Second Report to the Chief Justice of the Supreme Court of North Carolina

Prepared by
Judicial Branch COVID-19 Task Force
June 30, 2020

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About the North Carolina Judicial Branch
The mission of the North Carolina Judicial Branch is to protect and preserve the rights and liberties of all the people as guaranteed by the Constitutions and laws of the United States and North Carolina by providing a fair, independent, and accessible forum for the just, timely, and economical resolution of their legal affairs.

About the North Carolina Administrative Office of the Courts
The mission of the North Carolina Administrative Office of the Courts is to provide services to help North Carolina's unified court system operate more efficiently and effectively, taking into account each courthouse's diverse needs, caseloads, and available resources.

Introduction

On June 12, 2020, the Judicial Branch COVID-19 Task Force submitted its first interim report to The Honorable Cheri Beasley, Chief Justice of the Supreme Court of North Carolina. This second report is an addendum to that previously submitted report and covers the following additional recommendations that the Task Force developed during the second part of June 2020:

1. Recommendations on the resumption of civil and criminal jury trials;
2. Recommendations on best safety practices for civil and criminal jury trials; and
3. Additional intermediate and long-term recommendations on technology and court innovations.

The Chief Justice's Judicial Branch COVID-19 Task Force is comprised of the following members:

- The Honorable F. Donald Bridges, Co-Chair, District 27B Senior Resident Superior Court Judge
- The Honorable Jay Corpening, Co-Chair, District 5 Chief District Court Judge
- The Honorable Wayland Sermons, District 2 Senior Resident Superior Court Judge
- The Honorable Teresa Vincent, District 18 Chief District Court Judge
- The Honorable Billy West, District 14 District Attorney
- The Honorable Robert Evans, District 8 District Attorney
- The Honorable Marsha Johnson, Harnett County Clerk of Superior Court
- The Honorable Elisa Chinn-Gary, Mecklenburg County Clerk of Superior Court
- Kinsley Craig, District 27B Trial Court Coordinator
- Kellie Myers, District 10 Trial Court Administrator
- The Honorable Jason Cheek, Davidson County Magistrate
- The Honorable Jennifer Harjo, New Hanover County Public Defender
- John McCabe, Attorney and Appointee of the North Carolina Advocates for Justice (NCAJ)
- Wade Harrison, Attorney and Appointee of the North Carolina Bar Association (NCBA)
- Patrick Weede, Attorney and Appointee of the NCBA
- JD Keister, Attorney and Appointee of the North Carolina Association of Defense Attorneys (NCADA)

Please see the Task Force's June 12, 2020 report for a full description of the Task Force's three working groups—the Best Safety Practices Working Group, the Technology and Innovations Working Group, and the Virus Fatigue Working Group—as well as the members of and staff to those working groups.

Recommendations on the Resumption of Jury Trials

Jury trials constitute a cornerstone of the American justice system, both in civil and criminal courts, and a substantial number of civil and criminal cases cannot be resolved without the decision of a jury. Experience tells us that jurors help facilitate case dispositions, sometimes simply by being available. The effectiveness and fairness of the courts depend, in large measure, upon the availability and willingness of citizens to serve on juries. Throughout the duration of this pandemic, local court officials must find new ways to conduct jury trials that are as safe as practicable for all participants and that overcome the reluctance of many potential jurors to enter a public building and serve on a jury during a pandemic.

In light of the need to protect the public, jurors, and court personnel while safeguarding the fundamental rights of all parties, the resumption of jury trials presents one of the most daunting challenges in the expansion of court proceedings during recovery from the COVID-19 pandemic. Traditionally, jury trials have involved the gathering of large numbers of people—including potential jurors, courthouse personnel, attorneys, clients, witnesses, court reporters, bailiffs, and observers—in relatively small courtrooms. Jury service typically requires close physical proximity with other jurors, beginning in a jury assembly room, then in a courtroom gallery, followed by placement in a jury box, and concluding with deliberations in a small jury room.

The Task Force, comprised of various stakeholders in the judicial process, believes it is important to provide clarity and predictability, to the extent possible, with respect to the resumption of jury trials in our state courts. However, as the Task Force's prior report noted, there is no "one size fits all" approach with respect to North Carolina's 100 counties. Thus, the balancing of these complex concerns and considerations in individual cases must be left to the reasoned judgment of the presiding judicial officials.

Local officials should be mindful of the concerns of all stakeholders as their districts ramp up court operations, including the conduct of jury trials in both civil and criminal cases. The transition back to full operations may vary by the type and complexity of caseloads and by local issues such as the prevalence of the virus in any given county and the availability of appropriate facilities, but there must be a paramount concern for the safety of all participants. Like all other court proceedings, local judicial officials should attempt to scale back gradually toward the full resumption of jury trials.

The Task Force recommends that complex lengthy trials not be chosen as the first jury trials immediately after the Chief Justice's orders allow them. Instead, it suggests that local officials begin with shorter and less demanding jury trials, such as simple civil trials and lower-level felonies, while new protective measures are being perfected. Moreover, presiding judges should not force parties to proceed to trial if they are unprepared due to the pandemic, and should be sensitive to the potential need for additional delays to allow for adequate trial preparation by all parties.

Stakeholder Concerns

The complexities and the challenging nature of managing jury trials in this environment are illustrated by the comments and concerns that were expressed by the various stakeholders on the COVID-19 Task Force, some of which are shared across groups and some of which are in conflict with each other. The written comments about jury trials that various Task Force members submitted are attached to this report in Appendix B. A summary of the written and verbal comments follows:

1. **Judges** expressed concerns about the limitations of court facilities, including the fact that many North Carolina courthouses only have one or two courtrooms. There are significant challenges inherent in scheduling trials that accommodate social distancing, and judges expect there to be competition for limited courtroom spaces in the coming months as all court operations expand, not just jury trials. Judges also expressed concerns about management issues in safely summoning, orienting, and monitoring potential jurors and seated jurors, including the impact that trials will have on overall traffic in court facilities. Finally, judges expressed concerns over maintaining appropriate safety practices within courtrooms without creating an atmosphere that could operate to prejudice any party.

2. The **civil and family law bars** expressed a readiness to resume trials by early August in order to move their cases, as long as it can be done safely, but they requested as much advance notice as possible upon calendaring so they can coordinate scheduling and complete trial preparations. In order to accommodate social distancing concerns, the civil bar expressed a general willingness to consider consenting to six-person jury trials or bench trials in appropriate cases, as well as a reduction in the number of peremptory challenges.

3. The **district attorneys** expressed a similar desire to resume calendaring criminal trials by early August, coupled with local control over when and how trials in individual cases resume after that date. They expressed concerns that criminal defendants have both statutory and constitutional rights that could be impacted by an extended delay in jury trials across North Carolina. The district attorneys were especially concerned about defendants who are incarcerated. While the district attorneys agree that criminal defendants can waive certain rights, they noted that it is the individual defendant who must make that decision. For that reason, along with differences in facilities, resources, and health concerns throughout the state, the district attorneys expressed a belief that any emergency directives from the Chief Justice should set guidelines but allow local court officials to prioritize cases selected for trial. They noted that numerous other states are following such a localized approach. The district attorneys expressed concerns that each case is unique and that any decision to separate when jury trials can begin based on class of offense could prompt constitutional challenges. Finally, the district attorneys expressed concerns that victims of crime have constitutional rights and a strong interest in having their cases heard in a timely and efficient manner.

4. The **private criminal defense bar and public defenders** expressed a number of concerns about the resumption of jury trials, including:
    - The impact of the pandemic on their ability to meet safely with in-custody clients to review discovery and to conduct substantive discussions about case preparation;

- The increased difficulty in locating and interviewing witnesses and gathering other information to prepare a defense during the "Stay-at-Home" and "Safer-at-Home" phases;
- The impact that the pandemic has had on the ability of investigators, mitigation specialists, and experts to perform their work in the field;
- Concerns about their ability to protect their clients' constitutional rights to confrontation and cross examination if witnesses and jurors wear masks in a courtroom, as well as concerns about ensuring the accuracy of trial transcripts if witnesses testify wearing masks;
- Concerns about having the ability to communicate confidentially with their clients during trials, especially under arrangements that include social distancing or plexiglass barriers;
- Concerns that social distancing practices resulting in a reconfiguration of jury seating might impede their opportunity to view jurors during trial;
- Concerns about the dehumanizing impact of physical separations between them and their clients, as well as the potential negative inferences that jurors might draw from those physical separations;
- Concerns about the ability to select a jury that is fully representative of the community given that more prospective jurors will likely seek deferrals; and
- Opposition to a resumption of criminal jury trials without the consent of both the state and the defendant prior to September 21, 2020, and opposition to the resumption of any capital or non-capital first-degree murder trials prior to November 30, 2020.

5. **Clerks** expressed concerns about managing large numbers of jurors when they return to the courthouse, including the logistics of handling juror orientations and reporting. Clerks agreed that jurors should report in staggered intervals, but they recognized that this process will require more attention and planning. Because of these additional steps, the clerks asked that judges and attorneys carefully screen cases to ensure that cases calendared for jury sessions will actually require a jury for determination. Clerks also noted the need for generous deferral policies and second noticing for potential jurors who do not appear. Finally, clerks stressed the importance of messaging to the public concerning measures that are being taken to keep people safe, including the necessity of accuracy in that messaging.

6. **Court managers** expressed concerns about the potential impact that holding jury trials under current conditions may have on future appeals and motions for appropriate relief, as well as the safety of court reporters who often sit in close proximity to testifying witnesses.

7. **All stakeholders** expressed concerns about safety and the availability of appropriate personal protective equipment, particularly for high-risk participants and their families.

In addition to these stakeholder concerns, see Appendix C for the results of a June 2020 national public opinion poll of 1,000 registered voters, with many of the questions addressing citizens' attitudes toward jury service during the pandemic.

All of these concerns and perspectives should be taken into consideration by judicial officials as they plan for resuming trials in their districts. For criminal jury trials in particular, judges should be mindful of the handicaps that criminal practitioners have been and will continue to operate under during this pandemic, including the limitations on their ability to meet with their clients; the need for confidential

communications with clients and witnesses during trial; the importance of being able to view the facial expressions of witnesses during testimony; and the possibility that certain courtroom arrangements could prompt prejudicial inferences about their clients.

Recommended Minimum Requirements for Resumption of Jury Trials

Pursuant to the Chief Justice's Emergency Directive 16, and in an effort to balance all of these considerations, the Task Force recommends the following minimum requirements for the resumption of jury trials in the trial courts of North Carolina:

1. The Chief Justice should order, in an upcoming emergency directive, a specified date as the earliest date on which civil and criminal jury trials will be permitted to resume in the trial courts of North Carolina, based on the rule of law, the fundamental constitutional and statutory rights afforded to criminal defendants and victims, and her assessment of current statewide health data, subject to any prerequisites that the Chief Justice deems appropriate, including the submission of any operations plans from local districts.

2. In preparation for that directive, every senior resident superior court judge should, in consultation with other local court officials—including the COVID-19 coordinator, chief district court judge, clerk of superior court, district attorney, chief public defender (or one or more members of the local criminal defense bar in non-public defender districts), trial court administrator or coordinator, and a local civil attorney—craft a plan for the resumption of jury trials in his or her judicial district. In the event that the chief district court judge determines that a separate plan for district court is warranted, the chief district court judge should, in consultation with other local court officials—including the COVID-19 coordinator, clerk of superior court, trial court administrator or coordinator, family court administrator, and one or more members of the civil and domestic bar—craft a plan for the resumption of district court jury trials in his or her judicial district.

3. These plans should be crafted well in advance of the anticipated date of the first jury trial due to the lead time required to generate names for a jury pool and to issue jury summons. Communication and cooperation among local officials are imperative, not only with respect to the management of jury trials, but also with respect to the coordination of the use of court facility space needed for jury management and its effect on the operations of other courts within the same facility. Before proceeding with the scheduling of jury trials, the senior resident superior court judge and chief district court judge must be able to confirm to the Chief Justice that they have done the following:
    a. Reviewed all of the Chief Justice's Emergency Directives pertaining to COVID-19 and the recommendations of this Task Force; and
    b. Considered input from the stakeholders described above, as well as local public health officials, and concluded that it is reasonable for the district to proceed with jury trials under a local plan or plans crafted by those judges, which follow all appropriate standards for the health and safety of all participants, including any specific guidelines as may be provided by the Chief Justice.

    Depending on local health conditions, the senior resident superior court judge and / or chief district court judge may exercise discretion to delay resumption or to suspend operation of jury trials in the interest of local health and safety.

4. This Task Force does not consider remote jury trials to be a feasible option in North Carolina at this time. Hence, it is assumed that all jury trials will operate as "In-Person Court Proceedings" subject to the recommended best safety practices for such proceedings that were set forth in the Task Force's June 12, 2020 report to the Chief Justice. See Appendix D. Additional best safety practices for jury trials are set forth in the next section of this report. However, the Task Force does believe that some of the processes leading up to the impaneling of the jury—such as juror orientation, prescreening for deferrals and excuses, strikes for cause based on written juror questionnaires, and other aspects of jury management—could be handled by remote means.

5. In planning for the resumption of jury trials, every senior resident superior court judge and chief district court judge (or their designees) should meet with the clerk of superior court (or designated jury coordinator) in each county in their district to address the summoning and management of jurors during the period of required social distancing. The senior resident and chief district court judge (or designee) and clerk (or designee) should give careful consideration to special issues relating to jury management during upcoming months, including, for example:
    a. Determining the number of jurors to summon for sessions of court, taking into consideration reasonable projections for attendance and deferral requests in light of the pandemic;
    b. Assessing the feasibility and details of arranging for jurors to report in staggered groups (e.g., 25 to 40 in the morning and a similar number in the afternoon);
    c. Providing arrangements for online or staggered orientation sessions for each group of potential jurors as they report;
    d. Establishing criteria for addressing deferral requests based on COVID-19 concerns; the Task Force encourages the chief district court judges to review their district's excuse policy under N.C.G.S. § 9-6(b) and to expand it to allow for deferrals and excuses to be heard remotely and for more leeway for deferring / excusing jurors who are in a high-risk group (as defined by Centers for Disease Control and Prevention (CDC) guidelines);
    e. Including a printed message with each jury summons that is also posted online, advising potential jurors of the safety precautions that have been undertaken to protect their health and safety while serving;
    f. Conducting a safety "walk-through" with the clerk in each county (as well as designees from the sheriff's office and local health department) in his or her district, viewing where jurors will go from the time they enter the courthouse until they leave at the end of their service, including jury assembly, jury orientation, waiting before and after selection, entrances to and exits from the courtroom, break rooms, deliberation rooms, and other areas;
    g. Determining whether current jury assembly rooms and jury deliberation rooms are sufficiently large to provide appropriate spacing for social distancing in each room; if so, use tape or markings to indicate where seating is allowed; if not, identify other rooms to be used for jury assembly and jury deliberation (including the possible use of the trial courtroom, another available courtroom, or other room in an alternate local facility);
    h. Developing a waiting plan for seated jurors, using an appropriate waiting room or a call back system to free up space in the courtroom during the remaining jury selection, if needed;
    i. Determining whether each courtroom needs plexiglass shields at counsel tables, the witness stand, and / or the work stations of the courtroom clerk and court reporter;

j. Considering the possible need for cautionary jury instructions that may be appropriate with respect to obvious shields that have been placed in the courtroom in order to avoid prejudicial inferences by jurors, upon request; and
k. Preparing to deal with trial issues that create potential complications due to social distancing, including, for example, the handling of requests for bench conferences.

6. Pursuant to the Chief Justice's Emergency Directive 16, each COVID-19 coordinator is directed to determine whether there is adequate space in the court facility to convene a jury trial in keeping with current public health guidance. In making this determination, the COVID-19 coordinator should take into account the need for the venire to observe social distancing, as well as for jurors to be socially distanced in the courtroom and any deliberation room. The COVID-19 coordinator is encouraged to consult with the local public health director, or his or her designee, in making this determination where possible.

   If local court facilities are determined to be inadequate to convene socially distanced jury trials, the senior resident superior court judge is directed to identify, no later than July 1, 2020, other appropriate facilities where trials may be safely convened beginning in August and continuing during the pendency of this emergency.

   If the alternate facility is located outside the county seat, information about the alternate proposed facility shall, pursuant to N.C.G.S. §§ 7A-42(i) and 7A-130, be submitted to the North Carolina Administrative Office of the Courts (NCAOC) for approval and, in the case of the superior court division, to the Chief Justice for approval as well.

7. Upon identifying facilities for use in conducting jury trials with appropriate social distancing, whether in the courthouse or elsewhere, each senior resident superior court judge and chief district court judge should craft and adopt a set of local rules or administrative orders that govern how to conduct jury trials under conditions that necessitate social distancing in superior and district court, respectively. These rules should be drafted in a manner that will address at least the following concerns for all jury trials conducted while social distancing is recommended, whether the trial is held in a courtroom or an alternate facility:
   a. The manner in which failures to appear and requested deferrals will be handled; local rules are encouraged to provide for lenient failure to appear policies and the liberal granting of deferrals during the pandemic, with appropriate consideration of the impact this may have on fair cross-section challenges and the diversity of seated juries;
   b. Accommodate bench trials and jury trials with less than 12 jurors with the consent of the parties to better allow for social distancing; in criminal cases, there must be strict compliance with N.C.G.S. § 15A-1201;
   c. Any room to which jurors or potential jurors are directed should be sufficiently large to accommodate social distancing for that number of persons, and seating arrangements for jurors and other participants in the jury trial should be clearly marked to so provide while also allowing the parties and their attorneys to observe jurors during the trial;
   d. The maximum number of people who will be allowed in the courtroom at one time;
   e. The manner and scheduled sequences in which jurors will be required to report to the court facility and courtroom, such as staggered reporting times and the number of jurors in each reporting group;

f. The designation of the area in which jurors will be directed to wait before being brought into the courtroom;
g. The maximum number of potential jurors that will be summoned into the court facility at one time and the maximum number of potential jurors that will be directed into the courtroom at one time, considering necessary social distancing requirements;
h. The manner in which jury orientation(s) will be conducted, considering necessary social distancing requirements; (note that the size and dimensions of the courtroom and jury assembly room may require jury orientation(s) to be conducted in staggered increments or remotely);
i. The manner in which voir dire of prospective jurors will be conducted, considering necessary social distancing requirements; (note that the size and dimensions of the courtroom and jury assembly room may require voir dire to be conducted in staggered increments or remotely, in part);
j. Any restrictions on attorneys, witnesses, or other trial participants concerning approaching the bench, approaching a witness, or movement within the courtroom that will be required to maintain social distancing, such as:
    i. Counsel should remain seated at counsel table during witness and juror examination; and / or
    ii. When standing to present opening statements and closing arguments, counsel shall remain six feet from all other persons in the courtroom.
k. Any requirements for the introduction and handling of exhibits in the courtroom (e.g., requiring that all exhibits be presented to the jury electronically rather than passing exhibits among the jurors);
l. The optional use of podiums by attorneys for opening statements and closing arguments;
m. Any modifications to traditional or local customs concerning jury selection, including the potential use of written jury questionnaire(s);
n. Any special instructions to provide for the ability of attorneys to consult privately and confidentially with their clients during the trial, particularly in criminal cases, while maintaining social distancing or with other appropriate safeguards in place (e.g., plexiglass partitions); and
o. Review of any changes to the courtroom layout, being mindful of the importance of all participants being able to observe the facial expressions of the witnesses, jurors, and defendant, particularly in criminal cases.

8. Jury deliberations should take place in a room of sufficient size to allow for proper social distancing among all jurors. It may be necessary to use the actual courtroom or another courtroom as a jury deliberation room. If so, the presiding judge should enter appropriate orders concerning the privacy of jury deliberations and station bailiffs appropriately to enforce those orders.

9. Each presiding judge should be mindful and considerate of the anxiety of potential jurors who are kept waiting. Every effort should be made to begin jury trials promptly at the time designated. If unexpected delays are encountered, jurors should be allowed to leave the court facility and return at a designated time, rather than being kept waiting in a jury assembly room.

10. On or after the date specified by the Chief Justice as the earliest date allowed for the resumption of jury trials, and upon confirmation of readiness after consultation with the clerk of superior court and

the COVID-19 coordinator, civil jury trials may be calendared in district and superior court in consultation with the COVID-19 coordinator.

11. On or after the date specified by the Chief Justice as the earliest date allowed for the resumption of jury trials, criminal jury trials may be calendared for trial, subject to the following recommendations:
    a. The Task Force recognizes that authority for the calendaring of criminal cases lies with the district attorneys pursuant to N.C.G.S. § 7A-49.4. However, during the first 90 days after the Chief Justice's orders allow for the resumption of jury trials, the Task Force recommends that criminal cases selected for trial be prioritized by the senior resident superior court judge in consultation with the elected district attorney, the chief public defender (or a senior member of the criminal defense bar in non-public defender districts), and the COVID-19 coordinator.
    b. In conducting the prioritization of criminal trials as described above, the Task Force recommends that the senior resident superior court judge give careful consideration to at least the following factors:
        i. The extent to which a jury trial of the case can be conducted with safety for the health of all participants;
        ii. The readiness of the case for trial, as determined by counsel for each party;
        iii. The age of the case;
        iv. Whether or not the defendant remains in custody pending trial;
        v. The complexity, number of parties, and expected length of the trial; and
        vi. The consent, or lack thereof, of the defendant and defense counsel to proceed to trial at this time, particularly with respect to legitimate concerns over health and safety or the likelihood of unfairness arising from protective measures taken during the court proceeding.

