on a table in the deliberation room for the jury's review. Rather than having the jury pass the exhibits/evidence, jurors were encouraged to move to review the exhibits/evidence on the tables.

### *Food*

Many courts feed their jurors during deliberation, and some do so during the trial portion as well. Courts who do feed their jurors made special effort to ensure that jurors were provided with individual meals rather than communal food like pizza or salad.

### *Cleaning*

As part of their in-person operating plans, courts have laid out protocols for cleaning the courthouse and courtroom facilities. In addition to those protocols, the courts trying in-person jury trials added several cleaning protocols. First, judges made sure to assign seats to prospective and selected jurors to lessen the amount of cleaning necessary during breaks. If a jury shuffle was requested, the seating had to be cleaned prior to the next seating. Second, judges ensured that the witness stand was cleaned between each witness by wiping down the witness seating and other areas. Other areas of the courtroom where there is transition of individuals had to be cleaned during breaks and after hours.

## *Virtual Jury Trials*

In the three virtual jury trials that have been conducted in the state (2 to verdict), the challenges are different and are unrelated to the pandemic. Rather, the challenges are related to technology. However, with planning, practice, and preparation, the courts that have conducted virtual jury proceedings have been able to overcome those challenges to effectively administer virtual jury trials.

Courts trying virtual jury trials included with their summonses a remote jury questionnaire that inquired about the prospective jurors' available technology and ability to participate in a private space. While most indicated they could, a few did not have the technology. OCA provided iPads with cell service to those jurors to permit them to effectively participate. A few jurors did need to be excused because of technology challenges, but most did not have any significant issues.

Courts trying virtual jury trials needed a technically savvy bailiff to assist prospective jurors with technical issues during check-in, trial, and deliberation. The issues were generally easy to overcome with the assistance of the bailiff. A [training video](#) was produced by OCA to assist the jurors in their preparation for remote participation. However, the courts needed to take extra time during the juror check-in process to provide this assistance.

The courts divided the jury panel into smaller groups to allow easier observation of the prospective jurors during voir dire. This practice worked well, but it did lengthen the time required for voir dire. Judges, lawyers, and observers all indicated that they felt that the prospective jurors were at ease and more engaged than usual in the voir dire process. Prospective jurors were named with identifiers instead of their full names to increase privacy.

Once the jury was seated, the jurors were attentive without distraction. Each court recited special admonishments to the jurors to address issues that were unique to a virtual trial.

Jurors deliberated in a breakout room without difficulty and reviewed evidence that was submitted through a filesharing service like Box or DropBox.



# Recommendations

Based upon the experiences and proceedings detailed above, OCA makes the following recommendations regarding procedures for jury proceedings:

1. In-person jury proceedings should be limited to district and county courts, including statutory county courts and statutory probate courts, between October 1 and December 31.
2. All courts should be permitted to conduct virtual jury proceedings, which are allowable under the current emergency order. However, inailable criminal jury trials, virtual jury proceedings should only occur with appropriate waivers and consent of the defendant and prosecutor made on the record. In all other virtual jury trial proceedings, consent should not be required.
3. The local administrative district judge for each county and the presiding judge of a municipal court should be required, after conferring with all judges in the county (local administrative district judges) or city (presiding judges of municipal courts) to submit a plan for conducting jury trials consistent with guidelines for conducting jury trial proceedings issued by OCA. Included in those guidelines should be:

- a. Procedures for the summoning of jurors

Courts should be required to include with summonses information on precautions that have been taken to protect the health and safety of prospective jurors and COVID questionnaires that elicit from prospective jurors information about their exposure or vulnerability to COVID-19. Courts should consider using juror questionnaires for voir dire to assist in shortening the length of voir dire or the number of venirepersons. Courts should be encouraged to liberally grant excuses or reschedule prospective jurors who have been potentially exposed, who are symptomatic, and who are vulnerable or live with someone vulnerable to COVID-19.

- b. Guidance on appropriate locations for jury proceedings

Courts should be required to identify an appropriate location for conducting the various phases of a jury proceeding that enable adequate social distancing at all phases. Courts should detail how the court will ensure adequate security at the alternative location and that the court has followed the appropriate guidelines required of courthouses for in-person hearings.

- c. Requirements for screening

Courts should be required to screen all court participants and observers for elevated temperatures and use a questionnaire to determine if the individual has recently had symptoms of COVID-19 or been exposed to COVID-19. Courts should ensure that participants in a trial who are incarcerated should be screened by the jail/prison prior to transport to the courtroom and any known exposure, symptoms, or COVID-19 positive test results within the past 30 days be reported to the judge presiding over the jury trial.

