

JURY MANAGEMENT SUBGROUP OF THE COVID-19 CONTINUITY OF COURT OPERATIONS DURING A PUBLIC HEALTH EMERGENCY

State Courts Building ♦ 1501 West Washington Street ♦ Phoenix, AZ 85007

June 1, 2020

Chief Justice Robert M. Brutinel
Arizona Supreme Court
1501 West Washington Street
Phoenix, Arizona 85007

Jury Management Subgroup of the COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup Best Practice Recommendations

Dear Chief Justice Brutinel,

Enclosed, and submitted to the Arizona Supreme Court, is the *Jury Management Subgroup Best Practice Recommendations During the COVID-19 Public Health Emergency*. We are delighted to facilitate the work of this Subgroup, and our hope is that these *Recommendations* will be communicated to, and used as a reference, throughout Arizona and beyond.

Established by the “Plan B” Workgroup just a few weeks ago, this Subgroup includes judges, clerks of court, jury commissioners, and a court administrator. This Report recommends best practices, as of today’s date, courts should take into account to resume jury operations in light of the COVID-19 pandemic. These *Recommendations* represent best practices identified by the Subgroup after surveying Arizona courts and researching these issues nationally. Many of these precautions and recommendations will be implemented on a temporary basis, subject to change based on CDC guidance, user experience, and local court discretion.

The amazing volunteer Subgroup members, along with fabulous support of Court Staff, have worked hard in crafting these *Recommendations*. The *Recommendations* encompass the following issues: (1) remote grand jury proceedings; (2) taking measures to ensure the health and safety of all participants; (3) ensuring a jury pool that is a fair cross section of the community; (4) voir dire; (5) pretrial preparation, including resolving

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motions, scheduling, and preliminary jury instructions; (6) conducting jury trials; (7) attorney conduct and evidence during trial; and (8) final jury instructions and return of verdict. The appendix includes selected additional resources. The Subgroup's findings and recommendations will be shared with the Arizona trial courts in a statewide webinar, *Resumption of Jury Trials*, presented by some of the Subgroup members and others on June 8, 2020.

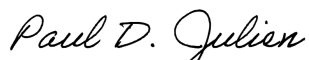
Although these *Recommendations* are a key part of the Subgroup's mission, it is anticipated that the effort of the Subgroup may continue, through weekly virtual meetings, capturing and circulating resources, and facilitating communications until that effort is no longer needed. In the meantime, we would request permission to circulate these *Recommendations* broadly, both within Arizona and nationally, given the substantial, time-sensitive need for guidance in these uncertain times.

As courts begin resuming jury trials, better ideas will likely become apparent and more changes will be required as the recommendations in this report are implemented. In order to keep current with the best practices developing in Arizona and around the country, the Subgroup recommends forming a standing committee to examine current and future jury practices in an ongoing effort to improve jury operations in Arizona.

It is an honor to participate in the planning efforts of the Subgroup. Each Subgroup member, and the Court Staff involved in the work, are to be commended for their commitment to this important project. Their work truly benefits the administration of justice, the Arizona judiciary, and all Arizonans in these uncertain times as we deal with the pandemic and prepare for a "new normal."

Should you have any questions or need additional information, please do not hesitate to contact us.

Very truly yours,


Paul D. Julien, Plan B Subgroup Chair
Judicial Education Officer
Administrative Office of the Courts
pjulien@courts.az.gov
Office: 602-452-3021

Chief Justice Robert M. Brutinel

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Samuel A. Thumma

Samuel A. Thumma

Plan B Workgroup Co-chair

Judge

Arizona Court of Appeals, Division One

sthumma@appeals.az.gov

Office: 602-452-6790

Marcus W. Reinkensmeyer

Marcus W. Reinkensmeyer

Plan B Workgroup Co-chair

Court Services Director

Administrative Office of the Courts

mreinkensmeyer@courts.az.gov

Office: 602-452-3334

Enclosure

Copy with enclosure via email to:

Members of, and Staff for, the COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup and Jury Management Subgroup

Dave K. Byers, Administrative Director, Administrative Office of the Courts

Mike Baumstark, Deputy Administrative Director, Administrative Office of the Courts

Jury Management Subgroup Best Practice Recommendations During the COVID-19 Public Health Emergency

Arizona Supreme Court
Administrative Office of the Courts

June 1, 2020



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JURY MANAGEMENT SUBGROUP MEMBERS

- Paul Julien – Judicial Education Officer, AOC, Chair
- Honorable Samuel A. Thumma – Court of Appeals, Division One
- Marcus W. Reinkensmeyer – Director, Court Services Division, AOC
- Honorable Jeff Bergin – Superior Court in Pima County
- Honorable Laine McDonald – Marana Municipal Court
- Honorable John Napper – Superior Court in Yavapai County
- Honorable Don Taylor III – Phoenix City Court
- Honorable Danielle Viola – Superior Court in Maricopa County
- Honorable Tim Wright – Superior Court in Gila County
- Honorable Don Watts – Maricopa County Justice Courts
- Nicole Garcia – Jury Commissioner, Superior Court in Maricopa County
- Megan Spielman – Clerk of Court/ Jury Commissioner, Superior Court in La Paz County
- Virlynn Tinnell – Clerk of Court/ Jury Commissioner, Superior Court in Mohave County
- Cassandra Urias – Deputy Court Administrator, Superior Court in Pima County
- Subgroup Staff: Marretta K. Mathes, JD – Court Project Specialist, AOC

I. INTRODUCTION

The right to trial by jury remains one of our most valued liberties, enshrined in the Sixth and Seventh Amendments to the Constitution of the United States and in Article 2, Section 23 of the Constitution of the State of Arizona.¹ Jurors are the heart of the judicial system in the United States, as juries put a human face on the law, help with legitimate case outcomes, and contribute to the finality of criminal cases and civil disputes.² The institution of jury trials has survived small pox, polio, tuberculosis, the Spanish Flu, and multiple wars and we must continue to preserve it during these extraordinary times.

Background

In response to the declaration of a statewide emergency by the Governor of the State of Arizona and concern for the spread of COVID-19, Arizona Supreme Court Chief Justice Robert M. Brutinel has issued a series of administrative orders directing courts to conduct business in a manner that reduces the risks associated with this public health emergency.

Directives set forth in these administrative orders include limiting in-person contact as much as possible by using available technologies, including suspending jury trials; following the Centers for Disease Control and Prevention's (CDC) social distancing recommendations; limiting the number of attendees required at in-person proceedings; liberally granting continuances; and authorizing flexibility for local rules and practices in each county.

To provide additional guidance to Arizona courts, the Arizona Supreme Court formed the COVID-19 Continuity of Court Operations During a Health Emergency Workgroup ("Plan B Workgroup"). On May 1, 2020, the Plan B Workgroup issued its "*Best Practice Recommendations*," identifying best practices supporting core court operations during the COVID-19 crisis and into the future. The recommendations include a transition from emergency operations to what will be the "new normal" for day-to-day operations until such time

Juries play a fundamental role in our democracy, "performing a critical role in the American justice system in protecting the rights of criminal defendants, in resolving intractable civil disputes, and in promoting public trust and confidence in the courts."

National Center for State Courts,
Center for Jury Studies

¹ *Jurors: The Power of 12*, Report of the Arizona Supreme Court Committee on More Effective Use of Juries (1994).

² *Id.*

as COVID-19 is resolved, including phased resumption of jury trials and other on-site court operations.³

Arizona Supreme Court Administrative Order (AO) 2020-79, issued May 20, 2020, and replacing AO 2020-75, authorized courts to begin resuming certain operations that had been suspended, including jury trials, beginning June 15, 2020. A Subgroup of members from the Plan B Workgroup and additional individuals, in consultation with the Plan B Workgroup, examined jury operations to make recommendations regarding what courts should consider for the resumption of jury trials in the new normal. This Report sets forth those recommendations.

Administrative Order 2020-79

AO 2020-79 provides the most recent guidance for the Arizona courts on the return to on-site court functions. AO 2020-79 provides direction on the resumption of jury trials, including the following measures for grand jury proceedings and jury trials:

- Jury trials may resume when Arizona enters Phase I, but not before June 15, 2020.
- The presiding judge of the superior court in each county should determine when jury trials can safely begin, taking into consideration the physical space of individual courthouses and courtrooms. Judicial leadership, referring, as applicable, to the chief judge of the court of appeals, the presiding superior court judge, the presiding judge of a limited jurisdiction court that has multiple judges, or, for limited jurisdiction courts that have only one judge, the judge of such court, shall employ appropriate social distancing and other measures necessary for the protection of jurors and the general public and shall post on court websites a schedule and information describing the protective measures taken.
- Until December 31, 2020, to reduce the number of citizens summoned to jury duty, procedural rules (including Rule 18.4(c), Rules of Criminal Procedure; Rule 47(e), Rules of Civil Procedure; Rule 134(a)(1), Justice Court Rules of Civil Procedure; and Rule 9(c), Rules of Procedure for Eviction Cases) are modified to afford litigants only two peremptory strikes for potential jurors per side in all civil and felony cases tried in the superior court, and only one peremptory strike per side in all misdemeanor cases and all civil cases tried in limited jurisdiction courts. This modification does not apply to capital murder cases.
- To accommodate social distancing standards, courts may stagger times for prospective jurors to report for jury duty, direct them to individual courtrooms rather than jury assembly rooms, and conduct voir dire remotely or in multiple groups. At the direction of the presiding judge, prospective jurors may be summoned to non-courthouse facilities that can accommodate larger numbers of individuals.
- Judicial leadership may authorize the use of technology to facilitate alternatives to in-person appearance for selecting grand and petit jurors and for conducting grand jury proceedings, and with the permission of the presiding superior court judge, for jury trials.

³ <https://www.azcourts.gov/Portals/216/Pandemic/050120CV19COOPRecommendations.pdf?ver=2020-05-06-150156-047> (last visited May 27, 2020).