12. It is further recommended that the first jury trials set for hearing should be civil cases, lower-level felonies (e.g., Class H or I), or misdemeanor appeals that are expected to take less than one week to try. In addition, it is recommended that no complex civil case, high-level felony case (e.g., Class B2 or higher, absent consent of the parties), or any case expected to require multiple weeks for trial be calendared within the first 90 days after the date specified by the Chief Justice for the resumption of jury trials.[1]

[1] With the exception of recommendation number 12, the Task Force unanimously approved these recommendations with respect to the resumption of jury trials. District Attorney Billy West and District Attorney Robert Evans voted to approve the recommendations generally as reflective of the best safety practices that are currently available to facilitate the resumption of jury trials. They objected to the inclusion of recommendation number 12 and similar language that they believe represents an unnecessary intrusion on the district attorneys' statutory authority under N.C.G.S. § 7A-49.4. They believe that a one-size-fits-all standard of what cases can be tried and when fails to allow for variations in facilities and resources among districts and that these decisions are best left to local authorities.

Therefore, Task Force members West and Evans suggested the following alternative language for recommendation number 12: "It is further recommended that the first jury trials set for hearing should be shorter and less demanding jury trials that are expected to take less than one week to try. In addition, it is recommended that no

13. Each presiding judge should be mindful of the importance of communication to potential jurors concerning safety precautions that have been taken so that they will be comfortable with the idea of jury service. The Task Force recommends that a letter from the presiding judge be included with each jury summons, advising potential jurors of the precautions that are being taken to provide for their health and safety during jury service, reminding them of the importance of jury service, and informing each juror that they have an opportunity to request a deferral of service by making that request in advance by telephone. It is suggested that requests for deferral be made in advance of the court date, but that a method also be provided for jurors to communicate changes in their status up until their reporting date, especially with respect to health concerns.

14. It is imperative that judges be mindful of and follow the recommended best safety practices for jury management and jury trials that are itemized in this report, and they should be familiar with all safeguards and precautions that have been undertaken to provide a safe space for jurors. As part of their orientation, judges should include mention of these safeguards in written and oral communications to jurors. The jury clerk should also have a list of these safeguards in order to address telephone inquiries from prospective jurors.

Recommendations on Best Safety Practices for Jury Management and Jury Trials[2]

Before Jury Selection and Trial

The first step in resuming jury trials and grand jury proceedings involves the summoning of a pool of prospective jurors from which to select juries. The focus in this stage is to disperse and reduce the number of individuals who appear in-person for jury service.

1. Juror Reporting Practices

- Judicial officials should anticipate lower jury yields. Assume that half of summoned jurors will appear after processing failures to appear, summons that are unable to be delivered, and deferrals / excuses.
    - Begin collecting statistics on juror yield, if not currently doing so, to determine the average number of jurors who appear and are willing to serve.

complex civil case, or any criminal case expected to require multiple weeks for trial, be calendared within the first 90 days after the date specified by the Chief Justice for the resumption of jury trials."

[2] The recommendations in this section are based on a number of different sources. *See, e.g.*, Coronavirus (COVID-19) section of the Centers for Disease Control and Prevention website; Coronavirus and the Courts section of the National Center for State Courts website; North Carolina Department of Health and Human Services' StrongSchoolsNC Public Health Toolkit (K-12) (June 8, 2020); North Carolina Department of Health and Human Services' Interim Guidance for Restaurants (May 22, 2020); Arizona Jury Management Subgroup Best Practice Recommendations During the COVID-19 Public Health Emergency (June 1, 2020); and Arizona COVID-19 Continuity of Operations During a Public Health Emergency Workgroup Best Practice Recommendations (May 1, 2020).

- Consider pooling jurors pursuant to N.C.G.S. § 9-5 to limit the number of venires that have to be summoned, as long as pooling does not increase the size of the pool required.
- Consider conducting juror orientation remotely to reduce the number of people in close proximity and to reduce the foot traffic to and within court facilities. (NCAOC should consider setting up an online verification form for jurors to complete to indicate they have read the handbook and viewed the orientation video.)
- If conducting juror orientation in person, do so with smaller groups of individuals at staggered times.
- Summon the jury pool to appear at staggered times to limit contact. Those selected to appear at staggered times should be randomly selected (e.g., if the space used for the jury assembly room has a maximum occupancy of 30 individuals and 80 jurors are summoned to report, then 30 jurors could report at 9:00 a.m., 30 jurors could report at 12:00 p.m., and the remaining 20 jurors could report at 2:30 p.m.).
- Consider using technology to notify jurors remotely when and where they should appear (e.g., if a trial settles at the last minute, the jury clerk would notify the jurors by telephone or other messaging medium that they are no longer needed, eliminating the need for the jurors to appear in-person).
    - A text notification system, similar to what the Judicial Branch currently uses for court date notification or the county uses for emergency notifications, could be used or texts could be sent via email.
- Prior to reporting, notify jurors of the amenities available and what is restricted / unavailable so they can plan accordingly (e.g., if access to a shared refrigerator is restricted, jurors may want to pack ice with their lunches).
- Provide clear information to jurors and potential jurors about the steps taken to prevent the spread of COVID-19. Communicate this information through jury summonses, websites, juror call-in messages, and courthouse signage.
- Use disposable stickers / name tags that are issued and disposed of daily in lieu of reusable plastic juror badges.
- Require jurors to maintain social distancing and recommend that they wear masks / face coverings when appearing in person. Courts should plan to provide masks for jurors who do not have a mask or face covering.
    - In cases where lip-reading or mood assessment of jurors may be useful, the court may also consider the use of face masks with clear panels, such as those used by individuals who are deaf or hard of hearing.

2. Excusal, Deferral, and Failure to Appear (FTA) Policies

- These policies should be retained to ensure jurors represent a fair cross-section of the community and to address legal challenges that may be posed after the trial.
- The chief district court judge or his or her designee, pursuant to N.C.G.S. § 9-6(b), should consider revising the district's excusal or deferral policy. Recommended policies include:
    - Reducing the number of people who must appear in-person to request an excusal or deferral by providing remote or telephonic request methods;
    - Considering deferrals of service before granting excuses;

- Allowing more flexibility for excusing / deferring individuals who may not be able to serve, taking into account the CDC guidance regarding persons who are *high-risk* or who may live with or act as a caregiver for someone who is high-risk, and including this information in the jury summons;
- Allowing more flexibility for excusing / deferring individuals who are at heightened risk of contracting COVID-19 and transmitting it to others, such as essential workers in the health or service industry or people who have recently traveled;
- Relaxing show cause policies (e.g., if a person does not appear, resending the summons rather than issuing show cause); and / or
- Offering an amnesty program after the COVID-19 pandemic has relaxed.

Those at high-risk for severe illness from COVID-19 are:

- *Older adults*
- *People of all ages with certain underlying medical conditions, particularly if not well controlled*

Source: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html

- Provide clear information with the jury summons regarding how to contact the court if a juror has safety concerns, such as a recent exposure to COVID-19, *up to and including the day of jury service*, to prevent a juror from appearing in-person who may have been recently exposed but is not within the court's deadline to request an excuse or deferral.

3. Jury Assembly

- The court should determine the maximum seating availability, applying social distancing measures, and mark appropriate seating arrangements (i.e., "sit here" or "don't sit here" signage). In high-traffic areas like elevators or cashier counters, it is advisable to mark spacing six feet apart to enforce social distancing.
- Reengineer courtrooms to allow social distancing (e.g., remove the jury box and replace it with individual chairs, if possible).
- Encourage jurors to wear masks / face coverings; provide masks when supply is available; consider requesting supply from the county.

"We now know from recent studies that a significant portion of individuals with COVID-19 lack symptoms ('asymptomatic') and that even those who eventually develop symptoms ('pre-symptomatic') can transmit the virus to others before showing symptoms. This means that the virus can spread between people interacting in close proximity—for example, speaking, coughing, or sneezing—even if those people are not exhibiting symptoms. In light of this new evidence, CDC recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies) especially in areas of significant community-based transmission."

Source:https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html

- Use additional courthouse space, if available, to space jurors apart for social distancing and summon small panels to the courtroom for voir dire.
- Avoid assembling large groups of people when possible. It is preferable to stagger groups throughout the day than to assemble everyone together in a large space. If this is not possible, determine if a large space exists in the community that could be used as the juror assembly room, such as a school auditorium or gymnasium, theater, convention center, or recreation center.
- Assembly areas should be frequently cleaned according to CDC and local health guidelines and recommendations.
- Limit the direct exchange of documents and other items with jurors (e.g., photo identification and parking vouchers).
- Provide hand sanitizer, tissues, and lined trash cans in all areas where jurors will convene.
- Restrict or remove shared amenities, such as books, magazines, microwaves, etc.
- Do not reuse pens / pencils without proper cleaning between use.

Jury Selection and Trial

This step occurs once the prospective jurors are in the courtroom for voir dire, impaneling, deliberation, and adjournment. The recommendations in this section may be used for grand jury proceedings as well. The focus during this phase should be on implementing the hierarchy of controls to minimize the potential for exposure to and spread of COVID-19.

There is a continuum of risks associated with the spread of COVID-19. Risk can be assessed based on the number of people, the size of a space, and the airflow over time. Due to the complexities of these factors, there is no specific time (e.g., 30 minutes or one hour) that people may safely assemble in the same room. To reduce the risks, individuals should take certain actions such as social distancing, washing hands often, avoiding close contact with others, disinfecting frequently touched surfaces, and wearing masks / face coverings. Removing a mask for a brief moment increases the risk of transmitting COVID-19 since COVID-19 spreads through droplets when people talk, cough, or sneeze. Masks / face coverings are also advisable because, when people raise their voice, this could increase the spread of COVID-19 due to the production and projection of droplets.

When considering whether attorneys, parties, and witnesses should be required to wear masks / face coverings in criminal trials, the rights of the defendant should be weighed against the health and safety of all individuals in the courtroom. Courts may consider requiring witnesses to wear masks while testifying, except in criminal trials, where the court should address confrontation clause issues with the parties pretrial. Courts may also consider the use of face masks with clear panels, such as those used by individuals who are deaf or hard of hearing.

1. Convening Jurors and Others in a Courtroom / Enclosed Space

- Require that all attorneys are healthy and not symptomatic and, before coming to court, require that they report to the court if they are not healthy or are symptomatic so they can receive further direction.

> *The CDC recommends that personnel entering the workplace "report symptoms, stay home, and follow CDC guidelines."*
>
> Source: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#more-changes

- The exposure risk increases with the amount of time spent in the courtroom. The North Carolina Department of Health and Human Services (NCDHHS) advises that no special precautions need to be put in place for trials expected to last longer than a week beyond those suggested herein; however, the duration of the trial should be kept as short as possible. Jury trials held in half-day increments are not advisable as that may lengthen the overall duration of the trial and lead to more opportunities for jurors to contract COVID-19 and transmit it in the courthouse.
- NCDHHS strongly recommends that jurors wear masks / face coverings, even if they are seated six feet apart, especially if they are in a small enclosed space for several hours. CDC guidance is that people wear face coverings when around others, even when social distancing.
    - Allow for breaks throughout the day to permit jurors to remove their masks, perhaps by going outdoors. While there is no CDC guidance stating that masks should be removed at certain intervals, it could make jurors more comfortable. However, jurors should maintain social distancing while outside and on breaks.
    - Mask clips may be used to make mask use more comfortable for those who must constantly wear face coverings.
- Consider selecting more alternate jurors than normal in the event that a juror must self-quarantine due to close contact with a positive COVID-19 individual outside the courtroom.
    - If a juror or other trial participant reports a COVID-19 positive test result, contact tracing would need to be initiated. In general, all people who were within six feet of someone who was COVID-19 positive need to be quarantined for 14 days. However, if the exposure occurred for many hours in a small courtroom with poor ventilation, all trial participants may need to be quarantined, even if social distancing was followed.
    - The local health department may need to notify the court that a trial participant is COVID-positive. The court may consider creating a list of contacts and sending that list to the local health department that can perform the notification. However, the court should keep in mind that, pursuant to N.C.G.S. § 9-4(b), public access to juror information shall be limited to the alphabetized list of names. Additional information, including addresses of prospective jurors, is confidential and not subject to disclosure without an order of the court.
- Microphones should be cleaned between each use, after each user, and at the end of the day. Alcohol wipes may be used after each person uses the microphone.

> *"Current evidence, though still preliminary, suggests that SARS-CoV-2, the virus that causes COVID-19, may remain viable for hours to days on surfaces made from a variety of materials. It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.*
>
> *If machinery or equipment [is] thought to be contaminated and can be cleaned, follow the CDC cleaning and disinfection recommendations. First clean dirty surfaces with soap and water. Second, disinfect surfaces*

using products that meet EPA's criteria for use against SARS-Cov-2 and are appropriate for the surface. If machinery or equipment [is] thought to be contaminated and cannot be cleaned, [it] can be isolated. Isolate papers or any soft (porous) surfaces for a minimum of 24 hours before handling. After 24 hours, remove soft materials from the area and clean the hard (non-porous) surfaces per the cleaning and disinfection recommendations. Isolate hard (non-porous) surfaces that cannot be cleaned and disinfected for a minimum of 7 days before handling."

Source: https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html

- Plexiglass partitions have been recommended for use in retail and manufacturing settings to aid in social distancing. Such partitions can be useful for designating one-way traffic in hallways or for brief encounters at cashier's counters. At this point, NCDHHS advises that there is no evidence on the effectiveness of plexiglass partitions in settings where people would share the same air for extended periods of time, such as a jury box or a small courtroom.

2. Voir Dire

- Direct prospective jurors to individual courtrooms rather than to a jury assembly room (online orientation will assist with this process).
- Conduct voir dire in stages with multiple groups to ensure safe distancing.
- When more than one panel of prospective jurors is needed, consider conducting multiple sessions of voir dire from small panels, striking jurors for cause, joining the panels, and then completing voir dire and peremptory challenges.
- Consider asking jurors to complete written pretrial questionnaires and submit them to the court electronically or by US Mail.
- Use remote technology, such as Webex, to conduct voir dire. Consider providing kiosks or remote access to computers for those who cannot connect from home.
- Encourage counsel and the parties to stipulate to six-person juries in civil trials to reduce the number of people in the courtroom and the amount of time required for jury selection.
- Provide clear information to impaneled jurors regarding how to contact the court if the juror has new safety concerns, such as a recent exposure to COVID-19. (The juror should not appear in-person to report this information to the court.)
- Conduct bench conferences in chambers or another location close to the courtroom (e.g., an adjacent jury deliberation room that may now be too small to accommodate a jury panel) where safe social distancing may be practiced.
- Consider streaming or projecting the trial to other courtrooms, or online, to allow the public to view the trial while limiting physical contact. This will limit the number of people in the courtroom to those whose physical presence is necessary.
- If the space previously used as the jury deliberation room contains restrooms for jurors that are not large enough to accommodate jurors safely, consider reserving restrooms for jurors near the currently designated deliberation space to limit interaction between jurors, lawyers, parties, and others in the restrooms.
- Courts should be cognizant that jurors may speak louder than usual due to social distancing and consider limiting nearby access to the jury deliberation space to prevent others from listening to deliberations.

- Provide hand sanitizer, tissues, and lined trash cans in the courtroom and jury deliberation room; provide sanitizing wipes in the jury deliberation room for cleaning of shared objects (e.g., dry-erase markers and table tops).

> *The CDC recommends practicing "routine cleaning of frequently touched surfaces.*
>
> *High touch surfaces include: Tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets, sinks, etc."*
>
> Source: https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html

- Affirm jurors rather than having jurors swear on a religious text. Notify jurors that they must bring their own religious text if they wish to be sworn. Religious texts brought to the courthouse should not be shared with another juror.
- Seat jurors in cordoned-off sections of the courtroom gallery, when possible, to provide appropriate distancing as recommended by current CDC and local health guidelines and rearrange courtroom furniture accordingly.

3. Exhibits

- Utilize technology to manage and view exhibits, if possible (e.g., view exhibits on a screen, in lieu of physical or paper exhibits).
- Attorneys / parties should be required to prepare marked original exhibits to be used at trial as well as copies of exhibits for counsel, the judge, each witness, and the court reporter.
- Attorneys / parties should be required to provide copies, for each juror, of any exhibit they will seek to publish to eliminate the passing of a single exhibit between jurors.
- If it is not possible to provide multiple copies of a published exhibit for the jurors, jurors should sanitize their hands and don gloves prior to handling the exhibit; jurors should properly remove and dispose of gloves and sanitize hands after handling the exhibit.

> *"Paper-based materials, such as books and loose-leaf paper, are not considered high-risk for COVID-19 transmission, and do not need additional cleaning or disinfection procedures."*
>
> Source: https://files.nc.gov/covid/documents/guidance/Strong-Schools-NC-Public-Health-Toolkit.pdf

4. Notebooks and Pens / Pencils

- Encourage jurors to bring their own pencils / pens; if the court provides pencils / pens, they should be new or properly cleaned prior to a juror's use.
- If juror notebooks are used, the court should provide instructions regarding where the notebooks are to be left or how they will be safely gathered and stored to prevent cross-contamination during court recesses.

- Courts may wish to give each juror a poly / plastic folder that can be easily cleaned with a disinfecting wipe, into which the juror may deposit writing instruments and notebooks during court recesses.

5. Additional Considerations

- Before reopening after being closed for a prolonged period of time, it is advisable to take certain precautions to decrease the risk of mold or Legionnaire's Disease and to ensure ventilation systems are operating properly.

> - *"Buildings should be assessed for mold and excess moisture.*
> - *A building HVAC system that has not been active during a prolonged shutdown should be operated for at least 48 to 72 hours (known as a "flush out" period) before occupants return.*
> - *After a building is reopened and occupied, routine (e.g., weekly) checks of the HVAC system are recommended to ensure operating efficiency.*
> - *Develop a comprehensive water management program (WMP) for your water system and all devices that use water. Guidance to help with this process is available from CDC and others."*
>
> Source: https://www.cdc.gov/coronavirus/2019-ncov/php/building-water-system.html

Additional Recommendations on Technology and Court Innovations

The Technology and Innovations Working Group of the Task Force was tasked with examining the types of proceedings that can be conducted remotely, whether legislative changes are needed to support that effort, and whether there are additional equipment needs, and with identifying innovations in court scheduling and operations based on technology. Based on the working group's recommendations, the Task Force's June 12, 2020 report included a series of recommendations to the Chief Justice, the NCAOC, and local court officials for their consideration for immediate implementation.

In this section of this report, the Task Force makes a series of additional intermediate and long-term recommendations to the Chief Justice, the NCAOC, and local court officials for their consideration. As the Chief Justice and the NCAOC deem appropriate, some of these recommendations may be better suited for additional discussion and consideration by the State Judicial Council.

It bears repeating in this second report that the NCAOC is currently developing an eCourts Integrated Case Management System (ICMS) that will enable all case types to be handled electronically from filing to disposition, thereby expanding access to the courts for all North Carolinians. The COVID-19 pandemic has highlighted the critical need for our courts to move away from paper and toward electronic management of our caseload, and the Task Force urges the General Assembly to fully fund this important and timely initiative. The Task Force recommends that ICMS continue to be developed and configured to accommodate its recommendations, as adopted by the Chief Justice, and that NCAOC request sufficient funding to implement those recommendations that are adopted, including funding for

the hardware, software, and training needed to make North Carolina courts more accessible to attorneys, litigants, and the public.

Particularly in light of the NCAOC resources that are currently dedicated to ICMS implementation, the Task Force understands that there may be technological or resource barriers to implementing some of the following recommendations. In addition, recommendations should only be implemented if they are consistent with principles of fairness, equal access, and unbiased justice.

Select Immediate Recommendations

The immediate recommendations in the Task Force's June 12, 2020 report were intended to be those that could be implemented with existing technology, that had little to no associated costs, or that could be authorized through an emergency directive. However, upon further examination of those recommendations, the Task Force has determined that the following immediate recommendations from its June 12, 2020 report may require technological enhancements:[3]

12. Recommend convening the chief district court judges to consider expanding the list of waivable offenses in criminal matters.
14. Remind courts to ensure public access to court proceedings held remotely, which may be achieved by providing information on the calendar that interested parties contact the appropriate court personnel to receive a link to the live session.
17. Recommend secure audio / visual communications from all jails and prisons to permit attorney / client communications, as well as remote hearings.
18. Provide attorneys and their clients a private means of communication *during* court hearings.
21. Recommend the following changes to calendaring / docketing of court matters:
    b. Use morning and afternoon calendars instead of single, day-long calendars. In criminal cases, district attorneys should consider defense attorneys that practice in multiple counties and allow for attorney scheduling to accommodate it (e.g., group cases by attorney blocks).
    c. Use "time certain" scheduling:
        i. In a district court traffic setting, schedule only the number of defendants that can safely fit in a courtroom for social distancing at different intervals (e.g., 40 defendants at 9 a.m., 40 at 11 a.m., etc.).
        ii. If current technology does not permit this practice, the Task Force recommends exploring options for implementing this capability as soon as possible.
    e. Schedule cases by attorney / parties (e.g., Attorney Smith's cases scheduled at 9 a.m.).
    f. If remote hearings are not possible for "high-risk" individuals, consider scheduling a block of time for "high-risk" individuals to appear in court.

[3] The numbering in this section repeats the numbering from the Task Force's original June 12, 2020 report to avoid confusion.

