

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

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Monica Milton: Thank you for joining us and welcome to Protecting the Right to Speedy Trial Amid Court Closures and Re-Openings. I'm Monica Milton, Public Defense Counsel for the National Association of Criminal Defense Lawyers. This webinar is being conducted as a part of the Justice for All, Strengthening the Sixth Amendment Grant. Partnering with NACDL on this webinar and this grant is the Association of Prosecuting Attorneys, the National Center for State Courts and Research Triangle Institute International. This webinar is supported by Grant number 2019 YA-BX-K001 awarded by the Bureau of Justice Assistance. BJA is a component of the Office of Justice Programs. Points of view or opinions in this webinar are those of the speakers and do not necessarily represent the official position or the policies of the US Department of Justice. With that said, I want to welcome you to our program.

00:01:18

So I'm going to introduce our panelists and our moderator moderated Professor Andrea Roth from UC Berkeley, Judge Trina Thompson, Superior Court Judge in Alameda County, California, Ryan Reid, Regional Manager of the State Public Defenders of Wisconsin, Jeffrey Howes, First Assistant District Attorney for Multnomah County, Oregon. And with that said, I'll let Professor Ross go ahead and open her slides.

00:01:41

Professor

Andrea Roth: So I'm really excited to be a part of this. And I know we want to hear from our speakers, so I'll be really brief and just setting the stage here. This is a photograph from 1918 in San Francisco where certain court proceedings were outside on which there are many issues with that being a possible solution. But let me just start with the language of the Sixth Amendment that all of you are surely familiar with, but just to point out that the fact that we have a right to a speedy trial is counterbalanced against these other rights and so at the same time that we want to make sure that criminal defendants get their day in court within a reasonable amount of time, we also have to make sure that the trial is public, that jury selection works, and their cross section and all those requirements, that the defendant has a right to be confronted with witnesses against them, has the ability to subpoena witnesses, and has a meaningful ability to work with their lawyer. And so if those rights are not secured by the processes we have, then it might, but up against the ability to have a trial within a certain amount of time. And of course, that's what we're facing now.

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Just wanted to point out what the Supreme Court's test is for determining what a speedy trial violation is. And again, for most of you, this will be a review. But it's not a bright line rule in the sense of, you know, anything more than five years is a violation. Instead, the Supreme Court has said, and this is still good law that you have to look to various factors. Those factors are first the length of the delay which is not dispositive, but which matters. And so, five years is worse than six months. The reason for delay, which is the Supreme Court essentially is talking about the government's justification for delay, for example, they did say that neutral reasons such as court backlogs, if they are

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the result of negligence, could go against the government in that sense, but it's really about, you know, are there good reasons for the delay on the part of the government. Then, did the defendant make a timely and sincere demand for a speedy trial. This is something that's unusual, compared to the other rights that seem to be a little bit more automatic. Here, you've got to show that you actually want a speedy trial in part because it's one of the rights that you know, sometimes it's to the benefit of the government rather than the defendant. It may be that the defendant is the one who is seeking delay for various convenience or strategy reasons. And then finally, prejudice to the defendant. Did the delay prejudice the defendant? And so determination of prejudice is actually within the definition of a speedy trial violation. What type of prejudice, would there be? This is sort of why the speedy trial right can be extremely critical to a defendant. First is if they are incarcerated, everyday matters. And so if you are on out on PR before trial, then you know fact that you have to wait is less prejudicial. There is anxiety and concern, obviously, even if you are not incarcerated the fact that you have a case hanging of your head is a major issue in your life. And so there's always a reason to have a timely resolution of the claim and of course for victims and for the public as well they have a stake in all of this. And then finally, an impaired trial defense. So it could be it for the same reasons we have statutes of limitations, if you don't have a speedy trial your witnesses could die or move away, their memories could fade and it can be more difficult for any factually innocent defendant to launch a meritorious defense as time proceeds. So those are some of the things that you need to consider. It's still a multifactor test in that way.

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Just wanted to point out that both under the Federal under federal law and also many states. There's also a statutory right to a speedy trial that doesn't necessarily have dismissal is the only remedy in the way that it pretty much is under the constitutional test but it's more of a bright line rule in terms of time. So for example, in the federal system it's 70 days from the date of the information or indictment or the initial appearance. But the time can be tolled in the ends of justice. And so even though it's a bright line rule federal judges have a lot of discretion in totaling the time or in excluding time from the calculation of the 70 days. And that's in the Federal Rules as well, the Court can dismiss, doesn't have to dismiss, an indictment for failing to bring the defendant to trial, without unnecessary delay. And then, I know not everybody's from California, but just to be clear, under State statutes and constitutions you also might have a bright line rule like a 60 day requirement in California that has been tolled recently because of the pandemics but now we're seeing actual in person trials and even state constitutions, for example, which have typically been construed by state courts to require some showing prejudice.

