

THE COVID-19 PANDEMIC: HOW INDIANA COURTS HAVE RESPONDED

JUDGE HEATHER WELCH*

On Sunday evening of March 8, 2020, I received a news alert that Eli Lilly & Company had instructed its 10,000-plus employees in the Indianapolis area to work remote until further notice due to cases of the global SARS-CoV-2 virus outbreak, which will be referred to hereinafter as COVID-19, finally reaching Indiana. I was surprised and concerned by this news. As the Presiding Judge of the largest state court system in Indiana,¹ my mind began racing as to what needed to be done to keep courts open and operational but, more importantly, how to keep litigants, lawyers, citizens, staff, and judges safe. That evening, I made a rough draft of initial steps to take to address this global pandemic in the Marion Superior Courts. This Article discusses the Marion Superior Court's and the Indiana courts' responses to the COVID-19 pandemic in March of 2020, how Indiana courts returned to in-person court hearings and jury trials, and recent cases decided by the Indiana Court of Appeals on issues related to the COVID-19 pandemic.

I. INITIAL RESPONSES TO THE COVID-19 PANDEMIC BY INDIANA COURTS

A. Marion Superior Court's Response

On Monday morning, March 9, 2020, I begin working through my draft list. My first order of business was meeting with Emily VanOsdol, Marion Superior Court Administrator, and Amitav Thamba, Marion Superior Court Chief Information Technology Officer. I explained to them the information I learned from the news and that we needed to develop a written plan to address how we would manage the Marion Superior Courts during an emergency public health crisis. I found a plan published by the National Center for State Courts (NCSC) entitled "Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators" and we modeled our plan after this benchbook.²

Our draft plan was completed by March 12, 2020, and we began to implement our plan shortly after. The Marion Superior Court Business Continuity Plan addressed the following items: 1) the goals and objectives during the pandemic; 2) identifying which judges and court employees would lead the implementation of the plan; 3) management of the Marion County Juvenile

* Judge, Marion Superior Court, Civil Division; Indiana Commercial Court Judge, Former Master Commissioner for the Marion Superior Courts; serving Marion County Courts since February of 2001.

1. See *Indiana Trial Court Statistics by County*, public.courts.IN.gov (2021), <https://public.courts.in.gov/ICOR/> (selecting "Marion County").

2. *Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators*, NAT'L CTR. FOR STATE CTS. (2016), <https://ncsc.contentdm.oclc.org/digital/collection/facilities/id/194> [<https://perma.cc/GF8P-PKJ7>].

Detention Center; 4) how to manage juvenile hearings on Children in Need of Services (“CHINS”) and Juvenile Delinquency (“JD”) cases; and 5) guidance and instruction for judges to manage their caseloads remotely (“Business Continuity Plan”).³

On March 11, 2020, the Judges of the Marion Superior Court Executive Committee (“EC”),⁴ Judges Alicia Gooden, Amy Jones, Christina Klineman, and myself, organized and conducted a meeting with the Marion County stakeholders to develop a plan to address court operations. This group included representatives from the City of Indianapolis, the Marion County Sheriff’s Office, Indianapolis Metropolitan Police Department, the Marion County Building Authority, the Marion County Clerk’s Office, the Information Services Agency (the City agency that manages all technology services for the city and county), the Marion County Prosecutor’s Office, and the Marion County Public Defendant Agency.

On the same day, an e-mail was sent by the EC to the judges of the Marion Superior Court regarding COVID-19.⁵ This communication strongly requested the judges of the Marion Superior Court take steps effective immediately and continuing for thirty days regarding court operations during the COVID-19 pandemic.⁶ Specifically, the EC strongly encouraged our colleagues to 1) not bring prisoners from the jail to the courts for routine pre-trial hearings; 2) to conduct as many hearings as possible remotely; 3) to exercise flexibility for thirty days on continuances; 4) to consider the continuance of all civil jury trials, out of custody criminal jury trials, and in custody jury trials for thirty days; 5) to conduct attorney only pre-trial conferences; and 6) to reduce the number of cases on the docket and focus on essential/emergency cases only.⁷ We provided information on what hearings would be considered essential/emergency, which included initial hearings on in-custody defendants; bond review hearings; initial and detention hearings on CHINS and JD cases; civil commitments, mental health, and minor guardianship hearings; protective order hearings; fact finding hearings on CHINS that are time sensitive; and any other essential hearing at the discretion of the judge.⁸ The e-mail also shared two orders issued by Judge Marissa McDermott of the Lake Circuit Civil Division on March 10, 2020 addressing her court operations and the COVID-19 pandemic.⁹ Judge McDermott

3. Marion Superior Court Business Continuity Plan (on file with Author).

4. The EC is comprised of four judges and these judges manage the make policy for the Court’s internal operations and generally manage administrative functions of the Court. If you review, the Marion Superior Court Administrative Rule LR19-AR00 Rule 300 section lists the various duties of the EC.

5. E-mail from the Marion Superior Court Executive Committee to all Marion Superior Court judges (Mar. 11, 2020) (on file with author).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; see also Order, *In re: The Matter of Mitigating Spread of Contagions*, No. 45C01-2003-CB-56 (Lake Cir. Ct. Mar. 10, 2020); Order, *In re: The Matter of Permitting Telephonic Appearance and Continuance Motions for Certain Court Dates*, No. 45C01-2003-CB-57 (Lake Cir. Ct. Mar. 10,

gave permission for the Marion County judges to use these orders as they wished in responding to the pandemic.¹⁰

On March 12, 2020, I presided over an in-person meeting of all the judges of the Marion Superior Court to discuss the Courts' response to the pandemic and the plan the EC had developed. On this morning, I was also informed that in a criminal jury selection that a prospective juror employed by Eli Lilly learned he was exposed to someone who tested positive for COVID-19. This information confirmed that the virus was going to affect court operations in Marion County and the State of Indiana.

During this meeting with our colleagues, the EC provided additional guidance to our colleagues which strongly encouraged judges to 1) permit any attorney to appear remotely that wished to do so without requiring a motion to appear remotely; 2) encourage social distancing be implemented in all courtrooms; 3) have each court coordinate remote appearances with attorneys and pro se litigants; and 4) continue any evidentiary hearing for good cause if anyone had flu-like symptoms or had been exposed to COVID-19 or tested positive for the virus.

Through the preparation of our Business Continuity Plan, I learned that Indiana Administrative Rule 17 would become an important tool for trials courts and the Indiana Supreme Court to manage court operations during this public health crisis.¹¹ Indiana Administrative Rule 17 permits Indiana trial courts to file an emergency petition for administrative orders with the Indiana Supreme Court.¹² This rule specifically mentions that the Indiana Supreme Court has the:

inherent authority to supervise the administration of all courts of this state, . . . in the event of natural disaster, civil disobedience, wide spread disease outbreak or other exigent circumstances requiring the closure of courts or inhibiting the ability of litigants and courts to comply with statutory deadlines and rules of procedure applicable in courts of this state to enter such order or orders as may be appropriate to ensure the orderly and fair administration of justice . . .¹³

On March 13, 2020, at 2:08 p.m., the Marion Superior and Circuit Courts filed an Ind. Admin. R. 17 Petition with the Indiana Supreme Court.¹⁴ Chief Justice Loretta Rush immediately issued an order on this petition at 6:00 p.m. on March 13, 2020.¹⁵ The Supreme Court order permitted the following:

2020).

10. *Id.*

11. *See* IND. CT. RULES ADMIN. RULES § 17 (2021).

12. *Id.*

13. *Id.*

14. Petition for Relief Under Ind. Administrative Rule 17, *In re: The Matter of Requesting Relief Under Ind. Admin. Rule 17*, Cause No. 49D01-2001-CB-000039 (Marion Super. Ct. 2020), available at <https://www.in.gov/courts/files/covid19-2020-0313-ar17-marion-petition.pdf>.

15. Order, *In re: The Matter of the Petition of the Courts of Marion County for Additional Administrative Rule 17 Emergency Relief*, No. 20S-CB-00113, 49D01-2001-CB-000039 (Ind. Mar.