Intermediate Recommendations

Based on the Technology and Innovations Working Group's recommendations, the Task Force makes the following additional intermediate recommendations with a proposed implementation date of no sooner than October 2020. Implementation of the first set of intermediate recommendations below should not require changes to existing technology or statutes or rules:

1. Recommend local policies for motions (or types of motions) to be addressed on written motion, without oral argument. Civil examples include motions to compel, motions to dismiss, motions to continue or for peremptory setting, and other administrative matters.
2. Request that appropriate representatives of the superior court judges, district court judges, clerks of superior court, court managers, and other stakeholders identify high volume / narrow discretion issues that may be fairly resolved using existing public-facing technology, including Online Dispute Resolution (ODR).
3. Evaluate programs for the support of self-represented litigants (e.g., ODR) and assess the use of such programs more widely in our courts.
4. Modify the North Carolina Uniform Citation (form AOC-CR-500) to include fields for a cell phone number and email address for the defendant or develop an alternate mechanism to collect this information in a way that protects the confidentiality of defendants.
5. Request that NCAOC prepare training platforms to teach attorneys and the public how to use Webex to interface with the courts and judicial system.
6. To reduce courthouse traffic, consider an emergency directive during a specified time period to waive the fine / penalty that is established pursuant to N.C.G.S. § 7A-148 for those defendants who elect to waive a trial or hearing, plead guilty or responsible, and pay the cost of their ticket without entering the courthouse (e.g., pay online) prior to their first court date.
7. Find other venues for jury trials or other high-volume court sessions.
8. Explore / consider temporary changes to improve the jury process for civil cases, such as:
    a. Requiring jurors to watch the juror orientation video online prior to appearing for service; and
    b. Encouraging the use of online juror questionnaires, and perhaps case-specific questionnaires, prior to appearing for service to reduce time in court.

The following additional intermediate recommendations may require enhancements to NCAOC's existing technology and / or new technology:

1. Establish a portal (computer terminal or iPad) at each courthouse for public use that would allow individuals without home computer access to participate remotely in a hearing outside of the courtroom.
2. Enable self-represented defendants to negotiate with a prosecutor prior to court (e.g., for certain traffic and low-level misdemeanor cases) by iPlea, Webex, or other technologies.
3. Authorize / permit limited driving privilege (LDP) petitions and other filings required in association with LDP petitions to be submitted electronically and for associated costs to be paid online.
4. Eliminate calendar calls and replace them with a digital / phone / kiosk-based check-in system.
5. Following the senior resident superior court judges' survey of jails and correctional facilities to determine the capability of attorney / client video conferences that the Task Force recommended in

its June 12, 2020 report, create a database describing each facility's capacity and contact information in order to allow remote contact with inmates by counsel for attorney-client communications and for court proceedings. Encourage each district's COVID-19 coordinator to make reasonable efforts to bring video capacity to facilities without this technology.

6. Explore / consider temporary changes to improve the jury process for civil cases, such as:
    a. Conducting voir dire remotely, with computers / kiosks in the courthouse for those who cannot connect from home; and
    b. Conducting remote civil jury trials.

Finally, the following additional intermediate recommendations would likely require statutory or rule changes, such as changes to the rules of civil procedure, rules of general practice, or the rules governing alternative dispute resolution:

1. Consider requesting that the legislature expand the scope of N.C.G.S. § 1A-1, Rule 53 to specify that alimony, child custody, child support, and equitable distribution issues may be referred by district court judges.
2. Amend paragraph 4 of Rule 6 of the General Rules of Practice to reflect that arguments of any motion may be accomplished by means of a "telephone, *remote, online, or electronic*" conference without requiring counsel to appear in court in person.
3. Amend the Rules of the Dispute Resolution Commission to permanently authorize remote district and superior court mediations. Require, absent a showing of good cause, remote mediations for superior court matters and district court family financial matters. In-person mediations can be held if social distancing can be observed and upon consent of all parties or order of the court.
4. Amend the Rules of Court Ordered Arbitration to allow for remote arbitration hearings and for in-person arbitrations to occur at locations other than the courthouse.
5. Establish statewide rules for the remote handling of all forms of evidence (e.g., marking / identifying, introduction, and live witness testimony), including the remote swearing of witnesses.
6. Explore / consider temporary changes to improve the jury process for civil cases, such as mandating / encouraging smaller civil juries and reducing the number of civil peremptory challenges and / or setting a reasonable time limit for voir dire.

Long-Term Recommendations

Based on the Technology and Innovations Working Group's recommendations, the Task Force makes the following long-term recommendations with a proposed implementation date of no sooner than 2021. Most of these recommendations will require enhancements to NCAOC's existing technology and / or statutory or rule changes:

1. Provide for the permanent ability to swear witnesses remotely for both civil and criminal cases (including for search warrants).
2. Provide for the permanent ability of judges, at a minimum, to sign documents electronically. The ability of law enforcement officers (for search warrants) and lawyers to sign documents electronically would also be beneficial.
3. In superior court, with the consent of all parties, permit remote criminal bench trials and civil bench and jury trials.

4. Consider the use of deposition testimony in criminal trials (for testimonial purposes, not for purposes of discovery).
5. Encourage the increased use of civil advisory or provisional jury trials in civil cases as allowed by N.C.G.S. § 1A-1, Rule 39(c).
6. Make all necessary rule and statutory modifications, such as N.C.G.S. § 1A-1, Rule 53, to authorize trial courts to refer custody, child support, alimony, and equitable distribution cases to referees / arbitrators and to select the referee / arbitrator if the parties do not agree.
7. Expand remote application for electronic filing of N.C.G.S. Chapter 50B relief to all North Carolina counties.
8. Based on the recommendations of the superior court judges, district court judges, clerks of superior court, court managers, and other stakeholders, and using examples from other jurisdictions as models, design and implement pilot program(s) for ODR.
9. Develop triage programs for district courts. "Triage" in this context is a process of screening cases prior to and at the time of filing and diverting them into pathways within the judicial system based on the level of services needed. The three pathways are: a) streamlined (involving minimal judicial resources); b) tailored (involving pairing services); and c) judicial / specialized (involving greater need for judicial management and intervention). The triage process may include ODR for streamlined or tailored cases.[4]
10. Create or expand notification systems (text / paging systems) to allow defendants, witnesses, litigants, attorneys, and jurors to receive instant notification when a civil or criminal case is ready to be heard.
11. Improve the current Court Date Notification System (ACEN) to allow for notification of time and date of both civil and criminal hearings. This would allow for instant notification when cases on high-volume dockets need to be rescheduled throughout the day (e.g., a case to be heard at 9 a.m. is postponed to 1 p.m. the same day).
12. Direct this Task Force, the State Judicial Council, or a new group with representatives appointed by the Chief Justice from the statewide organizations for senior resident superior court judges, chief district court judges, clerks of superior court, court managers, and the bar, to establish metrics for the evaluation of initiatives taken in response to the COVID-19 pandemic and to communicate with those groups about the effectiveness of those initiatives.

Because the additional ideas below require thoughtful analysis and input from a wide variety of stakeholders, the Task Force further recommends that the State Judicial Council give consideration to other, more fundamental long-term changes to the jury process. It may be appropriate to pilot some of these changes, to permit them only during declared states of emergency, or to otherwise assess their efficacy before permanently implementing them:

1. Consider reducing the size of the jury panel when the most serious charge is a misdemeanor or Class H or I felony.

[4] For information about triage programs, see CCJ/COSCA Family Justice Initiative Virtual Triage, Pathways, and COVID-19 (Nat'l Center for State Courts Apr. 6, 2020); A Model Process for Family Justice Initiative Pathways (Nat'l Center for State Courts 2019); and Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts (Nat'l Center for State Courts 2018). In addition, Stacey Marz, Faster and as Satisfying: An Evaluation of Alaska's Early Resolution Triage Program (Family Court Review Oct. 23, 2019) is available in Appendix E (reprinted with permission of the author).

2. Consider reducing the number of peremptory challenges in civil and criminal cases if the size of the jury panel is reduced to a six-person jury.
3. Rather than an appeal to superior court after a misdemeanor conviction in district court, consider permitting an "appeal" to a district court jury trial with a limited sized jury and a different presiding judge.
4. Create new and efficient ways to handle juror orientation, juror deferrals and excuses, and jury selection remotely.

Conclusions

As the Task Force stated in its June 12, 2020 report, adapting our state's court system to the current pandemic conditions is a challenge that none of us has had to meet before, and we must be patient with each other as we all seek to adjust the way we do business. As we explore new innovations as a result of this pandemic, we must always do so in ways that are designed to protect the safety of the public, the bar, and our Judicial Branch personnel. In addition to the specific recommendations contained in its June 12, 2020 report and this second report, the Task Force recommends that the State Judicial Council consider and address long-term improvements in court processes, both with respect to needs that have arisen from the COVID-19 pandemic and other deficiencies that have been highlighted by recent events in this country and state.

Appendix A

Judicial Branch COVID-19 Task Force Meeting

June 11, 2020

Task Force Co Chair, the Honorable F. Donald Bridges, convened the meeting at 2:30 p.m. by WebEx.

Reminder of Open Meeting and Roll Call:

Judge Bridges stated that the meeting is subject to North Carolina's open meetings laws and that a livestream had been made available to the public and members of the media. North Carolina Administrative Office of the Courts (NCAOC) Research and Planning Associate Emily Mehta took roll call. The following Task Force members were present via WebEx:

- The Honorable F. Donald Bridges, Co-Chair, District 27B Senior Resident Superior Court Judge.
- The Honorable Jay Corpening, Co-Chair, District 5 Chief District Court Judge.
- The Honorable Wayland Sermons, District 2 Senior Resident Superior Court Judge, was not present for roll call but joined the meeting at 3:38 p.m.
- The Honorable Teresa Vincent, District 18 Chief District Court Judge, was not present for roll call but joined the meeting at 3:20 p.m.
- The Honorable Billy West, District 14 District Attorney.
- The Honorable Robert Evans, District 8 District Attorney.
- The Honorable Marsha Johnson, Harnett County Clerk of Superior Court.
- The Honorable Elisa Chinn-Gary, Mecklenburg County Clerk of Superior Court, was not present for roll call but joined the meeting at 2:34 p.m.
- Kinsley Craig, District 27B Trial Court Coordinator.
- Kellie Myers, District 10 Trial Court Administrator.
- The Honorable Jennifer Harjo, New Hanover County Public Defender.
- John McCabe, Attorney and Appointee of the North Carolina Advocates for Justice (NCAJ).
- Wade Harrison, Attorney and Appointee of the North Carolina Bar Association (NCBA).
- Patrick Weede, Attorney and Appointee of the NCBA.
- JD Keister, Attorney and Appointee of the North Carolina Association of Defense Attorneys (NCADA).

The Honorable Jason Cheek, Davidson County Magistrate, was unable to attend. The Honorable Chuck Henry, District 4 Senior Resident Superior Court Judge, and the Honorable R. Allen Baddour, District 15B Resident Superior Court Judge, were present via WebEx. A number of additional people joined the WebEx as representatives of NCAOC and the School of Government (SOG) in their capacity as advisers and staff to the Task Force, as did Richmond County Sheriff James Clemmons.

Approval of June 4, 2020 Task Force Meeting Minutes:

Attorney Harrison moved to approve the minutes of the June 4, 2020 meeting, and District Attorney Evans seconded the motion. All Task Force members who were present approved the meeting minutes by a roll call vote.

Update from Virus Fatigue Working Group:

SOG Professor Jim Drennan said the working group's "Caring for You" products were finalized yesterday. Professor Drennan said he is proud of those products, and he hopes the Task Force members will use them in whatever ways they can to support the court system actors in the field. Professor Drennan said there is a video and one longer document, as well as two one-page documents. He said the longer document is the heart of it, and NCAOC's Communications Division did a wonderful job putting it into a visually appealing format.

Professor Drennan said he expects the Chief Justice and NCAOC Director to distribute those materials to the field later in the day and, once that is done, they can be made available to other groups that might want to use them, such as the NCBA. He added that the longer document has been edited slightly since the last version the Task Force saw to reflect the increased stress for many people in the court system as the new national crisis has raised awareness about how some people view the justice system. Professor Drennan thanked the members of the Virus Fatigue Working Group and the NCAOC staff who supported their efforts.

Judge Bridges thanked Professor Drennan and everyone who worked on these resources. He said the products are outstanding and he is as proud of this work as anything else the Task Force has done. He added that he has reviewed numerous reports from similar groups in other states, and this aspect of the Task Force's work is unique and creative. Judge Corpening agreed.

Intermediate and Long-Term Recommendations:

Best Safety Practices Working Group:

Trial Court Administrator Myers said the Best Safety Practices Working Group circulated a draft document earlier in the day that contained recommendations about jury management and jury trials. She added that the working group held a meeting after that document was shared to discuss some of the issues raised in it. Trial Court Administrator Myers said the working group's objective was to make safety recommendations that are evidence based and appropriate for the courts, noting that they relied heavily on their public health advisor from the North Carolina Department of Health and Human Services (NCDHHS). She said the overall recommendation from the public health advisor was that in-person jury trials should not occur unless there are appropriate safety precautions in place. Trial Court Administrator Myers turned to the working group's draft and noted that the sections highlighted in yellow are areas of concern for some members because of either practical limitations and / or constitutional questions.

Trial Court Administrator Myers said the document is divided into two parts. The first part addresses jury management issues, such as reporting practices, excuses and deferrals, and jury assembly. The second part addresses proceedings that would typically take place in the courtroom, including jury selection and trials. Trial Court Administrator Myers said the Task Force co-chairs plan to attach the previously approved best safety practices for in-person court proceedings from the first interim report as an appendix to these recommendations, so the working group tried to focus solely on jury trials.

Trial Court Administrator Myers noted that the working group has reached consensus about recommending that jurors wear face coverings in jury assembly areas, so the highlighted concerns on the second page of the draft will be moved to the section on in-court proceedings. She said the highlighted sections on the fourth page are where there is not full consensus. Trial Court Administrator Myers said the draft includes language from the federal guidance about jury trials indicating that presiding judicial officials need to weigh the rights of the defendant against the health and safety of everyone in the courtroom. She suggested that the working group revise that section to more clearly set forth those two interests and to give judicial officials guidance on weighing those competing interests.

Trial Court Administrator Myers asked Public Defender Harjo to share the constitutional concerns she has raised regarding face coverings. Public Defender Harjo said she has experienced some court hearings with attorneys and others wearing masks, and she believes it will be impossible to have criminal jury trials like that. She said defendants facing criminal jury trials have constitutional protections and conducting a jury trial is as much an art as it is a science. Public Defender Harjo said criminal defense attorneys need to be able to see the jurors' faces, and the jurors need to be able to see the lawyers' and witnesses' faces to make decisions about credibility. She added that jurors who have to sit through court all day wearing masks will be uncomfortable and have difficulty concentrating. Public Defender Harjo said she wears masks to court, but she takes them off when she is addressing the judge because it is difficult to hear and understand people through masks. She said wearing masks in trials will interfere with lawyers' ability to participate and see how jurors are reacting to evidence and could create prejudicial impressions in some jurors.

Public Defender Harjo said she has some of the same concerns about plexiglass barriers, noting that they cause a glare that can interfere with the ability to observe facial expressions. In addition, her understanding from health officials is that air particles can travel over and under the plexiglass barriers, so she would be concerned about the safety of anyone relying solely on such a barrier for protection while sitting in a closed room for a long period of time.

Public Defender Harjo said she believes the court system should wait until criminal jury trials can be held safely without masks, so that the defendants will get the constitutional protections to which they are entitled. She said, if a defendant wants to waive those protections, he or she has a right to do so and can choose to proceed with a bench trial or ask the court to determine what safety precautions can be put in place for a jury trial. However, until the courts can assure the accused that their constitutional rights to a fair trial will be protected, she believes jury trials where the defendant does not consent need to wait. She added that she believes that is the opinion of the criminal defense bar as a whole. Attorney Weede

asked whether the working group's public health advisor indicated whether her advice about wearing masks would continue until there is a vaccine or treatment or if there is any sense that those precautions could become less necessary over the coming months. Trial Court Administrator Myers said she did not.

District Attorney Evans said the Conference of District Attorneys is in favor of resuming jury trials as soon as reasonably possible subject to the best available safety advice that this Task Force can recommend to the Chief Justice. He said he would hold his additional comments until the Task Force reaches the jury trial section of the agenda. District Attorney West agreed.

Clerk Johnson said the clerks are the official record keepers, and it is going to be problematic for clerks to hear people who are speaking through masks. She said her courtroom clerks often have to ask people to repeat themselves when they speak while wearing masks and, in some instances, they cannot understand what is being said at all. She said masks muffle voices, and the court reporters are going to have the same problems.

Attorney Keister said the civil attorneys he has heard from share similar concerns about the active participants in a trial wearing masks, including attorneys, witnesses, and potential jurors during voir dire. He added that the civil bar does not seem concerned about jurors wearing masks during the actual trial when they are not speaking. Attorney McCabe agreed.

Attorney Harrison asked whether the public health advisor addressed the questions about spending longer durations of time in a courtroom where everyone is not wearing a mask. He said, in the counties where he practices, some people wear masks and others do not. He asked whether there is any scientific information that could inform the Chief Justice about whether masks should be required in the courthouses, and whether there is a significant increase in risk the longer a person spends in an area where someone else is infected but asymptomatic. Trial Court Administrator Myers said the NCDHHS advisor shared helpful information on those topics at the working group's meeting that day.

Public Defender Harjo said her understanding from the public health advisor is that there is a spectrum of risk, and that everyone wearing masks is the safest but safety diminishes as more people are without masks. She added that the same principle appears to be true with respect to time, and the risk increases as the length of time people spend in proximity increases. Public Defender Harjo said air circulation also impacts the spectrum of risk, and she does not believe there is any specific date when masks will no longer be recommended. Attorney Weede said the Task Force has talked a lot about there not being a one size fits all solution for many of the issues facing it, but he said this issue seems closer to requiring a uniform approach, at least in the criminal context, so that the courts do not create appellate issues.

Judge Bridges asked if Public Defender Harjo's position is that safety dictates that all participants wear masks but, because of the potential interference with the right to a fair trial, no criminal trials should take place except where the defendant chooses to waive constitutional protections and proceed. Public Defender Harjo said yes. Judge Bridges asked what should be done in those cases where a criminal

defendant chooses to waive those protection or files a motion for speedy trial demanding to go to trial. Public Defender Harjo said, in those circumstances, court actors will need to rely on the best safety practice recommendations and conduct a trial as safely as possible for all participants. She added that, in such cases, the courts may need to rely on protections like masks and plexiglass barriers and potentially even conduct portions of the trial remotely.

Judge Bridges said he is concerned that this position would leave it to the defendant and the defendant alone to make that decision. He said no defendant would be forced to submit to a trial but, if a defendant chooses to file a speedy trial motion, the witnesses and jurors would have to come to court and be subjected to conditions that other criminal defendants choose not to subject themselves to. Public Defender Harjo said the defendant is the one person in the courtroom with constitutional protections and rights. She said the courts can have trials that rely on protections like plexiglass under those circumstances but a criminal defendant who is facing significant prison time may choose to wait until the participants do not have to wear masks. Public Defender Harjo said there may need to be a reassessment several months down the road but, in 2020, she does not think it is unrealistic to say the courts should wait so that criminal defendants can have the same type of trials that other defendants have received over the years. Judge Bridges said the defendant is not the only person who has constitutional rights, noting that the state constitution now includes protections for victims.

Judge Bridges urged the Task Force members to bear in mind what the current discussion is about. He said the recommendations before the Task Force right now are from the Best Safety Practices Working Group, not the plan for resuming jury trials. Judge Bridges said the purpose of this report is to present the best safety recommendations for trials based on consultation with public health experts. He stressed that the Task Force is not yet talking about the policy considerations with respect to resuming jury trials, which is a matter that will be discussed later in the meeting. Judge Bridges said, where it is clear what the best safety practices are, the Task Force needs to express them and, where there are areas of disagreement about what the best safety practices are, the Task Force's work product needs to express that so everyone has the best information from public health advisors.

Trial Court Administrator Myers said, with the exception of a few questions that the working group asked its public health advisor at the meeting earlier today, she believes the best safety practice recommendations are close to final. She said she wants to add some more information that the group received today about plexiglass barriers and the impact of the duration of time spent together in an enclosed room, but she believes that can be done relatively quickly.

Judge Corpening agreed with Judge Bridges about the role of this working group, adding that the competing concerns of Task Force members about the resumption of trials can be delivered to the Chief Justice. Judge Corpening asked if it was the will of the Task Force to adopt the recommendations of the Best Safety Practices Working Group. Trial Court Administrator Myers suggested that her working group revise the second section on jury trials to focus solely on safety recommendations and to note any inconsistences in the guidance from public health experts, and that the Task Force vote on the final

recommendations by email. Judge Corpening said he would be open to that approach or to redistributing the recommendations for a final vote at the next meeting.

Attorney Harrison asked whether it would be possible to have the working group's public health advisor create a separate appendix with the information that is the scientific basis for the working group's recommendations. Judge Corpening said Trial Court Administrator Myers could make that request on behalf of the working group. Judge Corpening suggested that the working group make the revisions that Trial Court Administrator Myers suggested earlier in the discussion and ask for the additional scientific information Attorney Harrison suggested, and then recirculate the recommendations for an email vote the following week. Trial Court Administrator Myers agreed.

Technology and Innovations Working Group:

Judge Henry stated that the Technology and Innovations Working Group previously submitted immediate and intermediate recommendations to the Task Force. They also developed some recommendations about the resumption of jury trials, many of which have now been incorporated into the proposed plan that will be discussed later in the meeting. In addition, the working group has compiled a list of long-term recommendations that should be finalized early the following week. Judge Henry said the group does not have additional meetings scheduled, but it can reconvene at any time to respond to questions or address certain recommendations. He said the working group had a series of very open discussions, and he thanked all of the members and the AOC staff who supported their work.

Judge Corpening said any discussion of the jury trial recommendations from this working group would be held for that agenda item, and he asked if there was a motion to approve the other intermediate recommendations. Attorney Harrison so moved and Attorney Weede seconded the motion. All Task Force members who were present (Judge Bridges, Judge Corpening, Judge Vincent, District Attorney West, District Attorney Evans, Clerk Johnson, Clerk Chinn-Gary, Trial Court Coordinator Craig, Trial Court Administrator Myers, Public Defender Harjo, Attorney McCabe, Attorney Harrison, Attorney Weede, and Attorney Keister) approved the motion by a roll call vote.

