

The Right to a Jury Trial in the Time of COVID-19

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Editor's Note: This article represents the legal analysis of Janet Hoffman and is not intended to reflect the official position of the Litigation Section or of the Oregon State Bar.



Janet Hoffman

A jury trial is an iconic image. After selection, twelve impartial jurors are seated together in a jury box to observe the litigants, witnesses, and the court. In turn, the litigants observe the jurors, monitoring their presentations to respond to the jurors' reaction. During breaks, the jurors retire to a small jury room where they interact. Advocates address the jury in opening and closing arguments, standing close – but not too close – to present their case, all the

while trying to maintain credibility not only through their understanding of the facts and law, but also through facial expressions, body posture and tone of voice. From the jury box, jurors get an up-close chance to observe the testimony of witnesses who take the stand and present their direct testimony and then turn their attention to opposing counsel's cross examination, closely watching the reactions of trial counsel and the litigants as the witnesses responds to questions. Throughout the trial, jurors monitor the court's reactions. At the conclusion of the trial, following closing arguments and final jury instructions, the bailiff is sworn in and returns the jury to the jury room for deliberation where the jurors become a single entity "the jury" and render their verdict based their individual understanding of the evidence honed by the collective process of deliberation. The jury system fundamentally assumes that each juror has an equal opportunity to observe the entire court process.

With the pandemic defining our new normal and changing the way we convene, it is difficult to visualize a group of individuals who would not be anxious about the prospect of serving as a juror. They have valid concerns about their health and safety and the health and safety of their loved ones. Health experts agree outdoor activities are safer than indoors, it is important to restrict the size of gatherings, masks keep people safer, avoid public restrooms and maintain at least six feet of social distance between individuals. It is now understood that even loud conversations in closed rooms present elevated health risks.

Overlaid on these concerns are the statutory and constitutional rights, both federal and state that define the requirements of a "fair and impartial jury." The challenge facing litigants and the courts today is how to reconcile the constitutional mandates with the legitimate health concerns facing jurors. This begs the question: Can a defendant obtain a fair and unbiased jury trial of one's peers in today's current crisis?

Legal Standards

The current orders issued by the Governor and the state Supreme Court do not resolve the constitutional or statutory issues presented by a defendant's right to a fair and impartial jury trial. Both the Governor and the Supreme Court issued Orders designed to protect the health and safety of the general population and, specifically as to the later order, allow the courts to function during the pandemic. The Governor extended Oregon's current State of Emergency through Sept 4. Although restrictions have been eased in some counties, general procedures to protect against the spread of infection are in place as counties have reopened and individuals have returned to greater social interaction. On May 15, the Oregon Supreme Court issued Chief Justice Order no. 20-016 (the order) imposing restrictions on jury trials. The goal of the order is "to meet the courts obligations to the public while continuing to minimize health risks for judges, staff, litigants and case participants . . ." The order recognizes some criminal defendants will insist on jury trials before the September 4th date based on their constitutional and statutory rights to a speedy trial. According to the order, jury trials during this time at a minimum will require the following: social distancing, specified persons in the court room wear masks (excluding witnesses when testifying) and other reasonable precautions to protect the health of all participants. Once the State of Emergency is lifted, the state courts will set protocols for holding jury trials.

The governor's restrictions and the court's order are both laudable in that they enact safeguards meant to keep individuals in each courtroom protected from transmitting the virus during court proceedings. However, these procedures must still meet a standard of higher import: the Oregon and US Constitutions.

Enshrined in Article I of the Oregon Constitution is the right to a jury trial in both criminal and civil cases. The criminally accused is also guaranteed the right to a speedy trial under Article I, Section 10 of the Oregon Constitution, which states, "no court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay..." The Sixth Amendment to the United States Constitution guarantees a defendant the right to a speedy trial by an impartial jury. Under Oregon law, absent a waiver from the accused, misdemeanor trials must be commenced within two years from the date of filing the charging instrument, and felonies must be commenced within three years. ORS 135.746. If trials are not commenced within that time (absent specific exceptions) the case will be dismissed. ORS 135.752. Oregon law also contains the "60-day rule," which requires criminal defendants to be released from custody after a maximum of 180 days. It is this 60-day rule which is driving the court to hold jury trials during this time of emergency.