- d. Requirements for face coverings

Courts should be required to ensure that all persons entering the common areas of a courthouse, including a courtroom or any other location being used to conduct a jury trial, wear a face covering at all times unless the person is an individual that is not recommended to wear a mask by the Centers for Disease Control or the Texas Department of State Health Services.<sup>6</sup>

Courts should be required to ensure that all court participants wear face coverings from jury qualification through the end of trial. Court participants who may need to lower their face mask to speak or for a short period of time should be required to wear a face shield. When speaking, a court should permit a court participant to lower his or her mask so long as a face shield is worn and the person speaking is immobile.

e. Social distancing protocols

Courts should be required to ensure that social distancing of all court participants and observers is maintained at all times during the jury proceeding, including during the trial and deliberation. Special attention should be paid by courts to ensuring adequate social distancing and managed exits of individuals during breaks, especially when dismissing large groups of people for a break.

f. Alternate Jurors

Courts should be encouraged to consider selecting alternate jurors to permit the trial to continue in the event of a juror becoming ineligible to serve for a reason unrelated to that person's exposure to or contraction of COVID-19.

g. Arrangement of Courtroom

Courts should be required to submit as part of the jury trial plan descriptions or drawings of the way in which courtroom participants (judge, parties/counsel, jurors, witnesses, court reporters, bailiffs, public) will be arranged in the courtroom. Special attention should be paid to placement of the witness and parties so that the jurors, judge, and attorneys can see the witness and parties during testimony. Special attention should also be paid to placement of evidence presentation displays so that jurors and witnesses can see the information being displayed.

Courts should plan for spaces where a judge can have sidebar or private conversations with jurors and counsel.

h. Microphone protection protocols

Courts should be required to limit the shared use of microphones during the jury proceeding. If a microphone must be shared, courts should limit the passing of the microphone unless the microphone is cleaned between each user. In addition, the use of disposable microphone covers should be required to be placed on shared microphones and changed between each user.

i. Exhibit/evidence management

Courts should be required to limit the use of physical or paper exhibits/evidence where feasible or appropriate by converting the exhibit/evidence to a digital form. When physical or paper exhibits/evidence is required, courts should reduce the exchange of that exhibit/evidence to the number of persons necessary and should limit passing the exhibit/evidence to the individual members of the jury. If an exhibit/evidence is required to be transferred from person-to-person, single use gloves should be worn and discarded immediately after handling the exhibit/evidence.

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6. Currently, the CDC recommends that children under the age of 2 or anyone who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the mask without assistance not wear a mask.

During jury deliberations, courts should make efforts to provide the jury with access to digital exhibits/evidence that would normally be shared with the jury during deliberation. Where digital exhibits/evidence is not feasible, courts should consider limiting the transfer of the exhibits/evidence from juror-to-juror by spreading the exhibits/evidence on a table for inspection from the table in the jury deliberation room.

j. Vulnerable witnesses

Courts should be required to inquire whether witnesses to the proceedings have COVID-related issues. To the degree constitutionally permissible or with the consent of the parties, judges should permit witnesses to testify remotely via videoconference, especially if that witness has symptoms of or a recent positive test for COVID-19, has been recently exposed, or is vulnerable to contracting COVID-19.

k. Food precautions

Courts that provide food to jurors or other participants during a jury proceeding should be required to ensure individual food portions, such as individually boxed meals, are provided.

l. Cleaning requirements

Courts should be required to implement frequent cleaning protocols during the jury proceeding. Specifically, courts should ensure that shared spaces such as witness stands, seating in the gallery, and seating during qualification/voir dire are cleaned during transitions of those spaces. Courts should assign seats for members of the jury panel and selected jurors to reduce potential transmission and the need for more frequent cleaning.

4. To assist with coordination of local resources and to manage capacity issues, each judge wishing to conduct a jury proceeding, including a statutory probate judge, should be required to gain approval for that trial by the local administrative district judge and regional presiding judge.
5. The local administrative district judge overseeing the conduct of an in-person jury proceeding should be required to consult with the local health authority not more than 5 days prior to the jury proceeding to verify that local health conditions and plan precautions are appropriate for the trial to proceed.
6. In all jury trial proceedings, courts should be required to consider motions or objections related to proceeding with the trial, if any, on the record at least seven days prior to the trial. If motions or objections related to proceeding with the trial are made less than seven days prior to the trial, courts should be required to consider those motions on the record as soon as practicable.
7. Courts should establish communication protocols to ensure that no court participants have tested positive for COVID-19 within the last 30 days, have symptoms of COVID-19, or have been recently exposed to COVID-19.
8. Courts wishing to conduct virtual jury trials should be required to ensure that all prospective jurors have access to technology with which to participate.

9. OCA should be required to issue detailed guidance to assist courts wishing to conduct virtual jury trials and assist those courts in conducting the trials to the greatest degree possible.
10. The regional presiding judges should be required to ensure that all courts, including the statutory probate courts, in each region are operating in full compliance with the Court's Orders and the Guidance issued by OCA related to jury trial proceedings, report to the office of the Chief Justice of the Supreme Court any jury trial proceedings that are being conducted in the regions—and the court in which the proceedings are being conducted—that are inconsistent with the Court's Orders and the Guidance issued by OCA, and assist each region's local governments and courts to ensure that courts have the ability to conduct jury proceedings.
11. OCA should coordinate with the regional presiding judges to monitor the jury trial proceedings in the state and the Department of State Health Services regarding the public health situation in the state and regions of the state and should make additional recommendations to the Supreme Court as necessary to ensure the health of all participants involved with and observers of jury proceedings.



**UNOCCUPIED  
DUE TO  
SOCIAL  
DISTANCING**