00:07:04

So let me stop the share there and jump in right away to our panelists. And so one question that I'd like to start out with is to here, perhaps, starting with Judge Thompson. What innovations or creative solutions have been followed in your jurisdiction to facilitate in-person, socially-distanced jury trials during the pandemic. So if we could just hear what's going on in your jurisdiction. So Judge Thompson, you want to start us off?

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Transcribed 9/3/2020

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Judge

Trina Thompson: Certainly, thank you for that question, and thank you for the invitation to be part of this panel. In Alameda County our civil department has held several trials remotely. And they've been quite successful in civil trials, of course, the plaintiff's attorneys can provide additional resources. On the criminal side that luxury doesn't exist, but we have been able to conduct criminal trials in my department and in our in our court house at the Rene C. Davis and courthouse in Oakland. We will meet with one another. A floor is dedicated to one trial. So the parties may be in one department and the deliberation will be you utilize in another department. So the jury will use another department to deliberate where they are sequestered away from the other parties or social distancing purposes. We don't use some of the other court rooms and if we do, it's an with the limit limited capacity because the clerk or the court reporter or other court and celery staff may need that space for social distancing purposes. We have seating that is clearly marked where people can sit and then the social distance of a circumference of six feet, not six feet apart from each other, but the six-foot circle. And there's plexiglass where the witness will be testifying so that people can actually see the witness the plexiglass covers on one side of the judge's bench, the front for the court reporter and the side for the jurors.

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For defense attorneys and prosecution, they have tables that are now positioned differently perpendicularly from each other as opposed to horizontally, the way it was previously so that they are somewhat facing each other, but they have the required distance. One of the suggestions I made in the cases that I have, because I want to make sure we could see people when they were testifying, was to use face shields and face shields to inhibit someone from not being able to hear, but it will help the court reporter because they need to see the person while they're testifying. And then the person can keep their mask on, until such time that they need to start testifying, and they can remove it and place the face shield and that becomes their property after that. So those are some of the accommodations. We also have one way in and one way out. For our stairwell to go up you go one way to go down, you use the adjacent stairwell. So people are not congested and our elevators only have the capacity of four people at a time.

00:10:22

Professor

Andrea Roth: Thank you Judge. Jeffrey, do you want to tell us a little bit about what's going on in Oregon?

00:10:27

Attorney

Jeffrey Howes: Sure, I'm happy too. And thanks to everyone for having me also. And for those that are wondering, I'm in Portland, and it is not a blaze. So we are all safe and as happy as one

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could be. We've had two successful criminal jury trials, since the pandemic began, and that was pretty early on. Around the first of May and our process mirrored a lot of what Judge Thompson was just talking about: socially distance jurors in the back of the room and in the jury box with the litigants at the table spread apart; judge and clerk and witness would be up in the witness stand. We did that out of necessity, and we'll get into this a little later I imagine. But our rule is such that if a criminal defendant is in custody, that custody can only last a maximum of 180 days. And at that point, then the defendant would be released by operation of law. And so both of those trials occurred when you know the defendants time and custody had nearly lapsed but we're at about 170 eighth day on both. I gotta say that after those two trials, the appetite for more waned. While they were successful in that they went to verdict, I think there was enough hesitation by our presiding judge and our chief criminal judge about the process and about due process that we've sort of taken other steps, our legislature acted and sort of inserted an emergency clause into our speedy trial rules to allow for the retention of certain defendants if they were deemed to be sort of a clear and present danger if they were to be released, but more simply were released from custody.

00:12:40: In terms of practicalities, we had in order to ensure a public trial, our court uses WebEx. And we pipe WebEx into a second courtroom, so that the public could attend if they so chose and deliberations then, you know jury would retire together to an altogether separate courtroom so that they can be socially distanced and even before they deliberated they could be together and sort of sequestered. I don't know what's going to happen in the future. We've got the plans, sort of like Judge Thompson described in her courthouse to hold trials. But I think everyone in Portland and Multnomah County is kind of holding their breath and waiting to see if we're going to relax our restrictions, both those in place by the court and in place by the governor, we're still in what our governor refers to as phase one in Multnomah County. We still have a fairly high case count of COVID-19 and the high positivity rates so we're not moving anywhere soon but we showed that we can do it and I think that was an important first step, but we haven't done any actual trials, since the first part of May.

00:14:02

Professor

Andrea Roth: All right, thank you, Jeffrey. Ryan, could you tell us what's going on and in Wisconsin from defense attorney's perspective?

00:14:09

Attorney

Ryan Reid:

Yeah. Good afternoon. Again, thank you so much for inviting me and having me on this panel. In Wisconsin, it's kind of county by county. Up where I am in northwestern Wisconsin you have to submit plans to have jury trials and in person court hearings and most of those counties have done so. But for the most part, a lot of counties are shying away from jury trials Bayfield and Baron County are the two counties that have had trials in my area, but the other counties it depends on, you know, are they having in person? Are they primarily doing zoom or they kind of shying away and just doing felony

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in person? So it's kind of a county by county cross section of different people doing different things.