Under both the Oregon and United States constitutions a criminal defendant has a fundamental constitutional right to call witnesses on her own behalf and confront the witnesses called by the state. Face-to-face confrontation is central to this right. See Article 1 Section 11 of the Oregon Constitution; *State ex rel. Juw. Dept. v. S.P.*, 218 Or. App. 131, 178 P.3d 318 (2008); see also the 5th and 6th Amendments to the United States Constitution; *Maryland v. Craig*, 497 U.S. 836 (1990).

Just as fundamental, both constitution's guarantee the right to a fair trial which includes the ability to remove jurors for cause, identifying those who cannot judge a case fairly through voir dire. Individual history or attitudes that impact an individual from fairly deciding the case before them will disqualify them as a juror if they have such a fixed attitude of mind that it would control their action in some appreciable degree. See *State v Humphrey*, 63 Or. 540, 54 (1912). A failure to excuse a biased juror will result in a new trial. *Lambert v. Sisters of St. Joseph*, 227 Or. 223, 231 (1977).

Provisions and Orders Addressing Health Concerns of Jurors May Impact Their Impartiality

It's a safe assumption that potential jurors are concerned about their health and safety. Jury trials and the physical layout of courtrooms work against the current safeguard of social distancing and would enhance potential juror's anxiety about contracting the novel coronavirus. Members of the public place safety even above their own financial interests. A poll published on April 2nd by the Kaiser Family Foundation found that 8 in 10 people surveyed believed the government should prioritize slowing the spread of the coronavirus over protecting the economy. Kaiser Family Foundation, *The Impact of Coronavirus on Life in America*. Apr. 2, 2020. Similar attitudes were expressed in a non-partisan statewide survey of 900 Oregonians conducted between April 17 and 21. The public opinion firm DHM Research, partnering with Oregon Values and Beliefs Center, found that 82 percent of Oregonians either strongly or somewhat supported the stay-at-home order. Those surveyed held that opinion despite the fact that 40% had either lost a job or had their hours cut due to COVID-19 and the Governor's order. More recent surveys have found that similar attitudes persist even after several months of social distancing orders. See e.g. Liz Hamel et al., *Coronavirus: Reopening, Schools, and the Government Response*, KFF (Jul. 27, 2020), <https://www.kff.org/coronavirus-covid-19/report/kff-health-tracking-poll-july-2020/>; Czeisler et. al., *Public Attitudes, Behaviors, and Beliefs Related to COVID-19, Stay-at-Home Orders, Nonessential Business Closures, and Public Health Guidance*, 69 MMWR MORB. MORTAL. WKY. REP., 751 (2020).

These findings appear to reflect core values or fixed beliefs of potential jurors. It logically flows that they would also value their own safety over their civic duty to give defendants a fair trial. This concern for safety could manifest in hostility towards the accused or the entire jury trial process. Certainly, potential jurors' concerns about their physical safety and attitude towards the safety measures -- or lack thereof -- could create sufficient bias such that they must be excused.

Pursuant to the Governor's executive orders and incorporated into the Chief Justice's order, social distancing requires individuals to maintain a minimum of six-foot distance from one another. In order to "minimize health risks," Orders from the Governor and guidance from the CDC make clear wearing masks in public is a matter of personal and societal safety and recommend avoiding public restrooms and quarantining if an individual has been in close proximity with someone who becomes ill with coronavirus. Governor Kate Brown's reopening orders turn on reducing the rate of Covid

infection, limiting the size of gatherings, social distancing and mask wearing. See <https://govstatus.egov.com/or-covid-19>.

Individuals have been warned against large public gatherings. Therefore, a prerequisite to holding a fair jury trial is to ensure that none of the participants are infectious. A questionnaire sent to court staff, potential jurors and litigants that asks about a description of any symptoms and contact with anyone who may be infected does help mitigate fears, but that is certainly not dispositive as to whether or not a health risk is presented. Research indicates that some infectious individuals are asymptomatic and for those who do show symptoms they are most infectious during the two days before they show symptoms. He, X., Lau, E.H.Y., Wu, P. et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 NAT. MED. 672 (2020). The Chief Justice's order concerning jury trials requires the adoption of "reasonable precautions to protect the health of all participants . . ." While testing is the best security against infection, even assuming access to tests it may not be a reasonable requirement to place upon a prospective juror. A potential juror could refuse to take the test and would therefore be automatically eliminated from the pool of jurors. For those who consented, sharing the results could potentially violate HIPAA regulations. However, it could be argued that in order to protect the litigants and other jurors, the entire jury pool should be tested before jury selection. But even these efforts would ultimately be futile. In cases where a trial lasts more than one day, the initial tests given during jury selection will not protect against subsequent exposures, nor inform other individuals in the courtroom of that exposure. The weakness in our ability to screen for Covid presents heightened anxiety for prospective jurors.