- 1) The order permitted tolling beginning March 16 until April 6, 2020 of all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings, public health, and mental health matters; all judgments, support and other orders; and in all other civil and criminal matters before the courts;
- 2) Judges could exercise general jurisdiction over all cases;
- 3) Judges could continue all hearings deemed non-essential and conduct hearings in one courtroom;
- 4) The Initial hearing court could operate on a limited basis;
- 5) The Courts could reduce staff to only address emergency matters; and
- 6) The Courts could authorize the continuance of all civil and out of custody criminal jury trials, and in-custody jury trials if the rights of the defendant will not be violated from March 16 to April 15, 2020.¹⁶

The Marion Superior Court, with the assistance of our talented Court Administration Staff, was able to move the courts in-person operation to a completely remote process beginning on Monday, March 23, 2020. Each day we learned that certain procedures were working well, but others were not. The EC and key court administration staff met daily for the first several months of the pandemic to discuss new developments with the COVID-19 virus and evaluate our policies.

Another important part of the response to the pandemic was to provide information to the local and state bar associations to allow counsel to be informed on the Marion Superior Courts operation policies. Our technology staff quickly updated our website to reflect the current operations of the courts during the pandemic. The members of the EC spoke with members of the media to provide information on the courts operation plan.

During the first few months of the pandemic, the EC developed a plan to permit remote work for all court staff except our Juvenile Detention Staff. We made the decision to move from desktop computers to laptop computers with docking stations to permit immediate remote work when necessary. It was quite an undertaking to provide a laptop for all the employees of the Court including the probation officers. Due to the shortage of laptops, we were not able to complete the roll-out of laptops for all staff until early July of 2020. Within weeks of the pandemic, we were able to provide laptops to all Judges, Magistrates, Court Administration staff, and one court staff member per court. This allowed judges to conduct essential or emergency hearings remotely on Webex within days of the public health crisis.

The EC worked diligently to issue communication to our judicial colleagues and staff about the state of the operations of the Marion Superior Court. We worked with our colleagues and staff to receive input on best practices for addressing the COVID-19 pandemic. Next, I will discuss the response to the

13, 2020), <https://www.in.gov/courts/files/order-ar17-20S-CB-113.pdf> [hereinafter March 13, 2020 Order].

16. *Id.* at 2.

pandemic by the Indiana Supreme Court.

B. Indiana Supreme Court's Response

Since the beginning weeks of the COVID-19 pandemic and still to this day, Chief Justice Rush has demonstrated exemplary leadership. She immediately began issuing orders on trial courts' Indiana Administrative Rule 17 Petitions.¹⁷ On March 13, 2020, Clark, Delaware, Lake Circuit, and Marion County Courts all filed emergency petitions to address court operations during the COVID-19 pandemic.¹⁸ Within the first four weeks of the global pandemic, the Indiana Supreme Court issued approximately twelve Indiana Administrative Rule 17 Emergency Relief orders to assist Indiana trial courts in responding to this public health crisis.¹⁹

On April 24, 2021, she created the Indiana Resuming Court Operations Task Force ("Task Force") and appointed the following individuals: Task Force Chair and then President of the Indiana Judges Association Judge Vicki Carmichael from Clark County, Judge Dana Kenworthy from Grant County, Judge Rich Stalbrink from LaPorte County, Judge Hunter Reece from Warren County, and myself from Marion County.²⁰ The Task Force was staffed by Indiana Office of Court Services Attorneys Brenda Rodeheffer, Richard Payne, Jim McGuire, and Diane Mains.²¹

The Task Force at the direction of the Chief Justice has provided significant guidance to Indiana trial court judges on many topics affecting court operations during the pandemic. This Article will discuss the guidance provided by the Task Force in more detail in *infra* Part II.

The Chief Justice also requested that Justice Steve David assist by creating a subcommittee of the Task Force to examine remote jury selection and remote jury trials. This will be further discussed in *infra* Part IV. Chief Justice Rush also quickly obtained licenses for the use of remote hearings via Zoom and later implemented, with the assistance of the Indiana Office of Court Services Technology staff, a statewide platform for courts to live stream their court hearings allowing public access.

During 2020 and 2021, the Indiana Supreme Court issued many orders under Indiana Administrative Rule 17, permitting emergency relief for Indiana Trial Courts to address the COVID-19 pandemic.²² The following statewide orders were particularly helpful to Indiana trial courts in continuing court operations

17. See generally *Orders on Administrative Rule 17 Petitions*, COURTS.IN.GOV, <https://www.in.gov/courts/public-records/orders/ar17/>.

18. *Id.*

19. See generally *Other Orders 2020*, COURTS.IN.GOV, <https://www.in.gov/courts/public-records/orders/other-2020/>.

20. See *In Re: The Matter of the Admin. Rule 17 Emergency Relief for Ind. Trial Its. Relating to the 2019 Novel Coronavirus (COVID-19)*, 20S-CB-123 (Apr. 24, 2020).

21. *Id.*

22. See *Other Orders*, *supra* note 19.

during the pandemic.

The Indiana Supreme Court issued the first COVID-19 emergency relief order on March 16, 2021, *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, providing emergency relief on fourteen topics regarding trial courts' operations during the pandemic.²³ The order included:

- 1) tolling for a limited time all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings, public health, mental health, and appellate matters; all judgments, support and other orders; and in all other civil and criminal matters before all State of Indiana trial courts;
- 2) suspending criminal and civil jury trials for time subject to the constitutional right to speedy trial and protection against double jeopardy;
- 3) suspending new juror orientations, extending existing jury panels, and postponing jury service for the ill or high-risk individuals;
- 4) continuing non-essential hearings but excluding emergency, domestic violence, and criminal evidentiary hearings;
- 5) use of telephonic or video technology to conduct remote hearings, unless a litigant's due process rights would be violated;
- 6) permitting county's judges to exercise general jurisdiction over cases in each other's courts;
- 7) issuing summonses as opposed to bench warrants or notices of failure to appear;
- 8) listing categories of high-risk individuals which would constitute "good cause" to either appear remotely or continue a hearing;
- 9) allowing remote appearances on all non-evidentiary hearings without filing a motion;
- 10) limiting spectators in courtrooms when necessary to provide adequate social distancing;
- 11) trial court clerks could make drop boxes available for conventionally filed documents;
- 12) details on posting signage at all public entry points to judicial facilities informing individuals they should not enter the courthouse if they had any symptoms or could have been in a location where they were exposed to COVID-19 and permitting bailiffs or court security to deny entry;
- 13) permit continuances by phone if individuals are ill or in a high-risk category; and
- 14) courts should provide sanitation materials at all courtroom entrances

23. Order, *In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-00123 (Ind. Mar. 16, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123.pdf> [<https://perma.cc/SW22-CG5Z>].

and counsel table.²⁴

The Indiana Supreme Court extended the previously-granted relief in the March 16, 2020 order through May 4, 2020 via Administrative Rule 17 orders issued on March 23 and April 3, 2020.²⁵ The April 3, 2020 order also prohibited trial courts from issuing new writs of attachment, civil bench warrants, or body attachments pursuant to Trial Rule 64 until expiration of the public health emergency absent an emergency basis and stayed any of these orders which had been issued but not served.²⁶

On March 31, 2020, the Indiana Supreme Court issued an order which provided important guidance on custody, parenting time orders, and child support considering the stay-at-home orders issued by Governor Eric Holcomb.²⁷ Further, the Indiana Supreme Court began permitting remote oaths to be administered by judicial offices and notaries public suspending current rules of procedure which prohibit this practice.²⁸

Due to the early economic effects the COVID-19 pandemic was having on Indiana citizens, the Indiana Supreme Court issued an order addressing stimulus payments issue by the Federal Government in response to the pandemic. An order was issued on April 20, 2020 instructing Indiana trial courts to not issue new orders placing a hold on, attaching, or garnishing funds in a judgment-debtors account in a depository institution if those funds are attributable to a stimulus payment except for child support orders.²⁹ This order further required trial courts to schedule a hearing within two days when requested by judgment-debtors on previously issued orders to determine what funds were attributable to stimulus

24. *Id.*

25. Order, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-00123 (Ind. Mar. 23, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123a.pdf>; Order, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-00123 (Ind. Apr. 3, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123c.pdf>.