- As required by A.R.S. § 21-202(B)(2), jury commissioners must temporarily excuse prospective jurors whose jury service would substantially and materially affect the public welfare in an adverse manner, including but not limited to those who report a COVID-19 diagnosis or symptoms, or notification by a public health official of exposure to COVID-19, and may temporarily defer or excuse potential jurors who are highly vulnerable to COVID-19.
- The presiding judge of the superior court, in coordination with the county attorney in each county, may determine when grand juries can be resumed in a safe manner with proper social distancing. Grand jury selection may be conducted in-person by staggering the appearance of prospective jurors or by electronic means. The presiding judge may authorize grand jury proceedings to be held by videoconferencing.

Overview of this report

The Subgroup considered various logistical issues involved in resuming grand jury proceedings and jury trials in Arizona state courts. The recommendations in this Report are based on the information currently available, recognizing that the landscape is evolving and changing. By necessity, this Report is being provided as of June 1, 2020, fully recognizing that future developments and experience will have a significant impact on the recommendations in this Report. Accordingly, constant communication based on future developments and experience (both best practices and lessons learned) will be essential in ensuring the safe resumption of grand jury proceedings and jury trials.

The Subgroup looked to many resources, including Arizona law; the National Center for State Court's (NCSC) principal court research consultant, Dr. Paula Hannaford-Agor; the United States District Court for the District of Arizona; general recommendations of health experts; AO 2020-79; Plan B Workgroup *Best Practices Recommendations* (including the 10 guiding principles set forth in those *Recommendations*); publicly available information, including recommendations from the NCSC; reports from local court task forces; and elsewhere.

Based on this research and discussion with local trial courts, this Report presents recommendations and best practices in the following areas: (1) remote grand jury proceedings; (2) taking measures to ensure the health and safety of all participants; (3) ensuring a jury pool that is a fair cross section of the community; (4) voir dire; (5) pretrial preparation, including resolving motions, scheduling, and preliminary jury instructions; (6) conducting jury trials; (7) attorney conduct and evidence during trial; and (8) final jury instructions and return of verdict. The appendix includes selected additional resources.

Although submitting this Report on June 1, 2020, information-gathering and education efforts will continue for the foreseeable future. Later this week, Subgroup and Workgroup members will virtually attend a webinar, *Reestablishing Jury Pools in the COVID-19 Era*, presented by the Council of Chief Justices/Conference of State Court Administrators Rapid Response Team, to be held Thursday, June 4, 2020. In addition, on Monday, June 8, 2020, members will present at a webinar for Arizona courts, *Resumption of Jury Trials: Part 1 Pre-trial and Part 2 Conducting the*

Trial. In this interactive webinar, panelists will respond to questions “from the field,” with publication of an FAQ to follow.

II. REMOTE GRAND JURY PROCEEDINGS

Grand juries play a vital role in Arizona’s criminal justice system. Grand juries are to determine whether probable cause exists to show both that a crime has been committed and that one or more named individuals committed that crime. Procedural requirements for grand jury proceedings are unique and require due care to ensure fairness and confidentiality of the grand jury process.

By statute, each presiding judge in a county with a population of 200,000 or more people is to convene a grand jury every four months. Each grand jury must sit until a new grand jury has been impaneled or its term expires. A.R.S. § 21-402. With this background in mind, the Subgroup makes the following recommendations for remote grand jury proceedings.

A. Virtual grand jury proceedings

Impaneling a grand jury presents challenges as courts work diligently to resume court operations and ensure social distancing. Because the function of a grand jury differs from that of a petit jury, in grand jury proceedings, the rules of evidence and the Confrontation Clause are not applicable. Although these and other differences are applicable to virtual grand jury proceedings, videoconferencing platforms must be configured to safeguard the secrecy of grand jury proceedings and deliberations. Courts should also require electronically signed non-disclosure agreements from the grand jurors to ensure privacy during and after the online grand jury proceedings.

The Administrative Office of the Courts (AOC) has secured a statewide Zoom® license for videoconferencing services that courts can use for grand jury proceedings. Courts should explore the functionality of this platform, and other robust and secure videoconferencing platforms which allow for remote video interpreter services and electronic recording capacity, recognizing that by statute, courts shall appoint a court reporter to capture the verbatim record of all grand jury proceedings. A.R.S. § 21-411.

In April 2020, the Superior Court in Mohave County started using Zoom® to conduct grand jury proceedings. The grand jury in place at that time was impaneled in-person shortly before the statewide emergency was declared, having almost 120 days of remaining service before its end date. While the grand jurors appeared in person for a few weeks before the Governor issued the stay-at-home order, they were advised that future sessions would be conducted remotely and that instructions and call-in information would be sent to them. The court advised the grand jurors that although the proceedings would take place remotely, the proceedings would nonetheless remain confidential. The court then emailed or mailed each grand juror an instruction sheet with information explaining how to download the software to participate remotely.

The Superior Court in Mohave County organized a successful test run to work out operating procedures before conducting actual grand jury proceedings remotely. To do this, the court asked

the grand jurors to call in the day before their next session and court staff reviewed the process with the grand jurors.

On the day the actual grand jury proceedings were to take place remotely, the prosecutor, the court reporter, and the grand jury foreperson appeared in person in the same room, keeping appropriate social distancing. Other participants, including the grand jurors and some of the witnesses, appeared remotely. The prosecutor was the “host” of the proceedings and provided the remote call-in information to the witnesses. The prosecutor also controlled the video communications for hearing attendees. Since April 9, 2020, when Mohave County started the remote grand jury proceedings, the grand jury has returned indictments against 159 defendants.

The Superior Court in Mohave County’s next grand jury will be sworn in on July 9, 2020. For this grand jury, the court intends to have prospective grand jurors appear remotely if they wish. They will virtually “appear” in the morning and a panel will be selected. At that time, the jury foreperson will be selected, and the grand jury will begin considering evidence presented. During the lunch break, the jury foreperson will be asked to drive to the courthouse to sign indictments and be present when the judge returns to hear them. At the end of the day, the judge and grand jury clerk will join the prosecutor and the grand jury foreperson to hear the indictments, set bonds, if appropriate, and schedule arraignments. The grand jury clerk will also take the roll and mail debit cards to each grand juror for their per diem compensation. Each week, additional funds will be placed on the jurors’ debit cards for their attendance at grand jury proceedings.

B. Security in virtual grand jury proceedings

To ensure security, all virtual grand jury proceedings must be password protected, requiring all participants to enter a unique password before joining any proceeding. The court should ensure that a new password is generated for each new jury and/or each session. The court should also provide the host ID number to the prosecutor or another authorized person managing the proceedings, enabling that person to “lock” the meeting access after the last participant has joined, remove users, mute users, and disable users’ video if necessary. In addition, appropriate admonishments about the need for secrecy and security in grand jury proceedings should be provided as each session begins and ends. Furthermore, appropriate written acknowledgments by grand jurors of the understanding of the admonishment would be appropriate.

III. TAKING MEASURES TO ENSURE THE HEALTH AND SAFETY OF ALL PARTICIPANTS

Courts around the country are responding to COVID-19 in numerous ways, working to manage the contagion by balancing public health and safety with access and openness. Jury commissioners and their staff are at the forefront of this response, navigating through many unprecedented jury management issues. AO 2020-79 directs judicial leadership to employ appropriate social distancing and other measures necessary to ensure the health and safety of all participants, including jurors. This section serves as a resource for best practices to maximize doing so.

A. Reevaluating prospective juror reporting practices

Juror reporting practices must be re-evaluated as courts resume jury operations. The following strategies are designed to disperse the number of individuals appearing for and participating in jury service at any given time. Application of these recommendations in any individual courtroom or courthouse will depend upon specific logistical considerations unique to that facility.

a. Staggered reporting times

Historically, jury service brings, at times, hundreds of summoned jurors to the same courthouse each day. Traditionally, large groups of summoned jurors have been scheduled to report to the jury assembly room at the same time on a given day. To accommodate social distancing standards, AO 2020-79 authorizes courts to stagger reporting times for prospective jurors. For example, on a day where 150 potential jurors are needed, this might involve 50 individuals reporting at 8:30 A.M., 50 individuals reporting at 10:00 A.M., and 50 individuals reporting at noon. Depending upon needs and logistical limitations (including, for example, elevators), reporting numbers could be even smaller and at even more specific times throughout the day. Jury commissioners are strongly encouraged to implement this practice.

b. Multiple groups and smaller panels for voir dire

AO 2020-79 authorizes courts to direct prospective jurors to individual courtrooms rather than jury assembly rooms and to conduct voir dire in multiple groups where such measures would help with social distancing. Courts should implement these options as feasible. When more than one panel of potential jurors is required to select a jury, courts should conduct voir dire in multiple groups by having smaller panels report to courtrooms for voir dire. This allows courts to employ social distancing while conducting multiple sessions of voir dire, striking jurors for cause, joining the panels, and then completing voir dire and allowing peremptory strikes.

c. Non-traditional jury assembly areas

Courts should identify all possible areas within the courthouse where jurors can safely assemble. For each area, the court should identify the total seating available (applying social distancing measures) to determine appropriate seating arrangements. These measures likely will result in courts losing about two-thirds of the seating that would have been available under pre-COVID-19 circumstances.

Courts may also consider summoning potential jurors to non-courthouse facilities that can accommodate larger numbers of individuals. Examples include high school gymnasiums, empty retail buildings⁴, training facilities, theaters, convention centers, etc.⁵

B. Ensuring public health and safety in jury assembly areas

⁴ <https://www.thenewstribune.com/news/coronavirus/article242661641.html> (last visited May 25, 2020).

⁵ <https://www.independent.ie/irish-news/juries-could-be-picked-in-hotels-due-to-distancing-concerns-39216369.html> (last visited May 25, 2020).