Resumption of Jury Trials:

Judge Bridges said the Chief Justice directed the Task Force to develop recommendations for the resumption of jury trials and the Task Force has been working on those recommendations for some time now. He noted that this is one of the most daunting challenges involved in the courts ramping back up to full operations. He said, at the last Task Force meeting, the group agreed not to recommend a specific date for the resumption of jury trials and to leave that to the Chief Justice based on her assessment of the health conditions at any given time.

Judge Bridges said, at the last meeting, the Task Force received a report from the Technology and Innovations Working Group that was described as a three-legged stool for the resumption of jury trials after taking into account safety considerations. One concern that was expressed at that meeting was the role of the clerk in the decision-making process. He said the Chief Justice has issued an emergency directive that orders the senior resident superior court judges to undertake certain actions, including

efforts to safely resume trials, so it is clear that the Chief Justice intends to have the senior residents and / or their designated COVID-19 facility coordinators play a significant role in crafting local plans. Judge Bridges said, because of the clerks' role in summoning and managing jurors, one suggestion last week was that the clerks should play a critical role in formulating that plan. Thus, Judge Bridges said the proposed plan has been revised to recommend that, in formulating a local plan, the senior residents should work in consultation with the clerk, district attorney, and public defender or senior member of the local criminal defense bar.

Judge Bridges said, since the last Task Force meeting, he has attempted to merge the jury trial recommendations from the Technology and Innovations Working Group into the draft recommendations that already existed. He said there are some areas in which the language diverged somewhat, but he believes the working group's recommendations are now reflected in the proposed plan. Judge Bridges said the proposal now recommends that the Chief Justice identify a specific date as the earliest date on which jury trials will be allowed to resume. Although the specific cases selected for trial would be determined by the identified local judicial officials, the proposal includes a recommendation that local officials begin with short and simple trials, including simple civil trials, misdemeanor appeals, Class H and I felonies, or other trials that are expected to last no more than one week. Judge Bridges said the criminal defense bar requested that no murder trials be convened before late November, and the proposal now states that criminal trials involving offense classes of B2 or higher should not be held during the first 90 days. In addition, there is language providing that local senior resident superior court judges would have discretion depending on local health conditions to delay the resumption of trials for an additional period of time or to suspend them after they have resumed. Judge Bridges said Public Defender Harjo suggested that jury trials should not proceed without the defendant's consent, and the proposal now includes a recommendation that local court officials consider a number of factors in determining whether specific trials or types of trials should proceed, with the defendant's consent or lack thereof being one factor for consideration.

Judge Bridges said Judge Vincent suggested that the chief district court judges should be included in the decision-making process about the resumption of trials because there are jury trials in district court. He said he intended to add a recommendation that chief district court judges be consulted in formulating local plans, but he inadvertently neglected to do so. In addition, he has been told that there is some interest among the chief district court judges in developing their own plans for jury trials in district court. Judge Bridges said there are two basic options. The Task Force could recommend that the senior resident superior court judges' plans address jury trials in district court after consultation with the chief district court judges, or it could recommend that the chief district court judges develop parallel plans for district court trials.

Judge Bridges said he thinks those are all of the significant changes in today's draft compared to the draft the Task Force discussed the prior week. He said the message he received from the Task Force at its last meeting was to go back to the drawing board and try to integrate the Technology and Innovations Working Group's jury trial recommendations into the existing draft plan. Judge Bridges said he did that in consultation with Judge Henry and then took the revised proposal back to the superior

court judges' work group for their feedback. He said the current draft is a product of those efforts and he would be happy to entertain any comments about the revised draft.

District Attorney Evans said the Conference of District Attorneys supports every effort that can be made to ensure that jury trials resume as safely as possible. He said, when the Technology and Innovations Working Group submitted its recommendations the prior week, the district attorneys raised several issues. District Attorney Evans said the district attorneys understand that, in the midst of this crisis, they will have to move slowly and be reflective in choosing what cases to bring to juries. He said he believes the proposed matters that should be considered and the actors that should be consulted during that process are appropriate. However, the conference's primary concern is the erosion of the district attorneys' statutory authority to set calendars, especially given the restrictions that everyone will be under until there is a vaccine or effective treatment.

District Attorney Evans said the virus is getting worse by the day in North Carolina and none of us can predict what will happen in the coming months. He said it is a no brainer to start with shorter and less complicated trials, but he believes the proposed restriction on trials for certain classes of offense is unnecessary. District Attorney Evans said telling the district attorneys that they can only try lower-level felonies for the first 90 days and that they cannot expand to more serious cases does not get to the heart of the issue. He said he believes the real issue is not what class of cases they should try but, given limited resources and the risks that everyone will be facing, what type of cases are worth bringing to trial in the short term. District Attorney Evans said there may be lower-level felony cases that are not worth risking the health of jurors and witnesses to bring to trial, while there may be homicide cases that are not complex and will not take a long time to try. He said, assuming local actors follow all of the best safety recommendations and consult with others as needed, those cases can be tried relatively safely and they are not more difficult to try than the average class H felony. He said the artificial classification by class of offense does not make sense, and he wants to be in a situation where the courts are asking jurors to hear the cases that matter the most.

District Attorney West agreed. He said the district attorneys' primary objections to the draft proposal are the restrictions on trial by class of offense and that some of the recommendations seem to infringe on their statutory calendaring authority. District Attorney Evans said he cannot imagine that any of the district attorneys would want to start out with capital trials and, at least in his district, he would listen if the clerks came to him and said they could not handle a specific trial. Similarly, he said he would be receptive if a criminal defense attorney asks to delay any high-level felony trials because he or she is in a high-risk category. He said the collegiality of the bar is important to him and language that unduly restricts the district attorneys' calendaring authority is unnecessary.

Judge Bridges said the current proposal specifically references G.S. 7A-49.4, which is the statute that gives district attorneys calendaring authority. He said the superior court judges' work group wanted to recognize that statutory authority and to be clear that the intent is not to shift that authority in any way. However, as District Attorney Evans suggested, Judge Bridges said there probably are no judges who would approve proceeding with a capital trial right now. He said, despite the district attorneys having

statutory calendaring authority, judges have the ultimate control over whether particular cases proceed so the district attorneys' authority is not absolute. Judge Bridges said he hopes everyone will be mindful that the proposal contains recommendations and does not use terms like shall, must, or will. He said the Task Force has been clear since its inception that its mission is not to issue mandates or directives to local court officials, but to provide a resource for local court officials and recommendations to the Chief Justice. Judge Bridges said the recommendations about starting with lower-level felonies and the senior resident superior court judges prioritizing cases for trial in consultation with the district attorney and others are not mandates, and local officials will remain free to do what they chose to do within the confines of any emergency directives from the Chief Justice.

Judge Henry said the superior court judges' main focus was on the expected length of the initial trials. He said there are a number of unknowns right now, including how potential jurors will respond to the idea of jury service and what will happen if a defendant claims illness on the second or third day of trial. He said no one has worked through every possibility but, based on the collective wisdom and experience of the groups that have worked on this proposal, high-level felony trials are less likely to be shorter trials. He said he has not presided over a second-degree murder trial or higher that has taken less than a week in a long time. Judge Henry said the ultimate decisions will be controlled locally and cooperatively and arguing over the exact language of the recommendation may not be productive.

Judge Sermons said he understands the district attorneys' concerns, but the language about starting with low-level felony trials was primarily driven by not knowing how it will work to bring that many people into a courtroom. He said local judicial officials will not know how it is going to work until they do it and, once they do, they can react and improve. He said he is not opposed to wordsmithing the proposal but the intent is to try it, find out what works, and make improvements. Trial Court Administrator Myers added that the public health experts said the exposure risk increases with the amount of time spent in a courtroom, which is why shorter trials should be prioritized first.

Public Defender Harjo said she likes the proposal. She said she understands District Attorney Evans' point that there may be more serious trials that will take less than a week to try but, given that these are recommendations, such cases could be accommodated by a request of both the defendant and district attorney. She said the proposal gives due consideration to a lot of the concerns of the defense bar, including their inability to prepare cases due to the danger of being in close proximity with their clients. Attorney Weede said he is pleased with the draft. He said the initial section lays out the concerns of various stakeholders and the plan takes into account public health guidelines and the limitations on the ability of defense attorneys to prepare for trial. He said defendants charged with high-level felonies are facing the potential of decades in prison and the court system needs to ensure that their attorneys have adequate time to prepare a defense. He said it is going to be some time before attorneys will feel comfortable and safe visiting clients in jail, and he thinks the proposal is appropriate as drafted.

Judge Vincent said her preference would be to have the chief district court judges craft a separate plan for district court jury trials. She said that would avoid any miscommunications about conflicting schedules. Judge Corpening said the bulk of the recommendations apply to all trials, regardless of the

court in which they are held. However, the chief district court judges have the statutory obligation to schedule civil matters, so he agrees there should be a dual track with a separate district court plan. He said, in formulating that plan, the chief district court judge should consult with the COVID-19 coordinator, whether that is the senior resident superior court judge or a designee, because that person has to approve calendars right now. In addition, the chief district court judge should consult with the trial court coordinator or trial court administrator, family court administrator, and a domestic or civil lawyer.

Attorney Keister said he believes the proposal is excellent and addresses the concerns of the civil bar. He said a number of civil attorneys will be trying cases in multiple counties and clarified that the intent is to have every senior resident superior court judge and chief district court judge develop local orders with county-specific plans. Judge Bridges said yes, and Attorney Keister said that makes sense to him. Attorney McCabe said he feels very good about the proposal.

Clerk Johnson and Clerk Chinn-Gary said their concerns have been addressed and they are satisfied with the proposal. Trial Court Coordinator Craig agreed. Judge Bridges said the proposal will be edited to include dual tracks for plans for jury trials in both superior and district courts. Attorney Harrison said the chief district court judges should be added as a consultant in recommendation number 4.

District Attorney Evans said he thinks the plan is excellent overall. However, he believes that it would be sufficient for recommendation number 11 to state that the first trials should be short and less demanding and should be expected to take less than a week to try without any reference to the class of offense. District Attorney Evans said he believes it is important to develop as much consensus as possible before submitting these recommendations to the Chief Justice, and he would have to vote against the entire proposal because of that one section. He asked whether he could cast his vote in opposition to that specific item rather than the plan in its entirety.

Judge Sermons asked whether removing the examples in parentheses in recommendation number 11 would address District Attorney Evans' concerns. District Attorney Evans said yes, that would limit the recommendation to starting with shorter and less complex trials without specifying offense classes. He added that, if a district attorney tries to calendar a lengthy capital trial right away, he would expect the presiding judge not to allow it to proceed. Attorney Weede said he is comfortable with number 11 as it is currently drafted, noting that the language in parentheses just provides examples. Judge Bridges said one of the superior court judges in his work group has already identified cases that he wants to go to trial when jury trials are allowed to resume, including murder cases that are expected to take less than a week to try and where both the prosecutor and defense have agreed they are ready to proceed. He said that judge would be permitted to proceed with those trials under the current proposal.

Attorney Weede moved to adopt the resumption of jury trials plan as written with changes recommending a parallel plan for district court trials. Attorney Harrison seconded the motion. Trial Court Administrator Myers directed the Task Force to recommendation number 3, which provides that the Task Force does not believe remote jury trials are a feasible option at this time. She said the Best

Safety Practices Working Group's recommendations suggest the possibility of conducting various portions of a jury trial remotely. Judge Bridges read Trial Court Administrator Myer's written comment about number 3, which stated that the working group recommendations include remote practices leading up to the impaneling of a jury and actual trial, such as online orientation videos, remote pre-screening for deferrals / excusals, remote strikes for cause based on written answers to questionnaires, and voir dire, and suggested that number 3 be modified to distinguish between the processes involved in jury management, jury reporting, voir dire, and trial to ensure that some remote practices are encouraged. Attorney Weede amended his motion to include that language, and Attorney Harrison seconded the motion.

By a roll call vote, 13 of the Task Force members who were present voted to approve the motion (Judge Bridges, Judge Corpening, Judge Vincent, Judge Sermons, Clerk Johnson, Clerk Chinn-Gary, Trial Court Coordinator Craig, Trial Court Administrator Myers, Public Defender Harjo, Attorney McCabe, Attorney Harrison, Attorney Weede, and Attorney Keister). District Attorney West voted no, stating that he objected to recommendation 11 as drafted but did not object to the rest of the proposal; he asked if the report could include a footnote explaining his objection to number 11 and providing his suggested alternative language. District Attorney Evans also voted no.

Judge Bridges asked the Task Force members for their view on whether the report should include a footnote to recommendation number 11 explaining the basis of District Attorney West's and District Attorney Evans' objection. Attorney Harrison said he believes that would be appropriate, noting that the Chief Justice should know that the vast majority of the proposal has the Task Force's unanimous support. Attorney Weede agreed. Trial Court Administrator Myers agreed, noting that is how the Task Force handled her objection to one portion of its May 8, 2020 recommendations on deadline extensions.

Judge Bridges said, given the consent of the Task Force members who made and seconded the motion, he would be inclined to allow the report to include a footnote explaining the basis of their objection to recommendation number 11. He asked if the district attorneys would support the jury trial recommendations with the addition of such a footnote, and District Attorney West and District Attorney Evans said yes. Judge Bridges said the motion would be deemed amended and their votes are now in favor of the motion subject to the addition of a footnote explaining the basis of their objection to recommendation number 11. Judge Bridges added that the motion in favor of the proposal passed unanimously with the addition of that footnote.

Judge Bridges thanked the Task Force members for their hard work and their willingness to consider other points of view. Judge Corpening thanked Judge Bridges for his tireless pursuit of consensus on this issue.

<u>Suggested Statutory or Rule Changes and Funding Concerns:</u>
Given the length of the meeting, Judge Corpening suggested tabling a discussion of this issue until the next Task Force meeting, and Judge Bridges agreed. Judge Corpening asked the Task Force members to

be prepared to discuss any recommended statutory or rule changes at the next meeting, and to think about whether the Task Force should make any specific funding recommendations.

Goals for Next Meeting and Date:

The Task Force discussed the possibility of meeting the following week or taking a week off in light of the superior court judges' virtual conference the following week. After discussion, the group agreed to hold its next meeting on Wednesday, June 24th, at 2:00 p.m. Judge Bridges said the goals for that meeting will be to get the Task Force's final stamp of approval on the revised jury trial plan, to talk about recommended statutory or rule changes and any funding requests, and to get approval of the second report to the Chief Justice that is due by June 30, 2020.

The meeting adjourned at 4:50 p.m.

Judicial Branch COVID-19 Task Force Meeting

June 24, 2020

Task Force Co Chair, the Honorable Jay Corpening, convened the meeting at 2:00 p.m. by WebEx.

Reminder of Open Meeting and Roll Call:

Judge Corpening stated that the meeting is subject to North Carolina's open meetings laws and that a livestream had been made available to the public and members of the media. North Carolina Administrative Office of the Courts (NCAOC) Research and Planning Associate Emily Mehta took roll call. The following Task Force members were present via WebEx:

- The Honorable F. Donald Bridges, Co-Chair, District 27B Senior Resident Superior Court Judge.
- The Honorable Jay Corpening, Co-Chair, District 5 Chief District Court Judge.
- The Honorable Wayland Sermons, District 2 Senior Resident Superior Court Judge was not present for roll call but joined the meeting at 2:10 p.m.
- The Honorable Teresa Vincent, District 18 Chief District Court Judge.
- The Honorable Billy West, District 14 District Attorney.
- The Honorable Robert Evans, District 8 District Attorney.
- The Honorable Elisa Chinn-Gary, Mecklenburg County Clerk of Superior Court.
- Kinsley Craig, District 27B Trial Court Coordinator.
- Kellie Myers, District 10 Trial Court Administrator.
- The Honorable Jennifer Harjo, New Hanover County Public Defender.
- John McCabe, Attorney and Appointee of the North Carolina Advocates for Justice (NCAJ).
- Wade Harrison, Attorney and Appointee of the North Carolina Bar Association (NCBA).
- JD Keister, Attorney and Appointee of the North Carolina Association of Defense Attorneys (NCADA).

The Honorable Marsha Johnson, Harnett County Clerk of Superior Court, the Honorable Jason Cheek, Davidson County Magistrate, and Patrick Weede, Attorney and Appointee of the NCBA, were unable to attend. The Honorable R. Allen Baddour, District 15B Resident Superior Court Judge, was present via WebEx. A number of additional people joined the WebEx as representatives of NCAOC and the School of Government (SOG) in their capacity as advisers and staff to the Task Force, as did Richmond County Sheriff James Clemmons.

Approval of June 11, 2020 Task Force Meeting Minutes:

Judge Vincent moved to approve the proposed minutes of the June 11, 2020 Task Force meeting, and Clerk Chinn-Gary seconded the motion. All Task Force members who were present approved the minutes by a roll call vote.

Final Approval of Recommendations for Resumption of Jury Trials:

Judge Bridges said, at its last meeting, the Task Force discussed the substance of a final draft plan for the resumption of jury trials. He said a revised version of that plan is before the Task Force for approval at this meeting. He added that he does not expect anyone to be surprised by any provisions in this version but invited anyone with questions to raise them.

Judge Bridges said the revised draft includes four primary changes since the last version. First, based on the discussion at the last meeting, the current version includes a provision directing the senior resident superior court judges to consult with their local chief district court judges in crafting a plan for the resumption of jury trials, or allowing the chief district court judges to craft a separate plan for district court jury trials. He said that provision is intended to ensure that the chief district court judges are involved in the planning process or to give the chief district court judges the flexibility to develop their own plans. Second, at the last meeting, District Attorney West and District Attorney Evans voted in favor of the plan for resumption of jury trials, with the understanding that they would be able to include a footnote objecting to then-recommendation number 11 (current recommendation number 12). Judge Bridges said the draft report now includes that footnote, as well as additional language they requested in the district attorney portion of the stakeholder comments section.

Third, the National Center for State Courts (NCSC) recently released the results of a national public opinion poll that explored attitudes toward jury service during the pandemic. Judge Bridges said there had been some discussion about including the results of that poll in an appendix to the Task Force's second report, and the report now contains a reference to that poll on page 6. Finally, Judge Bridges said the report now includes a separate section containing recommendations from the Best Safety Practices Working Group with respect to jury trials. While approval of those recommendations appears separately on the meeting agenda, Judge Bridges said they really are part of the plan for resuming trials.

Judge Bridges asked if any Task Force member had questions or comments. Judge Vincent thanked Judge Bridges for taking into consideration her comments and requests for the chief district court judges to have a role in crafting local plans for the resumption of jury trials, and she said she likes having the options of collaborating with the senior resident superior court judges or creating an independent plan for district court jury trials. Judge Corpening noted that the first recommendation with respect to jury trials includes new language suggested by the Technology and Innovations Working Group about the Chief Justice specifying a date for the earliest resumption of trials based on the rule of law and the fundamental rights afforded to criminal defendants and victims, in addition to her assessment of statewide health data.

Attorney Harrison moved to approve the current version of the plan for the resumption of jury trials and to include it as drafted in the Task Force's second report, and Judge Vincent seconded the motion. All Task Force members who were present (Judge Bridges, Judge Corpening, Judge Sermons, Judge Vincent, District Attorney West, District Attorney Evans, Clerk Chinn-Gary, Trial Court Coordinator Craig, Trial Court Administrator Myers, Public Defender Harjo, Attorney McCabe, Attorney Harrison, and Attorney Keister) voted in favor of the motion by a roll call vote.

Approval of Recommended Best Safety Practices for Jury Trials:

Judge Corpening said the draft report now includes the Best Safety Practices Working Group's recommendations for jury trials on pages 12 to 19. Trial Court Administrator Myers said that working group submitted its draft recommendations for jury trials at the prior Task Force meeting, and they have since added source information from public health officials at Attorney Harrison's request. Trial Court Administrator Myers said the working group inserted that source information throughout the text as it did in the first report, rather than including it in an appendix. She said one new recommendation is included at the suggestion of a North Carolina Department of Health and Human Services (NCDHHS) intern, which is for local officials to consider the use of face masks with clear panels, such as those used by individuals who are deaf or hard of hearing. Trial Court Administrator Myers added that the revised report also includes a footnote directing readers to the primary sources the working group relied on in generating the best practices recommendations.

Judge Corpening thanked the working group for its efforts, and he asked if any Task Force members had questions or comments. Public Defender Harjo said the section containing the plan for resumption of jury trials contains a discussion about considering defendants' constitutional rights and the rule of law in regard to proceeding, and she wanted to clarify that language also applies to the best safety practices for jury trials. Trial Court Administrator Myers directed everyone to the language on page 15 of the report about weighing the rights of the defendant against the health and safety of all individuals in the courtroom.

Clerk Chinn-Gary referred to the language in that same section of the report about there not being a specific length of time that health professionals say is safe for people to assemble in the same room. Clerk Chinn-Gary said her local health officials have suggested that judges should either take routine breaks during the course of a session or that the courtroom clerks should be rotated so they are not in a courtroom for longer than a half day. She said there may not be a specific time that health officials would identify as safe, but they have suggested those options to mitigate the risk.

Judge Sermons moved to approve the best safety practices for trials, and Attorney Keister seconded the motion. All Task Force members who were present (Judge Bridges, Judge Corpening, Judge Sermons, Judge Vincent, District Attorney West, District Attorney Evans, Clerk Chinn-Gary, Trial Court Coordinator Craig, Trial Court Administrator Myers, Public Defender Harjo, Attorney McCabe, Attorney Harrison, and Attorney Keister) voted in favor of the motion by a roll call vote.