26. Order, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-00123 (Ind. Apr. 3, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123c.pdf>.

27. Order, In the Matter of Custody, Parenting Time, and Child Support During the 2019 Novel Coronavirus (COVID-19) Pandemic, No. 20S-MS-238 (Ind. Mar 31, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-ms-238.pdf>.

28. Order, In the Matter of Emergency Procedures for the Administering of Oaths Via Remote Audio-Video Communication Equipment Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-MS-236 (Ind. Mar. 31, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-ms-236.pdf>.

29. Order, In re Petition to the Indiana Supreme Court to Engage in Emergency Rulemaking to Protect CARES Act Stimulus Payments From Attachment or Garnishment From Creditors, Nos. 20S-MS258, 20S-CB-123 (Ind. Apr. 20, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-MS-258a.pdf>.

payments.³⁰

Since in March and April of 2020, many Indiana trial courts were conducting all their hearings remotely rather than in-person, the Supreme Court issued an order on April 22, 2020 creating public access to remote hearing by authorizing all non-confidential hearings to be live streamed on a public platform.³¹ These hearings could only be available during the proceeding and judges were required to admonish participants not to record the proceedings in accordance with Indiana Judicial Code of Conduct Rule 2.17.³² Additionally, judges should follow Administrative Rule 14 when conducting remote hearings.³³

The last significant order issued by the Indiana Supreme Court in April was on April 24, 2020, and required all Indiana trial courts in a county to submit a transition plan for court operations by May 15, 2020, extended previously issued emergency relief through May 17, 2020, and suspended jury trials until at least June 1, 2020.³⁴ Subsequently, the Indiana Supreme Court issued an order on May 13, 2020 extending the deadline for the transition plans to be submitted by May 30, 2020 and ordering that jury trials shall not resume until July 1, 2020.³⁵ This order also provided specific information that must be addressed in each county court's transition plan.³⁶

As time passed, the capability and features available to conduct remote hearings was developing rapidly in response to the pandemic. The Indiana Supreme Court appropriately issued an order on May 13, 2020 expanding the scope of remote proceedings and providing additional guidance to trial courts.³⁷ This order specifically permitted remote hearings on “(1) guilty pleas; (2) sentencings where the defendant waives the right to be present in court; and (3) any other proceeding with witness testimony where the defendant waives the right of confrontation.”³⁸ The Court further established a process if a party objected to

30. *Id.*

31. Order, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. Apr. 22, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123e.pdf>.

32. *Id.*

33. *Id.*

34. Order, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. Apr. 24, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123f.pdf>.

35. Order Extending Time for Expanding Trial Court Operations, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. May 13, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123h.pdf>.

36. *Id.*

37. Emergency Order Permitting Expanded Remote Proceedings, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. May 13, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123i.pdf>.

38. *Id.*

a hearing being held remotely and provided trial courts with discretion to conduct remote hearings over an objection if the court made a finding on the record of “good cause.”³⁹ As to jury trials, jury selection or the jury trial could be conducted remotely if all parties agreed.⁴⁰ During remote hearings, judges needed to ensure the proceeding was being recorded, that private breakout rooms were provided to allow counsel to confidentially communicate with their client, and that proper courtroom decorum is required in remote proceedings.⁴¹

The Indiana Supreme Court was required to issue yet another order on May 29, 2020 extending trial courts’ emergency tolling authority, continued the suspension of jury trials until August 15, 2020, and all other orders were extended.⁴² Once jury trials resumed in mid to late August of 2020, the Supreme Court authorized trial courts to create pandemic-specific juror safety Public Service Announcements.⁴³ This authorized courts to record or photograph the physical courtroom and areas adjacent thereto for purposes of providing the public with visual representations of how the courtrooms in Indiana have been modified to comply with health and safety guidelines.⁴⁴ This process pre-COVID-19 was prohibited by Indiana Judicial Code of Conduct Rule 2.17.⁴⁵

After trial courts resumed in-person jury trials in August 2020, the number of daily COVID-19 cases and hospitalizations subsequently began to increase substantially in various counties in the state in late October and early November 2020. This required the county trial court judges to react appropriately to provide the necessary safety protocols. The Indiana Supreme Court issued another emergency relief order on November 10, 2020, which reminded Indiana trial court judges that “they have an obligation to help protect their communities by taking proactive responsible steps to minimize the potential exposure and infection in-and from-their courtrooms by reducing in-person hearings.”⁴⁶ Trial court judges were reminded they have broad authority to take such steps after

39. *Id.*

40. *Id.*

41. *Id.*

42. Order Extending Trial Courts’ Emergency Tolling Authority and Setting Expiration of Other Emergency Orders, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. May 29, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123k.pdf> [hereinafter May 29, 2020 Order].

43. Order Authorizing Courts to Create Juror Safety PSAs, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. Aug. 14, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123n.pdf>.

44. *Id.*

45. IND. CODE J. CONDUCT R. 2.17 (2020).

46. Order on Continued Emergency Actions, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. Nov. 10, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123o.pdf>.

communicating with their local justice system partners and public health authorities.⁴⁷ Finally, the Court stated trial courts should do the following:

- 1) Communicate with local bar associations and attorneys to maximize the use of remote proceedings . . .
- 2) Require all participants of in-person court proceedings to wear appropriate masks . . .
- 3) Employ senior judges [to work remotely],
- 4) Minimize in-person proceedings in non-essential matters . . . , and
- 5) Provide for remote essential hearings when physical access to the courtroom is limited or exposed judges and court staff must quarantine.⁴⁸

Finally, on December 14, 2020, the Court issued an order again suspending all jury trials until March 1, 2021.⁴⁹

In 2021, the number of cases and hospitalizations related to COVID-19 began to improve following the expanded distribution of COVID-19 vaccines in Indiana. However, the Court still issued an order on May 7, 2021 extending authority for expanded remote hearings to continue.⁵⁰ The Indiana Supreme Court with input from the Resuming Court Operations Task Force and the Indiana Supreme Court Rules Committee, is still studying what type of hearings could still be conducted remotely in the future based on the positive experiences with remote hearings.

Furthermore, the Indiana Supreme Court, with the assistance of the talented Indiana Office of Court Services staff and judges from across Indiana, developed guidance for trial courts on 1) the status of foreclosure and eviction proceedings; 2) language interpretation in Zoom; 3) family law courts and communities; 4) jury trial materials; 5) sample signage; and 6) statements and messaging to Indiana trial courts.⁵¹

Next, I will discuss how the Marion Superior Courts and Indiana Trial Courts began to resume court operations during the COVID-19 pandemic.

47. *Id.*

48. *Id.*

49. Order Suspending Jury Trials, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. Dec. 14, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123p.pdf>.

50. Order Extending Authority for Expanded Remote Hearings, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. May 7, 2021), <https://www.in.gov/courts/files/order-other-2021-20S-CB-123b.pdf>.

51. *COVID-19 Responses and Resources*, Ind. Supreme Court, <https://www.in.gov/courts/covid/>.