Along with ensuring appropriate social distancing, jury assembly areas, whether traditional assembly rooms, courtrooms, or non-courthouse facilities, should be deep cleaned and disinfected, frequently, and items that could contribute to the spread of the virus should be removed from these areas. Recommended activities include:

- Wiping down workspaces (countertops, tables, armchairs, doorknobs, kiosks, etc.) frequently during the day and overnight using anti-viral cleaning products identified by the CDC.
- Avoiding the direct exchange of documents with jurors. If direct exchange is unavoidable, staff or jurors (or both) should wear gloves.
- Removing all unnecessary papers and paperwork from desks.
- Training for staff and others on the appropriate way to use gloves and face masks to avoid cross-contamination.
- Restricting access to common areas and removing courtesy amenities previously offered to jurors (such as snacks, coffee, puzzles, etc.) that are no longer appropriate.
- Providing jurors information ahead of time on what items are, and are not available, so they can come prepared.
- Posting handwashing signs.
- Placing hand sanitizer and wipes at counters and various locations of the jury gathering areas.
- Providing single use golf pencils or similar writing devices that are then discarded.
- Limiting the number of people in elevators to two to four people at a time (depending upon the size of the elevator) and frequently disinfecting elevator surfaces. The floors on each elevator should be marked so that people know where to stand to appropriately social distance. If staffing levels permit, it may be appropriate to have court personnel operate the elevator for jurors so that control surfaces are touched by fewer people.
- Because jury deliberation rooms in many courthouses will no longer be the designated area for juror breaks and deliberations, courts should consider reserving nearby restrooms for jurors, if possible, in a manner that minimizes interaction with other panels, lawyers, etc.
- If courtrooms are used for juror breaks and deliberation, both audio and video systems used to record court proceedings must be disabled during that time. In addition, attorneys will need to remove all of their materials from the courtroom.
- During Phase 1, AO 2020-79 requires judicial leadership to require court participants and visitors to wear masks or other face coverings, and courts may also require body temperature screening. Information regarding the requirement to wear masks and temperature screenings should be clearly communicated to all, including prospective jurors and jurors, so that they know what to expect before entering the courthouse.⁶

⁶ The Administrative Office of the Courts has developed health screening protocols through Administrative Directive 2020-10. <http://www.azcourts.gov/Portals/22/admindir/pdfs/2020/2020-10%20AD.pdf?ver=2020-05-21-155131-590> (last visited May 31, 2020).

C. Communication regarding safeguards used to ensure the health of prospective jurors, jurors, and court staff

Courts must keep the public informed about jury service and the precautionary measures taken to prevent the spread of COVID-19. Public messaging is a critical part of planning for reinstituting jury trials. The NCSC recommends that courts convey two messages as they resume jury trial operations: (1) communicating that courts take public health and safety seriously and have implemented policies to prevent the risk of infection and (2) showing what the courts are doing to ensure confidence in those efforts.⁷

This includes posting to their website information describing the protective measures taken. Such information should be widely communicated to the public, including prospective jurors, jurors, and court staff.⁸ Information about the safety measures being taken also should be included on jury summonses and other communication outlets, including:

- Public service announcements, media advisories, and press releases
- Social media platforms
- Juror call-in messages
- Courthouse signage
- Other communication technologies, including text messaging and email

A powerful example from the Superior Court in Pima County is found at:

<https://youtu.be/9IC9mnTDNdE>

D. Maintaining social distancing in the courtroom

Courts should identify, in advance, effective strategies for resuming jury operations in each specific facility where jury operations will be undertaken to ensure conformance with social distancing requirements. Jurors should have a safe experience and they must perceive that they will have a safe experience. Courts should:

- Provide clear signage and notices regarding social distancing requirements including seat and floor marking.
- Court postings should be in English and Spanish and should comply with the Americans with Disabilities Act (ADA).
- Consider alternative jury selection processes, including multiple small panels for a single case, using a struck method of jury selection (as opposed to strike and replace), *see* Ariz. R. Crim. P. 18.5(b) (discussing struck method in first sentence and strike and replace in second sentence) and using technology for remote screening (either initial screening or more broadly).

⁷ <http://www.ncsc-jurystudies.org/What-We-Do/COVID-Resources.aspx> (last visited June 1, 2020).

⁸ See Appendix for examples.

- Maximize the use of remote appearances through technology, such as video and audioconferencing platforms, giving due consideration to compliance with constitutional and statutory rights, feasibility, and connection stability.
- Seat jurors in a cordoned-off section of the courtroom gallery instead of, or in addition to, the jury box.
- Consider re-engineering courtrooms to accommodate social distancing, e.g., remove the jury box and replace it with individual chairs, remove some individual chairs in the jury box to ensure social distancing, or install ceiling height plexiglass between each juror. For example, the Phoenix City Court is completely reconfiguring some of its courtrooms to accommodate social distancing for jury trials.
- Use a larger courthouse conference room or training area for the jury to use during trial recesses and deliberations instead of the jury deliberation room.
- Minimize the number of prospective jurors present at each stage of jury service.
- Implement staggered reporting times.
- Have jury panels report directly to the relevant courtroom in lieu of congested jury assembly rooms.
- Assemble smaller panels (10-15 potential jurors) to report to the courtroom for voir dire.
- Explore administering written questionnaires remotely.
- Explore remote voir dire using video technology.
- Consider remote options for pre-screening jurors for hardship and for cause.
- Consider remote options for conducting jury trials in their entirety.

IV. ENSURING A JURY POOL THAT IS A FAIR CROSS SECTION OF THE COMMUNITY

As courts begin resuming new normal jury operations, reducing unnecessary foot traffic must be considered in policies and procedures implementing social distancing measures. Societal shifts resulting from the COVID-19 pandemic will inevitably impact how people will respond to a jury summons, how many people will seek excusals or deferrals, and how many people will appear through electronic means who would have otherwise sought an excusal or deferral. The complete nature and magnitude of this impact is largely unknown. Thus, courts should maintain juror yield and utilization statistics to support data driven decisions as jury management policies are adjusted in response to the new normal.

A. Online screening of prospective jurors

Along with regular foot traffic from daily filings and other daily business, petit jury and grand jury impanelments can bring hundreds of additional people to the courthouse on any given day. To reduce these numbers and ensure social distancing, courts should consider using technology that allows for virtual jury selection through a videoconferencing platform. Courts should also

implement processes to ensure that jurors are called in only when the court is certain that a trial is going to proceed. This focus on utilization has even more importance in the new normal.

AO 2020-79 allows judicial leadership to authorize the use of technology to facilitate alternatives to in-person appearances for selecting jurors. Using technology for this purpose will require coordination and planning. Using videoconferencing technology for prospective juror screening will have significant benefits, including reducing foot traffic in the courthouse and mitigating logistical challenges with court facilities to provide social distancing.

One solution that can be implemented to reduce juror foot traffic in the courthouse is an online screening tool to screen jurors for hardship. If such an online solution is used, the jury summons should include information regarding where jurors should go online to complete such a questionnaire.

Juror utilization is the measure of how efficiently the court allocates jurors who report to the courthouse for jury service.⁹ This measure is important as it relates to the cost of jury operations. It is also important because it impacts the costs potential jurors incur as citizens experiencing jury service and their perceptions of the local justice system.¹⁰ To this end, the pre-screening process can be strengthened by using questionnaires and other remote inquiries, such as supplemental questions, for further screening. For example, initial questioning can avoid situations where potential jurors are summoned to appear, only to go through the initial voir dire and be released after physically appearing in court.

The Superior Court in Maricopa County has created a proposal for an eJuror questionnaire and anticipates this will be very helpful to the process.¹¹ Jurors will be directed via their summons to respond online to complete their questionnaire. The questionnaire has three sections: contact information, qualifications, and demographic information. The questionnaire also contains general questions regarding ability to serve and potential hardships, beyond what is currently directed by statute. Each weekday morning, a report will be generated that reflects the information entered the previous day in response to the questions and identifies each juror that indicated a hardship request. This information will be provided to a duty judge, who will consider it and grant or deny the hardship request. The court will notify the juror of the court's ruling by phone or email, or by postcard if the juror did not provide a phone number or email address.

B. Establishing policies for COVID-19 related deferrals or excusals

Courts should establish and consistently apply policies governing requests for COVID-19 related deferrals or excusals, based on a specific application of established policies, the statutory standard for persons entitled to be excused from jury service set forth in A.R.S. § 21-202 and information available from the CDC and the Arizona Department of Health Services. In applying

⁹ Paula Hannaford-Agor, *Assessment of Jury Operations and Procedures for High Profile and Lengthy Trials in the Eighth Judicial District Court of Nevada* (2008).

¹⁰ *Id.*

¹¹ See Appendix for questionnaire.

such policies, deferrals (allowing a person to defer jury service to another time) should first be considered before granting excusals (where a person is excused from jury service altogether).

Although public health guidance is subject to change, at present, the CDC has identified the following groups of persons who may be at high risk for severe illness from COVID-19: (1) people 65 years and older; (2) people living in a nursing home or long-term care facility; and (3) people of all ages with underlying medical conditions, particularly if not well controlled, including (a) chronic lung disease or moderate to severe asthma; (b) serious heart conditions; (c) immunocompromised conditions; (d) severe obesity; (e) diabetes; (f) chronic kidney disease undergoing dialysis and (g) liver disease.¹² Court policies governing excusals and deferrals should take into account this guidance.

All such court policies should also address how jury trial proceedings will occur, recognizing that proceedings for an in-person jury trial are different than those for remote jury service (in whole or in part). Furthermore, it is particularly important that information about deferrals and excusals is captured and retained to ensure that potential jurors represent a fair cross section of the community and to address legal challenges which may be posed after the trial.