Approval of Technology and Innovations Long-Term Recommendations:

Judge Corpening noted that the Honorable Chuck Henry, Chair of the Technology and Innovations Working Group, was unable to join the meeting, and he asked Attorney Harrison if he wanted to give a report. Attorney Harrison said most of the working group's intermediate and long-term recommendations carry forward the immediate recommendations that were included in the Task Force's interim report to the Chief Justice. He said the additional recommendations include some resources for NCAOC to investigate and develop projects that will take a longer-term investment of time and resources, such as remote dispute resolution and triage procedures to save time and enhance

efficiencies. In response to Judge Bridges' request, he said the working group also identified one recommendation that would require legislative action, which would be an amendment to Rule 53 of the Rules of Civil Procedure.

Judge Corpening asked about the article on Alaska's Early Resolution Triage Program that might be included as an appendix to the second Task Force report. Attorney Harrison said NCSC provided that article to him as a resource about triage programs in district court. He noted that, unlike the other articles about triage programs that are linked in a footnote in the draft report, the Alaska article is behind a paywall. He said NCSC put NCAOC Deputy Director Danielle Carman and him in touch with the article's author, and she gave permission to include it in the Task Force's report if the members want to do so.

Attorney Harrison moved to approve the intermediate and long-term recommendations of the Technology and Innovations Working Group, and District Attorney Evans seconded the motion. All Task Force members who were present (Judge Bridges, Judge Corpening, Judge Sermons, Judge Vincent, District Attorney West, District Attorney Evans, Clerk Chinn-Gary, Trial Court Coordinator Craig, Trial Court Administrator Myers, Public Defender Harjo, Attorney McCabe, Attorney Harrison, and Attorney Keister) voted in favor of the motion by a roll call vote. Judge Corpening thanked Judge Henry and the members of the working group for their efforts.

Discussion of Recommended Statutory or Rule Changes and Funding Concerns:

Judge Corpening said this item has been on several meeting agendas but the Task Force has not had time to discuss it. He noted that the Technology and Innovations Working Group has recommended some limited statutory and rule changes, and said he believes this section can be deleted as a free-standing part of the report. Judge Bridges and Judge Sermons agreed. No Task Force member objected.

Final Approval of Draft Second Report to Chief Justice:

Judge Corpening directed the Task Force members to some additional changes to the overall draft report, including the addition of appendices with the NCSC poll results and the article on Alaska's triage program, the removal of the reference to recommendations on statutory or rule changes in the introduction, additions to the summary of the district attorney's concerns in the section on stakeholder comments about jury trials, and a reference on page 6 to the NCSC poll.

Clerk Chinn-Gary said the Chief Justice has noted in recent speeches that the General Assembly controls the Judicial Branch's budget and has asked for legislative support to ensure that the courts have the resources they need to operate during the pandemic. She said she would not want the omission of a section on funding concerns to diminish the opportunity to get legislative support for the Branch. Judge Corpening said NCAOC has already submitted its COVID-related funding requests. Judge Bridges said the Task Force's expression of support for NCAOC's requests could help, but he would not want it to appear to be a rubber stamp. Judge Corpening agreed, noting that the Task Force has not discussed this issue at any length. Attorney Harrison said a number of the long-term recommendations in the report will

require resources to implement and he does not believe the Task Force knows enough to project the amount of resources they would require.

Deputy Director Carman clarified the next steps for the Task Force's work products. She said she spoke with the Chief Justice's Chief of Staff, Anna Stearns, and her understanding is that the Chief Justice wants to receive the Task Force's second report and then have NCAOC create a final report that pulls out the Task Force recommendations that are directed at local officials and puts them into the form of a field guidance document that will be widely circulated throughout the Branch. Deputy Director Carman said the Task Force's first report is posted on NCAOC's website and the second report will be posted when it is final. However, the Chief Justice is the primary audience for those reports and the final outward facing document will be in the form of field guidance from NCAOC. In other words, she said legislators do not seem to be an intended primary audience for the Task Force's reports. Clerk Chinn-Gary said that feedback is helpful.

Judge Vincent moved to approve the additional revisions and the final version of the report, and Clerk Chinn-Gary seconded the motion. All Task Force members who were present (Judge Bridges, Judge Corpening, Judge Sermons, Judge Vincent, District Attorney West, District Attorney Evans, Clerk Chinn-Gary, Trial Court Coordinator Craig, Trial Court Administrator Myers, Public Defender Harjo, Attorney McCabe, Attorney Harrison, and Attorney Keister) voted in favor of the motion by a roll call vote.

Judge Corpening expressed his appreciation for the Task Force's work. He said the members all came together on very short notice and worked tirelessly to provide important and valuable information to the Chief Justice. He said he knows the members were already busy professionals and he is grateful for their willingness to jump into this challenging work. He thanked all of the members for their service to the State of North Carolina. Judge Corpening added that the Task Force might need to reconvene in the future, and he knows everyone will be willing to jump back in if it does.

Judge Bridges said he does not know whether the Task Force's work will be complete with the submission of its second report and, if the Chief Justice calls on the group again, he looks forward to working further with everyone. If not, he thanked each member for their service on the Task Force. Judge Bridges said a number of NCAOC, IDS, and SOG staff worked hard behind the scenes to support the Task Force's work, noting that the Task Force's work would not have been possible without them. He thanked all of those staff members for their service, and also thanked the Task Force's public health advisor from NCDHHS. Judge Bridges added that it was a pleasure to serve as Co-Chair with Judge Corpening.

Judge Bridges said the members of the Task Force come from diverse backgrounds and have varying interests, but all of the members have conducted themselves with complete professionalism and respect for differing points of view. He added that the strength of this group flows from its interactions and exchanges of different points of view.

The meeting adjourned at 3:00 p.m.

Appendix B

COVID-19 Stakeholder Responses About Resuming Jury Trials

June 2020

Below are the full detailed responses of constituent working groups regarding the resumption of jury trials.

Conference of District Attorneys (revised 6/4/2020)

North Carolina courts are a critical governmental function and jury trials are a fundamental right guaranteed by both the United States and North Carolina Constitutions. The right to a jury trial is one of the most important rights afforded to criminal defendants and the right to a speedy trial is often of the upmost importance, especially for those who are incarcerated. Victims of crime also have constitutional rights regarding the disposition of their cases and have a strong interest in having their cases heard in a timely and efficient manner. Further a defendant's constitutional rights are not delineated by the type of case. Rather, all defendants charged with any felony have a right to have their case heard by a jury of their peers. Each case is unique with its own priorities and complexities. Any decision to separate when jury trials can begin, based on selection of the arbitrary classification of capital and non-capital first-degree murder or any other type of case, is unjustifiable. Thus, long-term, sweeping, one size fits all restrictions on jury trials should not be dictated. Rather, a more localized approach which can better assess local resources, hear the arguments of the State and criminal defendants and implement safety precautions as delineated by the CDC, the Governor and the Chief Justice, is a more appropriate avenue to ensure justice is administered.

Throughout the country, local jurisdictions are making decisions and creating provisions to safely convene juries, thus allowing criminal defendants to avail themselves of their constitutionally afforded rights, regardless of the case type. These states have considered a myriad of factors, focusing primarily on safety concerns, logistics and constitutional and statutory provisions. We are aware of no state or Chief Justice who has determined when cases can be scheduled based on an arbitrary classification of case type. This type of restriction will produce constitutional challenges. Jury trials in parts of Oregon and in the Eastern District of North Carolina resumed in mid-May. In June, jury trials will resume in Maricopa County, AZ, Lincoln County, Montana, the 7th Circuit of South Dakota, St. Louis, Missouri and statewide in West Virginia and New Mexico. Pursuant to an order by the Chief Justice, certain counties in Mississippi can begin convening juries now with the entire state allowed to begin jury trials on July 27th. Also, in July, jury trials in St. Charles, Missouri and statewide in Indiana and Colorado will begin. Jurisdictions in Michigan, Texas and Oklahoma are preparing to resume jury trials in early August. Each of these areas in our country implemented, or plan to implement, safety procedures that include masks if requested, social distancing of at least 6 feet and even relocating to larger facilities to provide

additional space and promote safer procedures. Additionally, several jurisdictions in NC have continued to safely convene grand juries and others have grand jurors convening in the near future.

Chief Justice

During the COVID-19 global pandemic, our Chief Justice and the courts have recognized that adherence to social distancing and other public health guidance cannot be achieved with traditional and routine operation. Therefore, as with previous orders, it is imperative that the Chief Justice provide a best practices framework in which the critical court function of jury trials can convene. This framework should include a date in which jury trials may be considered for scheduling and guidance, which takes into account public health, public safety and the rule of law.

Our Chief Justice has already put into motion a plan that recognizes the value of local collaboration and empowers the senior resident superior court judge to serve as, or designate, a COVID-19 Coordinator. This coordinator should play a critical role in mobilizing a local COVID-19 team to advise regarding local guidelines and best practices for the resumption of jury trials. In order to provide a consistent date in which jury trials may begin, the Chief Justice should permit District Attorneys, pursuant to their statutory duty, to calendar cases for jury trials beginning August 3, 2020, subject to compliance with the framework set out by the Chief Justice and a locally developed safety plan. This is consistent with other states, such as New Mexico and Indiana, which required individual jurisdictions to submit COVID-19 plans before resuming jury trials.

COVID-19 Coordinator and COVID-19 Team

Local criminal justice professionals are in the best position to determine scheduling decisions in their district. In consideration that all North Carolina counties have vastly different courthouse facilities, community resources, pending caseloads, available court weeks and varying pandemic level threats, each district shall develop individual safety processes and protocols for implementing jury trials. The COVID-19 Coordinator should appoint a local COVID-19 team comprised of the Resident Superior Court Judge, District Attorney, Clerk of Superior Court, Sheriff, and other criminal justice professionals to develop a plan which will set minimum mandates to implement safe and effective jury trial settings in compliance with direction of the Chief Justice, current public health guidance and the following safety provisions. The maximum allowable occupancy of each courtroom or meeting space shall be established to accommodate six feet of social distancing of all trial participants. Trial participants include judges, prosecutors, defendants and their counsel, jurors, victims, witnesses, clerks, court reporters and bailiffs. Minimum mandates may include utilizing alternative community facilities as needed and available. Personal Protection Equipment, including hand sanitizer, cleaning supplies, masks, etc. shall be available and utilized with guidelines established by the COVID-19 Team in contemplation of activities and roles during the course of the trial and social distancing capabilities. The local COVID-19 team is in the best position to determine when court personal and available physical space is prepared to implement jury trials in a manner that is safe for all parties. This determination will likely differ from district to district and possibly county to county. These decisions are best made locally.

Not all counties have criminal superior court jury trial weeks scheduled in August. In fact, with many districts needing to identify alternative locations and the research, time, and collaborative discourse required to develop a local safety plan, many districts will not be able to schedule jury trials in August. However, an aspirational August 3rd start date is necessary to begin resumption of some jury trials in districts that can comply with safety plans.

District Attorney Responsibilities

The District Attorney shall calendar cases for trial in accordance with NCGS 7A-49.4. In addition to their statutory requirements, the District Attorney is in the best position, in consultation with defense counsel, victims and witnesses to determine when a case is ready to be calendared for trial. As such, the District Attorney has the unique statutory responsibility to set the trial calendar.

Trial Judge Responsibilities

As was the case prior to COVID-19, the presiding judge shall make all decisions regarding motions to continue a case scheduled for trial. Judges, elected by their constituents, who are serving in their home districts pursuant to the Chief Justice directive, consider issues presented by counsel including the availability of witnesses, ability of attorneys to prepare, scheduling conflicts, facility safety and readiness in proceeding with trial. Judges will continue to consider those, and other factors, when determining if, and when, jury trials should move forward in their jurisdiction. Therefore, even if the COVID-19 Team has developed an acceptable local safety plan, safe locations for jury trials have been secured, scheduled trial weeks are available and the District Attorney has calendared a case for trial, the trial judge can still consider numerous factors and continue a case.

District Attorneys statewide recognize the unique challenges presented by COVID-19. They have continued to partner with state and local entities to maintain the essential court function while protecting the rights and safety of defendants, victims, the public and courtroom personnel. Providing the ability to begin jury trials on August 3, 2020 will allow them to continue to review local needs and available resources while ensuring justice is administered in a safe, consistent and effective manner.

Public Defenders and Criminal Defense Bar

Submitted by Task Force Member Jennifer Harjo, New Hanover County Public Defender

As a committee member of the Judicial Branch COVID-19 Task Force, I solicited comments and concerns from Public Defenders and the Criminal Defense bar regarding the resumption of criminal jury trials. This document attempts to identify and compile the concerns which have been expressed. I have organized the comments by topic and have taken the liberty of condensing the concerns which were duplicitous.

Masks and Face Coverings:

Appellate lawyers are concerned that face coverings will impede the court reporter's ability to accurately transcribe trial proceedings.

Masks will interfere with the ability of the lawyers and jurors to hear and are likely to interfere with the witnesses' ability to speak clearly. Many lawyers who have been participating in court proceedings during these last few months have worn face masks and find it very difficult to speak. (I had one Superior Court Judge who could not understand me while I was standing at the bench and I had to remove my face protection so he could understand my arguments. He thanked me for doing so, even though the conduct violated CDC guidelines.)

Trial lawyers are concerned that masks will impede the jury's role to gauge credibility, one of their primary responsibilities. The ability of the jury to use it's "normal tests for truthfulness" when someone is wearing a mask is limited because so much of what we look for in others is based upon facial expression. This could be particularly difficult when a witness is sarcastic or speaks a foreign language, or where normal verbal indicators might not be present.

Masks have become highly politicized in a way that seems unpredictable and a little scary from the perspective of a lawyer (or client) who is trying to be politically neutral in the courtroom. For example, if an attorney in Durham decides not to wear a mask, the jury may take that to mean the person is conservative or reckless or it just may make them not like the attorney. In other counties, where the lawyer intends to wear a mask at all times, doing so may be taken as a political statement. This is magnified if the client is wearing a mask and needs to do so for health reasons. Criminal defendants are dehumanized if the jury cannot look them in the face.

Reading body language, particularly facial expressions, is critical to evaluating credibility and putting into context statements and reactions to statements, testimony, exhibits, etc.

Masks seem like an obvious bad choice. What if the case is a crime involving an allegation of a masked person? If the defendant is in a mask and the case involves an in-court identification, there can be no reliable identification.

Batson challenges require the judge to make credibility findings on the actions of the lawyers. Critical constitutional rights are in jeopardy if the lawyers are wearing face coverings while the court is exercising its obligation in determining credibility.

Jury Composition:

There is much concern about who may be willing to show up for jury duty. Those who do not take the virus seriously are more likely to show up. Those who take it seriously are more likely express concern and reasons for excusal.

More serious is the likelihood that jury clerks and judges are going to be pressured to let high risk people stay home until there is a vaccine or some solid treatment options -- as they should from a public health perspective. This means our juries may to skew upon age, gender and racial lines. There is ample public health evidence that certain "underlying health conditions" (e.g. diabetes) are more prevalent in African American and Latino communities. Men appear to contract the disease with greater severity than women, so we may see more men with underlying conditions inclined to stay home. This is a constitutional concern if it rises to the level of a fair cross-section claim.

Criminal jury trials demand community cross-section representation which cannot occur if there is a systematic approach to excusing any jurors who may fall in the COVID-19 high risk groups.

Clear Partitions:

Criminal lawyers have expressed an inability to participate in a jury trial where a barrier is placed between the lawyer and the client. Humanizing clients is a crucial in a capital case, but generally is necessary in every criminal trial. Barriers between clients and their attorneys creates a perception of danger or fear from the accused, thereby interfering with the presumption of innocence. In a case involving allegations of violence, the jurors must not perceive fear of the lawyer from the client.

Criminal defendants are entitled to protection and safety. However, they should not be forced to choose between safety and presenting themselves well to the jury. Because of this, and because of the risk that some of these procedures would ultimately be deemed prejudicial by an appellate court, the defense bar urges against high level felony trials, and especially capital trials, until they can be conducted in a truly "normal" manner.

Plexiglass can interfere with ability to view and hear the witness. Glares and angles in the courtroom may make it even more difficult.

Physical barriers impede the ability to approach a witness with exhibits, and with publishing evidence to jurors.

The optics of a physical barrier, translucent or not, between the witness and client/defendant are terrible in that it could appear that the witness needs protection from the client and that the client is a danger. This seems just as damaging to fairness as a facemask.

Just the appearance of a “shield” or “protection” or a “box” around a witness can affect the way one’s testimony is perceived. On the same note, if a defendant wishes to testify, his or her placement behind a box that may conjure up associations of being behind the glass that is often seen in jail images or create an effect that the jury should be protected from the defendant.

Clear partitions dehumanize the process of a live trial. Any partitions around the tables, witness stands or jury box will also create a substantial distraction.

Trial Length:

There is a likelihood that risk-averse jurors may feel compelled to rush through the process, including the deliberation process, to minimize contacts. Both sides are entitled to fair outcomes and if jurors feel stressed or compelled to hurry the process, the purpose of the jury is undermined.

Physical distancing / Facilities:

If jurors are separated by 6 feet, they are likely going to end up seated behind the lawyers, interfering with the ability of counsel to view the jury and speak to them. Additionally, it would leave the defendant sitting with his or her back to the jury which seems odd and alienating.

Alternate facilities will have to be developed to replace most courtrooms since social distancing would not be possible in most current configurations. If adequate spacing can be arranged, additional video and audio displays will likely be needed so all participants can effectively see and hear all relevant testimony. Trials with more than one witness will require a cleaning of the chair and the area between witnesses.

Exposure in the Courtroom:

Lawyers are concerned about the fear and panic that may be experienced if people are required to remain in a courtroom for extended periods of time. Recent scientific articles describe the risk as increasing over a period of time of exposure. Five (5) minutes is enough time to be in contact with the virus to contract it. Remote contact within a room with inadequate air flow is also believed to contribute to infection. Barriers may not provide the protection sufficient to provide comfort to jurors, witnesses, lawyers, judges, clerks and courthouse personnel necessary to accommodate a fair trial.

Virtual/Remote Trials:

Virtual trials eliminate the health risks and provide an opportunity for the accused to resolve his or her pending charges.

Virtual trials interfere with the ability to effectively cross-examine witnesses. Nuances about a witnesses' emotion, fear, confidence or uncertainty are difficult to ascertain or develop during a virtual trial.

Technological issues arise in virtual trials which may not be present to all parties' participating in the trial. For instance, a juror could be tending to other business or distracted while "on-line" without the knowledge of the judge or the lawyers. The interactions between lawyers and witnesses utilize more

than one sense. When a witness testifies, it's not just his or her statements that must be evaluated by a juror. Smell, sight, sound, all are factors in evaluating credibility. The physical presence and demeanor of a person are considered.

Conclusion:

Criminal defendants need to have their cases resolved in a timely manner. The ability to conduct criminal trials in a fair manner cannot occur in the immediate future. The measures proposed to proceed with jury trials during this pandemic limit a juror's ability to perceive many of the fundamental indicators people utilize to determine credibility. Perception is crucial, that's why we conduct *voir dire* and don't have clients appear in court in jumpsuits or shackles.

No one should be required to attend court proceedings while there exist serious health risks.

If jury trials are commencing in August, especially capital jury trials, health conditions would need to substantially improve, otherwise, courts need to have the capability to regularly test potential jurors and sitting jurors as well as participants and witnesses. There should contact tracing and quarantining of jurors and others testing positive. Jurors should to be vetted for whether they live or interact with others who are positive. Additional alternates would be required in a lengthy or capital jury trial.

Courts should make every effort to accommodate jury trials where both parties consent, including the consent of a defendant to any modified rules and distancing. Lawyers should not be prohibited from having close contact with their clients, but they should also not be forced to do so for the sake immediacy.

Criminal Defense Bar

Submitted by Task Force Member Patrick Weede

The primary concern among criminal defense attorneys who provided feedback pertains to jury trials. Most attorneys believe that the Chief Justice should direct that criminal jury trials not begin until the fall at the earliest. Attorneys who handle capital murder cases and non-capital first-degree murder cases noted issues unique to their work. Generally, they requested a longer delay. I am highlighting the main points below, and I conclude with a proposal.

Preparation Time

Attorneys have been greatly impacted by the COVID-19 pandemic, especially in terms of the ability to meet safely with clients who are in custody. This issue is particularly challenging for attorneys who handle capital/potentially capital cases as well as non-capital first-degree murder cases. These attorneys expressed concern that they have been unable to review discovery with clients, have substantive discussions about the case, and track down witnesses and other critical information. Attorneys who

focus on this work often have numerous pending capital/potentially capital cases so there is a lot of catching up necessary for each case.

Further, many of these cases involve investigators, mitigation specialists, and other experts who have been unable to complete their work since mid-March. Thus, those handling capital/potentially capital cases believe that the Chief Justice should issue a directive that no capital or non-capital first-degree murder trial should begin for at least 4-6 months after the end of the stay-at-home directive unless both parties agree.

Health and Safety

The health and safety of attorneys, clients, and their families is related to the preparation time issue. I also heard from several attorneys who are concerned about being in high-risk groups due to age and underlying health conditions. Attorneys who have a spouse or another family member in a high-risk category are also very concerned about exposing themselves and, consequently, their loved ones. As a result, they are concerned about their ability to meet safely with clients in custody and will need additional time to prepare adequately for trials.

Courtroom Setup

Attorneys and clients, especially those who are in high-risk categories, must be able to maintain proper social distancing during trial. Criminal attorneys expressed concern about safety since they must have the ability to confer privately with clients at the counsel table, especially during a trial. Proper social distancing would not allow for a defense attorney to have close contact with a client. On the other hand, a defense attorney who sits next to a client puts the health of the attorney and the client at risk. The installation of plexiglass at counsel table would be beneficial for health and safety but would present a challenge to confidential communications during trial.

Furthermore, assuming that proper social distancing will require jurors to sit in the gallery (as opposed to the jury box) in many courtrooms, the configuration of the courtroom will need to change. Attorneys must have the opportunity to see the jurors throughout the trial. If the jurors sit behind the attorneys, they (the attorneys) would lose the opportunity to view the jurors during the trial, which would impair a defendant's ability to have a fair trial. Thus, a plan to resume trials should account for a balance between health and safety and the fair trial requirement.