II. INDIANA COURTS RESUMING COURT OPERATIONS

A. Indiana Courts and Guidance from the Resuming Court Operations Task Force to Indiana Judges

As required by Ind. Admin. Rule 17, all Indiana trial courts are required to convene meetings and have discussions about how to restart in-person operations of courts with their local stakeholders.⁵²

The Resuming Court Operations Task Force met remotely every Tuesday from May 2020 to October 2020 to compile guidance on various topics for all Indiana trial court judges. Guidance was provided to judges via listserv and posted on the Indiana Supreme Court website.⁵³ The members of the Task Force provided guidance to our colleagues to assist them in conducting court operations in-person with sufficient safety protocols.⁵⁴ On May 8, 2020, the Task Force first issued a letter to judges with preliminary guidance.⁵⁵ The Task Force issued more formal guidance on *Resuming Court Operations of the Trial Courts: COVID-19 Guidelines for Indiana's Judiciary*.⁵⁶ This guidance provided a four-phased approach to resume court operations.⁵⁷ On September 15, 2020, the Task Force issued the *Resuming Court Operations of the Trial Courts: Protocol for In-Courthouse COVID-19 Exposure or Symptoms by a Participant in Indiana State Courts*.⁵⁸ This guidance made it clear that Indiana judges had a duty to provide a safe environment for all individuals whether they were attorneys, litigants, or staff because courts legally require such individuals to participate in the legal process.⁵⁹ It also provided detailed guidance on managing situations where individuals within the courtroom and offices either test positive or are exposed to someone who has tested positive.⁶⁰ The Task Force also issued guidance on court operations during the fall 2020 surge of COVID-19 cases, a sample letter to send to prospective jurors on safety protocols, a COVID-19 juror questionnaire, guidance on conducting remote hearings on CHINS, JD, and

52. IND. ADMIN. R. 17.

53. Ind. Supreme Court, *Guidance from the Resuming Court Operations Task Force*, available at <https://www.in.gov/courts/files/covid19-resuming-trial-court-operations-fall.pdf>.

54. *Id.*

55. *Id.*

56. Ind. Supreme Court, *Resuming Operations of the Trial Courts: COVID-19 Guidelines for Indiana's Judiciary*, Office of Jud. Admin. (May 13, 2020), available at <https://www.in.gov/courts/files/covid19-resuming-trial-court-operations.pdf>.

57. *Id.*

58. Ind. Supreme Court, *Resuming Court Operations of the Trial Courts: Protocol for In-Courthouse COVID-19 Exposure or Symptoms by a Participant in Indiana State Courts*, Office of Jud. Admin. (Sept. 15, 2020), available at <https://www.in.gov/courts/files/covid19-protocol-resuming-trial-court-operations.pdf>.

59. *Id.* at 3.

60. *Id.* at 4-10.

termination of parental rights cases, and Title IV-E requirements.⁶¹

The Task Force Judges participated in webinars presented by the National Center for State Courts, the National Judicial College, and the American Bar Association. In addition, the judges reached out to judicial colleagues across the United States to learn what protocols they were implementing to address COVID-19's impact on court operations. We wanted to talk with judges who had experienced the pandemic prior to us and focused on judges on the West Coast and in New York City. The Task Force also provided guidance on the following topics: 1) Personal Protective Equipment (PPE) vendors; 2) procedures for safely conducting jury trials during the COVID-19 pandemic; 3) assistance in understanding all of the Indiana Supreme Court orders; 4) tips on conducting remote hearings; 5) safety plans to reopen courthouses for in-person hearings and trials; 6) employment laws regarding COVID-19 to address staff issues; and 7) guidance on vaccines.

B. Marion Superior Courts Return to Operations Plan

I will discuss in this Section how the Marion Superior Courts returned to in-person court operations. In following the guidance of Chief Justice Rush and the Task Force, I convened the necessary stakeholders to discuss how we could reopen the courts for in-person business during the pandemic. The local stakeholders in Marion County included representatives from the City of Indianapolis, Marion County Sheriff's Office, Marion County Clerk's Office, Marion County Building Authority, Marion County Department of Health, and the Federal District Courts. We began meeting remotely on May 5, 2020, to discuss a plan to implement in-person business of the courts and other city and county agencies located in the City County Building.

All courts of the Marion Superior Court and the Circuit Court were then in the City County Building on 200 East Washington Street. The Traffic Court was located on the far east side of Indianapolis, and the Juvenile Courts were located near 25th Street and Keystone Avenue.

Pre-pandemic, the Marion County Sheriff's Office provided security for the City County Building and required visitors to pass through metal detectors upon entering the building and required all staff to show an official employee identification card to enter. In providing this function, the Marion County Sheriff's Office had implemented a process where they counted the number of visitors and employees that entered the building each day for several years. During our first meeting, we learned that the average number individuals entering the building on a given day was 5,000. We were also provided guidance from Dr. Virginia Caine of the Marion County Health Department on PPE recommendations for staff and the public, crowd capacity recommendations for the building and individual courtrooms, and information on testing for Court and City-County employees. Ken Clark, the City Controller, updated the stakeholders

61. Indiana Judges Association, *Resuming Court Operations Sample Documents*, available at <http://indianajudgesassociation.org/covid-19.php>.

on efforts to engage safety consultants, PPE procurement, and human resources policies. We began an initial discussion on consistent policies for admittance to the City County Building. Mark Peterson, from Marion County Building Authority, provided an update on efforts to obtain signage and markings for the building, hand sanitizer stations, and elevator button shields. I shared the Courts overview of the emergency relief that was granted for the Marion County Courts by the Indiana Supreme Court.

Since re-opening the City County Building safely was an enormous task, the committee met weekly from May until approximately August of 2020. In subsequent meetings, we discussed the following topics to determine the views from all stakeholders: 1) whether masks or face coverings would be mandatory and who would make this requirement; 2) how to ensure social distancing of six feet throughout the building; 3) what entrances would be used for which governmental agencies in the building; 4) whether someone would take the temperatures of all individuals entering the building; 5) who would ask the necessary screening questions of individuals entering the building; 6) what signage was necessary to properly and safely direct individuals in the building; 7) how to clean areas of the building if someone tested positive, and 8) who would enforce the mask mandate.

These discussions were positive, and the group worked as a team to safely open the building in June of 2020. Ken Clark, the City Controller, was quite helpful as the City retained a private safety company with expertise in cleaning and implementing safety protocols for a public health crisis. The Courts implemented a policy that if someone tested positive in a courtroom, this vendor would then conduct a deep cleaning of the surfaces while the judge conducted subsequent hearings remotely during the cleaning. In addition, if the judge, staff, or court participants were exposed to someone who tested positive for COVID-19, the court hearings would need to be held remotely. The City did a wonderful job assisting the courts in marking pathways to get to different locations in the building and designating which elevators people would use to get to their destinations. The Marion County Elected Officials (Auditor, Assessor, Treasurer, and Recorder) set up a help-desk in the main lobby of the building to provide quick service to the public without requiring them to wander throughout the building. The purpose of the help-desk was to get individual in and out of the building as quickly as possible. The Courts also set up a help-desk with the Clerk's Office and we worked together to staff the help-desk and assist individuals in getting to the proper court and answer questions about court and clerk operations.

Signage was a significant part of re-opening the building. We provided signs that directed people to entrances. Prior to the pandemic, there were three entrances: 1) the Market Street entrance on the north side of the building, which was the main entrance with two metal detectors staffed by Marion County Sheriff's Office employees, 2) the Delaware Street entrance on the west side, and 3) the Washington Street entrance on the south side. However, in the late spring or early summer of 2020, there was construction on Market Street and this entrance was closed, leaving only the Washington and Delaware Street entrances open. We used signage to inform individuals of which entrances to use. The

signage also instructed individuals to not enter the building if they had traveled outside the country in the last ten days, had symptoms of COVID-19, tested positive, or had been exposed to someone who had tested positive for COVID-19.

We also used large yellow circles to inform the visitors and staff when they were six feet apart to promote social distancing. The City assisted the courts in modifying our courtrooms to promote social distancing during hearings and jury trials by putting up signage and using tape to mark off chairs that could not be used. The City designated elevators for employee-use only and elevators for visitors, which was very effective. Marion County Building Authority was helpful in installing plexiglass in courtrooms and hand sanitizer stations through the building.

Dr. Virginia Caine participated in our weekly meetings and provided the stakeholders with medical information and recommendations on managing in-person hearings and jury trials during a global pandemic. Based on Dr. Caine's medical recommendations, the EC and Judge Lynch issued a mask mandate in June of 2020 prior to returning to in-person operations, which the Courts would enforce.⁶² However, the enforcement merely involved asking visitors to wear their masks or leave the building if they refused. Visitors were also provided information on requesting remotes hearings. Most individuals were compliant with the policy, but like with any rule or law, there were always a few who failed to comply.

