

Clients&Friends Memo

COVID-19 Update: Litigation, Incarceration, and Investigation in the Time of COVID-19

April 3, 2020

I. Introduction

In ways unimagined less than three weeks ago, the face of in-court litigation in civil and criminal matters transformed seemingly overnight and continue at near breakneck speed. The following article describes the key changes trial lawyers and their clients are likely to experience as the impact of COVID-19 continues to increase unabated.

II. Civil Litigation

As stay-at-home orders are going into effect around the country, the legal community is grappling with how to attend to client needs and litigation schedules when getting in a room together is no longer an option. With guidance from courts changing daily, if not hourly, the ultimate effects of the COVID-19 pandemic on the administration of justice remains to be seen.

Courts across the US and UK are making alterations to the way that business is conducted in light of COVID-19. Generally, courts are either moving hearings to virtual formats or severely limiting who may be admitted into the courthouse for in person arguments. Additionally, jury trials across the country are being continued as courts are unable to fill petit juries because of infection concerns. The National Center for State Courts has compiled a comprehensive website with links to each state court relative to COVID orders.¹ Additionally, the US Judicial Conference has temporarily approved the use of video and teleconferencing of certain criminal proceedings and teleconferencing for civil proceedings.² Some examples:

¹ *Coronavirus: News updates, court administrative orders, and more resources*, National Center for State Courts, <https://www.ncsc.org/> (last accessed April 1, 2020).

² *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, United States Courts (March 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

- US Supreme Court

For the first time since 1918, the Supreme Court delayed oral arguments scheduled between March 23 and April 1. And for the first time since 2000, the Justices did not take the bench to read their decisions aloud. Rather, in several cases argued in the Fall term, the Court published decisions online every five minutes. The Court has issued a standing order³ generally extending filing deadlines, and the building remains closed to the public indefinitely.

- New York

New York State courts have ceased hearing all non-essential matters, and have prevented all non-essential ECF. All state courthouses in New York City have moved to virtual hearings for essential matters, with the rest of the state implementing virtual hearings as soon as is practicable.⁴ Essential matters in civil courts are extremely limited and do not explicitly include commercial cases at this time.⁵ Essential matters in criminal proceedings include: arraignments, bail applications, reviews and writs, temporary orders of protection, resentencing of retained and incarcerated defendants, and essential sex offender registration act (SORA) matters.⁶ Governor Cuomo has issued an order tolling any affected statutes of limitations until April 19, 2020.⁷

The federal courts in New York continue to conduct business, but have implemented certain distancing measures. These measures include the ability for counsel to teleconference into hearings, body temperature screenings for people on probation or supervised release, and limiting physical access to the courthouse.⁸ The Southern District of New York (SDNY) has also ordered continuances on all jury trials scheduled to begin before April 27, 2020.⁹ Criminal defendants, particularly those detained pending trial, may make a motion seeking an exemption from this order to the District Judge assigned to the matter in the first instance.¹⁰ The Eastern District of New York

³ Miscellaneous Order, 589 U.S. – (March 19, 2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

⁴ *March 30th: New Message from Chief Judge DiFiore*, NYCourts.Gov (March 30, 2020), <http://www.nycourts.gov/index.shtml> (last visited April 1, 2020).

⁵ Administrative Order of the Chief Administrative Judge of the Courts, March 22, 2020 at Exhibit A.

⁶ *Id.*

⁷ Executive Order 202.8.

⁸ COVID-19 Protocols Memorandum dated March 20, 2020; *In re Coronavirus/COVID-19 Pandemic*, 20 Misc. 161 (S.D.N.Y. March 17, 2020); *In re Coronavirus/COVID-19 Pandemic*, 20 Misc. 155 (S.D.N.Y. March 16, 2020); *In re Coronavirus/COVID-19 Pandemic*, 20 Misc. 138 (S.D.N.Y. March 13, 2020).