C. One day/one trial process

During the pandemic recovery, courts should consider whether temporary alternatives to the one day/one trial model would yield better juror utilization by allowing courts to allocate jurors for multiple matters instead of summoning new jurors and going through the selection process anew. Courts could keep jurors “on call” for a certain number of days and ask them to report when needed during the established timeframe. Courts should continue to examine their jury trial operations during the pandemic recovery to determine which is most practical for their court, e.g., moving away from the one day/one trial model might work well in a large court, but might not work as well in a smaller court with an irregular or fluctuating jury trial schedule. Courts seeking to implement this practice would need to comply with statutory requirements, including A.R.S. §§ 21-332(B) and 21-335(B).

D. The digital divide

The jury pool from which the jurors are selected must be a fair cross section of the community. A “digital divide” refers to the gulf between those who have ready access to technology and the internet and those who do not. While courts work to safely resume jury trials through social distancing, diligence requires taking measures to ensure that impaneled juries are selected from a pool of prospective jurors representing a fair cross section of the community and not only of those persons who have ready access to technology and the internet. The NCSC is currently working with five states, including Arizona, on a proof of concept that would provide free internet or other technology solutions for prospective jurors to close this digital divide. This effort also may involve

¹² <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited May 28, 2020).

the use of more traditional technology, like telephone contact, to reach further into the community than what reliance solely on robust internet service may allow.

E. Continuously monitor innovations underway

Innovation and new methods for conducting court business are rapidly evolving during today's public health emergency. Courts should continue to monitor and stay abreast of innovations for handling jury selection and jury trials, fully leveraging technology. A clearinghouse of these jury management innovations and other efforts around the country can be found at:

<https://judicialstudies.duke.edu/covid-19-response-resources-for-judges/>.

V. VOIR DIRE

“The challenge of voir dire is to elicit meaningful information about prospective jurors’ abilities to maintain fairness and impartiality, and to obtain that information with reasonable efficiency.”¹³

Compared to some other states, Arizona has a comparatively limited voir dire process typically driven by the judge presiding over the trial in an effort to obtain a fair and impartial jury. Voir dire should be limited to traditional inquiries, including individualized case-based issues, so courts can start with a smaller group of prospective jurors who include only those likely to serve. This approach enhances safety by not bringing people to court who likely will not be selected to serve as jurors. Courts should continue to carefully plan how many people are brought to the courthouse, when they are brought to the courthouse, and the paths by which they will need to travel in the courthouse. Courts should also plan for what the jury process will look like in the courtroom to ensure the safety of all participants.

A. Remote voir dire

The Superior Court in Maricopa County has created a proposal for a remote voir dire process (although it will not use this process as it resumes jury operations). As contemplated, the processes for reporting to juror service would involve a combination of virtual and standard in-person reporting. Prospective jurors reporting virtually would be screened electronically and sign into the virtual platform. The prospective juror would then answer voir dire questions via video on their day to “check in.” The prospective juror would be sent a questionnaire and avow under oath that the answers are correct. A staff member of the jury office would be present to troubleshoot and address any camera or sound issues. Prospective jurors reporting in person would be directed to a specific location to fill out a questionnaire, which would include a time screen.

All questionnaires would be given to the trial judge once they are complete. The first 100 (a pre-determined number) prospective jurors who check in either in person or virtually would be assigned to a panel for a particular case. The judge would then question the panel in a courtroom

¹³ Judge Gregory E. Mize and Paula Hannaford-Agor, *Building a Better Voir Dire Process* (2008).

with the lawyers and the defendant in a criminal case present (unless the defendant's presence is waived). The judge would be able to show the jurors on screen, or the lawyers can log into the session in the platform to view the prospective jurors as they respond. Strikes for hardship would then be completed.

A modified strike and replace method can be used which allows no more than 15-20 prospective in-person jurors to be brought into the courtroom. The court can also use the struck method, where another 5-10 jurors can be added virtually or be physically brought to the courtroom.

The Superior Court in Mohave County plans to impanel a petit jury to hear a case in mid-June using the Zoom® videoconferencing platform. The court will complete jury selection on one day and then ask the impaneled jurors to appear the next day for a one- or two-day jury trial. The court anticipates that many prospective jurors will choose to appear remotely, but the summons will indicate the option of appearing virtually or in-person. The court will provide an instruction sheet, schedule a test run to ensure the technology is functioning, and ensure that prospective jurors know what to expect. They will be instructed on how to "raise their hands" during the voir dire process and will also be instructed on what to do if they are placed in a Zoom® virtual waiting room.

Courts can also consider using video broadcasting technology, allowing prospective jurors to be broadcast into the courtroom to participate in voir dire without having to leave the jury assembly room or other area in the courthouse, which would eliminate the need to ride in an elevator and traverse the courthouse.

B. Peremptory strikes and alternate jurors

AO 2020-79 temporarily limits the number of peremptory strikes in an effort to reduce the numbers of citizens summoned to jury duty. Courts should also examine the practical need for alternate jurors and reduce the number of jurors or eliminate the need for alternates where feasible. There are pros and cons to having alternate jurors. Factors such as the length of the trial, type of case, issues presented, etc., should be considered when determining if and how many alternate jurors are necessary. Minimizing the number of alternate jurors where practical allows for fewer people in the courthouse and respects the time of the alternate juror who may be present for the entire trial, but then dismissed once deliberations begin. Eliminating or reducing alternate jurors should be weighed against the public health realities that jurors may be more likely to have issues arise during the course of trial that may lead to excusal.

VI. PRETRIAL PREPARATION, INCLUDING RESOLVING MOTIONS, SCHEDULING, AND PRELIMINARY JURY INSTRUCTIONS

Jury trials are most efficient when issues that can be addressed before trial are indeed resolved pretrial. Pretrial conferences are vital to resolve as many issues as possible, to limit movement in the courtroom and to avoid delay and unnecessarily lengthening jury trials.

In criminal matters, consideration should be given as to whether the defendant needs to be present for a specific pretrial hearing or, as another alternative, whether the defendant may appear virtually. Where the defendant is in custody, courts should be cognizant of moving an in-custody defendant from one facility to another, as it mixes populations and increases risk of infection. Moves of in-custody defendants also result in quarantines when such individuals are returned to jail after court hearings.

AO 2020-79 sets forth the following priority for jury trials:

1. Criminal felony and misdemeanor cases, where the defendant is in custody;
2. Sexually violent person trials;
3. Criminal felony cases, where the defendant is not in custody;
4. Criminal misdemeanor cases, where the defendant is not in custody; and
5. Civil and any other jury trial cases.

Particularly for criminal matters in limited jurisdiction courts, applying these priorities require the court to first determine whether the defendant has a jury trial right. Some charges are jury eligible by statute, e.g., DUI (A.R.S. § 28-1381, et. al); contempt (A.R.S. § 12-863(A), Ariz. R. Crim. P. 33.4). Other misdemeanors may be jury eligible if qualified by the test set forth by *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005) (charge must be jury eligible at common law or a “serious” offense; “moral quality” prong no longer a basis for jury trial). Caselaw has developed addressing whether various charges are jury eligibility and should be addressed early on in the case to determine whether the defendant has a jury trial right.¹⁴

The most effective way to optimize jury trial time is to address, and resolve, issues that can be anticipated *before* trial. Accordingly, the new normal will—by necessity—acutely focus on the need for pretrial motions and hearings to limit the scope of matters considered during the trial, avoid delay, and provide that trials are not unnecessarily lengthened.

Pretrial conferences can and should address a variety of issues that will make trials more efficient and, as a result, shorter. In criminal matters, for example, pretrial conferences should address a variety of issues before the day of trial, including (1) length of trial and schedule; (2) jury selection issues and voir dire proceedings; (3) hearing and resolving pretrial motions (including motions in limine, where applicable); (4) settling preliminary instructions; and (5) courtroom protocols. In addition, scheduling orders are necessary to set deadlines for such motions and filings, ensuring they will be fully briefed by the time of the pretrial conference.

Courtroom protocol issues discussed at a pretrial conference should address, among other matters, how exhibits (including stipulations regarding the admission of exhibits), bench conferences, and mid-trial motions will be handled so that the jury is not inconvenienced; offers

¹⁴ See Appendix for selected misdemeanor offenses that have, and have not, been deemed jury trial eligible.

of proof; witness examination; no speaking objections; juror questions (including whether jury questions will be allowed or, given COVID-19 concerns, temporarily suspended for good cause); approaching witnesses; and other logistical issues for trial.

Prior to the trial, victim rights issues should also be addressed, including accounting for the victim's right to be present, whether the victim wishes to be present remotely (if technology is available), and the size of the courtroom. In addition, the need for interpreters and ADA issues also should be addressed pretrial to avoid unnecessary delay.

Along with resolving these issues at hearings held before the day of trial, orders resolving pretrial motions and addressing other trial protocol issues will continue to be essential to provide notice and detailed trial protocols to make jury trials as efficient as possible and avoid delays or confusion.

Rules regarding jury trials for eviction matters in the Superior and Justice Courts are addressed in the Rules of Procedure for Eviction Actions ("RPEA"). The eviction process must be completed in a very short time, even if the case is continued. A jury trial request for an eviction action must be demanded at or before the initial appearance or it is waived. RPEA 11(d). Trial is set for an initial return date, but it may be continued for no more than three days in Justice Court or ten days in Superior Court. Courts should implement procedures for hearing and deciding substantive motions in eviction actions before the day of trial so that jurors do not have to wait for a decision on the motion. Additionally, dispositive motion hearings should be conducted before and separate from the trial.

VII. CONDUCTING JURY TRIALS

Along with the importance of pretrial proceedings, rulings and preparation, courts must determine the logistics of getting people into the courtroom, including jurors, attorneys, witnesses, members of the public, etc. Courts should explore alternatives, such as projecting the trial on a screen in an area that allows the public and others to view the trial remotely or through video livestreaming. This will limit the number of people in the courtroom to those whose physical presence is necessary, as defined in AO 2020-79.

During the initial resumption of jury trials, jurors should first be assigned to criminal cases or other cases where a jury trial is required to be initiated within specific statutory limits, in accordance with the priorities set forth in AO 2020-79.