The mask mandate order was issued jointly, by the EC and Dr. Caine prior to re-opening the building.⁶³ The mask mandate was lifted July of 2021 but re-implemented when the Delta variant of COVID-19 arrived in Indiana in mid-August of 2021. In late November of 2021, the EC lifted the mask mandate again, with the exception of jury trials, to maintain a safe environment.

Dr. Caine also provided limits on the number of people that could gather in the building generally and limits for each courtroom. This assisted the judges in managing their courtroom for in-person hearings. We developed a schedule where odd-numbered courts would conduct in-person hearings on certain days while even-numbered courts conducted hearings remotely. Then, we flipped the schedule the next week. This helped manage the number of individuals entering the building. We encouraged our colleagues to conduct hearings remotely, if permitted under the Indiana Supreme Court emergency orders.

Many judges informed the members of the EC that they wanted temperatures to be taken of all individuals who entered the building. Many courts in Indiana did take temperatures of those entering the courts,⁶⁴ and this was effectively used in countries such as Korea, Spain, Italy, and Germany. Certainly, the EC made this request, but ultimately, the City, which manages the building with employees

62. See Order, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), Nos. 20S-CB-123, 20S-CB-231, 20A-CB-730 (Ind. June 19, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-1231.pdf>.

63. See Order Approving Expansion of Operations Plan, In the Matter of the Petition of the Owen Circuit Courts for Admin. R. 17 Emergency Relief, No. 20S-CB-120 (Ind. June 9, 2021).

64. For example, Clark County Courts.

from the Marion County Building Authority, decided that taking temperatures was not possible because there was not enough staff at the Marion County Health Department or Marion County Sheriff's Office to perform this function.

Overall, most of the protocols implemented by the local stakeholders were effective in managing operations in the City County Building. The biggest challenge was when participants for hearings appeared in-person and had symptoms of COVID-19, tested positive for COVID-19, or were exposed to someone who tested positive for COVID-19. It took a great deal of resources to manage this process to prevent the spread of the virus. However, we were able to quickly modify the policies that did not work and implement more effective policies to continue in-person hearings.

IV. JURY TRIALS DURING THE COVID-19 PANDEMIC

A. Jury Trials in Indiana Courts

Conducting jury trials during a global pandemic was one of the most challenging court processes to manage and conduct safely. On March 13, 2020, the Indiana Supreme Court permitted the suspension of jury trials in Marion County if the defendant's rights would not be prejudiced.⁶⁵ Per the Indiana Supreme Court order issued on May 29, 2020, Indiana trial courts were permitted to restart jury trials on August 17, 2020, provided the court had implemented measures which promoted the public health and safety of participants.⁶⁶ After August 17, 2020, some Indiana trial courts conducted jury trials, which varied from county to county based on the status of the virus. Some trial court struggled to figure out how to restart jury trials because their courtrooms were not large enough to accommodate social distancing and provide space for the number of participants to conduct the jury trial.⁶⁷ However, when COVID-19 cases were sharply increasing in December of 2020, the Indiana Supreme Court issued an order on December 14, 2020 again suspending jury trials in Indiana because it was not safe to conduct them.⁶⁸ Finally, with the permission of the Indiana Supreme Court, jury trials in Indiana restarted on March 1, 2021, and have generally continued to take place.⁶⁹

During the pandemic, the Task Force members discussed at length how we could re-start jury trials in a safe and effective manner. We participated in various webinars on this topic and spoke with colleagues in Indiana and other jurisdictions in the United States to develop best practices for restarting jury trials.

65. March 13, 2020 Order, *supra* note 15.

66. May 29 Order, *supra* note 41.

67. For example, Shelby and Clark County courts.

68. Order Suspending Jury Trials, In the Matter of Administrative Rule 17 Emergency Relief for Indiana Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), No. 20S-CB-123 (Ind. Dec. 14, 2020), <https://www.in.gov/courts/files/order-other-2020-20S-CB-123p.pdf>.

69. *Id.*

Justice Steven David of the Indiana Supreme Court created a subcommittee of the Task Force at the request of Chief Justice Rush. The mission of this subcommittee was to determine if remote jury trials or remote jury selection was a possible way to restart jury trials. This subcommittee was chaired by Judge David Riggins, Shelby County Superior Court 2, and he was assisted by Boone County Superior Court 2 Judge Matthew Kincaid, Warren County Circuit Court Judge Hunter Reece, Attorney Tony Patterson from Parr Richey Frandsen Patterson Kruse, Attorney John Trimble from Lewis Wagner, Chief Deputy Prosecutor Daniel Murrie from the Indiana Prosecuting Attorneys Counsel, Public Defender Michael Moore from the Indiana Public Defender Council, and myself from the Marion Superior Court. Judge Riggins named our subcommittee the “Tiger Team.”

In late March or early April of 2020, the Tiger Team set-up a remote jury selection with prospective jurors from Shelby County. We conducted the remote jury selection via Zoom. Judge Riggins presided over the process and Judges Kincaid, Reece, and myself observed closely and took notes on the pluses and minuses of this process. Judge Riggins developed a fact pattern for a civil and criminal jury trial. He discussed the general procedural rules of the remote jury selection and assisted the prospective jurors with technical challenges. Tony Patterson was the plaintiff’s attorney and John Trimble the defense counsel on the civil matter. On the criminal matter, Daniel Murrie was the deputy prosecutor and Michael Moore as the defense counsel. Each attorney had 10 minutes to question the prospective jurors about their ability to serve.

During the time the Tiger Team was testing the viability of remote jury selection or remote jury trials in Spring 2020, the Judiciary in the State of Texas had conducted a remote jury trial on a civil case.⁷⁰ However, it was only for settlement purposes, and the jury’s decision was not binding on the parties.⁷¹ Other jurisdictions in the United States also experimented with this tool to re-start jury trials.

In early 2021, while civil jury trials were still suspended in Indiana, some Supreme Courts in the country permitted remote jury trials in civil cases. On January 7, 2021, the New Jersey Supreme Court issued an order allowing 8 of 21 counties in New Jersey to conduct virtual civil jury trials where both parties consented effective February 1, 2021.⁷² The order required the cases to “involve straightforward, single-witness cases.”⁷³ The New Jersey Supreme Court Order then expanded remote civil jury trials on April 5, 2021 statewide with the consent

70. Angela Morris, *Guess What? Texas’ First Zoom Civil Jury Fizzles as No Attorneys Consent to Proceed Before Remote Jury*, Texas Lawyer (Aug. 19, 2020), <https://www.law.com/texaslawyer/2020/08/19/guess-what-texas-first-zoom-civil-jury-fizzles-as-no-attorneys-consent-to-proceed-before-remote-jury/?sreturn=20220502095618> [<https://perma.cc/RPV9-X4WJ>].

71. *Id.*

72. News Release: *Supreme Court Order Authorizes Remote Civil Jury Trials*, N.J. CTS. (Jan. 7, 2021), <https://www.njcourts.gov/pressrel/2021/pr010721a.pdf> [<https://perma.cc/7XJE-N5ND>].

73. *Id.*

of the parties.⁷⁴ Other Courts to join New Jersey in permitting remote civil jury trials were California, Florida, Arkansas, and Texas.⁷⁵

While according to the National Center for State Courts (“NCSC”), new civil case filings decreased during the pandemic as courts and attorneys were addressing emergency matters in the beginning of the pandemic.⁷⁶ When the pandemic continued to limit the ability of courts to safely conduct jury trials, the courts focused on resolving their existing cases. For example, in Colorado, “an average of 1,700 jury trials were held statewide between March and September in any given year but in 2020, there were just 322 jury trials held, a reduction of 80%.”⁷⁷

The Tiger Team was tasked with answering the four questions below. These questions are answered generally with more detailed reasons for the subcommittee’s recommendations to the Supreme Court.⁷⁸

Q: Do we need alternative methods to select jurors as we emerge from the COVID-19 pandemic and if so, what are they?

