

# In the Supreme Court of the State of Idaho

IN RE: JURY TRIALS

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AMENDED ORDER

September 16, 2020

To allow for the resumption of jury trials while fostering public safety and mitigating against the spread and the continuing rise in COVID-19 cases, and in light of the current inability of court administration throughout the state to comply with minimum safety protocols necessary for addressing the COVID-19 pandemic, pursuant to Idaho Court Administrative Rule 48 all State of Idaho jury trial proceedings shall be governed by the following rules until further order of the Court.

1. This Court's Order of April 22, 2020, IN RE: EMERGENCY REDUCTION IN COURT SERVICES AND LIMITATION OF ACCESS TO COURT FACILITES remains in full force and effect except to the extent modified by this Order. This Court's Order In Re: Jury Trials entered on July 24, 2020 and Amended Order In Re: Jury Trials entered on September 11, 2020, are hereby superseded by this order.
2. Due to the continuing rise in positive COVID-19 cases throughout Idaho, the time during which no trial juror shall be required to appear in person shall be extended to September 14, 2020. No jury trial shall commence in a criminal case before September 14, 2020, and in a civil case before December 1, 2020.
3. Any person sixty-five years of age or older is eligible to have jury service postponed for one year. *See Idaho Department of Health and Welfare, COVID-19 Guidance for Idaho Courtrooms and Juries: Public Health Risk Reduction Recommendations – June 29, 2020* ("Refrain from or consider refraining from calling on people who are 65 years of age or older for jury pools").
4. This Court's prior emergency orders suspending jury trials entered on March 23, March 26, April 14, and April 22, July 24, and September 11, 2020, shall be deemed to have tolled the time utilized to calculate the right to a speedy trial pursuant to I.C. § 19-3501.
5. COVID-19 Jury Questionnaires
  - a. Each jury commissioner, in addition to the summons sent to prospective jurors, shall send each juror a COVID-19 Questionnaire in the form provided in **Attachment A** to this order, which must be completed by the juror and returned to the jury commissioner prior to the prospective juror appearing for jury duty. In the event a juror does not return the questionnaire, the Jury Commissioner shall

contact the juror and attempt to resolve the issue, which may include completing the questionnaire over the telephone.

- b. The Jury Commissioner may modify this COVID-19 questionnaire to include a juror number or other similar identifying feature.
  - c. The completed questionnaires, which include private and individual health information, shall be available to the Judge, Jury Commissioner, and each party for use in the jury selection process. Such questionnaires are otherwise confidential and shall be exempt from disclosure as defined in Idaho Court Administrative Rule 32(g). The questionnaires may not be further disseminated by the parties or counsel of record. The district judge may place additional conditions on the use or publication of jury COVID-19 questionnaires. Any violation by a person granted access to the COVID-19 questionnaires as provided in this order, or as provided by a district court order regarding disclosure will constitute contempt of court.
  - d. Jurors who report positive responses to any of the questions on the COVID-19 questionnaire are eligible to have jury service postponed for one year.
6. Each day of trial, including during jury selection, all persons entering the courtroom or related facility, including for voir dire, will be screened before entering. This screening will include a noninvasive temperature check for temperature exceeding 100.3 degrees Fahrenheit and a series of questions regarding known exposures to COVID-19 and recent symptoms. For public health reasons, any persons demonstrating risk will be denied entry to the courtroom. The jury commissioner shall be notified of any juror who is denied entry. Each county may determine the method by which court staff will notify the jury commissioner. The health screening shall be in the form provided in **Attachment B** to this order.
  7. All provisions of I.C.R. 24 and I.R.C.P. 47, not otherwise modified in this order, shall remain in force and effect.
  8. The following shall govern jury selection in all jury trials:
    - a. For all jury trials, the court shall use the struck jury system as outlined in I.R.C.P. 47(g) for civil cases and I.C.R. 24(f) in criminal cases;
    - b. Peremptory challenges allotted to each side, being procedural mechanisms and not substantive rights, shall be modified as follows:
      - i. Pursuant to I.C.R. 24(d), if the offense charged is punishable by death and the state is seeking a death sentence when voir dire commences, each party, regardless of the number of defendants, is entitled to 10 peremptory challenges.