Impact of Current Health Data on a Fair and Impartial Jury Trial of One's Peers

Jurors will undoubtedly be anxious about congregating in large numbers in public spaces. Their anxiety is reasonable. They will face risk of exposure to the virus throughout their jury service including transportation to the courthouse, security lines to enter the courthouse, exposure to large numbers of strangers and working in close proximity to others. Parents of school age children will also be concerned about home schooling and supervision of their children until schools reopen.

These health concerns create a significant risk that jurors will not represent our general population. Large numbers of otherwise qualified jurors will potentially exclude themselves from jury duty simply based on age, underlying health risks, and their status as parents. Research has also shown that COVID-19 disproportionately impacts black/ African American and Hispanic communities. Garg et al., *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019*, 69 MMWR MORB. MORTAL WKY REP., 458 (2020). These disparities will prevent many defendants from being judged by a jury of their peers. Even if a jury can be selected, it is virtually impossible to impose standard health precautions within our current courtrooms and trial system. The witness stand is generally situated in close proximity to the jurors and court reporters. The jury boxes are often too small to allow for social distancing, so jurors will be required to spread throughout the

courtroom. Those sitting behind counsel table will not be able to observe the defendant during trial other than staring at his or her back, nor will they see the face of counsel. They will experience the trial remotely and will gather a fraction of the information that they are presented in comparison to jurors sitting in the jury box. Disputes about evidence will occur in instances when some jurors didn't have an opportunity to make an initial observation. Therefore, the jurors' exposure to the evidence presented in the courtroom will be different. Take, for example, a witness who identifies the defendant from the witness stand. The jurors sitting in front of the counsel's table will be able to see the defendant's reaction and may judge the validity of the identification based on watching both the witness and the defendant. Those behind counsel will miss this portion of the identification and will be unable to contribute regarding this point during deliberations, thus depriving the defendant of full jury participation.

Assuming these known challenges – and the myriad unknown challenges before us – are somehow overcome and a group of jurors is chosen and a system is developed that includes picking a significant number of alternates to guard against mistrials based on changes of juror's health profiles, how do we maintain the public nature of criminal jury trials. Oregon courts are constitutionally required to allow open courtrooms, which means public access. What ability does the judge have to require the health of members of the public be evaluated before entering the courtroom? The courts are currently set up to prevent weapons being brought into court rooms, but they are not historically involved in protecting the health of trial participants from potentially infectious members of the public who have a constitutional right to watch the proceedings and vice versa.

The Chief Justice's order states “[a] presiding judge may require that specified persons in the courtroom, excluding witnesses when testifying, wear masks . . .” Although there is no current scientific study as to the physiological impact on jurors of individuals in a courtroom wearing or not wearing masks, logically it will affect the proceeding. To some, mask wearing has become a sign of social respect or showing concern for others. A failure to don a mask may be seen as dangerous or irresponsible behavior. To others, masks have become a symbol of an overbearing government. In the current times, masks in and of themselves remind individuals they are facing potential health risks. Despite the potential ramifications to the justice served in each case, masks have been incorporated into the jury trial system as a safety precaution against the spread of a potentially deadly disease.

Further, a criminal defendant unbeknownst to themselves may be infected with COVID-19. Jails, prisons and other state confinement facilities have been linked to a number of outbreaks across the country. However, requiring a defendant to wear a mask in court would certainly put them at a disadvantage by creating a de-humanized jury reaction and may even make him or her look guilty. Courts may only compel defendants to briefly don masks for the narrow purpose of eyewitness identification in limited situations. *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986). Otherwise, the visual effect of seeing the defendant in a mask potentially creates a prejudicial impression of guilt in jurors' minds. For similar reasons,

defendants cannot be compelled to appear at trial in prison garb. *Bentley v. Crist*, 469 F.2d 854 (9th Cir. 1972). Requiring a defendant to wear a mask for the entirety of a trial would be an unprecedented step. Similarly, jail guards who transport and in-custody defendant and remain in the court room during the trial would potentially be required to wear a mask, thus raising a sense of menace in the courtroom. As of May 20th, 1,259 jail guards in New York alone have been infected with novel coronavirus and there have been 6 deaths. See *New York Times* May 21, 2020.