⁹ *In re: Coronavirus/COVID-19 Pandemic*, 20 Misc. 154 (S.D.N.Y. March 13, 2020).

¹⁰ *Id.*

has also restricted access to the physical courthouse, extended the time for preliminary hearings in criminal matters for sixty days after the initial appearance and continued all jury trials.¹¹

- District of Columbia

The D.C. District Court (DDC) and Bankruptcy Courts remain open with limited operations.¹² Access to the E. Barrett Prettyman Courthouse and the William B. Bryant Annex is restricted to judges, court staff, members of the media, and visitors with official business with the courts.¹³ All civil and criminal petit jury selections and trials scheduled to commence between March 17, 2020 and May 11, 2020 have been continued pending further notice of the Court.¹⁴ DDC has also postponed all other court appearances and hearings in civil, criminal, and bankruptcy proceedings set to occur between March 17, 2020 and April 17, 2020 unless the presiding judge issues an order in an individual case to the contrary.¹⁵

- North Carolina

The North Carolina Judicial Branch has ordered an extension of all court system deadlines, ordering that all documents due to be filed between March 16, 2020 and April 17, 2020 will be deemed timely filed if received before the close of business on April 17, 2020.¹⁶ The order does not apply to deadlines in the appellate courts.¹⁷ Chief Justice Cheri Beasley has directed that superior court and district court proceedings will be rescheduled for at least 30 days as of March 16, 2020 unless the proceeding can be conducted remotely, the proceeding is necessary to preserve the right to due process of law, or the proceeding is for the purpose of obtaining emergency relief.¹⁸

The United States District Court for the Eastern District of North Carolina (EDNC) has issued an order continuing all civil and criminal jury trials, but leaving all other hearings and proceedings subject to the discretion of individual judges.¹⁹ Grand jury matters will proceed pending further

¹¹ *In re Coronavirus/COVID-19 Pandemic*, Administrative Order No. 2020-11 (E.D.N.Y. March 18, 2020); *In re Coronavirus/COVID-19 Pandemic*, Administrative Order No. 2020-06 (E.D.N.Y. March 16, 2020); *In re Coronavirus/COVID-19 Pandemic*, Administrative Order No. 2020-08 (E.D.N.Y. March 17, 2020).

¹² *In re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic*, Standing Orders No. 20-9 (BAH (D.D.C. March 16, 2020).

¹³ Notice – Restricted Access to Courthouse (D.D.C. March 12, 2020).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Order of the Chief Justice of the Supreme Court of North Carolina (March 19, 2020).

¹⁷ *Id.*

¹⁸ Order of the Chief Justice of the Supreme Court of North Carolina (March 13, 2020).

¹⁹ *In re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic*, Standing Order No. 20-SO-5 (E.D.N.C. March 18, 2020).

order of the Court, and Magistrate judges will continue to preside over criminal matters such as arraignments, initial appearances, detention hearings, and issuance of warrants.²⁰ The use of video conferencing is encouraged whenever appropriate.²¹ EDNC has also issued an order limiting access to courthouses.

The United States District Court for the Western District of North Carolina continues to have physical hearings with limitations. Any detainees who are ill are to be immediately removed from the courthouse, judges are to stagger court hearings to the extent possible, and Magistrate Judge hearings have been moved into larger courtrooms and may utilize the "After Hours Warrants" procedures previously in place to use Skype for initial appearances and arraignments.²² Criminal case proceedings continue to take place. However, due to the difficulty of obtaining an adequate venire of jurors, any continuances will be excluded under the Speedy Trial Act.²³

The United States District Court for the Middle District of North Carolina has issued an order continuing all civil and criminal jury trials scheduled to begin before April 16, 2020.²⁴ Grand Jury proceedings scheduled for the month of March are cancelled.²⁵

A. How Litigants are Coping

With most courts closing or severely limiting physical interactions, litigants are being faced with the question of how best to proceed. For many cases, the answer may well be to sit back and wait for the dust to settle. However for those cases that cannot wait, creative solutions will be the name of the game.

