

The Impacts of COVID-19 on the Judicial System in Durham and North Carolina

Introduction:

COVID-19, a global pandemic, has taken an unprepared United States by storm. Of particular concern are areas of dense populations, such as the prisons and jail populations, as the spread of COVID-19 is rampant within close quarters. People serving time in prisons, or waiting in jails cannot properly social distance, supplies such as face masks took time to arrive at prisons, and testing of inmates is still not being done widely. Stemming from the lack of space and supplies creates the question of what new approaches might be needed to curb the outbreaks and transmission of COVID-19. Some new approaches may be taken at the courthouse level. Judicial branches work at the intersection of justice, the preservation of constitutional rights and public safety. COVID-19 has added an intersection with public health, as the judicial branches must now navigate how to conduct law as safely and fairly as possible during this pandemic. For this paper, I contacted people working towards justice in Durham, and North Carolina (NC) to see how COVID-19 has changed their daily jobs and if there have been specific policies guiding these changes they are experiencing. I reached out to 10 officials via email and was able to schedule phone meetings with 6. The phone conversations were from 10-35 minutes, and some participants provided additional resources via email. I was not given permission to use their names in this paper, however job titles were approved. The job titles of the people I spoke to included an assistant attorney, a trial court administrator, the DAs assistant and the DA, the clerk of court and a judge. In this paper I will first provide a chronology of formal guidance for the judicial system related to the pandemic followed by the key themes identified from the conversations, which included: returning to the courthouse during a pandemic, preparing the courthouse to meet COVID-19 Guidelines, navigation of jury trials during a pandemic, virtual trials and post-COVID-19 predictions.

A Chronology of Formal Guidance for the Judicial System related to the Pandemic:

Once COVID-19 arrived in the United States, updates to the justice system were applied throughout the States. Those pertaining to the courts within NC began on March 10, 2020, when the governor of NC issued executive order No. 116, which was the first of a series of executive orders that declared a state of emergency. On March 13th the Chief Justice of the Supreme Court of NC issued the first of a series of emergency directives for the court system. These court directives aimed to protect the health of court personnel and the public. Additional emergency orders were made since mid-March, and it was clear that the NC courts must remain open for essential business, and adjust the scope of operations and services significantly. On April 30th, 2020, Chief Justice created the Judicial Branch COVID-19 task force. The task force was asked to work with conferences and associations within the Judicial Branch to develop guidelines for future emergency directives, policy changes, and best practices to help courts across NC to have increased levels of service for the remainder of the pandemic.¹ On May 8th, 2020, Governor Cooper implemented the first of the three-phase reopening plan to relax some restrictions within NC. On May 22nd, 2020, NC moved into phase two. As the pandemic continues to change the task force has worked to come up with strategies to protect the health and safety of those working and going to the courthouse. The task force submitted reports to the Chief Justice on June 12th and 30th, 2020. These reports were to be used as resources for the Chief Justice and at local courts. The information in the reports was to be viewed as recommendations and guidance not directives. In NC there are 100 counties, and so there is no one set of rules that can be

implemented identically, making policy development challenging. On June 1st, 2020 the soft expansion of back to normal operations began. As part of the re-opening all court officials needed to stay informed about the current state of the Governor's Executive Orders, and the Chief Justice's Emergency Directives, as well as the CDC guidelines.¹

Returning to the Courthouse during a Global Pandemic:

When COVID-19 cases surged in the US, Durham NC was a hot spot. This led to the courts being closed from March 15th to June 1st and forced the majority of courthouse personnel to work from home. The courts during that time were only open to those who had arranged for custody – said the assistant attorney. During this time online communication increased between different parties to navigate online meetings and trials. At the federal level, the District Clerk from Charlotte NC, felt as if his staff were prepared to work remotely. This sense of preparedness was because they practice remote workdays once a month and have telework centers that employees can access if their home environment is not conducive to work. However, at both the state and federal level the semi-permanent transition to remote work was met with rigorous online trainings, and the need to navigate uncharted territory of prolonged virtual justice.

Most of the people that I spoke with felt that when they returned to work, they were in a safe environment. Currently, when they arrive to work, they are asked about signs and symptoms, their temperature is taken, and a nurse is present if any concerns arise. Of the various people that I spoke with, none of them had received a COVID-19 test through work. One person thought that getting tested would have been a good idea, others felt it unnecessary due to the other precautions that the workplace was taking. Moreover, there are limits to the number of people in certain areas, such as there are usually 4-6 people maximum working as a team, and at most in a court room 10-12, which they believed decreased the risk of infection and transmission. However, a caveat to this was the discovery that around 72 employees had returned to the Clerk of Court office, although the layout of the office and physical distancing of the desks was not explained. In summary, the methods used for returning to full operations seem to vary across workplace settings and decisions are being made through the local courthouse officials. The differences in implementation of the directives and guidelines occur because of the dissimilarities in courthouse design, caseloads, staffing and infection data. Further, the guidelines are at the discretion of the officials who are implementing them, and therefore there are case by case differences. These differences make a one-policy fits all solution to COVID-19 extremely challenging.