As for witnesses, a witness may not be required to wear a mask. However, what if they are uncomfortable not wearing one? What if jurors view a witness not wearing a mask as disrespectful behavior and, therefore, distrust the witness? What about the mandate that courts use reasonable precautions to protect the health of all participants? Recent studies have determined that a high risk of spreading germs occurs in closed rooms with little air circulation. Speakers exhale germs when they speak and wearing a mask is the best defense against infection. See e.g. *Stadnytskyi et al., The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, PROC. OF THE NAT. ACAD. OF SCI., May 13, 2020; *Hamner, et al., High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice*, 69 MMWR MORB. MORTAL WKL. REP. 606 (2020). Therefore, it is a safety consideration whether witnesses are required or allowed to wear masks in a courtroom.

While it may be a safeguard to illness, at the same time requiring a witness to wear a mask conflicts with a defendant's constitutional rights to confront a witness face to face. Witnesses may certainly be reluctant to testify in public courtrooms for the same reason that jurors would be reluctant to serve. They may also insist that they wear a mask. Will courts allow witnesses to wear masks for their own protection or the protection of jurors and others in the courtroom? Doing so would certainly impact the defendant's right to face their accusers. Although there have been constitutional challenges involving witnesses wearing religious garments and situations where the government has obscured a portion of a witness's voice or facial identification for their protection, these issues have been tied to a single witness in a trial and other witnesses were not impacted. In each case, there must be a specific countervailing reason to make a limited exception. See e.g. *United States v. De Jesus-Castaneda*, 705 F.3d 1117 (9th Cir. 2013) (witness was an active confidential informant in the Sinaloa cartel); *People v. Ketchens*, No. B282486, 2019 Cal. App. Unpub. LEXIS 3920 (June 7, 2019) (witness had a First Amendment right to wear a thin veil covering the lower portion of her face).

The very idea of every witness hiding the lower part of their face, including their mouths, from the jury is anathema to our court system. We all take cues from non-verbal communication that come with reading facial expression. We watch for grimaces, smiles, and down-turned lips to understand the meaning speakers place on their words. Uniform jury instructions advise jurors to judge credibility based in part on the demeanor of the witness. See Ninth Circuit Manual of Model Jury Instructions –

Crim. 3.9 (2019); Or. UCrJI No. 1006. A mask would prohibit jurors from undertaking this central function.

A suggested alternative that witnesses appear via Zoom or similar technology during criminal trials also presents inherent problems. Video testimony is not a substitute for appearing in person. It interferes with the ability of jurors to judge the truthfulness and value of a witness's testimony to their decision-making process. Germaine to this topic is a New York Times article of April 29, 2020, entitled "Why Zoom is Terrible." The article explains the common situation where individuals have a negative emotional reaction to those they are interacting with on Zoom. Although in some ways counterintuitive, the way the technology decodes and reconstructs data creates subliminal artifacts and inaccuracies in the pictures and responses that make individuals "feel vaguely disturbed, uneasy and tired without quite knowing why." These responses would certainly prejudice a defendant's right to a fair and impartial jury trial. That kind of subliminal response cannot be guarded against and would impede the fair delivery and processing of information. Currently, Oregon courts will not permit or force a party to accept video testimony. Prior to its admission both parties must stipulate to it. ORS 131.045; *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018) (witness's pregnancy did not justify use of two-way video).

The usual tactics of cross-examination, curative jury instructions, and expert testimony also cannot mitigate these problems. No lay witness could explain why they are unable to connect with the jury over video, nor can jurors be instructed to separate their automatic psychological reactions from their legitimate credibility assessments. Experts may be able to explain the reaction, just as they can explain the potential unreliability of eyewitness identification. *State v. Lawson*, 351 Or 724, 761 (2012). However, this only stands to undermine jurors' confidence in the entire system, not provide defendants a fair trial