- ii. Pursuant to I.C.R. 24(d), in all other felonies, each party, regardless of the number of defendants, is entitled to three peremptory challenges; however, if there are co-defendants and the court determines that there is a conflict of interest between them or among them, the court may allow one additional peremptory challenge (total of four), and permit them to be exercised separately (e.g. two each), or jointly.
- iii. Pursuant to I.C.R. 24(d), in all misdemeanors, each side, regardless of the number of defendants, is entitled to two peremptory challenges.
- iv. Pursuant to I.R.C.P. 47(i), in every civil case, each party is entitled to two peremptory challenges. If there are co-parties the court must determine the degree of conflict of interest, if any, among the co-parties and may allocate no more than two peremptory challenges to the co-parties, not to exceed a total of four, to be apportioned as determined by the court.
- v. Pursuant to I.C.R. 24(e) and I.R.C.P. 47(j), no additional peremptory challenges are authorized for alternate or additional jurors, irrespective of the number of additional or alternate jurors which are used.

9. Implementation of Struck Jury Method. In order to minimize the number of prospective jurors in the venire and the movement of persons in the courtroom, the following methods are strongly recommended for jury selection in all jury trials:

- a. Before a specific panel arrives for jury selection, all potential jurors in that panel shall be randomly selected and assigned a juror number, which number shall be used both to seat the jurors in numerical order, and to maintain the priority of potential jurors during selection of the jury;
- b. Whenever a juror is excused by the court for any reason, including in sustaining a challenge for cause, the next juror in numerical order who is not among those in the struck panel will be included in the struck panel, but the original randomly selected number priority of the jurors will not change; and

10. Voir Dire

- a. If sufficient space to allow for adherence to safety requirements for the jury venire is unavailable in the county courthouse, alternative locations with sufficient space may be utilized at the discretion of the Administrative District Judge for each district.
- b. In criminal cases, during voir dire, the struck panel of jurors must be in the physical presence of the defendant and counsel. Nothing in this provision shall limit the assigned judge from conducting in camera voir dire with an individual juror, so long as counsel for all parties are present, all defendants are present, and a verbatim record is made of the in camera proceeding. If reasonably feasible, and

as sufficient space allows for adherence to safety requirements, a reasonable number of additional potential jurors should also be present in the event there are excusals for cause in the struck panel.

- c. Only one room may be used to seat jurors during the voir dire process. Jurors may be brought in by smaller panels from the venire, if necessary.
- d. For all criminal trials, a verbatim record of voir dire proceedings must be kept by a certified court reporter. In trials held in the magistrates division a record of voir dire proceedings must be kept either through a digital recording created in the For the Record software or a verbatim record kept by a certified court reporter.
- e. In criminal jury trials, all challenges for cause and all peremptory challenges shall be exercised in the presence of the defendant and counsel.
- f. If the public is physically excluded from any portion of voir dire, the court must make findings on the record as to the reasons for the exclusion, the options for providing in person attendance that were considered, and the reasons the options were not viable. If the public cannot be physically present in the courtroom, a publically accessible live audio and video stream of the proceedings must be provided. Such live stream may be publically accessible either: (i) via transmission to the internet, or (ii) by transmission to a separate room in the courthouse only. Any live stream of a court proceeding shall not be a part of the official court record.

#### 11. Conduct of the trial, including jury selection:

- a. In all jury trials, the assigned judge, attorneys, and jurors must be physically present in the courtroom.
- b. In a criminal jury trial, with the judge's approval, counsel for both parties and defendant may stipulate that a witness may testify remotely. If the defendant is not present pursuant to Idaho Criminal Rule 43, counsel for the defendant may stipulate on his behalf.
- c. In civil jury trials, with the assigned judge's approval, counsel for the parties may stipulate to offer any or all testimony by video conferencing.
- d. All persons physically present in the courtroom must remain a minimum of six feet away from all other persons at all times in the absence of permission from the assigned judge. The assigned judge, at the request of counsel, may permit counsel to be closer to a client to facilitate appropriate consultation or may be allowed to approach a testifying witness, if necessary.
- e. All persons in the courtroom must wear a mask approved by the assigned judge at all times, unless an exception is granted by the assigned judge. In lieu of a face

mask, with the permission of the assigned judge, a witness while testifying or an interpreter while interpreting may wear a face shield or be behind a transparent barrier so facial expressions and the mouth can be observed when speaking.