A. Mask Requirements

AO 2020-79 requires all court participants and visitors to wear a mask or other face-covering in the courthouse beginning June 1, 2020 and throughout Phase 1. This means that, along with court personnel, all jurors, defendants, witnesses, and attorneys will be required to wear masks, including during trials. Consideration should be given to permit witnesses to remove their masks while testifying. Courts also should consider installing plexiglass around the witness stand and allowing participants to wear clear face shield masks, particularly witnesses while testifying, so

that they can be accurately identified. Courts should further consider how the requirement for masks or other face-coverings might influence in-court identification in those cases where identification is at issue.

Courts should instruct jurors that witnesses may be wearing masks, and this should not be considered in the determination of the witness' credibility. Accordingly, if masks are worn by witnesses while they are testifying, courts should ensure that the types of masks worn are consistent among the witnesses. For example, certain witnesses should not wear see-through masks while others wear opaque cloth masks.

Courts must also consider accommodations for interpreters, including American Sign Language interpreters, and should be mindful that special masks may have to be used so that lip reading is possible.

B. Bench trials and remote civil juries

Given the case priorities set forth in AO 2020-79, on the whole, criminal jury trials will proceed before civil jury trials. Additionally, because available jurors will be allocated to serve on criminal juries, the number of available jurors for civil trials may decrease. However, parties otherwise entitled to a jury trial can stipulate to a bench trial conducted in-person in the courthouse. *See* Ariz. Const. Art. 6 §17. Alternatively, for civil matters, the trial could be recorded and submitted to an asynchronous virtual jury. In this circumstance, the judge, the attorneys, the witnesses, any parties or party representatives and court staff would be in the courtroom, at an appropriate distance, while the jury then participates remotely.

C. Stipulating to judge selection

AO 2020-79 suspends until December 31, 2020 all rules that provide litigants with a change of judge as a matter of right. Accordingly, local courts could consider encouraging bench trials by allowing counsel to select the trial judge by stipulation. The court could also allow counsel to select any superior court judge regardless of whether the judge is currently assigned to the criminal bench, subject to the selected judge's availability and agreement, and approval by the relevant presiding judge. Not only would this encourage bench trials, thus eliminating challenges associated with holding jury trials, but it would also allow for a more flexible use of judicial resources.

D. Alternative civil trial approaches

a. Virtual trials

As courts work to find workable solutions to resuming jury trials, the State of Texas explored ways in which technology could be used for this purpose and held a virtual civil jury trial using videoconference technology on May 18, 2020.¹⁵ The jury trial was a one-day summary jury trial where jurors heard a condensed version of the case and rendered a non-binding verdict.

¹⁵ <https://www.reuters.com/article/us-health-coronavirus-courts-texas/texas-tries-a-pandemic-first-a-jury-trial-by-zoom-idUSKBN22U1FE> (last visited May 28, 2020).

Approximately two dozen potential jurors logged in by smartphone, laptop, or tablet for jury selection, and the trial was livestreamed on YouTube to accommodate public access.¹⁶

Courts opting for virtual trials should be mindful that they may be resource intensive, requiring a staff person to operate the technology and facilitate the process. Courts should consider conducting a short training for the jurors before the virtual trial begins. In addition, an appropriate court staff member would be responsible for technology during trial, including deliberations. This person would be muted and would not participate in the deliberations, but would be able to respond to any requests to display evidence, etc. As noted in section IV(D), courts should also ensure that potential jurors represent a fair cross section of the community and not only include those with high speed internet access. Courts may wish to consider whether a virtual trial is appropriate if any of the evidence is tactile or sensory specific as such evidence may not be able to be “displayed” in a virtual setting.

b. Summary jury trial

The Superior Court in Maricopa County has proposed several approaches for conducting summary jury trials. The report of the Civil Department Innovation Subcommittee (“CDIS”) indicates that this would be a non-binding alternative dispute resolution process in various possible forms, including for example:

- Approximately 15 venire panel members would be used to seat 4 jurors for a one-day trial with limited time-frames and relaxed evidentiary rules. A one-day jury trial might be binding or might be followed by a one-day mediation.
- A virtually appearing 8-person jury. The trial would not exceed two days. The trial might be followed by a one-day mediation.
- A recorded trial, detailed below.

The Maricopa County Superior Court CDIS report outlines the following process:

The jurors who respond using the online screening application, detailed in section IV(A), would be provided a questionnaire to ensure the juror has reliable internet access, a private space to participate, and a computing device with a camera. Jurors would be given a pretrial opportunity to appear and test their equipment. If a juror participates remotely, the juror’s time would constitute jury service as though it were in-person jury service.

Remote jury selection would attempt to replicate in-person jury selection in that bench conferences would occur outside of the jury’s presence. The CDIS report also recommends that courts should attempt to allow the jury to be together in the virtual meeting room before trial and during breaks to replicate the experience of jurors becoming a cohesive group.

In some scenarios, jurors will appear virtually, but lawyers and some witnesses will appear in person. Virtual jurors must be able to see the livestream of the trial, lawyers must have individual laptops, or the court must have cameras turned to the well of the court and available to show the

¹⁶ <https://www.bing.com/videos/search?q=texas+youtube+virtual+jury+trial&docid=13914474292524&mid=E5BEBD36F002C61065EBE5BEBD36F002C61065EB&view=detail&FORM=VIRE> (last visited June 1, 2020).

witness as the witness testifies. One possibility is to require remote jurors to have web cams so that the court and counsel can observe appearances and ensure that the jurors are present and attentive.

Juror questions may be submitted to the judge using a real-time chat feature. Deliberations will be in a secure password protected virtual room. Jurors will call the bailiff if they have a question or they have reached a verdict. Jurors will be provided a digital copy of exhibits using an online document repository or email.

After a verdict is reached, jurors will share with the judge a copy of the form of verdict. Absent any outstanding issues with the verdict form, the parties will join the meeting room and the clerk will read the verdict.

Jurors will be asked if the verdict accurately reflects their verdict and upon request, the jurors will be polled by the court. Jurors cannot sign the verdict form. As such, the judge will sign and file a verdict form indicating that the verdict was shown to the court by the foreperson, read in open court, and the jurors were asked to confirm the verdict on the record.

After the verdict, jurors will be questioned to gather additional information to improve virtual jury selection and service and juror compensation will be mailed.

c. Recorded trials

The Superior Court in Maricopa County is considering an approach whereby trials are recorded without a jury in the courtroom, and the recording is later shown to jurors to consider, deliberate, and render a verdict. This would allow courts to limit the persons present at the trial to attorneys, parties, testifying witnesses, and court staff. This also allows for a highly streamlined approach, with objections to testimony and evidence being edited out of the version of the video recording shown to the jury. Likewise, unexpected, objectionable, and prejudicial testimony could be edited out of the video. As such, jurors would see a finished video that would take less time to view than if they had been in court.

E. Exhibits

In a virtual jury process, the publishing of exhibits will need to be done differently. Parties should be required to have copies of any exhibit they are going to ask be published for each juror rather than passing around a single exhibit. This requirement could be addressed during pretrial hearings, so that the parties know which exhibits the court is likely to admit, meaning it could be published. In the alternative, before having jurors handle exhibits, jurors should sanitize their hands, put on gloves, and then handle the exhibit. Upon returning the exhibit or passing the exhibit, jurors should remove their gloves, throw them away in a nearby trash can, and sanitize their hands again.

F. Making the record

Courts should determine the most efficient procedure for creating the record during trials. For example, courts often experience time constraints related to court reporter breaks, etc. Courts may consider establishing a presumption that all parts of the jury trial during which the jury is not

actually present (discussing instructions, sidebars, etc.) will be conducted without a court reporter so that courts can maximize the time the court reporter is available for testimony and avoid delay.

Another significant issue is making a record on objections. Many judges favor a process that would allow attorneys to make a record of the objection and allow the judge to state the reasons for the ruling on the record. Sometimes this procedure involves sidebar discussions, providing more detail that the jury cannot hear. Because having counsel and the court reporter in close proximity to each other at the bench for this purpose is problematic, courts should explore using electronic recording technology for this purpose by having the attorneys speak directly into the recording system. The best solution, however, is to address as many issues as possible pre-trial, and then discuss the issue during a scheduled break or have the jury taken out of the courtroom if it is necessary for both sides to make a record of the objection. The attorneys can then make their objection on the record from their respective tables.

AO 2020-79 allows judicial leadership to authorize the use of electronic, digital, or other means regularly used in court proceedings to create a verbatim record, except in grand jury proceedings. With proper protocols in place, courts may consider using alternative means, or a hybrid method, to create the record. The Task Force to Supplement Keeping of the Record by Electronic Means examined the use of electronic recording to create the verbatim record and issued a report and recommendations in August 2019. The report and recommendations, which also lists the statutory and then-current rule requirements, can be viewed here:

<https://www.azcourts.gov/Portals/74/SKREM/082919/Final%20SKREM%20Report.pdf?ver=2019-09-09-132821-173>

G. Court interpreting

In resuming jury trials, courts should ensure that they continue to use credentialed interpreters. With social distancing measures and face mask requirements in place, courts will need to prepare for new challenges. For example, face coverings may increase an interpreter's need to ask for repetitions and clarifications. Courts should plan ahead for this and discuss with the interpreter how to best handle those requests. For interpreted testimony where the interpreter is physically present in the courtroom, the interpreter typically sits or stands with the witness on or next to the witness stand. With social distancing requirements, however, it may be necessary to plan for additional space to accommodate distancing when a witness needs an interpreter. Courts should also discuss with attorneys and the interpreter ahead of time how to handle objections to interpreted testimony and requests from the interpreter for repetitions or clarifications.

For simultaneous interpreting during in-person events, the interpreter should be provided with wireless equipment, so they do not have to remain in close proximity to the Limited English Proficiency (LEP) person. Where wireless equipment is not available, work or personal cell phones can be used to call the LEP person(s) and use their cell phones as ad hoc interpreting equipment. As a last resort, the interpretation can be performed in the consecutive mode, with the court planning for extra time accordingly.