Representative Jury

Criminal defense attorneys are also concerned about the ability to select a jury that fully represents the community. With many individuals currently looking for work, it will be difficult for them to serve as jurors in the near future, especially in murder trials that often last for weeks. Requests for a deferral will likely be higher than normal. Attorneys also noted that (especially in more rural Eastern NC counties) a number of potential jurors may be in high-risk categories and may be very reluctant to serve on a jury

for the foreseeable future (or even respond to a summons). This impact on a potential jury pool could affect whether a jury is representative of the community and, consequently, a defendant's right to a fair trial.

Proposal

Based upon the issues above, I respectfully request that the Task Force consider submitting the following proposal to the Chief Justice.

There is great interest among litigants, attorneys, witnesses, potential jurors, and members of the public in the resumption of jury trials. As we carefully work to increase the number of available court services, we must recognize that the resumption of jury trials will take time.

The COVID-19 pandemic has significantly impacted the ability of criminal defense attorneys and their teams to prepare for trial. The pandemic has affected attorneys' ability to meet safely with their clients (especially those in custody) and has impacted the work of investigators and experts in the field. This impact has been particularly noteworthy for attorneys and their teams in capital murder cases and non-capital first-degree murder cases in which the defendants are facing the death penalty or life in prison without parole. Additionally, attorneys in high-risk groups due to age and other health issues continue to be impacted greatly. To that end, jury trials should resume pursuant to the following schedule:

1) Jury trials in civil cases may begin on August 3, 2020.

2) Jury trials in criminal cases may begin on August 3, 2020 only if the State and the Defendant consent.

3) With the exception of capital murder cases and non-capital first-degree murder cases, all other criminal jury trials may begin on September 21, 2020.

4) Jury trials in capital murder cases and non-capital first-degree murder cases may begin on November 30, 2020.

Appendix C

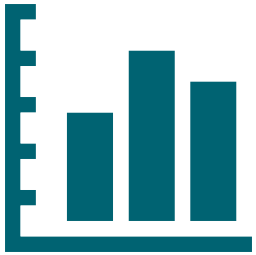
Appendix C

State of the State Courts in a (Post) Pandemic World

Results from a National Public Opinion Poll

NCSC
National Center for State Courts

// METHODOLOGY



What: National Multimodal Survey (Online + Phones)

Who: Conducted by GBAO Strategies

When: June 8-11, 2020

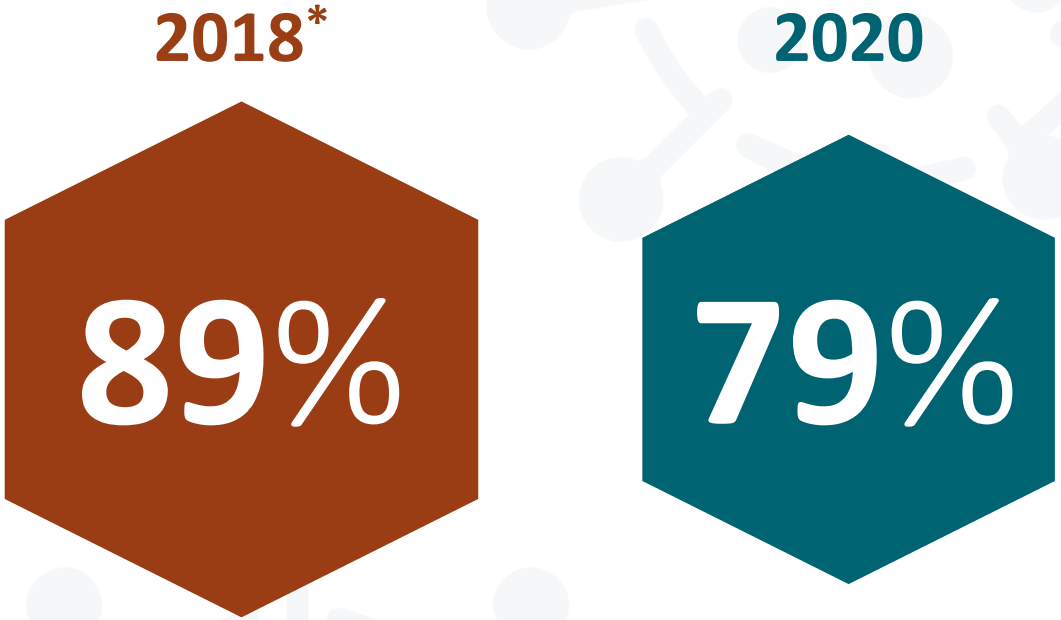
Polled: 1,000 Registered Voters

Stats: MOE +/- 3% (19 times out of 20)

// **FIGURE 2**

Has Support For Law Enforcement Changed?

Q: "How much confidence do you have in your local police department?"



**Highest score in our seven-year tracking poll (2014-2020)*

// **FIGURE 3**

African American Opinion About the Courts/Justice System

According to NCSC's 2015 State of the State Courts survey, **only 32%** of African Americans believe state courts provide **equal justice to all**.

"As I said before, they stopped me for no reason. **You don't have to be a criminal to be treated like one**."

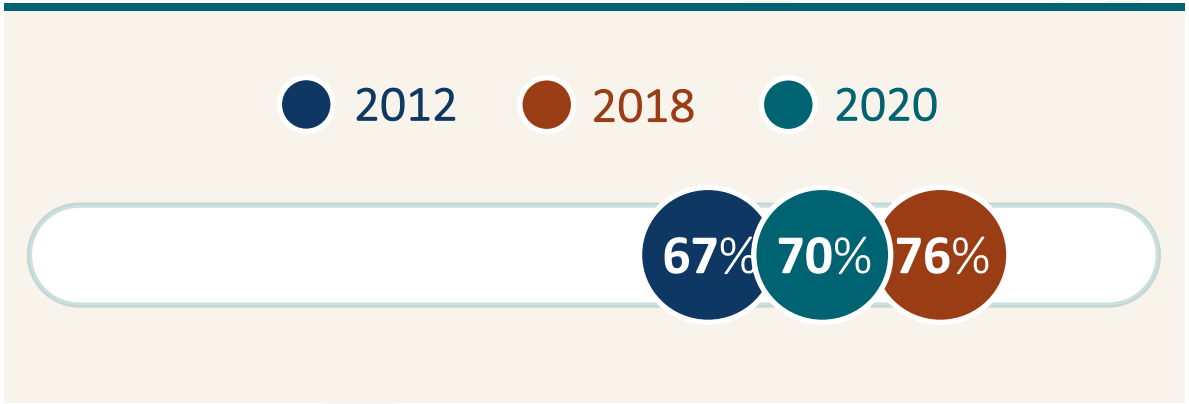
— African American man *(2019 NCSC focus group)*

// **FIGURE 4**

Confidence in State Courts is Steady

Q: "How much confidence do you have in the (state) court system?"

Percent who reported feeling confident in the state court system.



8 Year Average — **70%**

// **FIGURE 5**

Pandemic-Related Obstacles to Reporting for Jury Duty

14% Primary caregiver to an **elderly family member**

19% Could not secure **childcare**

47% Someone in their household with **an underlying health condition**

55% of respondents cited at least one of these obstacles to reporting for jury service, if called.

// **FIGURE 6**

Understanding "Comfort Levels" in a (Post) Pandemic World

Q: "On a scale of 1 to 10, how comfortable do you personally feel right now…"

Going to a friend or family member's home	**7.5**	
Going to the grocery store	**7.3**	
Going to a polling place to vote	**6.7**	
Going to a government office	**6.1**	
Eating out in a restaurant	**5.5**	
Reporting for jury duty at your local courthouse	**5.4**	**52%** scored this 0-5
Serving on a jury if selected	**5.1**	**54%** scored this 0-5

// **FIGURE 7**

What Protective Measures Improve Comfort Levels?

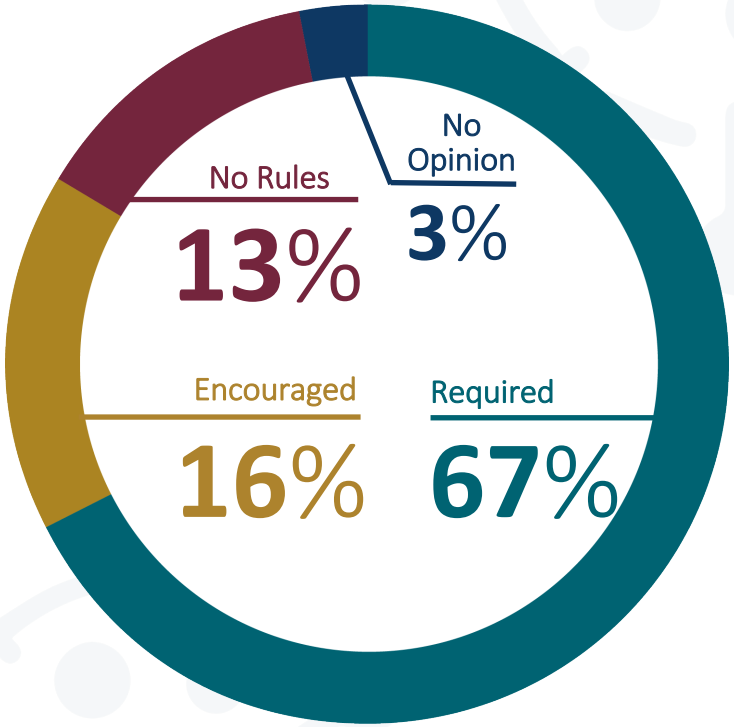
Q: "Please indicate whether the implementation of this protective measure would make you comfortable reporting to your local courthouse for jury duty."

// **FIGURE 8**

A Mask Requirement is Strongly Supported

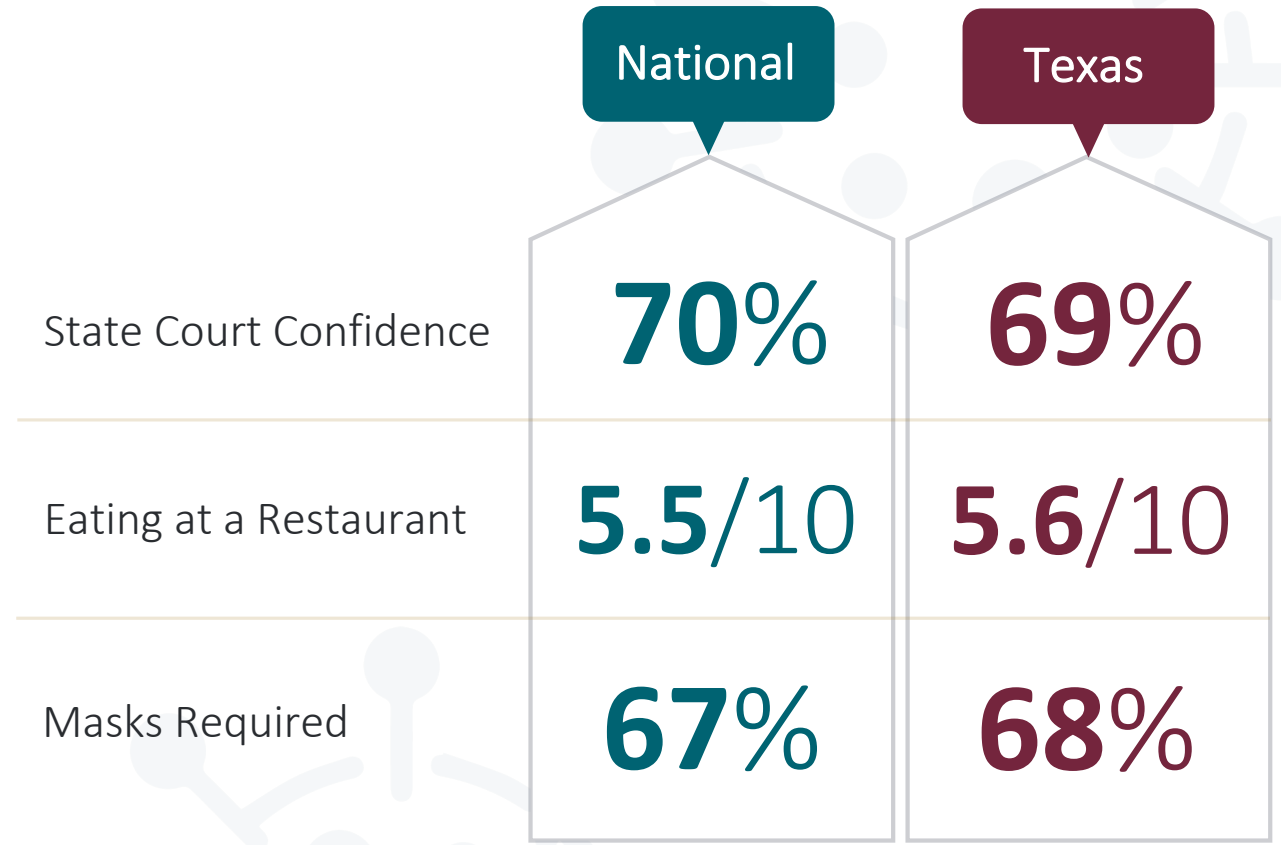
Q: "Which of the following best captures the rules you would like to see regarding the wearing of masks?"

For those entering a courthouse, masks should be...



// **FIGURE 9**

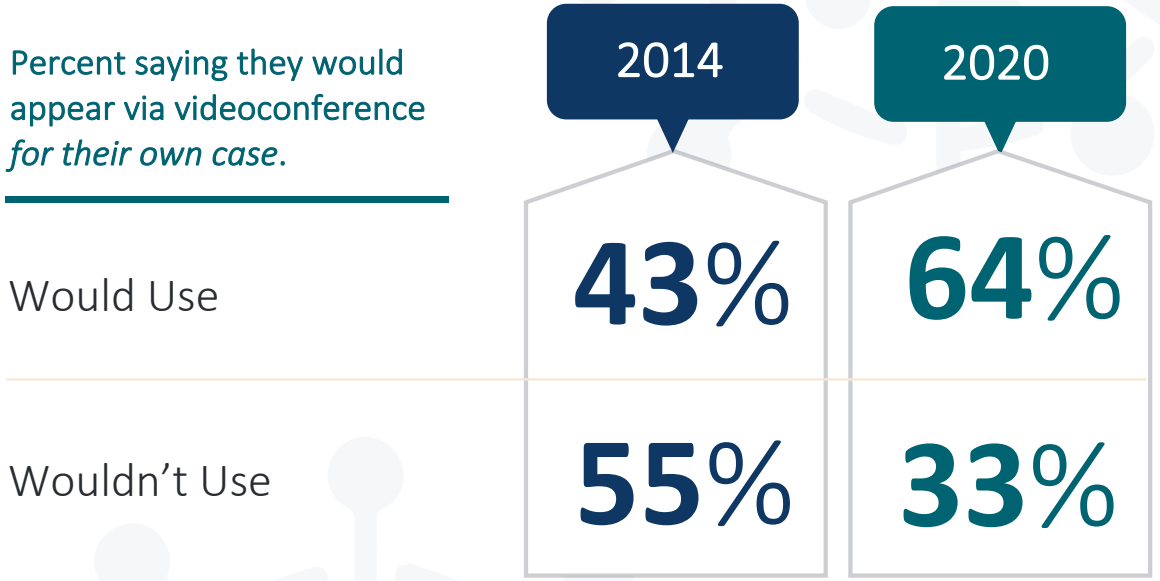
"This is nice, but *my* state is different..."



// **FIGURE 10**

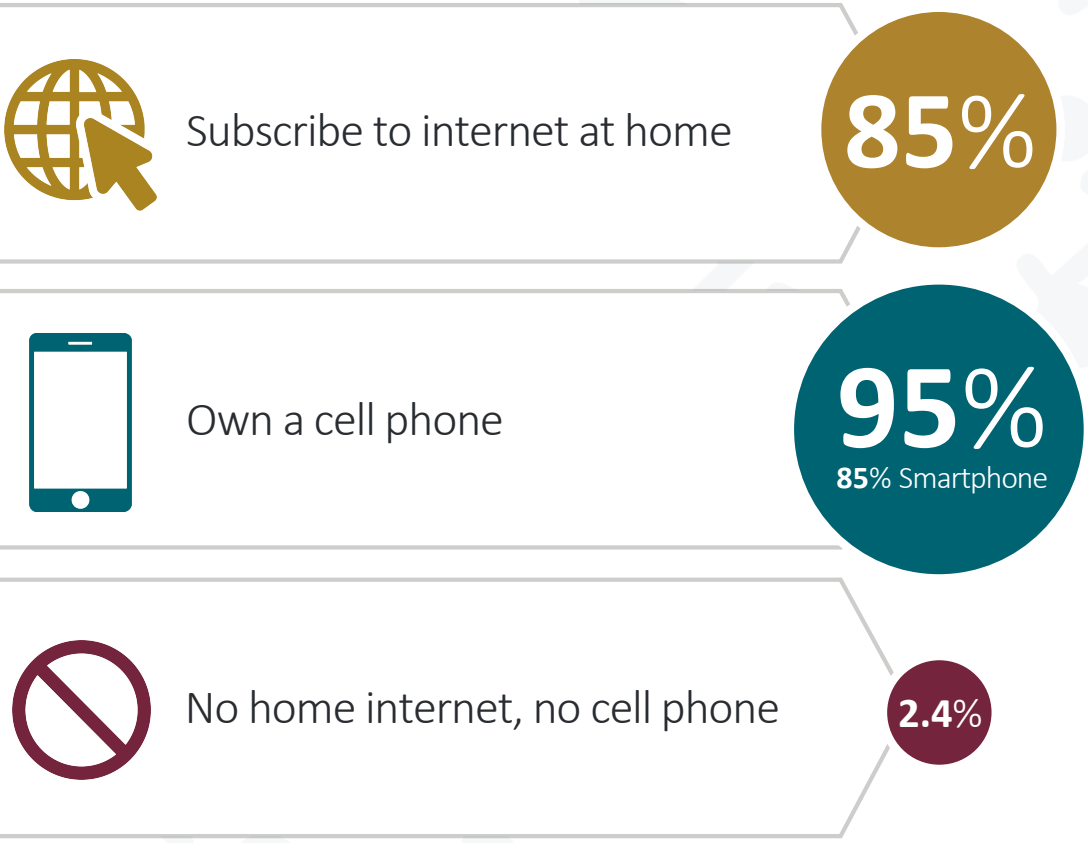
Attitudes Towards Using Remote Court Services

Q: "If you had business with the courts, and this service was available online, how likely would you be to use it?"



// **FIGURE 11**

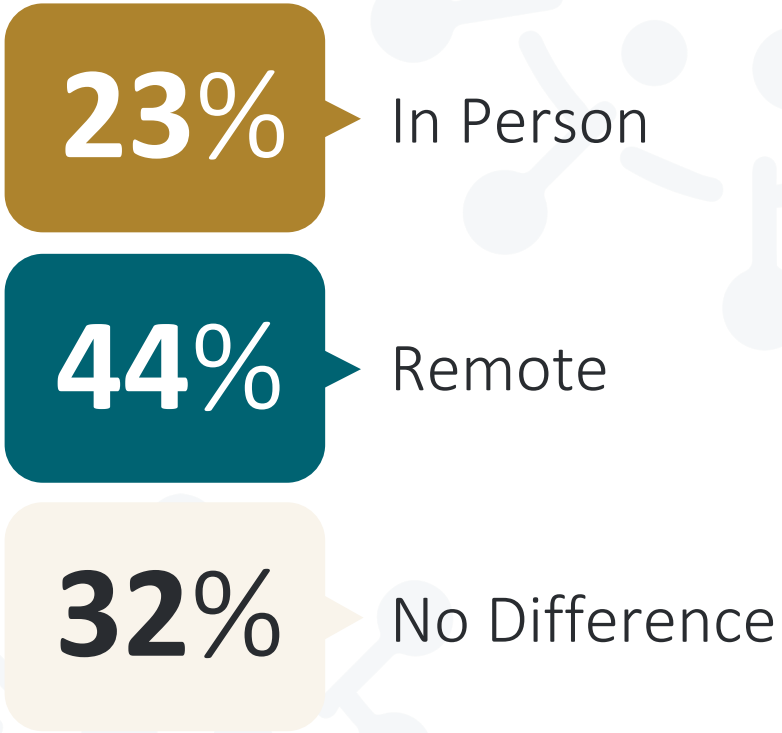
Most Americans Have the Technology Tools for Remote Participation



// **FIGURE 12**

Strong Public Support for Remote Jury Service

Q: "Are you more comfortable with in person or remote jury service?



// FINAL **TAKE-AWAYS** & **CONUNDRUMS**

People are looking for **alternatives to reporting to the courthouse**

The elderly present the greatest challenge—they are as uncomfortable with going to a courthouse as they are with accessing and using remote technology

Composition of the pool likely to be a challenge

Appendix D

Best Safety Practices for In-Person Court Proceedings

(recommendations submitted to the Chief Justice on June 12, 2020)

Pursuant to the Chief Justice's Emergency Directives, no session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and / or for extended periods of time in contravention of current public health guidance, and judicial officials should continue to make use of remote hearing technology to the greatest extent possible to limit in-person appearances.