- f. All court personnel in the courtroom, including court clerks, bailiffs, and security personnel, will be limited to those deemed necessary by the assigned judge.
- g. Easy access to hand sanitizer and bleach wipes must be available in the courtroom and jury room. Access to a sanitation station where hands can be washed with soap and water must be available within the building.
- h. Following jury selection, if the public is physically excluded from the Courtroom, the court must make findings on the record as to the reasons for the exclusion, the options for providing in person attendance that were considered, and the reasons the options were not viable. If the public cannot be physically present in the courtroom, a publically accessible live audio and video stream of the proceedings must be provided. Such live stream may be publically accessible either: (i) via transmission to the internet, or (ii) by transmission to a separate room in the courthouse only. Any live stream of a court proceeding shall not be a part of the official court record.
- i. Witnesses must be on call or scheduled for a time certain for their appearance to reduce exposure and unnecessary waiting.
- j. An assigned judge has the discretion to impose additional requirements or restrictions within the courtroom to promote the safety of participants, to promote efficiency, and to protect the integrity of the jury proceeding.

## 12. Live streaming of proceedings

- a. Idaho Court Administrative Rule 45 shall be applied when a camera in the courtroom supplements the physical presence of the public in any part of the trial.
- b. Any portion of a trial may be live streamed in lieu of allowing the physical presence of the public only when:
  - i. The assigned judge finds that health and safety concerns override other interests in allowing the public to be physically present in the courtroom;
  - ii. Denial of the public's physical presence in the courtroom is necessary to protect the health and safety of those participating in the proceeding, including, if applicable, a lack of sufficient physical space for adherence to required social distancing;
  - iii. The assigned judge has considered other reasonable alternatives to allow for the physical presence of the public;

- iv. The assigned judge has found on the record that live streaming is an appropriate alternative because:
  - 1. No reasonable in-person alternative is available that would sufficiently ensure the health and safety of those participating in the trial; and
  - 2. The available live streaming capability is a narrowly tailored and reasonable alternative.
- c. There shall be no live streaming of the following:
  - i. unless the live streaming is by transmission to a separate room in the courthouse only, images of jurors;
  - ii. audio of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench;
  - iii. images of notes upon the counsel table, nor of any exhibits before they are admitted into evidence;
  - iv. audio or images of off-the-record, in-chambers sessions or judicial deliberations;
  - v. audio or images of proceedings in which jurors may have to disclose personal, embarrassing, or prejudicial information that traditionally would be addressed outside of the presence of the other jurors and the public.
- 13. Consistent with this Court's Order of April 22, 2020, individuals who, in violation of these protocols, approach a juror or prospective juror, court services office, or other court participant, or is otherwise disruptive of the jury proceeding, or who enter a courthouse or other venue where court is being held in violation of these protocols, shall be denied access by anyone designated for courthouse security by the Administrative District Judge.
- 14. Any violation of this order may be dealt with through contempt proceedings set forth in Idaho Rule of Civil Procedure 75. Any violation witnessed by a judge may be addressed through summary contempt proceedings set forth in Rule 75(b).

IT IS SO ORDERED.

DATED this 16 day of September, 2020.

By Order of the Supreme Court

  
Roger S. Burdick, Chief Justice

ATTEST:

  
Clerk

**ATTACHMENT A**

Date: \_\_\_\_\_

Juror # \_\_\_\_\_

**COVID-19 initial screening questionnaire for prospective jurors**

The virus that causes novel coronavirus disease (COVID-19) is primarily spread from person to person. Courtrooms are considered medium exposure risk environments. To help protect the health of Idahoans, an initial screening to determine juror eligibility to serve should be conducted. Answering the medical questions is solely for the purpose of determining whether a juror can serve and the answers to the questions must be kept confidential.

1. **Are you 65 years of age or older?**  No  Yes
- a. **If yes, would you like your service to be postponed for one year?**  No  Yes

2. **Do you, or does anyone in your household, have any medical conditions that put you or a member of your household at high risk for COVID-19?** Examples are, but are not limited to, chronic kidney disease, chronic obstructive pulmonary disease (COPD), immunocompromised (weakened immune system) from solid organ transplant, severe obesity (body mass index [BMI] of 30 or higher), serious heart condition (such as heart failure, coronary artery disease, or cardiomyopathies), sickle cell disease, or type 2 diabetes mellitus. [Note: COVID-19 is a new disease and this list is subject to change. Changes will be posted to <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.] Please explain:

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- a. **If you answered yes to the above question, would you like your service to be postponed or would you like to remain as a juror in your current month?**

- No**, keep me in my current month. I do not feel that my above listed condition will limit my ability to serve.
- Yes**, please postpone my service for one year.