Preparing the Courthouse to meet COVID-19 Guidelines:

Each of the people that I spoke with shared with me the changes that they have noticed within their workspace. The changes that were noted came from directives such as the task force's June 30th, 2020 Guidance. According to the emergency directives 11,13 and 16 of the Chief Justice, each senior resident superior court judge shall serve as or designate a COVID-19 coordinator for each facility in their district. Further, prior to the publication of a court calendar the COVID-19 coordinator has to 1) ensure that each session of court will not result in the public sitting or standing in close proximity or for extended periods of time and 2) that all Judicial Branch personnel assigned to a courtroom for more than 30 minutes have face masks made available to them.¹ Further, according to the Chief Justice's Emergency Directive 21, effective July 16th, 2020, people must wear face coverings while they are in common areas and when they

are interacting with others. The type of face mask required is not described, nor are the full exceptions to these rules.

Due to the diversity of the courthouses and rooms throughout NC the task force leveraged the Center for Disease Control and Prevention (CDC) tool called the Hierarchy of Controls, as seen in Figure 1, to aid in implementation of various tools to help prevent the spread of COVID-19. According to the Hierarchy of Controls, the top of the triangle suggests that wherever possible the risk of infection should be eliminated. Therefore, in-person meetings were to be limited wherever possible, such as, proceedings, affidavits, arguments, waivable offenses and the like. The second part of the triangle is substitution, so the alternatives suggested by the task force were online platforms such as WebEx and tools through the Electronic Compliance and Dismissal system. The last three parts of the triangle are engineering controls, administrative controls and personal protective equipment (PPE). These last three prongs of the triangle are to be employed when substitution is not possible. Engineering controls are designed to isolate employees from hazards, such as the use of plexiglass barriers, hand sanitizing stations and disinfectant. Administrative controls include the actions by the hiring authorities or employees through changes to policies and procedures, such as teleworking, and online trainings. Lastly, PPE is to be used to protect the individual worker through the use of masks/ face coverings, gloves and goggles. Of the recommendations provided by the task force guidelines, some have been put into place at various courthouses and offices as explained by the people I spoke with. Specifically, at one office they were to 1) observe social distancing, 2) have reduced number of people within the courtrooms, 3) screen everyone prior to entering the courthouse (temperature and survey questions from a nurse), 4) conduct in-person meetings and hearing on WebEx and Zoom when possible, 5) reduce unnecessary traffic (such as access to records), 6) place sneeze screens in front of counters at the office, 7) supply and wear masks in common areas, and 8) have hand sanitizer stations available.

What I found most interesting when discussing the courthouse revamp was the power of the judge within their courtroom to decide what parts of the guidelines are needed to be followed. First, the judge can decide whether the case is in-person or virtual; second, the judge sets the precedent for the PPE being worn in their courtroom. For example, if the judge is having a difficult time hearing someone speak the judge can tell the person to remove their face mask. The removal of the face mask could allow the judge and the scribe to better understand what the person is saying; however, this could also put that person and others at risk due to the removal of the mask. I can see how this situation would be tricky to navigate, as to have a fair hearing everyone must be audible, but the instruction to remove PPE in a public space could be unsafe. After hearing this scenario, I then asked what happens for people with certain disabilities, such as people who are hard of hearing, who may rely on lip reading to understand. The response was that these are case-by-case situations and it would be up to the judge in that courtroom to decide how to proceed. The power that the judge has even to decide measures put in place to protect others during a pandemic was eye opening to me, and I believe this could further increase hierarchical powers that already exist within the trial setting.

To visualize the changes within the courtroom, one participant sent me the COVID-19 plan for the Statesville courthouse for both civil and criminal trials (Figure 2). The layout of the courtroom differs for civil versus criminal trials. This document put into perspective the level of detail required to adjust to the new guidelines for COVID-19 within the courtroom and further confirmed the amount of work it will take each courthouse to uphold the guidelines. Each courthouse and courtroom will require a detailed plan such as this to be able to proceed with in-

person trials. These changes will impact the formality of the hearings; the atmosphere of the room; and the dynamics between defendants, lawyers, judges and jury members.