For American Sign Language interpreters, both the interpreter and the relevant participant(s) may need to be exempted from requirements to wear masks. Facial expressions and other non-verbal communications are vital components of providing such effective interpretation.

When one or more participant(s) appear(s) remotely:

- Ensure that those appearing remotely have the requisite technology and that it meets the minimum technical requirements for the platform to be used.
- Ensure that the interpreter is technically competent with any equipment to be used.
- Perform a check of audio and video, as appropriate, prior to starting the event, to ensure that all participants can see and hear each other.
- Discuss with the interpreter the procedure to follow for requesting repetitions or clarifications.
- Discuss with attorneys the procedure for objections to interpreted testimony.
- Clearly identify all participants in the hearing or event.
- Remind participants of the interpreter's role.
- Remind participants that interpreters are ethically obligated to interpret everything they hear.
- Advise all court participants to speak clearly and more slowly than they otherwise would.
- Ensure the courtroom and all other locations from which participants appear are as quiet as possible.
- Advise all speakers to identify themselves each time they speak so the interpreter can more readily identify the voices.
- Ask participants to speak directly into their microphones so the interpreter can hear them.
- Ask participants to speak in brief, but complete segments for easier interpretation.
- If needed, direct participants to pause so interpretation can be performed.
- Allow only one person to speak at a time.

A National Center for State Courts "Recommendations For In-Person Court Interpretations" bulletin, addressing in-person court interpretation in the new normal, issued earlier today, can be found at:

https://www.ncsc.org/data/assets/pdf_file/0030/38478/Recommendations-In-Person-Court-Interpretation.pdf (last visited June 1, 2020).

VIII. ATTORNEY CONDUCT AND EVIDENCE DURING TRIAL

Many of the issues surrounding attorney conduct during trial and dealing with evidentiary issues should be addressed, and where possible resolved, before trial and through court orders addressing those issues and the governing protocols. This occurs in a variety of ways using a variety of mechanisms, including the court's enforcement of disclosure and discovery obligations, motions in limine, final pretrial statements, court-ordered deadlines for disclosure, discovery and

objections, protocols adopted by individual judges, and other measures more fully discussed above in the Pretrial Preparation and Conducting Jury Trial sections. When applied properly, these mechanisms make trials more efficient and effective, shorter, and result in a better jury experience. In the new normal, these mechanisms are critically important to prevent avoidable delays during trial and to help maintain social distancing.

Trial judges have substantial authority and discretion to control and direct attorney conduct during trial. Along with the court's inherent authority, "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." Ariz. R. Evid. 611(a); *see also* Ariz. R. Civ. P. 40(b) ("The court should adopt trial procedures as necessary or appropriate to facilitate a just, speedy, and efficient resolution of the action," including time limits, advance scheduling, pretrial rulings, electronic presentation of evidence and "other means of managing or expediting trial"). Among other things, courts should consider the following procedures for attorney conduct during trial:

- Require that all attorneys are healthy and not symptomatic and that they report to the court if they are not healthy or are symptomatic before coming to court. The AOC has developed health screening protocols through Administrative Directive 2020-10.¹⁷ In the event an attorney is not healthy or is symptomatic, measures should be taken for the attorney to (1) participate remotely; (2) have another attorney take their place during trial; or (3) take other appropriate action.
- Prohibit attorneys from physically approaching any witness. Relevant exhibits should be placed on the witness stand before the witness takes the stand. If that has not occurred and a relevant exhibit is not within reach of the witness, court staff will make that exhibit available to the witness using appropriate procedures to ensure safety.
- Require that attorneys question witnesses while seated at counsel table, avoiding the traditional use of a common lectern (which would create the need for the lectern, microphone, and related areas to be deep cleaned between direct, cross, and re-direct examination for each witness).
- Establish clearly defined and limited areas where counsel can stand when presenting opening statements and closing arguments to ensure appropriate social distancing.
- Prohibit speaking objections. Speaking objections are improper, waste time, can provide information that the jury should not receive, and are avoidable. Instead, a timely objection or motion to strike summarily stating the specific ground applicable (unless the ground is apparent from the context) properly preserves at trial a claim of error in a ruling to admit or exclude evidence. Ariz. R. Evid. 103(a)(1).
- Prohibit sidebar or bench conferences where attorneys physically approach the bench. Along with compromising social distancing, such conferences are often unnecessary,

¹⁷ <http://www.azcourts.gov/Portals/22/admindir/pdfs/2020/2020-10%20AD.pdf?ver=2020-05-21-155131-590> (last visited May 31, 2020).

distracting to the jury, and cause delay. Instead, issues that need to be addressed outside of the presence of the jury should be addressed before trial or, for unexpected or new issues that arise during trial, such issues should be addressed during a scheduled break outside of the presence of the jury, either in chambers or in open court.

- Alternatively, if technology allows the use of white noise (to prevent the jury from hearing) and headphones and sensitive microphones (allowing only the judge and counsel to hear and be heard and the court reporter to hear), such alternatives can be used in the rare occasion where counsel and the judge need to confer about an issue outside of the hearing of the jury.
- Another alternative would be to use a see-through barrier between the parties and the judge, with appropriate microphones, that would allow the attorneys to safely approach the bench while providing an appropriate barrier and also allowing the court reporter to hear. In extraordinary circumstances, the court could excuse the jury from the courtroom, with resulting delay and the possibility of compromising social distancing.
- If sidebar or bench conferences are allowed, designate a safe area to conduct sidebars that allows for appropriate social distancing and is deep cleaned after use and that is out of the presence of the jury and where a record can be created. A sidebar will generally have a minimum of three people and therefore will require a substantial space.
- Prohibit counsel from approaching the bench for any other reason unless first requested and the request is granted by the court and, even then, ensure proper social distancing.
- Direct counsel to remove all items from counsel tables at the lunch break and the end of each day to allow for deep cleaning of the area.
- Encourage the use of technology in dealing with exhibits. If courtroom technology is available, this may include having all involved (including the witness, judge, and counsel) use a screen to view an image of an exhibit, as opposed to requiring that the physical or paper exhibit be handed around. Similarly, if courtroom technology is available, this may include having video screens to allow an exhibit to be published to the jury or for each juror to have a tablet, deep cleaned before trial begins and then assigned to that individual juror for the entirety of the trial, to view exhibits admitted into evidence.
- If available technology cannot be used to manage exhibits, require counsel to have marked original exhibits to be used at trial and sufficient copies so that (1) counsel, the judge, each witness, and the court reporter have their own, and (2) for exhibits that will be offered in evidence, sufficient copies so that, if admitted in evidence in a way that will be available for deliberation, each juror would have his or her own copy and not have to handle and share the same exhibit.
- If juror notebooks are used, jurors should be instructed where to leave their notebooks during breaks and at the end of the day so that they will not be disturbed and can later be picked up by that same juror with appropriate social distancing. If this is not feasible, measures should be taken to gather juror notebooks using gloves or other appropriate measures, so they are retained securely during breaks or overnight and then provided back

to the jurors. Where feasible, jurors should be provided with disposable pens or pencils and paper that will not be shared, and then thrown away at the end of the trial.

- Particularly when Arizona Rule of Evidence 615 (“the Rule”) is invoked, consider where witnesses should wait before they are called to testify and communicate with counsel about that location to ensure that counsel informs witnesses of the location.
- Require counsel to provide notice, at least 24 or 48 hours in advance, of witness order and scheduling to avoid delays and to ensure social distancing.
- Require counsel to advise all witnesses of courtroom procedures and to make inquiries to ensure witnesses are healthy and not symptomatic.
- Rope off “no-person zones” to ensure proper social distancing in the courtroom, including by the jury box, by the witness stand, and by the bench.
- Have hand sanitizer available for counsel, witnesses, jurors, and court personnel.
- Ensure that the witness stand, including the seat and microphone, is deep cleaned after each witness testifies.
- Require that anyone handling original exhibits should do so wearing appropriate disposable gloves to be thrown away at the end of each trial session.

IX. FINAL JURY INSTRUCTIONS AND RETURN OF VERDICT

Final jury instructions and verdict forms must be in writing and filed. *See* Ariz. R. Civ. P. 51(e)(2).; Ariz. R. Crim. P. 21.3(d), 23.1(a). As with preliminary jury instructions, the discussion and settling of final jury instructions and verdict forms should be done in a way that ensures social distancing and does not delay trial. This may involve the court taking the jury instructions submitted by the parties, drafting final instructions and verdict forms for consideration by the parties and then circulating those drafts to the parties electronically. The parties and the court can then discuss those drafts either during breaks at trial or before or after the trial day, as applicable. Then, the court can revise and finalize the final instructions and verdicts to be used, again circulating them to the parties electronically. The parties also need an opportunity to make any objections, on the record for the final jury instructions and verdict forms, either during breaks at trial or before or after the trial day. Additionally, the court needs an opportunity to rule on these objections.

Along with the court reading the final instructions and verdict forms to the jury, how each individual juror will be provided copies will depend upon what technology is available. If courtroom technology is available, this may involve having a video screen visible to the jury that displays the final instructions and verdict forms as well and for each juror to have a tablet, deep cleaned before trial begins and then assigned to that individual juror for the entirety of the trial.

If such technology is unavailable, each juror should be provided a written copy of the final instructions and verdict forms, with measures taken to ensure that the paper is only touched by

disposable gloves and placed on the juror's chair during the break just before the final instructions are given.

Fielding of jury questions during deliberations should be planned for in advance. If technology is used, it may be that the jury foreperson emails or otherwise electronically messages the jury question to the bailiff, who could then forward the question to the judge and parties. When an answer is formulated by the court after consultation with the parties, that response could be provided from the court to the foreperson in the same electronic format. If, on the other hand, no such technology is used, a paper note (treated with appropriate care) could be used for the question and the response. Similar approaches would be used when the jury is unable to reach a verdict and is at an impasse.

