

Practicing in a Pandemic

CLE May 21, 2020

Questions and Answers

00:55:41 Ray Scheetz: How is defense counsel going to be able to communicate with their clients during a jury trial?

The Court is testing the use of the interpreter private line for communication between counsel and client, as well as other technologies. Also, the Court has allowed breaks, and in certain cases cleared the courtroom, so counsel may confer privately with the client. This will likely be a topic for a final pretrial conference and is somewhat dependent upon the preferences of defense counsel.

00:55:43 George Davison, Jr.: What is the backlog of criminal cases versus civil? When do you see the Northern District having a civil jury trial?

The delay for both criminal and civil cases is from one to three months, depending on the stage of the case. While the Court is looking to resume jury operations in June 2020, it may be August or later before a civil trial is held. Much depends on the status of each case. Individual judges will consult with counsel and their clients as cases progress toward trial and the COVID-19 situation develops.

00:57:39 Lori Bullock: Does the court anticipate limiting the potential jury pool during voir dire?

Not at this point. While the scope of questioning of the jury pool will include questions about COVID-19, the Court is not going to create hard rules about excluding any additional class(es) of people. In resuming grand juries in May 2020 we have found that public opinion is all across the spectrum, so the Court will continue to excuse jurors (or not) based on the totality of the individual circumstances.

01:07:40 Bob Tiefenthaler: Since many law offices are closed to the public/clients, we can't have a defendant come into our office and actually see the discovery file for themselves? Thus, in criminal cases, would reviewing discovery files with a client by sharing your screen with an out-of-custody client over Zoom violate the discovery stipulation? If there is not going to be a good way for a defendant to review their discovery file, would continuances of criminal trials be liberally granted until such time as the defendant could have an adequate opportunity to personally review the discovery file?

Counsel might consider filing a motion with the Court describing the circumstances and details of a proposed videoconference discovery meeting with their client so that both sides and the Court can address the potential issues and reach a satisfactory arrangement. Judges will continue to review motions to continue trial on a case-by-case basis, giving particular consideration to factors outlined in 18 U.S.C. § 3161, including a defendant's ability to adequately prepare for trial.

01:08:27 pburns: In a civil case, one party wants to take Zoom depositions. The other party objects, citing general difficulty handling a lot of exhibits. Will the Court order the Zoom depositions to proceed? Can you give examples of factors to consider if Zoom depositions will be allowed or blocked?

While individual cases may present insurmountable obstacles to remote depositions, the parties are strongly encouraged to use remote means during the pandemic. "The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means." Fed. R. Civ. P. 30.

01:10:31 Shuttleworth Ingersoll: What is your reaction to lawyers who insist that they must meet in person with their client to prepare for depositions or to defend their deposition? Kevin Caster

In the absence of unusual circumstances, the inability to meet with a client or other witness to prepare for a deposition should not be an excuse to forestall discovery. Readily available technology exists to prepare witnesses remotely.

01:11:16 Charles Paul: Has the court taken any steps to reduce the number of pre trial detainees?

The Court does take the current pandemic situation into account, with all other relevant factors, in making detention decisions. At both initial detention hearings and in motions to reconsider previously issued detention orders, the court takes into account the particular facts and circumstances presented in each individual case.

01:14:25 heather_quick: Is the bench involved in monitoring infections/testing at the county jails? In the SDIA, the Polk County Jail provides daily updates regarding COVID-19, which the USAO circulates to the judges and FPD. As you may know, 84 inmates and 9 staff (as of today) at Polk County have tested positive.

Yes, the Court receives a daily report on the status of every county jail that holds federal detainees in the Northern District of Iowa. As of May 21, 2020, there have been very few cases at these facilities.

01:17:24 paige: Will everyone at a jury trial be required to wear masks? Everyone but witness and attorney who is doing questioning?

This will be situational. For example, in conducting grand jury right now we are asking everyone to wear a mask as they enter, leave, or move about the room. Jurors who are seated (and socially distanced) may remove their mask while seated. Witnesses wear a mask entering and leaving but remove it while testifying. Counsel wear a mask while moving about but remove it while speaking. Everyone is distanced.

01:17:27 JED: Will the Court consider voir dire questions allowing comparison of COVID exposure and "beyond a reasonable doubt"?

The Court is reviewing this issue right now with input from the bar.

01:20:15 Priscilla Forsyth: Has the Court taken into account the information the State Court has considered, i.e. task forces, medical experts and other committees saying June 1, 2020 is too soon to resume court services? It's my understanding they are going to push the date back again.

Yes, the Court is reviewing this, and additional data. For example, the federal courts have been receiving regular guidance from the Administrative Office of the United States Courts as to factors that should be considered in deciding when to resume various court functions. One important factor is the extent to which state and local authorities have eased "stay home" restrictions and restrictions on the

operations of retail businesses. The Court is paying close attention to decisions made by the State of Iowa and other governmental units.