If local court officials determine that in-person court proceedings may be scheduled pursuant to the Chief Justice's Emergency Directive 11, they should implement a combination of engineering controls, administrative controls, and personal protective equipment, such as:

1. Maximum safety occupancy shall be posted (Emergency Directive 12).
2. Public seating shall be clearly marked for social distancing of six feet in all directions (Emergency Directive 12).
3. All Judicial Branch personnel assigned to a courtroom for more than thirty minutes should have a facemask made available prior to the session of court (Emergency Directive 13).
4. Stagger start and break times when there are multiple courtrooms operating.
5. Schedule appointment times for hearings.
6. Divide high-volume calendars into multiple courtrooms by last name.
7. Ask that only the person required to be in court appear and that all other individuals (e.g., family, friends, and children) remain outside the courthouse facility while socially distanced, or encourage these individuals to stay home or wait in vehicles.
8. Eliminate in-person calendar calls and require calendar calls that must take place to be done remotely via Webex.
9. Assign the same court personnel to work with the same judge in the same courtroom (less rotation to reduce spread).
10. Install physical barriers (plexiglass) in front of the judge and / or courtroom clerk.
11. Encourage materials for the hearing, such as briefs and memoranda, to be submitted electronically to the court prior to the hearing and discourage hard copies unless they are required to be in the court file.
12. Designate separate doors as "entrance only" and "exit only" to control the flow of traffic in tight doorways.
13. Permit the use of door stops, when not violative of fire and safety codes, to minimize frequent touching of doors into and out of the courtrooms.
14. Designate a single person to retrieve documents from counsel and parties and deliver them to the presiding judge or clerk (e.g., a bailiff).
15. Instruct counsel and parties not to approach the presiding judge or clerk unless directed by the court and only when wearing a mask / face covering.
16. Instruct defense counsel to wait behind the bar and to approach the prosecutor's table only when directed to do so (i.e., do not crowd the prosecutor's table).
17. Affirm oaths; inform people that they must bring their own Bible [or other religious text] if they wish to swear on [it].

18. Minimize the passing of objects, including papers and pens, that normally would be passed back and forth in court transactions and interactions. Individuals should wash their hands after contact and before touching anything else. Pens should be cleaned between use, if shared.
19. Provide cleaning wipes at counsel tables to wipe surfaces, if available. Encourage attorneys and parties to bring their own wipes to clean tables.
20. Encourage all participants to follow the CDC guidelines on how to protect themselves from COVID-19.

Additional considerations for in-person court proceedings include:

1. With respect to **attorney-client communication and interactions** when social distancing is not possible, consider plexiglass partitions, masks / face coverings, and / or headsets and microphones (must be a private connection).

2. **Interpreters:**
   - Disposable gloves and disinfecting wipes or alcohol prep pads should be provided in order to allow for safe handling and disinfection of interpreting equipment.
   - To allow for social distancing, court interpreters must be required to provide and use remote wireless interpreting equipment for all in-person events. Alternatively, interpreters and limited English proficient (LEP) parties should be allowed to bring their mobile phones into the courtroom to be used in lieu of interpreting equipment. This would allow the interpreter to create a direct audio connection to the LEP party, thus avoiding any physical handoff of equipment.
   - Interpreters must disinfect interpreting equipment before and after use.
   - Interpreters must sanitize equipment in front of the LEP party before handing it to the party.
   - If the use of equipment or mobile phone is not practical or allowed, especially in brief proceedings, the interpreter must be allowed to maintain physical distancing from the LEP party and to interpret in the consecutive mode loudly enough to be heard.

3. **Witnesses:**
   - Encourage remote appearances, when permitted by law.
   - Consider alternate locations for witnesses, such as a jury box, to effectuate social distancing from the bench.
   - Provide tissues and hand-sanitizer at the witness stand.

4. **Court Reporters:**
   - Social distancing should be clearly marked and enforced around the court reporter's station / desk in the courtroom.
   - If the witness or clerk sits above the court reporter, consider moving the witness or court reporter to another location in the courtroom (e.g., jury box) to minimize the droplets spread through coughing, talking, breathing, etc.
   - Equipment should be cleaned frequently.
   - Permit the court reporter to appear remotely via Webex when possible.
   - Be cognizant of court reporters using the voice writing method as they may not be able to wear a mask / face covering while in court.

5. **Weddings:**
    - Limit the number of observers (two witnesses are required).
    - Conduct in-person ceremonies outside, enforcing social distancing.
    - Consider permitting observers to appear remotely (e.g., via cell phone or FaceTime).
    - Limit the days and times available for weddings to be performed.

6. Ensure that courts safely remain open to the **public and press:**
    - Local courts will need to decide who is asked to leave a courtroom if the maximum safe occupancy is reached.
    - Consider administrative orders regarding the number of credentialed press permitted and utilizing pool feeds to help minimize the number of individuals in a courtroom while also keeping the courts open.
    - Consider permitting remote observation of in-person court proceedings to minimize the number of individuals entering a court facility while keeping the courts open.

Appendix E

FASTER AND AS SATISFYING: AN EVALUATION OF ALASKA'S EARLY RESOLUTION TRIAGE PROGRAM

Stacey Marz

The Alaska Court Early Resolution Program (ERP) addresses many issues – self-representation in divorce and custody cases, triaging to determine the appropriate resolution approach, the importance of early intervention and the desire to use a simplified process and a problem-solving approach. This article reports on an evaluation of the Anchorage ERP. It found different outcomes for ERP cases that settled than comparable cases that proceeded on the regular trial process track with respect to the following outcomes:

- time to disposition,
- number of staff processing steps and associated completion time, and
- number of motions to modify filed within two years of the disposition.

Key Points for the Family Court Community:

- Courts can resolve 80% of their contested divorce and custody cases between self-represented parties in just one hearing with a special calendar that employs a problem-solving approach, triage, a simplified process, and early intervention.
- Courts should use problem-solving approaches instead of the traditional adversarial model to resolve divorce and custody cases.
- Courts can facilitate problem-solving by using unbundled volunteer attorneys, mediators and settlement judges to help parties resolve cases.
- Courts should triage cases into the appropriate resolution approach.
- Case screening can occur effectively using information from the pleadings and filed documents along with information about each party's other court cases.
- Early intervention in the case process is important to allow the parties to resolve and move on as soon as possible.
- There are significant efficiencies for the court by mass calendaring many cases for the same hearing time.

Keywords: *Custody; Differentiated Case Management; Divorce; Early Resolution Program; Problem Solving; Self-Represented; Simplification; and Triage.*

Many courts are grappling with how to manage divorce and custody cases involving self-represented litigants efficiently and effectively. Some are exploring how to triage each case to determine the appropriate resolution approach. Some are implementing processes in which the litigants avoid contentious litigation and resolve the issues as quickly as possible. The Alaska Court System created the Early Resolution Program (ERP) to improve outcomes for families. The program identifies and triages newly filed contested divorce and custody cases involving two self-represented litigants, applying a non-adversarial process shortly after the case is filed. The author evaluated the Anchorage ERP and compared three years of ERP cases that settled to a control group composed of similarly situated cases that proceeded on the regular trial track before ERP began.

This article provides a look at the possible pathways a hypothetical family's case could take—ERP or the typical trial track—to understand the types of issues that need to be resolved and how the processes differ. It explains the prevalence of self-representation in divorce and custody cases in Anchorage, which is similar to much of what is seen in courts across the country. Providing the

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foundation for why the court system created ERP, there is discussion about the appropriateness of a problem-solving approach, the importance of caseflow management and early intervention by the court, and the need for triage. There is a section outlining the Early Resolution Program, including the triage screening process. The evaluation is summarized, including the methodology and outcomes. Finally, the findings and conclusions are presented.

I. HYPOTHETICAL FAMILY AND POSSIBLE CASE PATHWAYS

To understand the difference between a case that has an ERP hearing and a case that takes the usual adversarial case approach, it is helpful to consider a fictitious couple, Ms. W and Mr. H, whose situation represents a case commonly heard in the Alaska Court System. They have been married for 14 years. They have two children, aged 10 and 12. They split up four months ago after deciding their marriage was over. They own a home with a mortgage in which Mr. H has been living since they separated. Ms. W rented an apartment 15 minutes from the marital home. The children have been living with each parent one week at a time for alternating weeks. Ms. W is a teacher and has vested in the school district's pension. Mr. H is a manager in a home improvement store and has no retirement account. Their debts include medical bills, credit cards, and Ms. W's student loans.

Mr. H filed a divorce complaint in the Anchorage court on May 16, 2014, asking for shared decision making regarding the children, a parenting schedule with the children living with him Monday–Friday and with Ms. W Friday–Monday. He wants an even split of the marital property and debt. Ms. W filed an answer[1] on June 2, 2014. She asks for shared decision making regarding the children and a parenting schedule of weekly rotations between each parent. She wants Mr. H to keep the house and pay her one-half the equity and split the debt. She wants to keep her pension.

This case could take two different courses. One course would result in the divorce being completed within eight weeks of filing after one uncontested hearing, no postjudgment motions, and fewer case-processing steps by court staff. Another course would result in the divorce taking six months to resolve after a trial, a postjudgment motion to modify, and a higher number of case-processing steps.

A. COURSE 1: EARLY RESOLUTION PROGRAM

If their case takes the first course, within one day after Ms. W files the answer, the file is routed to the Family Law Self-Help Center. That day, a staff attorney reviews the file to determine whether it meets the criteria for the Early Resolution Program (ERP). First, he determines whether the case involves two self-represented litigants. If so, he triages the case to determine whether it is suitable for ERP. Cases are referred to ERP unless there are factors that would exclude it from the program. If appropriate, the attorney schedules the case for an ERP hearing before a settlement judge in approximately three weeks along with up to nine other cases. He sends a notice of the early resolution hearing immediately after the triage is completed and the case is accepted, notifying the parties about the special opportunity to resolve their case quickly by working with legal professionals at the courthouse. The notice also advises the litigant about useful information to bring to court and the staff attorney's direct phone number for questions. Two days before the hearing, the staff attorney calls each party to remind them about the hearing, explain how ERP works, and explain the factors the judge uses to decide parenting issues and the division of marital property and debt. He also suggests information to gather to make the hearing process go more quickly, encourages the parties to think about workable solutions specific to the issues in the case, and asks them to discuss the issues before coming to court if possible, answering any questions.

Depending on the issues in the case, the parties may be assigned two volunteer unbundled attorneys or a court mediator to help them try to resolve the issues by agreement at the hearing. If the case

is similar to the approximately 80 percent of the cases that are heard in ERP, they reach a settlement in one hearing after working together for up to three hours. The parties go into the courtroom with their volunteer attorneys where a judge hears the terms of the agreement, asking any necessary questions. A staff attorney finalizes the final documents—findings of fact and conclusions of law, parenting plan, divorce decree, and child support order—in the courtroom during the hearing. The judge reviews and signs all the documents, which are then copied and distributed in the courtroom. The judge grants the divorce, and the parties leave the courtroom with all the documents in hand. The case is docketed in the case management system by the next day and the case is closed.

B. COURSE 2: ADVERSARIAL CASE APPROACH

Alternatively, the case could take a different course if not referred to ERP. In this scenario, after Ms. W files the answer on June 2, 2014, the judge sets a 15-minute trial-setting conference for four to six weeks later, at which both self-represented parties are to appear. During the conference, the judge schedules a trial for February 27, 2015. Afterward, the judicial assistant types up a trial scheduling order that includes the trial date and time, noting the requirement to file trial briefs and witness lists and to exchange exhibits 45 days before trial.

On November 14, 2014, Ms. W files a motion requesting to take the children to Hawaii for winter break after Mr. H told her she could not take the children on vacation because he had different plans for them. She also files a supporting affidavit and proposed order. However, Ms. W fails to fill out the certificate of service section on the form indicating she provided Mr. H with a copy of her filing, so, on November 20, the court's civil department mails her a written deficiency notice alerting her that she needs to serve Mr. H again and file a completed certificate of service. On November 27, Ms. W sends Mr. H a copy of the filing and files a certificate of service that day. On December 9, Mr. H files an opposition to Ms. W's motion, along with an affidavit and proposed order, stating he did not want the children to go to Hawaii because their 95-year-old grandmother (his mother) was going to be visiting Anchorage over the holidays. On December 15, Ms. W files an expedited motion, affidavit, and proposed order, and an underlying motion, affidavit, and proposed order, asking the court to schedule a hearing on the vacation matter as soon as possible because she already purchased the Hawaii plane tickets and rented a condo on Maui for ten days, and they were supposed to depart on December 20.

The court schedules a hearing on December 19 for 30 minutes. After hearing each side's arguments, the judge rules from the bench and allows Ms. W to take the children to Hawaii. After the hearing, the judge listens to the electronic recording, writes up a two-page order, and gives it to his judicial assistant. She dockets the order in the electronic case management system, makes two copies to mail to each party, and puts the original order in the file.

By mid-January, the parties follow the trial scheduling order and each files the trial brief, witness list, and exchanged exhibits. On February 12, the parties appear at a 15-minute pretrial hearing where the judge tells them the trial will happen on the scheduled date. On February 27, the trial occurs over the course of four hours. At the trial's end, the judge takes the matter under advisement. On March 10, the judge reviews the notes he took during the trial and listens to parts of the testimony of the parties and some of their witnesses. After two and a half hours, he reaches a decision and drafts the required final documents. His judicial assistant makes the distribution copies, dockets the documents in the case management system, files the originals, and mails copies to the parties.

The implications for litigants and the court system are different depending on which course the case takes. A case that moves through Course 1 is there specifically because the triage screening process found the case suitable for ERP. The ERP process is geared toward helping parties settle their dispute without trial. The case gets into court quickly and likely resolves in one hearing. Cases that go the Course 2 route usually result in multiple appearances and a longer time until the case is over. No systemic screening process is involved and cases are treated generally as if they are destined for trial regardless of the issues or characteristics of an individual case. Elongating the parties'

interaction with each other and the court system is problematic, particularly when the majority of family law cases involve self-represented individuals.

II. PREVALENCE OF SELF-REPRESENTATION IN ANCHORAGE DIVORCE AND CUSTODY CASES

"A traditional hallmark of civil litigation is the presence of competent attorneys zealously representing both parties."[2] "The idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion."[3] It is widely believed that at least 75 percent of cases handled by civil courts nationally involve at least one self-represented litigant.[4] In the Anchorage court, the majority of contested divorce and custody cases involve at least one self-represented party, with the percentage ranging from 67 to 72 percent between 2010 and 2014. The percentage of cases with two self-represented parties increased from 38 to 45 percent over this five-year period.

People represent themselves for a variety of reasons. Many low-income and middle-income individuals, as well as small businesses, cannot afford to pay for attorneys. Others believe they can handle the matter themselves or want control over their cases.[5] The ready availability of information in books and online has fostered the perception that the legal process can be navigated without an attorney.[6] "[G]rowing numbers of people who use family courts simply do not want or trust lawyers to serve their best interests even when they can afford them."[7] These reasons for not hiring an attorney "reflect economic and social trends and are not likely to change in the near future."[8]

Self-represented litigants pose challenges for the court. They may be unfamiliar with court procedure, so they may make mistakes regarding the documents they file and may not know how to conduct themselves during hearings or trials. Judges may feel tension between instructing self-represented litigants about proper procedures that Alaska Supreme Court case law permits and not giving them legal advice that is clearly prohibited to maintain judicial neutrality.

III. A PROBLEM-SOLVING APPROACH IN FAMILY LAW CASES

Courts generally use the adversarial model to resolve divorce and custody cases. The adversarial system relies on the court and the litigants engaging in a rational fact-finding process to reach legally appropriate and final decisions for legal disputes. Court rules provide the procedures for opposing parties to make their respective arguments and introduce supporting evidence so the judge is able to issue an impartial final decision. The adversarial model, however, is not suited to resolve family law disputes. "Although adversary procedures are rooted in due process of law and perform essential social functions, they do not meet the needs of many reorganizing families who look to the courts for solution."[9] "As family law scholars repeatedly explain, adversarial procedures are uniquely costly and counterproductive in resolving custody disputes."[10] The process "bears with it significant emotional and financial cost."[11] It facilitates one parent's alleging that the other parent engages in bad behavior and deficient parenting to elevate his or her position, exacerbating existing hostility and engendering long-term mutual distrust. As one critic characterized it, "The formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another."[12] Jane Murphy and Jana Singer write extensively about how the adversarial process used in family dispute resolution harms children, parents, families, the judicial system, and lawyers and undermines confidence in the legal system.[13] Interestingly, litigants tend to express dissatisfaction with the adversarial process, even when they prevail at trial.[14] "There is a profound consensus that the emotional costs of adversarial custody proceedings are intolerably high."[15]

Reform efforts in domestic relations courts reflect this understanding. As Professor Singer observes, courts are undergoing a "paradigm shift" away from a "law-oriented and judge-focused

adversary model" toward "a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime."[16] Recognizing that family disputes are not well served by the adversarial system, the Conference of State Court Administrators (COSCA) issued a white paper that called upon court leaders to consider a problem-solving approach to family cases:

> To aid litigants in reaching acceptable outcomes to these very personal disputes, court leaders must examine the management of family cases and the underlying system used to resolve these cases. If courts are to help families fashion outcomes that are both legally appropriate and practically workable, court leaders must de-emphasize the adversarial model of dispute resolution and place greater weight on a "problem-solving" approach to family cases. Court leaders must ask what the current system does—through its processes, procedures, attitudes, and lack of resources and services—to aggravate the problems seen in family cases[.][17]

COSCA called for

> creating a judicial environment that identifies and minimizes the wide-ranging negative effect that these cases can have on the parties, both during the court process and afterwards. To the extent that courts can soften the adversarial nature of family proceedings by encouraging restorative, problem-solving resolution processes, they will help the litigants reach outcomes that are more acceptable to everyone.[18]

In resolving family law disputes, the court system's role "as adjudicator is compatible with being a convener, mediator, facilitator, service provider, and case manager."[19] A problem-solving approach to family cases envisions the judge and court staff as viewing "their roles and actions as defined by both the law and the unique needs of each family."[20]

Research suggests that attempts by courts to formulate problem-solving focused alternatives to the adversarial process for separating and divorcing parents have yielded positive results.[21]

IV. CASEFLOW MANAGEMENT: EARLY INTERVENTION

In creating a problem-solving approach to family cases, it is critical to think carefully about caseflow management. "Effective caseflow management is the process through which courts move all cases from filing to disposition. Judicial branch supervision and management is imperative to manage the time and events involved in the life of a case."[22]

A basic principle of caseflow management is that the court should control the progress of cases, with no unreasonable interruption in its procedural progress from initiation through disposition.[23] Courts should give attention to civil cases at the earliest possible point, resulting in earlier settlements.[24] Steelman et al. provide the following:

> The objectives of early intervention are to make the point of case resolution happen as early in the case process as is reasonable, and to reduce the costs for the parties and the court of getting to case resolution. This reflects recognition that most cases are resolved by negotiated settlement or plea, while only a small percentage of cases are actually resolved by the binding decision of a judge or jury after a trial.[25]

It is important to avoid delay in family cases because the adjudication style can be distinguished from other criminal and civil case types. "Instead, family cases are dominated by what has been called 'diagnostic adjudication,'" which focuses on the proactive role of the court in defining the issues and fashioning appropriate remedies.[26] Specific caseflow management techniques recommended for divorce cases to promote more prompt justice as outlined in Steelman et al. include the following:

- Recognize emotional issues;
- Adopt and follow time standards;

- Adopt appropriate measures for self-represented litigants because the majority of cases are likely to have one or both parties representing themselves;
- Exercise control over the scheduling of case events;
- Develop simplified procedures to expedite uncontested cases;
- Screen cases early for assignment to differentiated case management tracks;
- Give careful attention in divorce decrees to property, custody, visitation, and support questions; and
- Give management attention to contested postdisposition matters.[27]

As Richard Zorza's article on the need for court simplification to enhance civil access and justice transformation provides:

> Speedy resolution, while not the only goal, is important to litigants. Speed is also closely related to total cost. For poor and middle-income people, each hearing or step may represent lost wages, or even the threat of a lost job, as well as incidental travel and childcare expenses. To the extent that advocacy costs are being incurred, those also increase with longer case processing time. Finally, extra time adds complexity and, thus, other costs. Several decades of caseflow management data give us the tools to assess this criterion and a history of attempts to control timelines.[28]

V. DIFFERENTIATED CASE MANAGEMENT AND TRIAGE

Many courts have recognized the value of differentiated case management (DCM) to control case progress, to reduce the time to resolution, and to reduce costs for litigants. DCM is "a technique courts can use to tailor the case management process to the requirements of individual cases."[29] Central to the DCM approach is the recognition that many cases should proceed through the court system at a faster pace than other cases if appropriate pathways are provided. Cases should not "wait for disposition simply on the basis of the chronological order of their filing."[30]

The next step in the evolution of case management beyond DCM is a "more refined triage based upon issues raised rather than case type."[31] In the context of courts, case triage is a more aggressive form of case management that identifies the appropriate resolution approach for a specific case based on its issues and characteristics. Some have defined triage as

> a process of rational distribution of resources based on litigant need and case complexity to assure all litigants have equal access to justice. In other words, triage should be designed to sort resources and people to enable the most just, accurate and efficient result for all.[32]

"Triage is necessary to match the right issues with the right adjudicatory processes."[33] As such, four cases of the same case type might go into four different tracks: one may receive a problem-solving approach of a settlement calendar; one may receive mediation services; one may be in the early neutral evaluation track; and one may receive the full adversarial treatment processing for a trial.

Numerous stakeholders, including court administrators, judicial officers, and legal service providers, increasingly recognize the importance of triage within the legal system.[34] Identifying the most appropriate process at the outset has three significant benefits. It may save parties from repeated visits for multiple family court service processes, it avoids delays, and it reduces the escalating polarization and associated entrenchment of positions that can accompany repeated failed settlement attempts through multiple processes.