3. **Are you a healthcare worker directly involved with the diagnosis, treatment, management, or care of patients who have or are suspected of having COVID-19?** [Note: Healthcare workers include physicians, nurses, nursing assistants, emergency medical personnel, dental professionals and students, medical and nursing students, laboratory technicians, phlebotomists, pharmacists, therapists, hospital volunteers, and some administrative staff and environmental services staff.]

- No**, keep me in my current month. I do not feel that my profession will limit my ability to serve.
- Yes**, please postpone my service for one year.

**If the answer to all of the above questions is NO, continue on to page 2.**

4. Are you currently experiencing, any of the following symptoms?

- |   |  |
|---|--|
| <input type="checkbox"/> Chills                                   | <input type="checkbox"/> New loss of taste or smell  |
| <input type="checkbox"/> Cough                                    | <input type="checkbox"/> Sore throat                 |
| <input type="checkbox"/> Shortness of breath/difficulty breathing | <input type="checkbox"/> Congestion or runny nose    |
| <input type="checkbox"/> Fatigue                                  | <input type="checkbox"/> Conjunctivitis ("pink eye") |
| <input type="checkbox"/> Muscle or body aches                     | <input type="checkbox"/> Nausea or vomiting          |
| <input type="checkbox"/> Headache                                 | <input type="checkbox"/> Diarrhea                    |

5. Do you feel feverish or have a temperature above 100° F? *If a thermometer is available, please take your temperature before answering this question.*

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6. In the past 14 days, has **anyone in your household** tested positive for SARS-CoV-2 or COVID-19?

- No  Yes

7. In the past 14 days, have you **been in close contact with anyone** else who has tested positive for COVID-19? Close contact means less than 6 feet apart for 15 minutes or more.

- No  Yes

8. In the past 14 days, **have you tested positive** for SARS-CoV-2 or COVID-19 or been told by your health care provider that you might have COVID-19?

- No  Yes

9. In the past 14 days, have you **been notified by your public health district** that you were or might have been in close contact with someone who tested positive for COVID-19?

- No  Yes

10. Have you been tested for COVID-19 and are waiting to receive test results?

- No  Yes

Return this completed questionnaire to the Jury Commissioner. You will be contacted by the Commissioner if there are any concerns about your service.

## ATTACHMENT B

### COVID-19 daily screening questionnaire for jurors

The virus that causes novel coronavirus disease (COVID-19) is primarily spread from person to person. To help protect the health of jurors and other people working at or visiting court facilities, jurors should be verbally screened for possible signs and symptoms of COVID-19. The questions below can be administered by telephone on the morning of the jury summons or in person prior to entering the court facility. If administering in person, both parties should wear a cloth face covering or facemask and precautions should be taken to ensure physical distancing or barrier protection. Answering the medical questions is solely for the purpose of determining whether a juror can serve and the answers to the questions must be kept confidential. The court may choose to use a touchless infrared thermometer upon arrival of a juror, but appropriate Personal Protective Equipment should be worn by the person checking temperatures. Note that temperature screening reduces, but does not eliminate, risk as not all people with COVID-19 have a fever.

1. **Are you currently experiencing, any of the following symptoms?**

- Chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Conjunctivitis ("pink eye")
- Nausea or vomiting
- Diarrhea

2. **Do you feel feverish or have a temperature above 100° F?** If a thermometer is available, please take your temperature before answering this question. [Consider having the court offer thermometers to jurors as many households lack a thermometer for taking a person's temperature.]

The next questions (3-7) apply to the time since you were last here at court.

Since you were last here...

3. ... has anyone in your household tested positive for SARS-CoV-2 or COVID-19 or experienced any of the symptoms listed above?
4. ... have you been in close contact with anyone other than a household member who has tested positive for SARS-CoV-2 or COVID-19? Close contact means less than 6 feet apart for 15 minutes or more.
5. ... have YOU tested positive for SARS-CoV-2 or COVID-19 or been told by your health care provider that you might have COVID-19?
6. ... have you been notified by your public health district that you were in close contact with someone who tested positive for SARS-CoV-2 or COVID-19?
7. ...have you been tested for SARS-CoV-2 or COVID-19 and are waiting to receive test results?

If the juror or prospective juror answers **yes** to any of the above questions, they should not enter the court facility and should promptly contact the jury commissioner for further instructions.