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We're also utilizing plexiglass, face shield and masks. One of the things most counties are doing is doing health screenings when people come in the courthouse, you know, doing the temperatures, doing the self-screening questions. So yeah, I mean, a lot of the things that the Judge and Jeff had mentioned there are happening. The trial that I was a part of really focused on moving around the jury. So trying to set up the jury in the middle. Jury comes in they stay there and kind of moving around and utilizing that to kind of stop contact, contact with jurors, contact between other people. So, you know, I know that there's some questions we're going to be getting into, but I kind of want to reiterate some of the things that the other two panelists have talked about but that it's kind of a hodgepodge of jury, some places there's no in person hearing and kind of going county by county

00:15:54

Professor

Andrea Roth: Great. So that's a wonderful overview of some of what's actually going on right now in three different jurisdictions. It looks like we have a lot of questions about jury selection and fair cross section and what jury venires are actually looking like. And I know you all talked about the social distancing of jurors in the courtroom. But, do any of you see trends? Judge, we could start with you. If you do, but otherwise, we can hear from Jeffrey and Ryan about trends in jury, who's showing up and jury selection issues?

00:16:31

Judge

Trina Thompson: Well, one of the things that I need to clarify is that the trials that we did have in our criminal department goals were trials that had already started prior to the pandemic. and then they were in abeyance and they were resumed. So there were already jurors in place they came back and they completed the trial successfully. The cases that came there after the summons that went out, I believe, a large number of summons, over 500, and maybe 100 people would show up. So, some of it was COVID related hardships, people that moved, people are ill, they changed address, they've moved out of state. So there's all of this fluidity that's going on right now. That makes it hard to really measure and it's hard to know what we can do to close those gaps? Also, because a lot of things are now computerized you're also assuming that everybody has the same bandwidth that they have the same access so those are all things that as we get closer and closer to trying cases, the judges are putting their heads together to find out how do we close these gaps? Who in our technology department can assist us in making sure that we're having a broad reach? But I am finding that people are because they're so civically engaged now, given the climate and some of the educational forums that have been taking place around the discussion about civil obligation. And they understand that judges and lawyers in a trial context, we can't do our job with integrity without the participation of our citizens being willing to serve. But we also have to look at our public health issue as well.

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Transcribed 9/3/2020

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Transcript times are an approximation

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Professor

Andrea Roth: Jeffrey, do you see trends, including and what you know, including demographic trends if you see any?

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Attorney

Jeffrey Howes: We do. And I actually talked with my jury coordinator as part of this call. I think a lot of jurisdictions have this professor, we don't really get a fair cross section to begin with and Multnomah County is predominantly white County and yet, like I think a lot of jurisdictions, have Black, Indigenous and People of Color overrepresented in our criminal justice system, but underrepresented in our jury pool and what I've seen, and what our jury coordinator have seen is an exacerbation of that with COVID. We summon grand jurors three panels, a month, so that's 21 people, but we summon 100 to get those 21 and for a typical jury service day we asked 250 people to come in and we're only seeing about 40 to 50 show up every day and of those what I've seen is a distillation of those skewed demographics, where it's the people that can afford daycare or don't have children or are retired. And also that have fewer sort of underlying health concerns and as in my county like I believe in a lot of counties. Black and Indigenous and People of Color are overrepresented when it comes to a COVID positivity rate. So I spoke with my counterpart at the Public Defender's Office here and we talked about the fact that, and he's raised this many times in in our collaborative meetings, that what we're seeing and what we're going to see for some time is an exacerbation of already skewed demographics when it comes to jury panel at least a broad venire. And, well, we'll get to later, but I think maybe this can be a stepping stone towards improving that aspect of our jury selection.

00:20:39

Professor

Andrea Roth: Okay well more on that later. Thanks for that appetizer. I'm sure Ryan thoughts on jury selection in Wisconsin.

00:20:48

Attorney

Ryan Reid: Yeah, um, the two trials I was a part of, on one was in late May and one was in mid-June, I was surprised how many people showed up. Our panels are usually about 50 people up here in rural Wisconsin. And we did a double panel in Bakersfield, and about 55 people showed up and I thought it'd be mostly middle aged or younger, but it was young people, it was mid people and it was old people, which I liked. I mean, in these counties, there isn't really a lot a lot of diversity to begin with. But, you know, having that diversity of age is really important because you're going to get different perspectives and different experiences.

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But with the people that didn't show up, you know, keeping those conversations with the clerk and checking in with her. It's happened to be heard of who was calling in what

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Transcribed 9/3/2020

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Transcript times are an approximation

ages were calling in, and really, you know, pushing her to make sure that We had a fair cross section because I did have a conversation we had multiple meetings, especially for the first trial I had what, what's going to happen if you know we have only really young people show up, or what's going to happen if you know under 40 people show up or you know we excluded so many jurors, and we can't, you know, there weren't a lot of people on the street and Washburn at the time. So it's like, what, what's the backup plan or how are we going to deal with that. But in Wisconsin, I can definitely say this one of my counterparts in Barron County was also surprised that people really wanted to show up and do their civic duty as the judge had mentioned, some of the pre teaching the letters that the clerk sent out about the safety protocols, having doctors and nurses on hand. I think really made people feel safe. So they wanted to participate. So I think that really helped get participation higher than I think a lot of people expected.