In a criminal trial, the form of verdict would be signed by the foreperson (through the juror's number or signature); in a civil case, the verdict would be signed by the foreperson or the number of jurors required to return a less than unanimous verdict, again, through the juror's/jurors' number(s) or signature(s). If technology is used, that form of verdict could be signed electronically and shared with the court. Alternatively, and where no technology is used, the appropriate juror(s) would need to physically acknowledge by signing the verdict form(s) to be used and provided to the court.

The return of the verdict, in whatever form provided, would be done in open court. Jurors then could be polled to ensure that it was their true verdict, as appropriate. The jury would then be thanked for their service and discharged. Any post-verdict debriefing by the court, including to assess the measures taken, would need to be done remotely or otherwise, ensuring appropriate social distancing.

X. CONCLUSION

This Report recommends the best practices courts should implement to resume jury operations in light of the COVID-19 pandemic as of June 1, 2020. These recommendations represent the best practices identified by the Subgroup after surveying Arizona courts and researching these issues at the national level over the past several weeks. Many of these precautions and recommendations will be implemented on a temporary basis, subject to change based on CDC guidance, user experience, and court discretion. Courts should modify local processes as deemed appropriate, which includes resuming previous successful processes.

As courts begin resuming jury trials, additional and different best practices will likely become apparent and more changes will be required as the recommendations in this Report are implemented. In order to keep current with the best practices developing in Arizona and around the country, the Subgroup recommends forming a standing committee to examine current and future jury practices in an ongoing effort to improve jury operations in Arizona.

APPENDIX —SELECTED RESOURCES

Arizona Jury Service: What to Expect

<https://www.azcourts.gov/juryduty/Jury-Service-What-to-Expect>

Example Juror Announcement Webpages

Superior Court in Maricopa County

<https://superiorcourt.maricopa.gov/jury/juror-announcement-page/>

<https://superiorcourt.maricopa.gov/jury/excused/>

Superior Court in Pima County

https://www.sc.pima.gov/Portals/0/Library/SuperiorCourt_Jury_Notice.pdf?no-cache

Phoenix City Court

<https://www.phoenix.gov/court/jury-duty>

Scottsdale City Court

<https://www.scottsdaleaz.gov/court/jury-duty>

Selected Authorities Addressing Whether Misdemeanor Offenses Are Jury Eligible

Misdemeanor Offenses Eligible For a Jury Trial:

- **DUI** (A.R.S. § 28-1381, et. al)
- **Indecent exposure** (A.R.S. §13-1402), *City Court of City of Tucson v. Lee*, 16 Ariz. App. 449, 494 P.2d 54 (1972) (common law right)
- **Shoplift / Theft** (A.R.S. §13-1802, 1805), *Bosworth v. Anagnost*, 234 Ariz. 453, 323 P.3d 736 (App. 2014); *State v. Superior Court In and For Pima County*, 121 Ariz. 174, 589 P. 2d 48 (1978) (common law right); *Sulavka v. State*, 223 Ariz. 208, 221 P.3d 1022 (App 2009); *State v Kaluali (Kroll, real party in interest)*, 243 Ariz 521, 414 P.3d 690 (App. 2018) (theft of services).
- **Reckless Driving** (A.R.S. §28-693A), *Urs v. Maricopa County Atty's. Office*, 201 Ariz. 71, 31 P.3d 845 (2000) (common law right)
- **Resisting Arrest** (A.R.S. §13-2508) *State v. Le Noble*, 216 Ariz. 180, 164 P.3d 686 (App. 2007) (common law right)
- **Allegation of Sexual Motivation** *Fushek v. State*, 218 Ariz. 285. 183 P.2d 536 (2008)

- **Unlawful Imprisonment** *Kaniowsky v. Pima County Consol. Justice Court*, 239 Ariz. 326, 371 P.3d 654 (App. 2016)
- **Contempt** (if consequences can exceed \$300 or six months in jail) (Ariz. R. Crim. P. 33.4)

Misdemeanor Offenses Not Eligible for a Jury Trial

- **Drag Racing** *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005)
- **Marijuana Possession** *Stoudamire v. Simon*, 213 Ariz. 296, 141 P.3d 776 (2006)
- **Assault** *Spence v Bacal*, 243 Ariz. 504, 413 P.3d 1254 (App. 2018) (multiple assaults); *Phx. City Prosecutor v. Klausner*, 211 Ariz. 177, 118 P.3d 1141 (2005)
- **Interfering with Judicial Proceedings** *Ottaway v. Smith*, 210 Ariz. 490, 113 P.3d 1247 (2005)
- **DUI Prior Convictions**, *Newkirk v. Nothwehr*, 210 Ariz. 601, 115 P.3d 1264 (2006)
- **Assault, Contributing to the Delinquency of a Minor**, *Fushek v. State*, 215 Ariz. 274, 159 P.3d 584 (App. 2007)
- **Adult Services** (Scottsdale City Code violation), *Crowell v. Jejna*, 215 Ariz. 534, 161 P.3d 577 (App. 2007); *Buccellato v. Morgan*, 203 P.3d 1180 (Ariz.App 2008)
- **Trespass** *State v. Willis*, 218 Ariz. 8, 178 P.3d 480 (App. 2008)
- **Obstructing Highway** *Mack v. Dellas*, 235 Ariz. 64, 326 P.3d 331 (App. 2014)
- **Serious Physical Injury/Death w/Moving Violation (28-672)** *Phoenix City Pros. Office v. Hon. Nyquist*, 404 P.3d 255, 243 Ariz. 227 (App. 2017)

Superior Court in Maricopa County

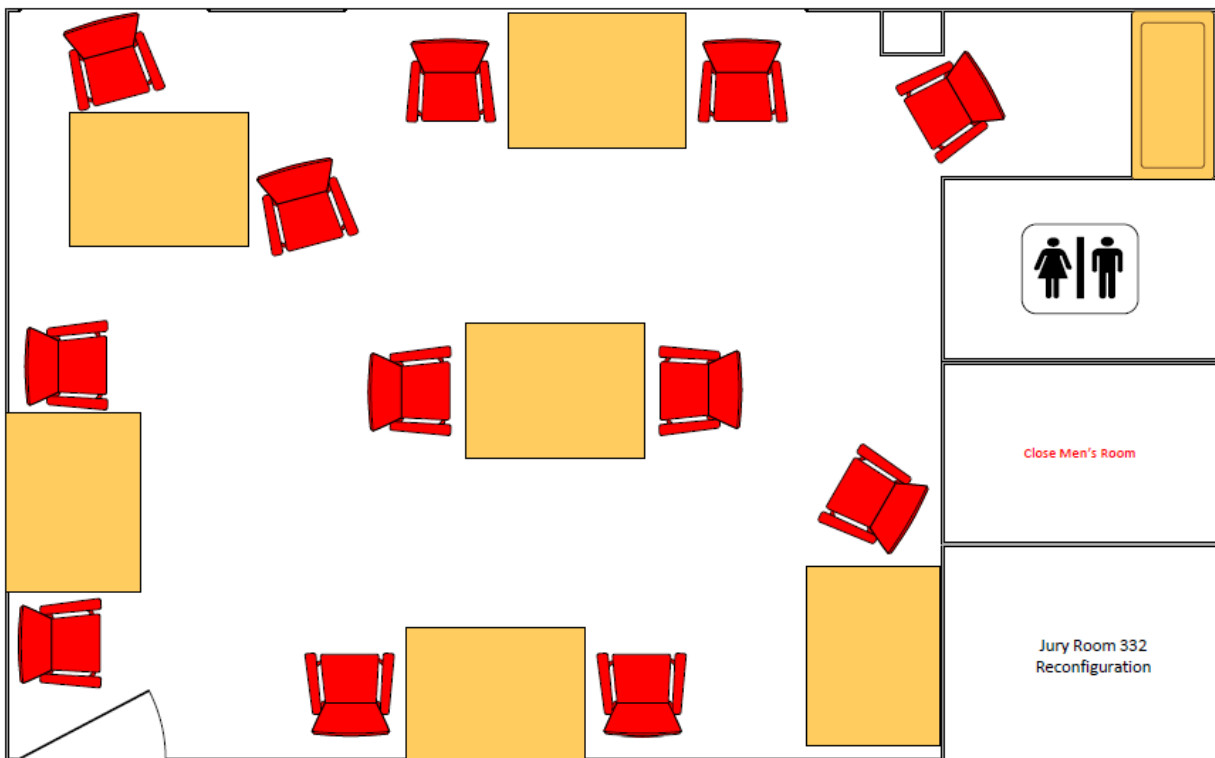
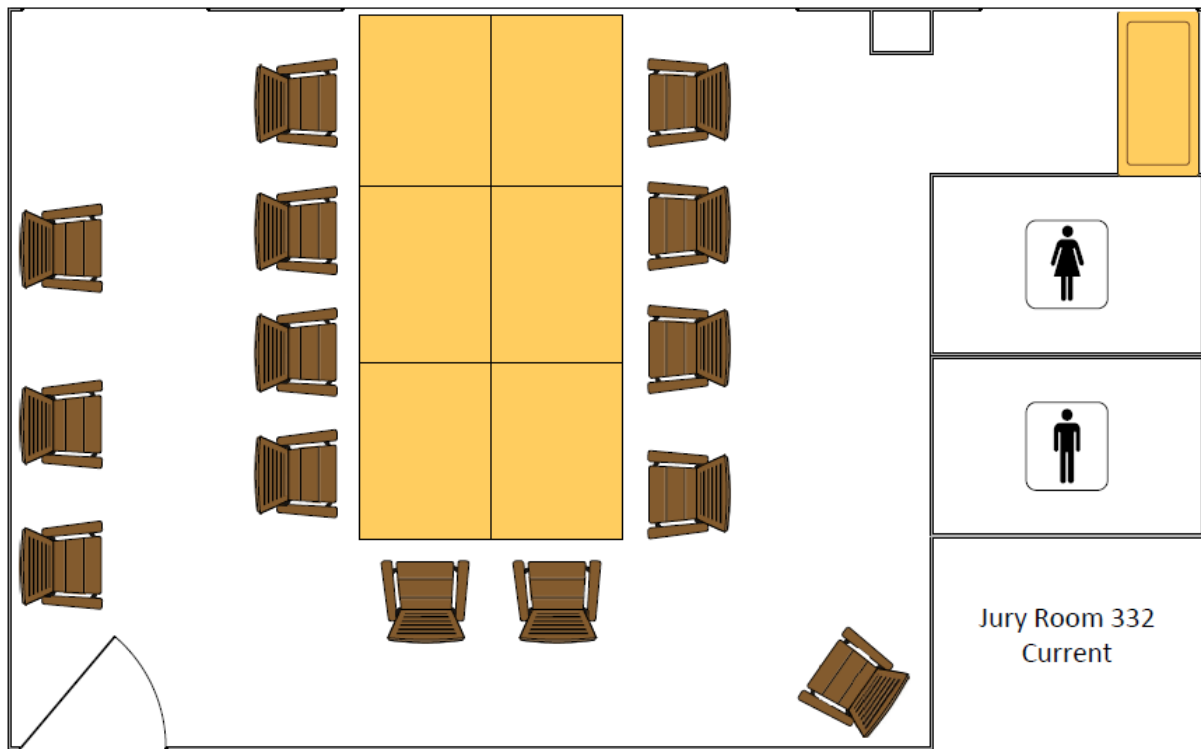
Social Distancing in the Assembly Room