On March 18, 2020, the Second Circuit held oral arguments over the telephone for the first time in its history.²⁶ Though there were speedbumps along the way, including sounds of sirens in the background and one lawyer inadvertently interrupting Judge Wesley, participants seemed optimistic that the situation was the best possible outcome given the circumstances.²⁷ Conversely, the D.C.

²⁰ *Id.*

²¹ *Id.*

²² *In re: Coronavirus COVID-19* (W.D.N.C. March 13, 2020).

²³ *Id.*

²⁴ *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Standing Order 13 (M.D.N.C. March 16, 2020).

²⁵ *Id.*

²⁶ Tom McParland, '*Maiden Voyage*' on a Stormy Sea: 2nd Circuit Holds 1st Set of Oral Argument Teleconferences in Face of Coronavirus, New York Law Journal (March 19, 2020, 5:25 PM), <https://www.law.com/newyorklawjournal/2020/03/19/maiden-voyage-on-a-stormy-sea-2nd-circuit-holds-1st-set-of-oral-argument-teleconferences-in-face-of-coronavirus/>.

²⁷ *Id.*

Circuit held remote arguments on March 20, 2020 with less success.²⁸ During arguments, a call dropped and an arguing attorney was unable to get back into the proceeding for several minutes.²⁹ A US magistrate judge in a civil case in the Southern District of Florida severely admonished litigants who could not resolve a fairly basic discovery dispute, leading to one party filing an emergency motion for a protective order seeking the delay of a deposition for a corporate representative. The judge reminded the parties, “we are living in an unprecedented situation. Nevertheless, the lawyers in this case have been exchanging snippy emails over the past two weeks over the scheduling of a corporate representative deposition. Moreover, defense counsel certified that this routine discovery dust-up is so important that it merits ‘emergency’ status. No, it doesn’t.” The attorneys will be required to appear at some point in the future to “explain their behavior in the context of the far-more-important issues this Court (and the entire world) is facing.”

It remains to be seen whether remote proceedings will remain in use after the COVID-19 crisis has passed, but in the meantime litigants should be prepared to proceed remotely. That includes contingency plans for technology failures and patience and understanding in dealing with the opposing side. Truly urgent matters will require flexibility in the weeks to come.

III. Criminal Cases

Both the Department of Justice and the Division of Enforcement of the Securities and Exchange Commission have gone to great lengths to assure the public that investigations and prosecutions would continue, even while many law enforcement personnel work remotely. Depending on location, proffer sessions and government interviews have continued, albeit virtually. What were once commonplace internal investigations or proactive reviews are being conducted via video or telephone. Subpoenas continue to flow, though response times have in many cases been extended. Both the SEC³⁰ and DOJ have announced that fraudulent activities relating to COVID-19, including false claims to consumers, price fixing, and dishonest stock claims will be prioritized

²⁸ Josh Gerstein, '*Kind of a mess*': D.C. Circuit arguments enter the coronavirus era, Politico (March 20, 2020, 5:45 PM), <https://www.politico.com/news/2020/03/20/dc-circuit-court-cases-coronavirus-139628>.

²⁹ *Id.*

³⁰ The Enforcement Division is focused on monitoring the markets for misconduct related to the COVID-19 crisis. In a statement issued on March 23, 2020, the Co-Directors of the Division of Enforcement “emphasize[d] the importance of maintaining market integrity and following corporate controls and procedures.” SEC, Statement from Stephanie Avakian and Steven Peikin, Co-Directors of the SEC’s Division of Enforcement, Regarding Market Integrity (Mar. 23, 2020), <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>, <https://www.cadwalader.com/resources/clients-friends-memos/covid-19-update-what-are-the-effects-on-the-secs-enforcement-program>

for enforcement activity.³¹ The SEC suspended trading in the securities of two companies over concerns about potential misinformation about the companies' marketing rights to a COVID-19 treatment, as well as the effectiveness of one company's product to treat COVID-19.³² But perhaps the greatest impact of COVID-19 on criminal cases is on about-to-be or currently incarcerated defendants.