00:22:33

Professor

Andrea Roth: Thanks, um. A couple of the questions that we got before the webinar today had to do with how we prioritize cases, given that if even if we do have jury trials, it's going to be a lower number because of how many jurors show up and all of these new procedures that have to be followed. So if I know each of you has a different role with respect to this question, but if you have thoughts on how cases are being prioritized how, you know, to the extent their discretionary decisions for judges and the parties to make, how are those decisions being made. If it affects charging decisions or, you know, how are backlogs in caseloads being managed, given the small number of trials. Judge, your thoughts?

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Judge

Trina Thompson: What we did here in Alameda County in California is that our Chief Justice sent out emergency protocols and rules that we could utilize in order to assist us in downsizing our in-custody population. So we all got together, we began looking at the entire in custody population to see who was eligible and suitable to be released so that they would not suffer any pre trial incarceration for an extended period of time, given the COVID spread and given the COVID spread within institutions. The second thing we looked at was which cases, we're going to have priority based on there. No time waiver status, which cases were serious and violent cases, if they were not serious violent, then we may have downgraded their custody status or downgraded at their bail. Or we utilized some other form of monitoring by electronic monitoring or allowing another agency to provide us with some supervision of defendants that we're not categorized as series of violent felons accused and would be able to once again downsize that population. And then to determine whether people wanted to waive time if they were already in a trial department and we're still trying to navigate what's going on, because some cases we're sitting in a trial department, getting ready to start trial before all of this happen. So every 60 days to 90 days, the Court has to make specific findings, good cost findings to why that case is not impacting the jury, and asking for stipulations or waivers from the defendant in Council, to see if it provides some flexibility and the

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

waiver regularities. But even if that happens, the judge should still make very specific findings about the availability or unavailability of witnesses travel ban issues covert issues. Alameda County has a very high COVID rate, all of these different things that contribute to why the court was not able to proceed with this particular trial and then to try to, you know, do some of those other matters, particularly pulmonary hearings where we can do some screening of cases that shouldn't have individuals in custody.

00:25:51

Professor

Andrea Roth: Thanks. Jeffrey has this affected, I know you mentioned collaboration with the public defender in Portland, has this affected prosecutorial discretion decisions?

00:26:01

Attorney

Jeffrey Howes: Yes, you know, from the get go, you know, we pulled our entire staff together, we've got a staff of about 80 lawyers and the DA and I pulled our staff together, and the first thing we said was right now everyone increases their risk tolerance for letting people out pre trial. And that just came from the top down. We're not going to keep people in our jail, which has not had an outbreak, although our prisons have, but we're going to reduce we're going to sort of suck it up and we're going to increase our risk tolerance. And then we started, you know, talking to our lawyers about, you know, making better deals making, making better plea offers. So this is a different time and it's a different situation and you know, it's a little bit of a balance of, you know, victims want and need their day in court and their closure and if their due restitution. They need that and that'll never go away, but we needed to start addressing our backlog before it became a huge backlog and that's what we did. And, you know, without the threat of a trial looming over a criminal defendant, sometimes there's less and less incentive to resolve one's case and we get that in the midst of all this, I got a new boss, a new district attorney took over here on August 1st and he ran on a on a platform of reform. And so, one would think that this dovetails nicely. And I think it will. But we've had a lot of other things going on in Portland, that maybe have taken his attention away from tinkering with our plea negotiation policy.

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But that said, you know, what we're looking at now is possibly implementing a diversionary type program for a lot of these people that are backlog, you know, for a long time, Portland was the auto theft capital of North America. I'm not sure it still is, but we have a lot of stolen cars here and stolen cars seem while gravely important and sometimes devastating to a victim. Sort of less important in the grand scheme of things, and my kind of part of the public defender's office and I had, I had a heart to heart talk about a process of offering a plea or some restitution, some programming to address underlying issues, whether it's drug use or mental health, and then with an opportunity for dismissal at the end of a specified time. Still getting everything that a prosecutor would want out of a resolution, but without the tag at the end that sticks a person with a felony conviction. I think those conversations are going to go forward and if they do,

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

then that's going to be an innovative way, something that hasn't happened, specifically in Multnomah County, on felony cases to clear our backlog.

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Professor

Andrea Roth: Thanks. Ryan I know your role is necessarily a bit more reactive as a defense lawyer but have you had shifts in the way that you manage caseloads or strategies, given that you have more than one client?