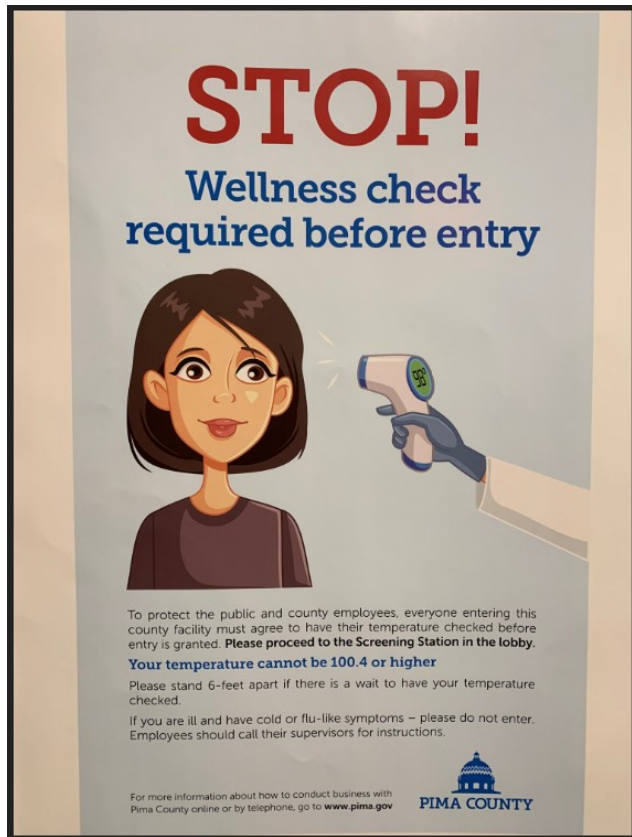


Jury Assembly Room, Superior Court in Maricopa County, Arizona



Superior Court in Pima County





Court Interpreter Guidelines and Best Practices

Questions regarding interpreter issues can be directed to the AOC Language Access Coordinator: dsvoboda@courts.az.gov.

Remote Platforms

A number of options exist. Some courts may opt for a simple telephonic option. Others may choose a more sophisticated video remote interpreting platform. Still others may use a combination of options. Here are brief notes on some common options:

- Telephonic only – simple, low tech solution. Does not provide video of remote participants. Not recommended for interpreted events longer than 30 minutes or events involving testimony.
- Video options
 - AOC VRI System – allows full simultaneous interpreting and private attorney-client communications. Requires Cisco VRI equipment. May be compatible with other videoconference equipment, but with less functionality
 - WebEx – interpreted events can be performed in the consecutive mode
 - Zoom – allows full simultaneous interpreting and private conferences for sidebars or attorney-client communications
- Hybrid Options

- Using options that are normally limited to the consecutive mode of interpretation, simultaneous can be achieved by having another conference call line or direct telephone call between the interpreter and the LEP party. The interpreter and LEP party simply mute their courtroom mics for simultaneous and then unmute them when needing to address the court or answer questions.

Superior Court in Maricopa County Juror Prescreen Questionnaire

HARDSHIPS

The following questions address your ability to serve as a juror. Please keep in mind it is not whether you want to serve, but whether you can serve. Arizona law only permits a prospective juror to be removed for specific reasons, including that jury service would cause an undue or extreme physical or financial hardship to the prospective juror or that service would substantially and materially affect the public interest or welfare.

Additionally, if you are concerned about managing your work responsibilities or care for another, you may request to postpone your jury service for up to 90 days. Please visit the [Jury website](#) for details or call 602-506-JURY(5879) for more information.

Are you requesting to be released from jury service as a result of undue hardship (example: financial, employment, travel, care provider, etc.)? Yes/No

If yes: My request is related to:

Care Provider: Yes/No

If you are requesting to be released from jury service because you provide care for another (child or adult), is there someone who can provide the care while you serve on a jury? Yes/No/I don't know

Please explain in detail why not or whether you need additional information to answer this question:

COVID-19: Yes/No

If your personal experience during the COVID-19 pandemic would make it hard for you to participate as a juror for any reason, please explain and be specific:

Employment: Yes/No

If your request to be released from jury service is employment related, please identify your employer, the nature of your employment, and your job duties and be specific:

Financial Hardship: Yes/No

If you are requesting to be released from service due to financial hardship, please review our [Compensation](#) page. Additionally, the [Arizona Lengthy Trial Fund](#) allows jurors who qualify to recover some, most, or maybe even all of your lost income during jury service. For trials of 6 or more court days, you may be reimbursed for lost income of up to \$300 a day from day 1 to the end of the case. If you still are concerned about potential loss of income you will have an opportunity to explain that below.

After reviewing the information regarding juror compensation, are you still requesting to be relieved from service due to financial hardship? Yes/No

If yes, please explain in detail the reason for your request:

If yes, does your employer compensate you for jury service?

Physical: Yes/No

Please detail the reason you are requesting to be released from jury service, and be specific:

If you would like to submit a doctor's note or a medical excuse form, please call the Jury Office at 602-506-5879 for more information.

Other: Yes/No

If you are requesting to be released from jury service for a reason not listed above, please explain and be specific:

IF YOU ANSWERED "YES" TO ANY OF THE ABOVE, YOU ARE NOT EXCUSED FROM JURY SERVICE. IF THE COURT DETERMINES THAT YOU ARE NOT ABLE TO COMPLETE YOUR SERVICE AT THE COURTHOUSE, YOU WILL BE NOTIFIED.

TRIAL LENGTH

If because of health reasons or other unavoidable circumstances you are unable to serve on a trial of the length indicated below, answer "no". Please keep in mind it is not a matter of whether you want to serve or do not want to serve, but whether you can serve. If you answer "no", you are required to complete the section below indicating the reason why you are unable to serve on a trial.

Can you serve on a trial of any length? Yes/No

If no, why not?

Can you serve on a trial of up to ten (10) days? Yes/No

If no, why not?

Can you serve on a trial of up to five (5) days? Yes/No

If no, why not?

Can you serve on a trial of up to three (3) days? Yes/No

If no, why not?

IF YOU ANSWERED “NO” TO ANY OF THE ABOVE, YOU ARE NOT EXCUSED FROM JURY SERVICE. IF THE COURT DETERMINES THAT YOU ARE NOT ABLE TO COMPLETE YOUR SERVICE AT THE COURTHOUSE, YOU WILL BE NOTIFIED.

TECHNOLOGY

You may be asked to serve as a juror-from-home using a video conference platform. Please complete the questions below to indicate your eligibility.

Do you have EACH of the following:

1. A private and quiet space? Yes/No

2. Access to a reliable internet connection? Yes/No

3. Access to a tablet, smart phone, or desktop or laptop computer with a camera?

Yes/No

4. The physical ability to watch and listen to court proceedings using a computer or phone (typically trial occurs between 9:00 a.m. and 5:00 p.m. excluding breaks and lunch)? Yes/No

5. The general ability to watch and listen to court proceedings without interruption or distraction (typically trial occurs between 9:00 a.m. and 5:00 p.m. excluding breaks and lunch)? Yes/No

I cannot serve as a juror-from-home because:

IF YOU ANSWERED “NO” TO ANY OF THE ABOVE, YOU ARE NOT EXCUSED FROM JURY SERVICE. IF THE COURT DETERMINES THAT YOU ARE NOT ABLE TO COMPLETE YOUR SERVICE AT THE COURTHOUSE, YOU WILL BE NOTIFIED.

Based on the information I have provided above, I am asking to be released from jury service. Yes/No

if yes: **Would you like to postpone your service? Yes/No**

IF YOU WOULD LIKE TO POSTPONE YOUR SERVICE, YOU WILL HAVE AN OPPORTUNITY TO SELECT A NEW DATE AFTER YOU HAVE COMPLETED THIS QUESTIONNAIRE. ONCE YOU HAVE FILLED OUT AND SUBMITTED ALL THE PAGES OF THIS QUESTIONNAIRE, YOU WILL BE TAKEN TO A PAGE WHERE YOU WILL HAVE THE OPTION TO REQUEST A POSTPONEMENT. IF YOU ARE COMPLETING THIS QUESTIONNAIRE WITHIN TEN DAYS BEFORE YOUR DATE OF SERVICE, YOU ARE NO LONGER ELIGIBLE TO REQUEST A POSTPONEMENT.