Conclusion

Legitimate health concerns facing jurors and other trial participants puts the constitutional right to a speedy trial at odds with the ability to have a fair and impartial jury and to confront one's accusers face-to-face. Defendants may refuse to waive their speedy trial rights because they need or want their trials heard now as they are currently in custody and are concerned about their own health and safety during this time or are anxious about a trial hanging over their heads. Courts are rightfully concerned about maintaining public health and safety, but are also concerned about backlogs in trial dockets rising during this pandemic. Balancing all of these concerns with the constitutional rights of the accused will be difficult, if not impossible. As U.S. District Court Judge Jed Rakoff, who sits in Manhattan, writes, "if well past July and for months to come, it is still dangerous for twelve people to gather together in tight quarters to hear and determine civil and criminal cases, it is not easy to see how the constitutional right to a jury trial will be genuinely met." Jed Rakoff, *Covid & the Courts*, THE NEW YORK REVIEW OF BOOKS, Apr. 30, 2020. Thus, in moving towards reopening our judicial system, we must not rush towards resuming jury trials in their normal manner without taking the time to appropriately address and consider a

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defendant's constitutional rights. Each safety measure adopted by the court potentially impacts different components of what together constitute a fair and impartial jury trial. A defendant who insists on a speedy trial would first need to waive the other constitutional rights that will be given up in exchange for enforcement of that single right. For those who want to quickly and safely resume jury trials, it is important to understand that efforts to ensure courtroom safety will risk infringing on constitutional rights that are integral to our system of jurisprudence and fundamental to the rights of the accused.

Comments From The Editor

Unconscious Effective Practices

By Dennis P. Rawlinson

Miller Nash Graham & Dunn LLP



Dennis P. Rawlinson

One of the most important but often least effective components of a trial presentation is the direct examination of expert witnesses. It is unusual these days when a trial or arbitration presentation does not include direct examination of at least one expert. Completing such a direct examination is not difficult, but it is rarely done effectively and persuasively.

Set forth below for your consideration are some suggestions for the framework of the direct examination of an expert.

The Tickler

For two to three minutes, when an expert first takes the stand, he enjoys a few golden moments when he has the fact-finder's full attention, and so do you as his direct examiner. Instead of spending the first 15 minutes of testimony on a litany of the background and qualifications of the expert and encouraging the court or jury to daydream or grow bored, ask two or three initial questions that tell the fact-finder who the expert is and why he is there. For instance:

Q. Doctor, can you tell us what kind of doctor you are?

A. Yes, a neurologist.

Q. Is a neurologist a doctor skilled in the diagnosis and treatment of diseases of the nervous system?

A. Yes.

Q. And have you come here today to explain to the fact-finder (court or jury) your diagnosis and treatment of the damage to plaintiff's nervous system caused by the accident?

In short, within the first two to three minutes, make it clear to the fact-finder who the expert is and what he or she will be talking about.

Adding the Power of Persuasion to the Tickler

A tickler can be a powerful tool of persuasion. Here's why and some explanations and three alternative examples of how to use them for your consideration.

Example 1

Psychologists, who study such things, have concluded that the average human has an attention span of 30 to 45 seconds. This means that if you try to focus on an inanimate object such as a pencil on a desk and the object does not move or change, your attention will wander from the pencil after 30 to 45 seconds. Once you realize how limited a jury's attention can be, you should consider ways to keep and recapture the jury's attention.

One of the most challenging portions of a trial to successfully accomplish while retaining the jury's attention is setting the foundation to qualify an expert witness as an expert. The process can be mind-numbingly boring. For example:

1. Doctor, where did you go to medical school?
2. Doctor, where did you do your residency?
3. Doctor, where did you do your internship?
4. Doctor, what is your specialty?
5. Doctor, do you have related subspecialties relevant here?

Talk about a sing-song-boring direct. Simply mind numbing! The jury is gone. Their minds are elsewhere—three minutes into the direct exam!

Instead of the direct exam, the jury is thinking about their favorite sports team, where they want to go on vacation, what they need to buy at the grocery store, what they will fix for dinner—anything but your boring direct exam.

Once you have lost the jury's attention, it is difficult to recapture it.

Worse yet, you are in a race with the other side to communicate and have the jury adopt your theme as their own rather than adopting your adversary's theme. How do you capture and keep or recapture the jury's attention for this purpose?

Assume you are handling a medical malpractice case. You know that 80 percent of such jury cases result in jury verdicts for the defendant because most of us like our personal doctors, believe they have a hard job, and therefore give wide latitude for medical judgment.

As a result, your theme and case must not be gray but must be black and white. That is, it must not be subject to multiple interpretations but it must establish a universal truth so the defendant doctor cannot hide behind the medical judgment rule to escape liability.

You stress that due to the doctor's performance of a drastic and dangerous procedure called an angiography, your client is paralyzed over half of her body. Many others undergoing this procedure do not survive.

What is the black and white theme? What is the underlying truth of the case?