Screening criteria are needed, as well as a consistent methodology, that could be used by different staff members to arrive at the same resolution track despite who is doing the screening. Different courts and organizations have embarked on developing screening tools.[35]

The Connecticut Judicial Branch Court Support Services Division pioneered a combination of an intake process, the Family Civil Intake Screen, and a menu of services that include mediation, a conflict resolution conference (CRC),[36] a brief issue-focused evaluation (IFE),[37] and a full

evaluation.[38] The Family Civil Intake Screen was designed to "streamline families into appropriate services by paving more efficient and appropriate paths through the family court system based on each family's needs."[39] The screen includes questions that address the level of conflict, communication and cooperation, complexity of issues, and level of dangerousness.[40]

VI. EARLY RESOLUTION PROGRAM

In 2009, inspired by her experience with problem-solving drug courts, Anchorage Superior Court Judge Stephanie Joannides wanted to manage her family law cases involving self-represented parties differently and more efficiently. She partnered with the author, who is the director of the court's statewide Family Law Self-Help Center (FLSHC), to create a new program called the Early Resolution Program (ERP) to manage contested divorce and custody cases with two self-represented litigants. Katherine Alteneder, who was working at the Alaska Pro Bono Program (APBP), offered to bring unbundled volunteer attorneys into the program and to help figure out the case-screening process.[41] The unbundled volunteer attorneys would advise and represent self-represented litigants at the ERP hearings and negotiate with the other party's volunteer attorney in the spirit of settlement. This unbundled representation would be for the ERP hearing only; extensive training materials and limited-scope representation agreements were developed to facilitate this limited-scope work. In addition to partnering with APBP, Wendy Lyford, the court's mediation program coordinator, offered to provide mediators from the court's Child Custody Visitation and Mediation Program, as appropriate, to parents needing assistance with parenting plans at the ERP hearings.

The court system anticipated that early intervention in the case process and the help of legal professionals would encourage parties to settle their issues rather than go through a protracted court trial. The result would be faster resolutions in which the parties created their own solutions after benefiting from legal advice, mediation or a settlement conference, and a lessening of workload for the courts.

In ERP, an FLSHC staff attorney conducts a triage process with every newly filed contested divorce and custody case involving two self-represented litigants. The attorney screens the case to determine suitability for the program and, if included, assigns the appropriate free legal resource—volunteer unbundled attorneys, mediator, or settlement judge—to help resolve the case. Upon acceptance, the FLSHC attorney sends each party a plain-language scheduling notice to appear at an ERP hearing that includes information about the program. Attendance at the hearing is required, but the case is usually removed from ERP if one or both parties hire an attorney.[42] Six to nine cases are placed on the court calendar for the same hearing time slot. The process is swift, and the parties often leave the courtroom with all issues resolved and signed copies of all the necessary final paperwork.

After a six-month pilot, in mid-2011, the program became institutionalized in the Anchorage court. As of September 2018, over 1,200 cases had been heard in the Anchorage ERP. Three other court locations also run ERP calendars. After screening, over half of the eligible cases are included in the program. Approximately 80 percent resolve by agreement.

A. ERP TRIAGE

Effectively triaging divorce and custody cases involving self-represented litigants to determine the appropriate resolution approach is a hot topic in family law.[43] The Alaska ERP screens cases to determine whether the case could resolve by agreement with the assistance of volunteer attorneys, mediators, and/or a settlement judge soon after the case is filed. An FLSHC staff attorney conducts a simple two-level triage process using readily available information for each newly filed contested divorce and custody case involving two self-represented litigants. Level 1 looks for reasons to exclude a case, and, if included, Level 2 determines which legal resource—volunteer unbundled attorneys, mediator, or settlement judge—is appropriate to help the parties resolve the issues.

The Level 1 screening starts after an answer is filed because both parties are participating in the case, which is necessary to reach an agreement. The screening reviews the court file, which typically includes the complaint and answer that provides information about the marital property and debt in a divorce, and the parties' positions on parenting plans for children of the relationship (i.e., how decisions about the children should be made, what living schedules the children should have with each parent, and information about each party's earnings and tax returns). The screening also reviews each party's individual court case histories as reflected in the electronic court case management system, including domestic violence, criminal, child protection, mental commitments, small claims, evictions, and other divorce or custody cases with different partners.

Importantly, the screening process does not weigh heavily the level of conflict between the parties or their positions on the issues because the adversarial process likely contributes to the parties' conflict. Moreover, ERP staff attorneys have observed that the parties' positions are not necessarily reliable indicators of what they really want or expect to happen when the case is decided. Some parties have reported that their positions represent what they think they should request. Their position may also be the result of posturing or may be based on a misunderstanding of what the legal terms *legal custody* and *physical custody* actually mean. Instead, the screener looks for reasons to exclude a case from ERP, believing that most cases could benefit from a settlement process if provided appropriate resources. Some factors that may cause a case to be screened out as inappropriate include current and serious domestic violence incidents, especially if there are minor children involved;[44] issues requiring evidentiary findings, such as a challenge to the court's jurisdiction or disputed valuation of marital property; a pending child abuse or neglect case; or a nonparent who has asserted that he or she should be awarded custody.

Regardless of whether the parties agree on any issues, the case will be included in ERP if a workable solution seems obvious (e.g., disputes regarding legal decision-making authority, living schedule issues that do not involve contested relocation, and low-value assets/debts, although division of retirement accounts and marital homes is common). In addition, important factors are the length of marriage and separation, the age of the children, and whether the list of marital property and debt is similar, even if the values or proposed allocations are different.

The second level determines the appropriate legal resource for the individual case: two volunteer unbundled attorneys, a mediator, or a settlement judge. Assignment depends on several considerations, including the issues involved and how close the parties' positions are to the realistic range of possible outcomes given the facts of the case and the legal framework.

If the staff attorney determines that the parties would benefit from legal advice because one or both parties' positions are extreme or unrealistic given the legal framework, there is known or alleged domestic violence, or a party seems particularly indecisive, a free volunteer unbundled attorney is provided to each litigant for the hearing. The volunteer attorneys provide limited-scope representation, advising their client for the ERP hearing only and negotiating with the opposing party's volunteer attorney to see whether any agreements can be reached. Sometimes, due to the issues in the case (e.g., a long marriage with no minor children but many items of marital property to address), a volunteer attorney may function as a neutral, not advising either party, but acting as a mediator to help facilitate communication. Also, if there are not enough volunteer attorneys to be assigned to each party at a particular hearing, one attorney may work as a neutral to see whether any issues can be resolved.

Cases involving parties with children are often assigned a mediator from the court's Child Custody Visitation and Mediation Program if it is determined they could benefit from talking through the details of a parenting plan or need assistance communicating. Young parents of babies are particularly suited for mediation because they have many years to co-parent during a child's minority period. Also, parents of teenagers are good candidates for mediation; the teen's preference is often strongly indicative of what the final parenting arrangement will be to avoid runaway situations when teens do not want a certain living arrangement.

Some cases are not assigned attorneys or mediators if there is nothing in dispute or relatively few or simple issues need to be decided and they work directly with the settlement judge. At every

hearing, there are usually one or two cases in which the parties had short marriages, had no children, and agree there is no property or debt to be divided. The settlement judge can finalize such cases very quickly. In some cases, it is determined that the "black robe effect" will be helpful to educate parties about the reality of their proposed positions and attorneys, or the mediator can ask the judge to talk to the parties to explain an issue, such as how child support is calculated, or to present options.

If the parties reach an agreement, the ERP judge makes sure it meets the legal requirements and the parties memorialize it on the record. During the hearing, an FLSHC staff attorney drafts the final orders based on the agreement that the judge signs at the hearing's conclusion and distributes them to the parties in the courtroom.

B. EVALUATION FOCUS

Once a triage tool or screening process is implemented, it is important to track the outcomes of the cases to determine whether the tool meets its intended objectives. In 2015–2016, an evaluation was conducted to determine whether there were differences between ERP cases and cases that proceed through the typical adversarial process with respect to

- time to disposition from the answer filing date to the disposition date;
- number of processing steps conducted by court staff and the judge and amount of time associated with those steps; and
- number of motions to modify filed within two years of the case disposition.

Shorter time to disposition and fewer case-processing steps that take less time overall provide evidence of enhanced case-processing efficiency. Resolving cases more quickly results in reduced time for litigants engaging in their court cases and thus facilitates their transition to life after court. To determine whether litigants are satisfied with the case resolution, the number and timing of post-judgment motions to modify can be reviewed. The assumption is that parties file motions to modify soon after the final judgment if they are unhappy with the outcome. Reviewing the number of motions to modify can be useful when comparing two different case-processing methods, particularly when one process emphasizes quick disposition.

VII. METHODS

The evaluation goal was to determine whether ERP cases that resolve by settlement have better outcomes than similarly situated cases that do not go through ERP and proceed through the typical trial process. There was an abundance of information collected for ERP cases since the program began in December 2010, including case outcomes, time to disposition, and the number of motions to modify. This evaluation looked at 299 ERP cases that resolved by settlement from 2011 to 2013.

It was not possible to create a control group from cases that occurred during the same time period as the ERP cases because they would not be comparable. The cases from 2011 to 2013 that were not accepted into ERP were rejected because they had disqualifying characteristics. To find a group of cases in which to compare the relevant outcomes, a random sample of 392 divorce and custody cases from 2007 to 2009, prior to ERP implementation, was screened using the same screening methodology as ERP cases.[45] The screening looked at the documents in the file until the answer filing date and ignored everything filed after that date. In addition, a search of the court's electronic case management system occurred for each party to the case using a name search to determine each of their court case histories until the date of the answer. From that group of 392 screened cases, 228 would have been "accepted" into ERP, had it existed at the time.

A. TIME TO DISPOSITION AND MOTIONS TO MODIFY

Reports generated from the court's case management system calculated (1) the time from the answer filing date to the disposition date and (2) the number of motions to modify filed within two years of the disposition date for the cases in the ERP group and the control group.

B. CASE-PROCESSING STEPS AND TIME TO PROCESS CASE

It was not possible to calculate the precise number of steps and associated amount of time for each case in the ERP group and the control group because that information was not collected when the cases moved through the system. As such, a proxy of the average case's processing steps was determined for ERP and for cases that proceeded through the typical process before the assigned judge in 2015–16 when this evaluation occurred. The number of steps to process an ERP case and a typical divorce or custody case was determined for each process. Each step was identified, and the amount of time in minutes to conduct each associated step was calculated. The total number of processing steps and total minutes for all steps were added together for an ERP case and for a typical divorce or custody case.

ERP case-processing steps are relatively uniform. There are slight variations depending on whether a case is a divorce with or without children and with or without property. Non-ERP cases can vary depending on the issues in the case and the judge hearing the case, but the typical divorce or custody case often follows a similar case processing pathway. For purposes of this analysis, six cases were assumed to be heard during an ERP hearing. Also, the case-processing steps for the typical divorce and custody group involve the following three courtroom events:

- an initial status conference or trial scheduling conference;
- a trial call or pretrial hearing; and
- a trial/settlement conference.

The analysis assumes no motions are filed requiring additional hearings.

For ERP and typical divorce and custody cases, every step to process a case was identified. This involved tracking a case file from initiation to closing by identifying each step a file takes, including court staff and judge tasks and associated average amount of time in minutes to perform that task. The tasks and time were calculated by observation and self-reporting by appropriate staff and judges.

VIII. FINDINGS

Cases that resolved through ERP compared to the typical trial track had different metrics. Table 1 summarizes the findings. The time to disposition from the answer filing date varied significantly between the cases that settled in ERP compared to those in the control group that resolved before the assigned judge. The mean time to disposition from the answer filing date for ERP cases was 50 days and 172 days for the control group, a statistically significant difference. ERP cases resolved three to four times faster than the control group cases. This difference can be attributed to the ERP process that screens cases as soon as the answer is filed and subsequently schedules a hearing a few weeks later, at which most cases resolve by agreement.[46]

There was also a difference in the number of motions to modify filed within two years of the disposition. This outcome was chosen as a proxy for litigant satisfaction based on the belief that dissatisfied litigants file motions to modify soon after the disposition, essentially as a way to express buyer's remorse to a settlement. ERP cases had .18 motions and the control group cases had .22 motions. There was not a statistically significant difference between the two outcomes. The very low number of motions to modify in both groups indicates that filing one was a relatively rare

Table 1
Overview of Findings

	ERP Case	*Control Group*
Time to disposition, mean	50 days	172 days
Time to disposition, median	42 days	104 days
Time to disposition, standard deviation	33	199
# of motions to modify	.18	.22
# of motions to modify, standard deviation	.51	.80
	ERP Case	***Typical Divorce or Custody Case***
# Case-processing steps—divorce w/o children (may have property/debt to divide)	28 steps	49 steps
# Case-processing steps—divorce w/children (and no property/debt) and custody between unmarried parents	30 steps	49 steps
# Case-processing steps—divorce w/children and property/debt to divide	30 steps	49 steps
Time to process—divorce w/o children (may have property/debt to divide)	219 minutes	1,038 minutes
Time to process—divorce w/children (and no property/debt) and custody between unmarried parents	260 minutes	1,053 minutes
Time to process—divorce w/children and property/debt to divide	265 minutes	1,053 minutes
Weighted average time to process a divorce or custody case	240 minutes	1,047 minutes

occurrence and most cases did not include a postjudgment motion in the two-year time frame. This result suggests that ERP cases, which resolved significantly more quickly than typical divorce and custody cases, did not result in more dissatisfaction. In other words, any concerns that the ERP process is too quick and parties do not have enough time to think about the issues are not reflected in additional postjudgment motion activity, and fewer motions result.

The number of processing steps and staff time per case varied significantly between ERP cases and typical divorce and custody cases. From filing to disposition, there are 28 or 30 processing steps in ERP cases depending on whether child custody is at issue, taking a total of 240 minutes (4 hours) of staff time. A typical non-ERP divorce or custody case has 49 processing steps which takes 1,047 minutes (17.45 hours). ERP cases have 39 percent fewer processing steps and save greater than 13 hours per case. The ERP process is more efficient than the typical case processing for two main reasons. First, once the staff attorney screens and accepts a case into ERP, the file stays with the attorney, eliminating many case-processing steps that occur in typical cases. Second, there are great efficiencies in scheduling multiple cases during the same ERP hearing block, especially when most cases resolve in one court event.

IX. CONCLUSIONS

The Early Resolution Program was designed to address many issues of interest to the Alaska Court System—self-representation in family law cases, the need to triage to determine the appropriate resolution approach, the importance of early intervention, and the desire to use a simplified process and a problem-solving approach. This evaluation shows that ERP has been an effective way to resolve newly filed contested divorce and custody cases involving two self-represented parties. It resulted in much faster resolutions for litigants and court staff than similarly situated cases that are resolved in the typical adversarial fashion. ERP cases involve many fewer case-processing steps and

substantially less staff time. ERP cases have similar levels of satisfaction as typical divorce and custody cases, as represented by the number of motions to modify filed within two years of disposition. This evaluation showed that ERP has been an effective and efficient way to resolve newly filed contested divorce and custody cases involving two self-represented parties.

NOTES

1. In a contested divorce and custody case, the plaintiff starts the case by filing a complaint and other required documents and serving the documents to the defendant. The defendant has 20 days to file an answer to the complaint, responding to each of the plaintiff's requests and also including counterclaims that assert his or her own requests. If the defendant does not file an answer within 20 days, the plaintiff may file an application for a default judgment.

2. Paula Hannaford-Agor, *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, Nat'l Ctr. For State Courts iv (2016), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

3. *Id*. at vi.

4. Self-Represented Litigation Network, *SRLN Brief: How Many SRLs?*, https://www.srln.org/node/548/srln-brief-how-many-srls-srln-2015.

5. California Administrative Office of the Courts, Handling Cases Involving Self-Represented Litigants, A Benchguide for Judicial Officers, 1–3 (2007).

6. Conference of State Court Administrators, Position Paper on Self-Representated Litigation 1 (2000).

7. Andrew Schepard, *Tragedy and Hope*, 40 Fam. Ct. Rev. 5, 6 (2002).

8. *See* Hannaford-Agor, *supra* note 3, at 1–2.

9. Rebecca Love Kourlis, Melinda Taylor, Andrew Schepard, & Marcia Kline Pruett, *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 Fam. Ct. Rev. 351, 354 (2013).

10. Rebecca Aviel, *Counsel for the Divorce*. 55 B.C. L. Rev. 1099, 1107 (2014).

11. Kourlis et al., *supra* note 9.

12. Janet Weinstein, *And Never the Twain Shall Meet Again: The Best Interests of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 132–33 (1997).

13. Jane C. Murphy & Jana B. Singer, Divorced from Reality: Rethinking Family Dispute Resolution, Chapter 2 (2015).

14. Kourlis et al., *supra* note 9, at 360.

15. Aviel, *supra* note 10, at 1108.

16. *Id*. (citing Singer and Murphy).

17. Conference of State Court Administrators, Position Paper on Effective Management of Family Law Cases 1–2 (2002).

18. *Id*. at 6.

19. *Id*. at 5.

20. *Id*. at 6.

21. Kourlis et al., *supra* note 9, at 362.

22. Nat'l Judicial College, Fair, Timely, Economical Justice: Achieving Justice Through Effective Caseflow Management 4 (2009).

23. David C. Steelman, Nat'l Center for State Courts, Improving Caseflow Management: A Brief Guide 7 (2008).

24. David C. Steelman, John A. Goerdt, & James E. McMillan, Nat'l Center for State Courts, Caseflow Management: The Heart of Court Management in the New Millennium 25 (2004).

25. *Id*. at 3.

26. *Id*. at 43.

27. *Id*. at 49–51.

28. Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 Drake L. Rev. 845, 859–60 (2012).

29. Bureau of Justice Assistance, U.S. Department of Justice, Differentiated Case Management: Program Brief 1 (1993).

30. Bureau of Justice Assistance, U.S. Department of Justice, Differentiated Case Management: Implementation Manual 1 (1993).

31. Thomas M. Clarke & Victor E. Flango, *Case Triage for the 21st Century*, in Nat'l Center for State Courts, Future Trends in State Courts 2011: A Special Focus on Access to Justice 146 (2011).

32. Thomas Clarke, Richard Zorza, & Katherine Alteneder, Triage Protocols for Litigant Portals: A Coordinated Strategy Between Courts and Service Providers 1 (2013); s*ee also* Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake That Maximizes Access and Outcomes*, 89 Denv. U. L. Rev. 859 (2012) (providing a comprehensive discussion of legal triage).

33. Victor E. Flango & Thomas M. Clarke, *Which Disputes Belong in Court?* 50 Judges J. 22, (2011).

34. *See* Clarke & Flango, *supra* note 31, at 1.

35. *See* Michael Saini, *Triage in Family Law: Presentation to the Nat'l Center for State Courts*, https://prezi.com/3ujqwzoheap6/saini-2014-triage-in-family-law-presentation-to-the-national-centre-for-state-courts/ (last visited Apr. 11, 2019) (including examples of growing work in this area around the world, in Canada, New Zealand, and Australia); *see also* Hill User Friendly Justice, http://www.hill.org/project/rechtwijzer (last visited Jan. 4. 2016) (specifically Rechtwijzer 2.0, an interactive online justice application from the Netherlands that was part triage, getting consumers to legal resources, and part dispute resolution from 2014).

36. The CRC blends mediation and negotiation processes with the primary goal of helping the parties reach a resolution. If the parties cannot reach a resolution, a court counselor may direct the process, obtain collateral information relevant to the case, and offer suggestions as well as recommendations. Attorneys are usually present during the CRC.

37. The IFE is a nonconfidential process of evaluating a limited issue impacting a family and/or a parenting plan. The goal is to define and explore the issue causing difficulties for the family, gather information regarding only this issue, and provide a recommendation to the parents and the court regarding a resolution to the dispute. It is limited in scope, involvement, and duration.

38. Marcia K. Pruett & Megan Durell, Family Civil Intake Screen and Services Evaluation: Final Outcomes Report. Connecticut Jud. Branch Ct. Support Servs. Div. (2009).

39. *Id*. at 4.

40. Peter Salem, Debra Kulak, & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 Pace L. Rev. 741, 758–61 (2006).

41. The volunteer attorney component of ERP transitioned later to be under the auspices of Alaska Legal Services Corporation.

42. Occasionally if one party hires an attorney, that attorney and client agree to participate in ERP and work toward a settlement with a volunteer attorney representing the other side.

43. In 2013, the State Justice Institute funded a project to identify case triage strategies for case types with high numbers of self-represented litigants. *See supra* note 31, Clarke et al. *See also* Thomas M. Clarke, Nat'l Center for State Courts, Building a Litigant Portal, Business and Technical Requirements (2015) (providing the business and technical requirements for building a litigant portal as a vehicle for case triage); Victor Flango & Thomas Clarke, Reimagining Courts: A Design for the Twenty-First Century (2015) (discussing triage in the majority of the book).

44. Alaska Statute 25.24.150(g) includes a rebuttable presumption that a parent with a history of domestic violence cannot get anything more than supervised visitation, unless specific time-intensive conditions are met. A history of domestic violence is defined as more than one domestic violence incident or a domestic violence incident resulting in serious physical injury (AS 25.24.150(h)). If it is clear that the presumption applies in a divorce with children or a custody case between unmarried parents, the case is excluded from ERP. The rationale is that there is nothing the parents can negotiate to resolve the custody issue, except for the parent with the domestic violence history agreeing to have supervised visitation and completing the required programs.

45. It was necessary to determine the sample size needed, so a power analysis was conducted that considered the standard deviations for both the range of numbers in the time to disposition data set and the number of motions to modify data set. The power analysis revealed that at least 100 cases were required to be in the control group to arrive at a valid comparison for the time to disposition, but 200 cases were required to be in the control group to arrive at a valid comparison for the number of motions to modify. Based on the historical screening acceptance rate of 50 to 60% for cases found suitable for inclusion in ERP, close to 400 cases needed to be screened to arrive at a control group of at least 200 cases.

46. Some ERP cases return for a second ERP hearing if they reach an interim agreement and want to see how it goes for a period of time before finalizing it, or if they are making progress but need to gather more information, such as to find out whether a house can be refinanced into one spouse's name before reaching an agreement on the property.

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