00:29:39

Attorney

Ryan Reid: Yeah, in Wisconsin, the remedy isn't necessarily a dismissal, but it's a custody to add a custody, we call them signature bonds. So a lot of courts were really open to hearing those motions to convert cash bonds to signature bonds and that happened really quickly. I was really surprised how many sheriff's and judges were really quick to say, Okay, we have this population that has, you know, maybe low level felonies, you know, just a non appearance cash bond and a misdemeanor go from those cash bonds to signature bonds. So I think that took care of a lot of the speedy trial issues. But I think the way that the courts were really trying to figure out what's going to try and what's how they're going to do what that was felony versus misdemeanor, custody versus out of custody, we have termination of parental rights cases where people have the right to a jury trial, is their liberty interest involved, how long is the case been pending?

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One of the big things that that really pushed my trial and in Bayfield was witness availability. One of the witnesses was good, wasn't available till September. So this was already sad. And then, long story short, I came on board, maybe a month before the trial. So I think those different multi factors really went into play. I really can't stress enough that a lot of judges were really quick to, for low level things or even sometimes mid level felonies, if you could show some kind of connection to the community. That they were willing to let this person out of custody. So I think that really took away some of the pressure to have the trial. And especially in counties where they still aren't having them I think judges were really open to reassessing that as time has gone on as we keep making these arguments. Well, Your Honor, we're not having trials, you don't have a plan or you don't want to trial, this person sitting in custody on a mid level felony. I think we need, you know, and here's his mom and now we have all these other resources. So I think just trying to convince the courts and the DA is that especially in counties that aren't having jury trials, or very limited number. Here's, here's our plan that would never have flown pre-COVID, but now they're really open to okay, show me what's going on and I'll consider it. So we've had a lot of luck with that really even at the prison. And, you know, having those conversations about getting people out of at a customer that way for code weighted issues and getting some sentence modification, so just being creative with the statutes and convincing them that under the circumstances, we have to, you know, public health versus some of the other concerns that used to be a big deal.

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

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Professor

Andrea Roth: Got it. Thank you. So I think I have maybe one more minute to ask a question before we open up for Q and A, but I think it's pretty fluid here. I've already suggested there some questions that you all have already weighed in on. But, um, one thing that I haven't asked yet that I want to make sure that we hear from you on is whether there are well, first what legal issues have arisen with respect to the practices that have been used to fill as facilitate in person jury trials, aside from fair cross section? And the speedy trial right itself, which we've talked about, maybe I can go back to that, but also what unexpected benefits, perhaps, there may have been in what's been happening over the past few months. And just to have one positive note here with everything going on. And maybe some practices that you foresee us holding on to even when the pandemic recedes a bit. Judge, thoughts on that well?

00:33:16

Judge

Trina Thompson: My thoughts are as follows. We've been able to live stream. Some of our proceedings, most of our proceedings, so the public is able to hear cases as they're being resolved and as they're being heard. In addition, particularly in a community where there is a large demographic of racial diversity as well as economic diversity. It has really allowed people to have access to justice without having to disrupt their employment. So if it's a brief hearing, if it's an uncontested hearing, if it's a status hearing they're able to participate remotely take a break from work, not disrupt and lose an entire day or half a day and that may be something we want to think about going forward. As we begin to talk about the stress that we're putting on our citizens when they are accused or when they're witnesses or when the attorneys find themselves in multiple appearances and it's an appearance that can be resolved relatively quickly. And something that will streamline the process, particularly when we get back to normal. Or when we get back to you know really servicing all of these cases, and we are public servants, first and foremost, we will have a backlog and so we can find ways to utilize this new technology to reduce that backlog by allowing people to resolve cases remotely and to be able to have negotiation conferences status hearings, all of those hearings that just take up time from the actual litigation, will, I think, serve us well.

00:34:54

Professor

Andrea Roth: Thanks. Jeffrey?

00:34:57

Attorney

Jeffrey Howes: I agree with the Judge and I think two things: Number one, the foisting upon the practitioners this technology like we're using today and like I've been using in court and with you know my counterparts is making us more comfortable using that technology, and I expect that to continue and to get better. I was lousy at zoom calls in April, but I'm

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fairly adept at it now. And I think that a lot of my colleagues are also and I think that you know that has benefits on so many different levels like the judge said not requiring a criminal defendant to take a half day off of work to come down for a 15 minute hearing to park to get childcare, all of that kind of stuff to save litigants time to save the court docket time. So I think that this sort of troubling situation will move our technology forward and that's a good thing.

00:36:06: The second thing is that I think you know from the people on my side of the table, the prosecutors, I think a lot of times when changes suggested or when different things are proposed, or when a relaxing of things like our adherence to mandatory minimums you know, is suggested, then the reaction is no, the sky is going to fall if we do that. And I think this has forced a sort of reckoning among at least the people in my office and I think the people in my state that, no, the sky is not falling because we're not seeking that mandatory minimum sentence or because we're not so worried that a person missed a court hearing that we want to file a failure to appear charge on. So a little bit of it is just a reset that's mandated by circumstances that I hope is going to have benefits in the future.