A. Impact on Incarceration

While staying home and social distancing are keeping many Americans healthy during the COVID-19 pandemic, those options are unavailable to many in the criminal justice system. Those individuals—whether temporarily confined in detention centers or courthouse holding facilities, or incarcerated in jails or prisons—face potentially dire circumstances as the virus spreads. Criminal defendants and their attorneys are petitioning courts for action, and many courts are following through.

Jurisdictions have already started addressing the unique risks posed by incarceration given the realities of COVID-19. Some state courts have held mass bail and plea hearings to reduce the jail populations.³³ Attorneys contemplating such requests should consider arguing that their client's particular "physical and mental condition" are factors to consider when setting release conditions³⁴ and that detention unnecessarily imperils their client. Also, attorneys may argue that state "stay-at-home" orders and limitations on international travel render their client unlikely "to flee or pose a danger to the safety of any other person or the community," which is a factor weighing in support of pretrial release or release pending sentencing or appeal.³⁵

For those defendants who cannot avoid pretrial or post-conviction detention, they face the challenge of maintaining continuous contact with their legal counsel during a health pandemic. To mediate an ongoing dispute between the Federal Public Defenders and the Bureau of Prisons ("BOP") regarding attorney access to detainees, a federal judge in the Eastern District of New York appointed former US Attorney General Loretta Lynch to help the parties formulate new protocols

³¹ See DOJ, Press Release (20-289): Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products (Mar. 9, 2020), <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

³² See SEC, Release No. 88142 (Feb. 7, 2020), <https://www.sec.gov/litigation/suspensions/2020/34-88142.pdf>; SEC, Release No. 88265 (Feb. 24, 2020), <https://www.sec.gov/litigation/suspensions/2020/34-88265.pdf>.

³³ See Cleveland.com, "Cuyahoga County officials will hold mass plea, bond hearings to reduce jail population over coronavirus concerns" (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>.

³⁴ 18 U.S.C. § 3142(g)(3)(A) (factors to be considered for release of a defendant pending trial).

³⁵ 18 U.S.C. §§ 3142(d)(2), 3143(a)(1), (b)(1)(A).

during the pandemic.³⁶ As the Second Circuit wrote in its opinion remanding the case to the district court for further proceedings, COVID-19 poses “a different and even more dramatic challenge.”³⁷

For its part, BOP maintains a website dedicated to its COVID-19 response.³⁸ Lawyer visitation privileges were suspended for 30 days starting March 13, 2020, though, BOP asserts that “case-by-case accommodation will be accomplished at the local level and confidential legal calls will be allowed in order to ensure inmates maintain access to counsel.”³⁹ Attorneys seeking in-person visits with their clients should be prepared to submit to the BOP’s “COVID-19 Screening Tool,” which asks visitors whether they have visited areas with high concentration of COVID-19 cases and whether they are currently experiencing COVID-19 symptoms.⁴⁰

B. Trial Deadlines

The Sixth Amendment guarantees criminal defendants a “speedy” trial.⁴¹ That right is on an uncertain footing with many courts closing or limiting operations in the immediately foreseeable future.

The federal Speedy Trial Act establishes time limits for completing various stages in a federal criminal prosecution.⁴² For instance, an information or indictment must be filed within 30 days of an arrest or service of a summons, and trial must commence within 70 days of that (or “from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs”).⁴³

Federal courts have issued administrative orders that suspend the Act in their respective courts, meaning that criminal defendants’ constitutional right to a jury trial will be put on temporary hold.

³⁶ Law360.com, “Loretta Lynch To Referee Dispute Over Detainees’ Atty Access” (Mar. 23, 2020), https://www.law360.com/whitecollar/articles/1256200/loretta-lynch-to-referee-dispute-over-detainees-atty-access?nl_pk=5da50ce1-c87e-4a40-a009-022a5094923&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar.