01:21:19 Priscilla Forsyth: Will witnesses be wearing masks? Won't that impact the ability to assess credibility?

Witnesses will be asked to wear a mask moving about the courtroom but will remove it while testifying.

01:24:03 Bob Tiefenthaler: What if after the trial starts and a jury is seated, one juror becomes symptomatic during a trial? Will the entire panel be required to self-quarantine for 14 days and the trial suspended, or will a mistrial be given?

Good question. As with most "what if" questions, there is no absolute answer. The Court will look at the totality of the circumstances and make a decision.

01:28:31 paige: What if one juror refuses to wear a mask and the rest of the panel refuses to serve with him because it is not safe? Honestly, I'm not sure I would agree to be in a courtroom for a week or more with someone who refuses to wear a mask.

We have found with grand jury this month that people generally understand the situation and comply with reasonable requests, but if this were to occur the Court would have a conversation with that juror and make a decision accordingly.

01:29:11 mweston: Consider how you will handle the individual juror's opinions about wearing masks. There may be concern about serving with others who are not wearing masks. Should you have masks available for those who do not bring them?

The Court will take this into consideration, and currently does make available masks, gloves, hand sanitizer, and wipes.

01:30:35 Priscilla Forsyth: According to the Siouxland District Health Dept. 40% of the positive people in Woodbury county are asymptomatic. So, questioning may not help.

The Court does take that into consideration.

01:31:31 George Davison, Jr.: How will issues about meals and breaks be handled for jurors during the trial and during deliberations? How about issues with jurors who do not live in Sioux City or Cedar Rapids and have to travel to and from the courthouse?

With grand jury this month we have spread them out during breaks and meals to several locations in the courthouse to maintain social distancing and would do the same with petit jurors.

01:37:41 cconover: I can envision jurors who have been out of work, are finally able to get back to work, who raise a hardship excuse that they cannot forego wages during a trial. Similarly, people may have childcare or other caregiving challenges due to the pandemic and raise a hardship excuse. What happens when we get simply get too few prospective jurors to proceed when we combine medical issues and hardship issues?

These are common issues the Court has dealt with in the past and will continue to consider. In this environment the Court may call in a larger jury pool, and/or conduct pre-screening of jurors.

01:40:23 Michael Giudicessi: Will the recorded video of a Zoom deposition, which is not certified by a videographer, be deemed admissible/usable for display at trial so long as the transcript is certified by the court reporter?

The Court cannot provide a firm answer to this question, as this would be an evidentiary ruling for the presiding judge to make if admissibility is challenged.

01:51:11 Kirk Schuler: Interpreters speak to non-English speaking defendants with closed circuit audio. Attorneys may be able to do the same. Thanks for the presentation NDIA and Judges Strand, Williams, and Roberts.

Excellent point, we are investigating this option.

Via e-mail

Will the Court require all attorneys to wear face masks to avoid jurors from prejudicing one party's counsel or the other for wearing masks (or not) when the judge has "encouraged" at least the jurors to wear face masks? Will the judge be wearing a face mask?

Everyone will be requested to wear a mask, except when speaking or testifying. In various hearings this month it has not been an issue. The judge is socially distanced in the courtroom but may or may not wear a mask depending on circumstances (e.g.: side bar).

How will the Court handle cases where counsel and key witnesses are all from out of state (diversity cases), and the party has difficulty bringing those people to trial?

Video appearances have been and continue to be an option in the Northern District of Iowa.

What about for cases where key witnesses (i.e.- expert witnesses) who may not want to travel and their only internet access is slow (from experience with doing a remote expert deposition where 40 minutes were spent dealing with technology issues), making 2 way videoconference presentation of testimony potentially not viable?

The Court would address this in the specifics of the case. One option that has been used in the past is to have the witness report to their local federal courthouse for a video connection.

If some testimony has to be presented remotely by 2 way video due to COVID-19, how will the Court handle exhibits with the witnesses?

It may be possible to use multiple screens so that exhibits can be displayed to remote witnesses.

If some testimony has to be presented remotely by 2 way video due to COVID-19, how will the Court monitor/prevent counsel from communicating with the witness during examination?

This has been successfully done with all parties and the Court on the same VTC platform. The Court has routinely relied on an admonition to counsel regarding communication with witnesses about their testimony before the witness's testimony has been completed. This admonition may be extended to the situation you describe.

If some testimony has to be presented remotely by 2 way video, how will the Court prevent the witness from conducting independent research during their testimony?

Usually the Court can see what the witness is doing, hand movement, eye movement. Again, the Court will consider expanding its admonition to witnesses to deal with this situation.

How will large/voluminous exhibits be handled that would normally go back to the jury room? Will parties be allowed to stipulate to bookmarking pages if they're submitted to the jury electronically?

The Northern District of Iowa has an electronic evidence display platform that should be able to handle the request. The Court welcomes reasonable stipulations to make voluminous exhibits more accessible and understandable to jurors.