00:37:00

Professor

Andrea Roth: Ryan - possible benefits for defendants in their families and defense witnesses?

00:37:06

Attorney

Ryan Reid: Yeah, no, I think the flexibility of appearance has been a game changer, especially in rural Wisconsin transportation that could be another zoom webinar in and of itself and the effects on girl defendants and litigating their cases and representing them. But we have bail jumping in Wisconsin and failure to appear bench warrants and that has gone. I wouldn't, I wouldn't say down but it's definitely helped get people to court either zoom or by telephone it's really helped with that. I think looking forward, sometimes witness availability is sometimes hard because you have to ask for the expense to get the witness and then to get the witness here. And I think if your client is okay with the person appearing and the judges okay with the person period by zoom. I think it's going to help widen the net for experts, again, especially in rural Wisconsin. I also think it's helped access to clients. I know you know best practices to go to the jail and meet with your client. But when you can't go to the jail zoom telephone Google Hangouts. Any other tell telle means is the next best thing. And I think it really leads me to my next point conversations that you usually wouldn't have with other criminal justice partners. I had more conversations with sheriff's and judges, showing them, hey you know this this person showed up every time. But now they don't have a data plan so they can't show up or, you know, just having those open dialogue conversations in a way that I just think is landing better because everyone's in the same situation with it. So I think really humanizing, not just the public defender's office, but our clients and really advocating for our clients, I think, has become a little easier because of that evening of the playing field.

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Duration 57:44

Transcript times are an approximation

00:38:54

Professor

Andrea Roth: Thanks. And so I should say we have so many wonderful questions from the gallery. I can't possibly ask all 45 of them, but a number of them, Ryan, have to do with the meaningful communication between attorney and client. And so it might be that Dr. Thompson and Jeffrey also have insights about this, but if I could start with you. Do you feel like you have meaningful access to your clients? To what extent are you able to speak with them meaningfully virtually or otherwise? And do you feel like there's other solutions we could be trying to make it better?

00:39:33

Attorney

Ryan Reid:

Yeah, I think, you know, it's summer right now. And I think winter is going to offer some challenges but meeting the people in parks, parking lots outside the office, port parking lots, just being really flexible with meeting people has been really helpful again in custody, you know, zoom, you know, being flexible with the share of how can I see this person you know with health screenings and, you know, with the defense attorney. I think really having to make that hard decision of, you know, I'm going to put myself, possibly in harm's way so that I can meet with this person really talk about their case in a confidential way, in a rapport building way with a lawyer-client relationship way that I think sometimes it's necessary.

00:40:20:

I think one of the questions sent out was you know, waving the six feet social distancing and trial. You know how close, you're going to get to your client. And I really have been happy with the jail because they've told me that they're screening people, that they're taking temperatures, that they're doing what they can do in custody to keep in made safe, which is going to keep me safe. It's going to keep the public safe. So I think there's that piece, but I also think as criminal defense attorneys, we really need to soul search and say, you know, if I can't represent this person for a health reason or an age reason should they may be tagged him the case with another attorney that is willing to do so. Is there something you can work out where you can represent the person but I think it does take a lot of you know, you're here to represent this person, I think, you know, representing the state and being a judge is a little different because you do have that human person in front of you or on the line or, you know, zoom wise. So I think you really have to figure out what you're willing to do and how your office or how your practice can accommodate their constitutional rights and their ethical obligations that they're entitled to.

00:41:30,

Professor

Andrea Roth: Happy to move on. Also, but Judge Thompson or Jeffrey, if you have thoughts on how this issue has been dealt with in Alameda County or Oregon, feel free to jump in.

00:41:42,

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

Judge

Trina Thompson: And the way it's been handled here is that we're able to put people into breakout rooms, if they're if they want to have a private conference during the court hearing and we place them in breakout rooms where the DA and perhaps the defense attorney can be in a breakout room, then we can do another breakout room where maybe the defense attorney and their client are in a breakout room that are able to have a private conference.

00:42:05: One of the things that I also wanted to talk about was just the Rules of Professional Conduct. This is an opportunity for judges to mentor attorneys through this, you know, what are you have in your background, you know, does the witness have something in their background that could be prejudicial to the proceeding. Different protocols are going to need to be vetted, and the sooner attorneys weigh in on that and start drafting that in there and motions: here's some admonitions we'd like to see; here are some protocols; what are we going to do we need to go and close session; what are we going to need to do when we have a witness that is we need to have some vetting without the jury present and without the public presence and; how do we make sure that people aren't trying to interact with the jurors when they're on the witness stand in the attorneys and the judge have taken a sidebar by zoom in a breakout room. There were all these protocols that people need to start thinking about, they have to remember the judge is not the person who's a litigator, we're the neutral. So attorneys need to start thinking about this landscape, thinking about how they're going to handle it, but also thinking about their own professional conduct how they are appearing in court, even if it is on zoom, what they're advising their witnesses, what they're advising their client whether there's some communication that's going on in the screen and we can all see it. There are so many things that we do need to make sure that attorneys are taking a much more progressive role and making sure that they're making their record and they are allowing the judge to be able to weigh in as a neutral and to be able to resolve some of these potential technological issues.