³⁷ *Federal Defenders of New York, Inc. v. Federal Bureau of Prisons*, No. 19-1778, Slip Op. at 27 (2d Cir. Mar. 20, 2020), http://www.ca2.uscourts.gov/decisions/isysquery/e6c13c51-4c4b-4e8b-aa8e-00221dbdbb1b/3/doc/19-1778_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e6c13c51-4c4b-4e8b-aa8e-00221dbdbb1b/3/hilite.

³⁸ See BOP, COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/index.jsp>.

³⁹ BOP, COVID-19 Action Plan (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp.

⁴⁰ BOP, Visitor/Volunteer/Contractor COVID-19 Screening Tool (Mar. 13, 2020), https://www.bop.gov/coronavirus/docs/Visitor_Volunteer_Contractor_COVID-19%20Screening_v1_March_2020.pdf.

⁴¹ U.S. Const. amend. VI.

⁴² 18 U.S.C. §§ 3161–3174.

⁴³ 18 U.S.C. §§ 3161(b), (c)(1).

For instance, the SDNY issued an administrative order excluding the time between March 16, 2020 and April 27, 2020 from counting under the Act, as the court found “that the ends of justice served by taking such action outweigh the interests of the parties and the public in a speedy trial.”⁴⁴ Practitioners should check local orders to understand, and to advise their clients regarding, how much delay should be expected.

C. Sentencing and Surrender Issues

It will likely be in clients’ best interest to seek a continuance of any upcoming sentencing. Although a court must impose a sentence “without unnecessary delay,” sentencing schedules may be varied “for good cause.”⁴⁵ Court closures and the unavailability of administrative staff may very well make it impossible to complete the required presentence investigation, defendant interview, and presentence report in an effective manner. Moreover, health and social-distancing concerns may make it difficult for the defendant to arrange for witnesses to testify in court on his or her behalf at the sentencing hearing.

For unavoidable sentencings, a variance to a noncustodial sentence should be the immediate goal. The Sentencing Guidelines allow for variances in cases where “age” and “physical condition” are “present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.”⁴⁶ The judiciary’s increasing recognition of the severity of the COVID-19 pandemic may open the door for arguments that a client’s unique risk factors warrant home detention in lieu of incarceration.

Defendants who have been sentenced should seek a continuance of their surrender dates, citing the risks posed by the growing number of COVID-19 cases in correctional facilities.⁴⁷ As the end of the pandemic is hardly in sight, extensions may be granted that are much further out in time than typically granted.

Defendants who are under removal orders face a particular hurdle. Those who must voluntarily leave the country by a certain date face a shrinking number of available international flights. If flights

⁴⁴ *In re: Coronavirus/COVID-19 Pandemic*, Standing Order (SDNY, Mar. 13, 2020), [https://www.nysd.uscourts.gov/sites/default/files/2020-03/2020MISC%20154a%20\(002\)%20-%20In%20Re%20Coronavirus-COVID-19%20Pandemic.pdf](https://www.nysd.uscourts.gov/sites/default/files/2020-03/2020MISC%20154a%20(002)%20-%20In%20Re%20Coronavirus-COVID-19%20Pandemic.pdf).

⁴⁵ Fed. R. Crim. P. 32(b).

⁴⁶ United States Sentencing Commission, Guidelines Manual, § 5H1.1 (Age) (Nov. 2018); *id.*, § 5H1.4 (Physical Condition) (Nov. 2018).

⁴⁷ As of the date of this article, BOP reports that 57 inmates and 37 staff in its facilities have tested positive for COVID-19. See BOP, COVID-19 Tested Positive Cases, <https://www.bop.gov/coronavirus/index.jsp> (last accessed on April 1, 2020).

are unavailable by the removal date, changes to the removal order should be promptly sought lest clients face additional time in ICE detention facilities.