A: Yes. Social distancing with personal protective equipment makes traditional jury selection in some Indiana Court houses is not possible. Alternative methods may include smaller panels throughout the day, more spacious venues (community buildings, churches, gymnasiums), and in select circumstances remote video jury selection.

Q: Are some alternatives better suited for criminal or civil trials?

A: Yes. Smaller panels and possibly remote jury selection by agreement seem most appropriate for simple 6-person civil jury trials. Non-Complex criminal trials could use smaller panels as well. Complex civil and criminal trials cases would likely benefit from a more spacious venue.

Q: What are the pros and cons of each alternative?

A: In-person jury selection is the gold standard. None of the alternatives are equal to it. Each alternative presents unique challenges.

Q: To what extent should there be guidance for each alternative?

A: Rules should make it clear that the parties should be free to explore consensual alternatives without fear of reversal or error. Parties expecting a completely traditional jury selection may be disappointed and are encouraged to be flexible.

74. *Id.*

75. Michael Hartman, *What Social Science Can Tell Us About Remote Jury Trials*, *National Conference of State Legislatures*, (May 18, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/what-the-social-sciences-can-tell-us-about-remote-civil-jury-trials-magazine2021.aspx> [<https://perma.cc/G8XK-LS8R>].

76. *Id.*

77. *Id.*

78. *Resuming Operations of the Trial Courts: COVID-19 Guidelines for Indiana’s Judiciary*, Ind. Sup. Ct. (May 13, 2020), <http://indianajudgesassociation.org/pdf/Covid-19/COVID-19%20Guidelines%20for%20Indiana's%20Judiciary.pdf> [<https://perma.cc/QN8Q-UYZP>].

The Tiger Team provided Justice David and the members of the Indiana Supreme Court a recommendation on the viability of remote jury selection and remote jury trials. The subcommittee recommended that in-person jury trials are the “gold standard” and that remote jury trials or remote jury selection should only take place if the parties consent. We arrived at this decision after having several discussions with the members of the Tiger Team about the positive and negative aspects of remote jury trials. We referred to this as “The Hollywood Squares method.” After completion of our mock remote jury selection on both a criminal and civil case, the subcommittee had the following observations:

- 1) There were various technology challenges which included: lack of a strong internet connection, background distractions such as family members interrupting the prospective juror, one juror needed to switch from her cell phone to a computer because her phone was not charged, and another juror was connected by video but needed to connect to the audio via his phone.
- 2) While the attorneys were conducting jury selection, the boxes on Zoom would move around and the attorneys found it difficult to focus and observe the prospective jurors’ mannerisms.
- 3) We thought civil jury trials would be the best option for remote jury trials or remote jury selection as the parties may be willing agree to this procedure as it would require only six jurors. This might also be an acceptable method to resolve your civil case now rather than waiting a few years particularly if the Plaintiff was best served by an earlier resolution of the case. Remote jury selection would be best suited for civil cases with straightforward facts and limited witnesses. However, we were concerned about the public reaction to trying civil cases prior to in-custody criminal jury trials.
- 4) It may present new opportunities for attorneys to gain knowledge about jurors by seeing them in an environment of their choosing.
- 5) It provides a health benefit by reducing the risk of exposure to COVID-19 and other viruses.
- 6) The court and attorneys will need to monitor the juror’s attention and engagement while they are at home and be prepared to redirect the juror if necessary.
- 7) The number of prospective jurors on a panel should be few enough to allow sufficiently large video display for the court, attorneys, and parties to see and observe the proceedings and to allow better management of the session.
- 8) It may lessen the ability of counsel to assess group dynamics, body language, and to follow up on reactions from others in the jury box.
- 9) The Court would need to communicate detailed information on how to participate in remote jury selection and set expectations for participation such as backgrounds, ambient noise, how to report technical issues, Code of Conduct 2.17 admonishment, jury orientation process, and explain how jurors can communicate

- sensitive or confidential information using breakout rooms, and
- 10) The Court should provide rules and training to attorneys to make sure attorneys were able to manage this type of jury selection or jury trial.⁷⁹

On criminal jury trials, there were significant constitutional challenges which included 1) a defendant may not have a jury of his/her peers during a pandemic, 2) counsel's ability to adequately prepare for trial if the attorney's client is in quarantine in jail, and insufficient legal precedent to predict whether remote jury selection would satisfy the constitutional rights to be present at every meaningful stage.

Throughout the pandemic, the NCSC continued to provide resources and good guidance to US courts. One excellent resource was a publication entitled "Constitutional Concerns Related to Jury Trials During the COVID-19 Pandemic."⁸⁰ This resource provided caselaw and guidance on the right to a speedy jury trial, right to a public jury trial, right to an impartial jury trial, representative jury pools, selecting unbiased petit jurors, confrontation clause, grand juries, and a right to a civil jury trial.⁸¹

As of today, to my knowledge, there have been no remote jury selections or remote jury trials in Indiana. While this was a worthwhile exercise and the subcommittee learned a great deal, we decided this was not a viable tool to restart jury trials in Indiana.

The Task Force Judges focused on providing guidance to our colleagues on how best to restart jury trials. Early in the pandemic, the Judges of the Task Force participated in several webinars presented by the National Judicial College and National Center for State Courts which provided information on how to restart jury trials. As one might imagine, conducting a jury trial during the COVID-19 pandemic was the toughest court proceeding to implement measures to keep the jurors, attorneys, litigants, and court employees safe. There were many different people coming from different locations with different COVID-19 practices. At times, there could be up to twenty-five or thirty people in a courtroom for long periods of time. The Task Force provided best practices for restarting jury trials and jury trial considerations judges should address prior to restarting jury trials during the COVID-19 pandemic.⁸² This guidance addresses where and how you

79. *Resuming Operations of the Trial Courts: COVID-19 Guidelines for Indiana's Judiciary*, IND. SUP. CT. (May 13, 2020), <http://indianajudgesassociation.org/pdf/Covid-19/COVID-19%20Guidelines%20for%20Indiana's%20Judiciary.pdf> [https://perma.cc/W69N-8SXV].

80. *Constitutional Concerns Related to Jury Trials During the COVID-19 Pandemic Version #3*, NAT'L CTR. FOR STATE CTS. (Mar. 29, 2021), https://www.ncsc.org/__data/assets/pdf_file/0034/57886/Constitutional-Concerns-Related-to-Jury-Trials-During-the-COVID-19-Pandemic.pdf [https://perma.cc/T63U-KEUE].

81. *Id.*

82. *Resuming Operations of the Trial Courts: COVID-19 Guidelines for Indiana's Judiciary*, IND. SUP. CT. (May 13, 2020), <http://indianajudgesassociation.org/pdf/Covid-19/COVID-19%20Guidelines%20for%20Indiana's%20Judiciary.pdf> [https://perma.cc/W69N-8SXV].

could manage and conduct jury selection with social distancing and masks. This guidance also provided a COVID-19 questionnaire for prospective jurors to ensure individuals were not appearing who had been exposed to someone who tested positive for COVID-19, had symptoms of COVID-19, or had tested positive for COVID-19.⁸³ As the pandemic progressed, we learned this tool was key in keeping people safe. We also encouraged our colleagues to implement a liberal deferment of jury service policy which included exempting healthcare workers, individuals caring for small children or elderly individuals, and individuals who needed to return to work after the stay-at-home orders to support their families.⁸⁴

In addition, Judge Bruce Parent of the Lake County Courts Civil Division petitioned the Indiana Supreme Court to conduct a simple limited witness civil jury trial in June of 2020. The Court granted his request. Judge Parent was able to successfully complete this jury trial by implementing masks and social distancing. The Indiana Supreme Court website on COVID-19 resources has an Indiana jury checklist which Judge Parent developed after his jury trial to assist other Indiana trial courts in restarting jury trials.⁸⁵ There are other excellent resources on this webpage which include sample videos developed by Indiana trial court judges to assist prospective jurors in understanding the steps Courts had taken to make courts safe for jury trials.⁸⁶

B. Jury Trials in the Marion Superior Courts

In June of 2020, the Marion Superior Courts began working on a plan to restart jury trials. The Court implemented a plan that permitted L6 felony and misdemeanor, and civil jury trials to take place in the City-County Building where most of the courts are located. Since the lower level felony, misdemeanor, and civil cases only require six jurors and one or two alternates, this was a good option to restart jury trials. Thanks to our skilled technology staff, we were able to repurpose the Marion Superior Traffic Court located on East Washington Street for use by the major felony judges who required twelve jurors and one or two alternates. The Marion Superior Traffic Court has a large spacious courtroom and waiting room. This was ideal for social distancing. Marion Superior Court Traffic Judge Marcel Pratt was quick to volunteer the use of the Traffic Court as he recognized the significant challenges to conducting major felony jury trials in the courtrooms in the City County Building because they were not large enough to do so safely. This plan was followed from August 17, 2020 through December 13, 2020.