00:43:55

Professor

Andrea Roth: Thanks. Jeffrey, any thoughts.

00:43:58

Attorney

Jeffrey Howes: I'll just be real brief. I was on a work group talking about these very issues and I guess I'll say that I'm hopeful also that the technology is going to continue to improve. We all work on a zoom or WebEx platform right now but I know that those companies are developing additional technologies like private breakout rooms for litigants and defendants and witnesses so that even in the midst of a call like this, I could maybe step into a another virtual arena and have a private conversation so, you know I'm hopeful. Although hope that we don't need it. But if we need it. And I think that we can all count on technology evolving also.

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

00:44:48

Professor

Andrea Roth: Thanks. So another group of questions have to do with confrontation and jury assessment of when is demeanor, or defended demeanor. So Judge Thompson showed us, she actually brought props today, that showed us an actual screen that is different from a mask so that you can see witnesses face. But if the jurors are in the back of the room, I've seen defense motions arguing against masks, but also arguing about the distance between jurors and witnesses. So maybe starting with Ryan - thoughts on whether you think that there's a meaningful way to ensure confrontation rights in socially distance trials.

00:45:39

Attorney

Ryan Reid:

Yeah I think there's two schools of thought. I think I may be in the minority but in my trial, the voir dire in my trial took place in a gym. We were closer to the people in the "box", but everyone was wearing a mask and we talked about it multiple meetings before the trial. I didn't think masks were a problem. I thought that we'll listen to their voice seeing their eyes. Their demeanor just in their body language. I thought I could get enough feel for that witness based on what they were saying, and how they were presenting I had conversations with other people that have had trials in Wisconsin post COVID and they were aghast, that I did that, that I didn't object and they said that the jury had face shields for voir dire but masks for during the trial and I and the witnesses had a shield that you could see through but I thought that based on, you know, being the first trial. I was happy that so many people showed up. I thought that the masks were fine. But I can definitely understand the other perspective that you that you need those shields to gauge credibility. So I think it kind of comes down to the attorney. I think it comes down to what the client wants or what the client feels, but I definitely understand that there's two schools of thought and that some people are so pro shield. But that's my perspective, I think I try to imagine what I would have done pre COVID and I pay attention more to people's voices anyway and body language, then whatever smiling or frowning.

00:47:24

Professor

Andrea Roth: Okay, okay. Jeffrey, thoughts?

00:47:27

Attorney

Jeffrey Howes: I agree with a lot of what Ryan said, and I guess that I caution my lawyers to you know tread very carefully on this, you know, the speedy trial right and the right confrontation primarily lies with the with the criminal defendant and we don't know what an appellate court is going to do with these issues. And the last thing that any prosecutor wants is to, you know, suffer a reversal because they were pushing the envelope on something like mask versus shield and I actually a lot of what Ryan said rings very true with me, but I also think that the distance issue is, maybe even more critical and our to jury trials that

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

we've had here in Multnomah County, you know, the juror that was furthest away from the witness was 70 feet away and I just, I think that you're getting a lot of diminishing returns in that regard and you can amplify that with technology, you can have both a live witness and a big screen TV closer or something like that. These are innovations that could take place. But with all innovations I counsel my lawyers to proceed with caution and to give a wide berth to a defense attorneys argument about these things. They're just better suited to make those arguments and I'm not well suited to argue against a confrontation right like this. So maybe we'll get better, but I don't even really want to get better at it.

00:49:10

Professor

Andrea Roth: Just out of curiosity, was there a defense objection to the 70 foot distance in that case.

00:49:16

Attorney

Jeffrey Howes: There was, yeah, there was. And, you know, but it was sort of like the show must go on. Here we are. So while there was an objection. It was overruled.

00:49:30

Professor

Andrea Roth: Got it, got it. Judge Thompson, thoughts on procedures, I mean aside from what you already pointed out?

00:49:38

Judge

Trina Thompson: Um, what we've been doing in my department well before COVID even existed, is that we do have an evidence presentation system. And we also have a stand alone screen as well that the district attorney office brings into the courtroom and that has allowed people to be able to see a lot of the exhibits some of the 3D presentations. When witnesses are talking and now it's a matter whether you can do a split screen where you have on one side of the screen the witness, who's testifying and on the other side of the screen the actual exhibit. Those are going to be some major challenges as we move forward. And again, we all are hoping that this is a moment in time and that things will go back to some normalcy. But in the meanwhile, when you have individuals in custody. We do need to keep in mind our professional responsibility, the speedy trial rights of those who are accused and not convicted and making sure that we make it so that a cross section of our community is able to participate, both in terms of defendants' families witnesses, as well as the public.