D. Compassionate Release

With over 2 million prisoners, the United States has the world's largest prison population.⁴⁸ The BOP alone houses some 175,000 inmates across its facilities.⁴⁹ The close proximity of inmates and prison staff, and unsanitary conditions at some facilities, make prisons potential hotbeds for contagion. The risk is not unique to the US—prison officials across the globe are considering inmate releases, some at mass scales, to offset the unique risks posed by the pandemic.

The need for a rapid response is acute. There are at least 94 positive COVID-19 cases among inmates and staff in the federal prison system.⁵⁰ The number is likely to grow exponentially. In light of this risk, on March 26, 2020, the Attorney General directed the BOP to ensure that the BOP utilized home confinement for at-risk inmates who are non-violent and pose minimal likelihood of recidivism, and laid out a series of criteria relating both to the health of inmates and public safety to assess the propriety of early release. The Federal Public Defenders has an informative website setting out forms, relevant guidance and pertinent decisions for lawyers considering any release petition, or pretrial or pre-sentence delay or avoidance of incarceration.⁵¹

In addition to the DOJ's order, compassionate release is also potentially available through the First Step Act. However, the First Step Act requires an inmate to first petition the BOP for release, and to allow the BOP up to 30 days to act on the petition. However, in light of the urgency of the health crisis, some defendants have petitioned courts directly, on an emergency basis, for compassionate release. Their arguments for bypassing the exhaustion requirement include the futility of waiting for BOP to deny their request, the urgency for an immediate decision, and that exposing inmates to the risk of COVID-19 amounts to cruel and unusual punishment prohibited by the Eighth Amendment. Despite relatively few cases of release being granted thus far,⁵² whether these arguments will be successful largely remains to be seen.

⁴⁸ See World Prison Brief, Highest to Lowest – Prison Population Total, <https://www.prisonstudies.org/highest-to-lowest/prison-population-total>.

⁴⁹ See BOP, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (statistics as of March 12, 2020).

⁵⁰ See BOP, COVID-19 Tested Positive Cases, <https://www.bop.gov/coronavirus/index.jsp> (last accessed on April 1, 2020).

⁵¹ See Federal Defender Service Office, Coronavirus Disease 2019 Resources, <https://www.fd.org/coronavirus-disease-2019-covid-19>.

⁵² In notable examples, courts refused to grant compassionate release without exhaustion to Michael Cohen and "Real Housewife" star Brynn Baylor.

IV. UK Impact

The COVID-19 epidemic in the UK has accelerated the attempts to resolve the tension between established procedure and technology in criminal cases. It is an integral part of criminal procedure that the defendant and witnesses attend in person and that hearings generally take place in public. As Lord Chief Justice Hewart said in *R v Sussex Justices*, “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁵³ This principle of open justice is reflected in Criminal Procedure Rule 9.2—“that the court must exercise its powers in public.”

These two related but distinct issues—the attendance of parties in a case in person or remotely, and the broadcasting of hearings—have moved uneasily forward alongside technological advances. COVID-19 has accelerated the pace of change.

A. Remote Attendance

The Coronavirus Bill 2020 (the “Bill”) received Royal Assent and passed into law on Wednesday, March 25, 2020. Amongst a wide range of emergency measures, the Bill includes urgently-needed provisions allowing for the greater use of video and telephone communication in UK criminal court proceedings. The Bill updates several pieces of legislation including the Criminal Justice Act 2003, the Crime and Disorder Act 1998 and the Criminal Procedure Rules (“CrimPR”).

Under the Criminal Justice Act 2003 (“CJA”) and the Crime and Disorder Act 1998, the courts may allow a participant, including someone who is to give evidence, to take part by live link in a trial, a criminal appeal to the Crown Court or other hearings. The court may make such a direction which includes any or all of the participants, including the court itself.⁵⁴

Proceedings are regarded as taking place at the location where the member or members of the court takes part in the proceedings and joining via video or audio live link will be considered as complying with any obligation for a person to attend court. A hearing may now be conducted entirely as a video or audio hearing (subject to certain prohibitions and limitations) and a participant may take part by live link from any place in the world.