83. *Id.*

84. *Id.*

85. *Resuming Operations of the Trial Courts: Protocol for In-Courthouse COVID-19 Exposure or Symptoms by a Participant in Indiana State Courts*, Indiana Supreme Court Office of Judicial Administration (Sep. 15, 2020), <https://www.in.gov/courts/files/covid19-protocol-resuming-trial-court-operations.pdf> [<https://perma.cc/5LGL-APL6>].

86. *Serving Jury Duty*, IN.GOV, <https://www.in.gov/courts/services/jury/>.

I want to now discuss the modifications to the courtrooms in the City-County Building which were necessary to conduct jury trials. During this time, vaccines did not exist and courts in Indiana, including the Marion Superior Court, implemented guidelines suggested by the Center for Disease Control (CDC), the Indiana State Department of Health, and local health departments to successfully restart jury trials. First, staff from the courts and City configured all the courts to implement six-foot social distancing by marking which seats could not be used. By implementing social distancing, this required the judge to put the jury in the gallery seating area for the public and prohibited use of the jury box during the trial to maintain social distancing. Next, the attorney tables needed to be rearranged to face the gallery seating and to allow counsel to see the witness on the witness stand.

In August of 2020 through July 1, 2021, masks were required in the City-County Building by order of the Marion Superior Court Executive Committee and Dr. Caine of the Marion County Department of Health.⁸⁷ If prospective jurors appeared with no facial mask, the court provided them with a mask. The courts also used hand sanitizer and disinfecting wipes, to maintain a safe environment in the courtrooms. While plexi-glass was difficult to find at this stage of the pandemic, it was installed around the witness stand for additional protection. The Court also ordered several face shields to permit the witness particularly in criminal cases to use during their testimony.

Due to the small size of the juror deliberation rooms, jurors deliberated in extra courtrooms. The judge and attorneys could not have bench conferences during the jury trial as was a common practice prior to the pandemic. Thus, judges used another courtroom near the jury courtroom for bench conferences outside the jurors' presence. This is a practice that both judges and attorneys seem to prefer because attorneys can freely make their record on these issues without being concerned that the jurors will overhear the conversations.

Modifications were made to the initial juror information to include a COVID-19 questionnaire. Prospective jurors were required to answer standard questions about whether they had symptoms or were exposed to someone with COVID-19 either by completing them on-line or by telephone prompts. The purpose was to not have prospective jurors appear who had symptoms of COVID-19, had been exposed to someone who tested positive, or who themselves tested positive for COVID-19. The Marion Superior Courts still use this questionnaire today as safety measure.⁸⁸

On March 1, 2021, the Marion Superior Courts implemented a three-phase plan to restart jury trials.⁸⁹ Phase 1 permitted one major felony jury trial on Monday and Thursdays to take place at the Traffic Court; permitted one lower

87. Order on Protective Facial Coverings and Six (6) Foot Distancing, Marion Cir. Ct. (June 9, 2020), <http://mscslates.indy.gov/Document/Get?DocName=ordFacialCoveringsOrderSigned060920> [<https://perma.cc/CS87-M9Y6>].

88. Questionnaire on file with author.

89. THE HON. JAMES D. OSBORN, MARION SUP. CT. JURY TRIAL RESUMPTION PLAN (2021) (on file with Author and the *Indiana Law Review*).

level criminal jury on Mondays, Tuesdays, Wednesdays, and Thursdays; and permitted one civil jury trial on Tuesdays.⁹⁰ Under Phase 1, the court was summoning 1,350 prospective jurors per week and had about ten percent of those summonsed appear, which was about 100 to 135 people.⁹¹ We remained in this phase until the end of March of 2021.⁹²

We entered Phase 2 on April 1, 2021 and it stayed in place through June 30, 2021.⁹³ During Phase 2, major felony jury trials returned to City-County Building with one major felony jury trial taking place on Mondays, Tuesdays, Wednesdays, and Thursdays; with one lower level criminal jury trial taking place on the same days as the major felony jury trials; and with one civil jury trial taking place on Mondays, Tuesdays, Wednesdays, and Fridays.⁹⁴ During Phase 2, we summonsed 2,550 per week with about ten to fifteen percent of those summonsed appearing.⁹⁵

In July 2021, we moved to phase 3 of our jury plan.⁹⁶ Under this phase major felony and lower level criminal jury trials would take place on Mondays, Tuesdays, Wednesdays, and Thursdays with civil jury trials taking place on Mondays, Tuesdays, Wednesdays, and Fridays.⁹⁷ We also began to summons 3,100 jurors per week with about twenty to twenty-five percent of the individuals appearing.⁹⁸ While the Court has still not fully returned to our pre-COVID-19 jury processes, this will be our next step.

Since the Marion Superior Courts are moving to a new Courthouse tentatively on February 10, 2022, the committee anticipates that in spring or early summer we hope to be conducting jury trials as we did pre-COVID-19. However, it may still be necessary to wear a mask and implement some social distancing, but we hope to return to the judges trying their cases on the days they used prior to the COVID-19 pandemic. We will begin to summons four-thousand per week with one-thousand per day on January 10, 2022, and the committee hopes that will result in sufficient prospective jurors appearing to permit all jury trials ready to proceed to resolve their cases.

I am proud to report that my colleagues on the Marion Superior Court have completed the following numbers of jury trials since the end of March of 2020:

Lower felony/misdemeanor division:

Judge Helen Marchal	9 criminal jury trials
Judge Amy Jones	5 criminal jury trials
Judge Charnette Garner	5 criminal jury trials
Judge Christina Klineman	4 criminal jury trials

90. *Id.* at 1.

91. *Id.*

92. *Id.*

93. *Id.* at 2.

94. *Id.*

95. *Id.* at 3.

96. *Id.*

97. *Id.*

98. *Id.*

Judge William Nelson	3 criminal jury trials
Judge Clayton Graham	4 criminal jury trials
Judge Clark Rogers	3 criminal jury trials
Judge Annie Christ:	2 criminal jury trials
Judge Jose Salinas	2 criminal jury trials
Judge David Certo	2 criminal jury trials
Total for lower felony/misdemeanor division: 39 criminal jury trials	
Major felony division:	
Judge Sheila Carlisle	22 jury trials
Judge Angela Dow-Davis	22 jury trials
Judge Cindy Oetjen	21 jury trials
Judge Shatrese Flowers	21 jury trials
Judge Mark Stoner	14 jury trials
Judge Grant Hawkins	11 jury trials
Judge Jennifer Harrison	7 jury trials
Judge James Osborn	5 jury trials
Total for major felony:	123 jury trials
Civil Division:	
Judge Heather Welch	7 jury trials
Judge John Chavis	4 jury trials
Judge PJ Dietrick	2 jury trials
Judge James Joven	2 jury trials
Judge John Hanley	2 jury trials
Judge Kurt Eisgruber	1 jury trial
Judge Gary Miller	1 jury trial
Judge Timothy Oakes	2 jury trial
Total civil jury trials:	21 jury trials
Total jury trials since August 17, 2020: 183 jury trials.⁹⁹	

For any given year in the three to four years prior to the COVID-19 pandemic, there were approximately two-hundred and fifty criminal jury trials and fifty civil jury trials.¹⁰⁰ Thus, based on the statistics we are now conducting slightly more than half of the jury trials that we were conducting prior to the pandemic.¹⁰¹

Next, I am going to discuss my personal experience in restarting civil jury trials during the pandemic. I had the pleasure of conducting the first civil jury trial in Marion County on September 22, 2020 when the initial surge of cases in the Spring and Summer of 2020 had ebbed. It was a car accident case which was scheduled for two days. I was quite nervous about how this would play out but in the end the jury trial was successful completed. We had no jurors, attorneys, litigants, or staff become ill from the virus during the two-day jury trial. In fact, the jurors had positive attitudes and were eager to serve to assist their community.