00:51:50

Attorney

Ryan Reid: I think confrontation to me is I'm more concerned about maybe witnesses confrontation than voir dire, and again I may be in the minority, but I think it's more important to have the witness be observable by the jury and by the defendant and to have that

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

confrontation. I know we haven't even gotten to virtual zoom jury trials. But I think you have to have everyone in the same room for sure. So I'm more concerned about that.

00:51:20

Professor

Andrea Roth: So speaking of zoom. So a number of folks have asked about the efficacy of virtual trials, it may well be that only if the defendant requests it would it really be imposed on the defendant. And so one question, and this goes into some other questions have been asked. What if a defendant wants to go forward to get their speedy trial with a bench trial which they don't have a constitutional right to, they would need the courts and the government's permission generally, a six person jury trial. Sounds like in Louisiana that's happening to facilitate socially distanced trials or a zoom trial, to what extent have defendants made such requests? And do you think that they would be pushed back from the prosecution or the court if those requests would be made? Is that something that defense attorney should be doing more Ryan, maybe we can start with you if you have thoughts?

00:52:15

Attorney

Ryan Reid:

One of the plans, I won't name the county, but it allows for a six person trial and the court, the court. We had a back and forth on this. And I said, There's no way I'm ever going to be part of a six person jury trial in a criminal trial, there's just no reason, you know, maybe a bench trial, we go over the positives and negatives of that and the client wants to do that. But for the most of the people sitting in custody, ABC felonies are very serious and if you're having if you're wanting a trial and I'm advising people that you have the right to this 12 person jury. If we're going to have a trial, we should at least have a procedurally as good as we can have trial. I think there's more of an appellate issue if defense attorney start, you know, advising people the six person versus 12 or I would never be a part of a zoom trial. I think that that's and again, we're not at this question yet, but is this even constitutionally adequate. Is it really that fair, you know, the judge on a previous call we talked about, you know, you really can't control what the jurors are doing. I think really paying attention. I just think that there's, you know, we're going to have a jury trial has to be 12 person, it has to be in the same room and I think anything else. I'd be very concerned about being a part of. So that's my opinion.

00:53:34

Professor

Andrea Roth: I perhaps we could hear from Jeffrey, and then Judge Thompson I think you'll have the last word.

00:53:41

Attorney

Jeffrey Howes: Um, you know I appreciate everything that Ryan said, and I'll say this, that I isn't a trial, but I had a high profile sentencing that was to take place first in early March than in late March and I finally got pushed back to late June and with all the logistics that we dealt

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

with. Me, thinking I'm being smart and innovative, I suggested we do a zoom sentencing and the trial had taken a month to try and it was big news. And I didn't expect the backlash that I got from the victims and the case victims want to be present. Also, and there you know almost every state. I'm sure has at least two if not constitutional victims' rights. And like I said, I just didn't anticipate the need from a victim to be present in the presence of the defendant and a judge and a jury so I don't see zoom trials going forward in my county anytime soon. We do have bench trials and defendants waive their right to appear in front of a jury to have a trial from a jury relatively routinely here that decision is discretionary. With the judge, but my office would rarely object. So bottom line is victims would need to be consulted and I was made to look foolish by suggesting that we have a zoom sentencing, so I won't be doing that again.

00:55:15

Professor

Andrea Roth: Interesting. Judge Trina Thompson?

00:55:19,

Judge

Trina Thompson: My final word is where I started. We can't do our job with integrity without a cross section of the community. And that's going to require 12 people to make a decision. Our professional responsibility as jurist as officers of the court are to be the guardians of due process. And when we start to dilute individuals' constitutional rights for convenience. We are really running up against some real long term issues. And it's something that's very attractive. We want to be team players. We want to participate, sometimes in what we call group think. But it is those moments of courage, where individuals are saying, you know, let's pause for a moment. Let's be creative. Let's make sure that we're meeting and conferring but let's not forget what our primary roles are and what it is we're supposed to be doing when the community entrusted us with these jobs.

00:56:18

Professor

Andrea Roth: Okay. Monica, I don't know if we're out of time. A lot of folks had questions about jury voir dire, and whether in your jurisdiction attorneys are allowed to ask questions about jurors trepidation about COVID, sounds like an Arizona prosecutors are objecting to such questions. So if I had time for another question that would be it. But I recognize that we may be out of time.

00:56:48

Monica Milton: So, we are out of time. And on behalf of NACDL, NCSC, RTI International, I just want to thank our panelists. Our moderator and our viewers for joining us for this important part and discussion. So CLE credit is available for those states listed, um, please, go to our website. If you want the forms and if you have any questions about CLE you can email ccrisfield@NACDL.org.

Preserving the 6th Amendment: Protecting the Right to Speedy Trial Amid Court Closures & Re-Openings

Transcribed 9/3/2020

Duration 57:44

Transcript times are an approximation

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If you'd like to learn more about opportunities for training and technical assistance from the Justice for All, Strengthening the Sixth Amendment Grant please email JFA@NACDL.org. Thanks again to everyone, and have a wonderful day.