Part 18 of the CrimPR has been amended and is now titled “*Measures to assist a Witness, Defendant or other person to give evidence and participate*.”⁵⁵ A key amendment, can be found at 18.1(e) where the court is now empowered to grant a direction to permit a “*defendant or other person to give evidence or to attend a hearing when not giving evidence by live link*.” Previously,

⁵³ *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

⁵⁴ Section 53(1) of Criminal Justice Act 2003 states that “The court may sit for the purposes of the whole or any part of the proceedings at any place at which such facilities are available”.

⁵⁵ The underlining denotes additions to the title.

this solely applied to witnesses giving evidence to the court. It is clear that the aim of these amendments is to assist parties, the public and courts themselves with continuing normal operations.

The main exception, as previously announced by the Lord Chief Justice on Monday, is that no juror may participate by live link (section 51(1B) of the CJA). Another relevant exception to note is that under section 51(10) of the CJA, a court may not refuse or revoke bail for a person if any person (other than someone giving evidence) attends proceedings via a live audio link and that person also objects to the refusal or revocation.⁵⁶

It remains to be seen how jury trials can be accommodated in the present reality. The live event of a jury trial includes numerous safeguards designed to protect the rights of defendants – unscheduled private consultation between lawyers and clients, the ability to observe and react in real time to developments in court, and the ability for the jury to physically get together and debate amongst others.

B. Broadcasting of Hearings

Photography and broadcasting of criminal cases in the UK is prohibited under section 42 of the Criminal Justice Act 1925 and reinforced under the Contempt of Court Act 1981. Taking photographs or private recording of cases is dealt with harshly by the courts.

UK Supreme Court cases have been broadcast since 2009. The public can watch the live stream of almost all hearings. Court of Appeal cases have allowed some broadcasting since 2013. In January this year, Parliament introduced the Crown Court (Recording and Broadcasting) Order 2020 which will allow cameras to broadcast the sentencing remarks of High Court and Senior Circuit judges in some of the most high-profile courts across the country, including the Old Bailey.

Filming will be restricted to sentencing remarks only and no other court user—including victims, witnesses, jurors and court staff—will be filmed.

But now that it is relatively easy for most people to video conference with off the shelf software how does the criminal justice system balance remote access with a prohibition on photography and recording? Is the prohibition actually necessary in many cases and how does it sit with the principle of open justice? It is not clear how the courts could continue to maintain current restrictions in an era of public video transmission.

⁵⁶ Criminal Justice Act 2003 Section 51(11) contains an exception to this rule: “But subsection (10) does not apply if section 4 of the Bail Act 1976 does not apply to P”.

In terms of immediate practical effects, there is already anecdotal evidence of the COVID-19 emergency affecting bail and sentencing decisions. It is plainly much harder for the prosecutor to assert that there is a real risk of a defendant fleeing the jurisdiction if granted bail. As is set out above, the BBC has reported that consideration is being given to releasing prisoners on temporary license to relieve pressure on prisons. In such circumstances remands into custody and custodial sentences are less likely to be ordered. Conversely, it is practically much harder for a community based punishment to be imposed and undertaken.

V. Looking Forward in the US and Across the Pond

If the practical challenges can be overcome, allowing remote attendance of both civil litigants and criminal defendants will continue and might be a sensible path forward in many cases. Perhaps staggered proceedings and more flexible rules for non-jury proceedings than for jury trials can be permanently implemented. Could a jury trial take place with all parties and the jury attending remotely? Could trials be staggered to reduce the disruption to individual jurors? Will trial strategists develop techniques better suited to the screen than the court room? Can a defendant be fairly sentenced if she does not appear in person in front of the sentencing court? Will this finally resolve persistent questions of over-incarceration? The answers remain to be seen, but, COVID-19 is likely to have unimagined impact on litigation and criminal justice beyond just the lawsuits that surely will emanate from this crisis.

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