99. Indiana courts obtain these numbers via the jury system and then internal run reports. Case statistics from the Marion Superior Court Jury Pool data as of December 8, 2021.

100. *See supra* comment accompanying note 99.

101. *See supra* comment accompanying note 99.

During this trial, everyone in the courtroom remained masked during the entire trial, even witnesses and attorneys. While this was not ideal, the trial was a success.

Since the pandemic began in mid-March of 2020 to the time of publishing, I have completed seven jury trials. Certainly, the shorter jury trials of two to three days have become routine to conduct with various COVID-19 protocols. The masks and social and distancing of six feet remained in effect from July 9, 2020 until Marion County Department of Health lifted this requirement on July 1, 2021.¹⁰² When the Delta variant arrived in Indiana and COVID-19 cases were on the rise, the mask mandate was re-implemented on August 16, 2021.¹⁰³

As we progressed through the pandemic, I had the opportunity to try two four-day jury trials in July and September of 2021. Again, by implementing the above COVID-19 protocols, I was able to successfully conduct these jury trials. Finally, on October 12, 2021, I presided over a ten-day jury trial on an Indiana Commercial Court case with two separate defendants, a total of seven attorneys, and approximately five paralegals and technology staff members present in the courtroom. During this jury trial, all individuals in the courtroom wore masks, although I permitted the witness testifying to wear a face shield if the witness was comfortable doing so. I required the attorneys to wear masks unless they were speaking, in which case they could wear a face shield. Like previous jury trials, we conducted *voir dire* while the prospective jurors were seated in the public gallery. However, in this trial, the jurors felt comfortable seated in every other chair within the jury box. The Court still used an extra courtroom for the jurors during breaks as well as for deliberations and for attorney conferences with the Court outside the presence of the jury.

Overall, Indiana trial courts have been able to address the challenges the COVID-19 pandemic created in restarting jury trials. While some courts have yet to return to their pre-pandemic jury trial procedures, litigants are able to exercise their constitutional rights to a trial by jury. Since we are unsure now how the Omicron variant of COVID-19 may affect our communities and jury trials, it seems some of the best practices we have created could become a permanent part of courts' jury trial procedures.

V. COVID-19 CASES FROM THE APPELLATE COURT

Next, I want to discuss the opinions issued by the Indiana Court of Appeals which involve the COVID-19 pandemic. To my knowledge there have been five opinions issued on post-judgment interest, the eviction moratorium, whether delays caused by the pandemic violated litigant's constitutional rights, the use of remote hearing technology, and a preliminary injunction enforcing a lease

102. Marion County Public Health Department, Public Health Order 20-2020 (July 9, 2020), https://drive.google.com/file/d/1EftsBbdzy1fUIPsUEGMM_B_9-5P7xgcZ/view.

103. Order on Protective Facial Coverings and Social Distancing, Marion Cir. Ct. (Aug. 16, 2021), <http://mscslates.indy.gov/Document/Get?DocName=ordUpdatedFacial%20CoveringsOrder-August2021-signed> [<https://perma.cc/A7FM-A3S3>].

agreement.

A. Post-judgment Interest

In *Denman v. St. Vincent Medical Group, Inc.*, the Indiana Court of Appeals held that the Supreme Court's March 13 and March 23 Emergency Relief orders that stated "no interest shall be due or charged during the tolled period[.]" beginning on March 16, 2020 did not apply to post-judgment interest because the Indiana Supreme Court's inherent emergency powers do not permit modification of the post-judgment interest statute, which is a substantive rather than procedural statute.¹⁰⁴ The Court of Appeals interpreted the term "interest" in the Emergency Orders not to include post-judgment interest.¹⁰⁵

B. Eviction Moratorium

In *Colvin v. Taylor* the Indiana Court of Appeals affirmed that "[t]he court did not violate Indiana's moratorium on evictions and foreclosures."¹⁰⁶ The Court of Appeals held that the trial court did not violate the Governor's Executive Orders prohibiting all evictions involving residential property which expired on August 14, 2020 but the trial court was reversed on other grounds.¹⁰⁷

C. Delays in Court Hearings Due to COVID-19

In *the Matter of K.W. and R.W.*, the Court of Appeals held that "the trial court had authority to grant a continuance of the fact-finding hearing for good cause. . . . due to delays caused by the COVID-19 pandemic, Father's failure to appear for the August hearing, and Father's request for new counsel."¹⁰⁸

In *Blake v. State*, the Court of Appeals held the trial court did not commit error when it denied Blake's motion for discharge under Ind. C.R. 4(B) and found that "[t]he trial court's finding that an emergency existed was reasonable in light of the circumstances relating to the Covid-19 pandemic that existed at the time."¹⁰⁹ Further, "[t]he trial court did not err by continuing Blake's jury trial and denying his motion for discharge."¹¹⁰

D. Remote Hearings

In *re Termination of Parent-Child Relationship of I.L.*, the Court of Appeals held that remote proceedings for a termination of parental rights hearing did not

104. *Denman v. St. Vincent Med. Grp., Inc.*, 176 N.E.3d 480, 491, 503 (Ind. Ct. App. Aug. 18, 2021), *reh'g denied*, Oct. 29, 2021.

105. *Id.* at 504.

106. 168 N.E.3d 784, 788 (Ind. Ct. App. 2021).

107. *Id.* at 788-89.

108. 178 N.E.3d 1199, 1208 (Ind. Ct. App. 2021).

109. 176 N.E.3d 989, 995 (Ind. Ct. App. 2021).

110. *Id.*

deprive her mother of due process rights during the COVID-19 pandemic.¹¹¹

E. Preliminary Injunction Enforcing a Lease Agreement

In *Abercrombie & Fitch Stores, Inc. v. Simon Property Group, L.P.*, the Court of Appeals affirmed the trial court's granting of a mandatory preliminary injunction as "it was reasonable for the trial court to conclude that Abercrombie's sudden decision to vacate and permanently close its stores [at Simon Malls] would present irreparable harm to Simon."¹¹² The trial court was affirmed in finding that "indirect effects of a mass store closing, along with the consequences of the pandemic, supported the trial court's grant of injunctive relief until a final judgment on the merits may be rendered."¹¹³

VI. WHAT THE FUTURE HOLDS FOR INDIANA COURTS?

The Indiana Supreme Court, Indiana Court of Appeals, and Indiana trial courts may have never anticipated a global public health emergency as impactful as COVID-19, but Indiana's judges responded quickly and effectively to keep Indiana courts open and accessible to Indiana citizens. This demonstrates the commitment the Indiana Judiciary has to serving our citizens in the best way possible regardless of the challenges judges might face. What the future holds for courts and COVID-19 is uncertain, but Indiana trial courts have the tools to continue to keep courts operating during this pandemic. I feel confident, if a year from now we are still living in the COVID-19 pandemic, that Indiana Courts will continue to serve our communities effectively.

111. 177 N.E.3d 864, 872 (Ind. Ct. App. 2021).

112. 160 N.E.3d 1103, 1111 (Ind. Ct. App. 2020).

113. *Id.*