Navigation of Jury Trials during a Pandemic:

Jury trials are a cornerstone of the American Justice system within the civil and criminal courts. There are a substantial number of cases that require the jury to contribute to providing a fair trial. Due to the pandemic the courts must find a way to conduct jury trials that are fair to all participants, balancing the right to a fair and timely trial with the health of all participants. Currently, for state level cases in NC, there are no jury trials happening and the Chief Justice will order when to resume these trials. The resumption of jury trials is one of the largest challenges the courts will face as COVID-19 continues and jury trials continue to pile up as they are postponed. By September 30th, 2020, the courthouses must submit a jury trial protocol to be reviewed. To guide these protocols, the task force has provided minimum requirements for the resumption of jury trials. The first requirement is that every senior resident superior court judge should consult with other local officials such as the COVID-19 coordinator, chief district court judge, clerk of superior court, district attorney, chief public defender, trial court administrator, and the local civil attorney to craft a plan for the resumption of the jury trials within their judicial district.¹ From speaking with a few of these representatives it was clear that communication between these people was occurring, and at a much higher rate than pre-COVID-19. Of the people I spoke with, they saw the increased communication as positive, and hope that this continues even when COVID-19 is under control. Further, it appears that each person that I spoke to was at different parts of the plan development. For example, one person was the lead COVID-19 representative at their courthouse, meaning that they have been heavily involved in getting different parties to communicate, and trying to solidify plans. This coordinator noted how challenging this protocol has been to craft as there are differences between types of jury trials, considerations for how to find jurors, and higher ineligibility of selected jurors due to having to consider preexisting health conditions of the potential juror and their family members.

In helping to understand how jury trials could be run, the COVID-19 coordinator I spoke with shared with me that she had reached out to the District Clerk in Charlotte NC who was involved with the first jury trials at the federal level since COVID-19. Interestingly, only 10 jury trials have occurred in the United States since they were stopped due to COVID-19 and 5 of these trials occurred under the supervision of this District Clerk. I was also fortunate enough to speak to this District Clerk to learn about his experience with jury trials during COVID-19. What was important to him was ensuring that people were still able to receive a fair trial in a timely manner as keeping people in jail or awaiting trial during COVID-19 also increased the risk of contracting the virus.

The District Clerk explained to me, that at the federal level they shut down the court room for jury trials for one month. They then were able to reopen one court room per location (he oversees three courthouses), at a cost of 250,000 per room. To afford the reopening local money was first used, and then congress provided COVID-19 relief to reimburse. He said that most of the credit for their successful re-opening goes to the local and federal Judges with whom he works. Further, he mentioned that they considered the demographic of defendants that typically come through the federal system in their re-opening plan, as they are typically young (20-40 years old) and may be less likely to have pre-existing health conditions and thus a less vulnerable population to COVID-19. I thought that was an interesting observation, as COVID-19 does seem to impact older people with pre-existing health conditions at a higher rate, yet younger

people are not immune. Further within their re-opening plan for Jury trials was that at each of the active courts there would be a nurse and if any of the participants were suspected of COVID-19 or had tested positive recently the trial would be pushed back 14 days (the length of quarantine required for suspected cases). A caveat to this is that access to testing in NC and throughout the States has been difficult to obtain with a slow turnaround time for results, and some cases are asymptomatic. With the 5 jury trials that have occurred under his supervision no one has been a suspected COVID-19 case, and so delaying of the trial for 14 days has not yet occurred. I then inquired if formal policies were leading the jury trial re-opening at the federal level, to which he responded no. He believed that policies would be too rigid and therefore too difficult to implement due to the variety of courthouse, courtrooms, and resources available. For the courts he oversees they try to schedule no more than 10-12 people per case, have only 6 people in a sentencing hearing, and have changed their process for the selection of jury members so that fewer people are required to come into the courthouse for screening. For the first Jury trial there were 26 people selected, and 14 of them acted as the jury for a trial around July 27th, 2020. During this first trial the jury deemed the defendant not guilty. He said that this verdict made all of the preparation and urgency behind restarting jury trials worth it because it reminded people as to why these trials are so critical. If this trial had been delayed the defendant would have been sitting in jail, which is unjust and puts them at risk for COVID-19.

For state level cases the protocols for Jury trials are still being developed. Prior to proceeding with jury trials the senior resident superior court Judge and chief district court Judge must be able to confirm with the Chief Justice that they have 1) reviewed all of the Chief Justices Emergency Directives pretraining to COVID-19 and 2) communicated with the different stakeholders within the justice system as well as local public health officials and concluded that it is reasonable for the district to proceed with jury trials under the submitted plan.¹

Virtual Trials:

Due to the concern of large gatherings contributing to the spread of COVID-19, the courts have had to adjust to virtual court sessions when possible. From speaking to different people, I learned that this has been an expensive transition, a learning process and depends significantly on the Judge. I was fortunate enough to speak to a Judge to learn more about their experience in the new virtual court hearings and how this has impacted their practice. The Directives from the Chief Justice are what this Judge is following within her courtroom, specifically with respect to filing and recommendations for cases. However, as these changes are not deemed permanent there is no policy that is impacting her courtroom. Yet, this Judge was aware of the real-world impacts that COVID-19 is having on the Durham community and has taken this into consideration within her courtroom. Specifically, she is not currently sending anyone to jail, so she is not hearing any child support cases or eviction cases due to financial hardships and the unemployment rate increasing during the pandemic. Further, she is prioritizing cases such as restraining orders, as she is aware of the dangers that can exist and be exacerbated during a pandemic. These are her own choices as a Judge who is using her discretion with regards to civilians enduring a pandemic. This Judge understands the benefits of virtual trials, as they decrease the health risks for all involved and has found there to be more courtroom engagement compared to in-person sessions. She speculated that the increased engagement could be due to increased accessibility to attend the hearing, the comfort of one's own home, and that participants may feel valued by the justice system that is demonstrating compassion for one's

health risks and concerns. Another positive of the virtual transition was the approval of electronic signatures for civil cases, as before these signatures needed to be provided in person.

Limitations to the virtual hearing do exist, and there are few rules guiding the proceedings. Some of the concerns that we discussed included fairness of the trial, documentation filing, and body language. Her largest concern of the virtual hearing was the potential violation of rights, such that the virtual sessions would eliminate attorney-client communication as there is no longer the whispering or notes that can be passed between attorney and client. She adapts by ensuring that she offers time for communication to occur between participants and takes more recesses during her hearings. She said she is just waiting for the day when people start scheduling re-trials due to the unjust or unfairness of WebEx hearings. Another concern was the documentation of the hearings being filed. When in-person, the clerk of court files the documentations, however in virtual court sessions she questions how this can happen and stated that they are still navigating this issue. Lastly, she noted that some parties cannot be seen as their video doesn't work or they do not have access to such technologies. She feels that this impacts her judgement as body language plays a big role in understanding the person's remorse, and respect for the court. Lastly, it was unclear whether virtual trials would remain an option post COVID-19.

Post COVID-19:

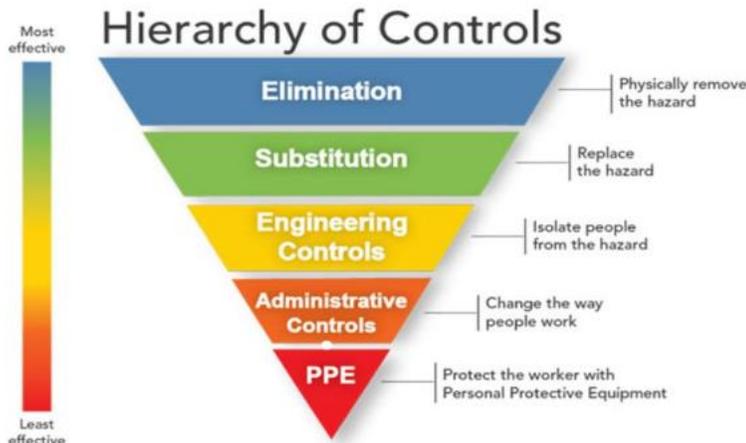
The global pandemic will eventually come to an end and we will arrive to a 'new normal'. I asked the officials that I spoke with if they think that the intersection of health and justice will become more prominent moving forward and if there will be permanent changes made. Most people thought that COVID-19 was an eye-opening experience that increased the use of technology and hygiene within the courts, but that it will not have long lasting effects on the system. This means that policies have not been developed to sustain any changes that have been made to the courthouse, or to sentencing. One person thought that health might be considered in future superior court matters discussing substantial time but that it would not likely be formal, as that would require the passing of a law. Another person said that COVID-19 likely won't be considered during sentencing and that only one case through their courts had been released early due to COVID-19 as she was 8 months pregnant and almost done her sentence. They concluded that the release or sentencing of people based off of COVID-19 concerns could actually cause more people to be without healthcare and could potentially increase the spread of the virus. The predicted lasting changes pertaining to hygiene of the courts included disinfection of the courthouses, increased cleaning, and a stock of PPE available when needed. The increase in technology that will remain post-pandemic are the up-to-date courtrooms and hopefully the increased communication between different levels of the justice system, which have been required during the pandemic.

Conclusions:

In conclusion, COVID-19 has added a unique intersection between the justice system and public health; the judicial branches must now navigate how to conduct law as safely and fairly as possible. The court system has taken action to address the immediate concerns of COVID-19 by implementing strategies to reduce in-person meetings, and to adhere to the public health rules. From speaking with all of these people by phone, I was able to better understand how COVID-19 has impacted their workplace and their responsibilities. However, it appears that the intersection between health and the judicial branches caused by COVID-19 may only be temporary as

legislation is unlikely, however, courtroom policies may be adjusted at the discretion of the judges.

Figures:



Source: <https://www.cdc.gov/niosh/topics/hierarchy/default.html>

Figure 1. The Hierarchy of Control from the CDC. ¹



Figure 2. Civil and criminal trial courtroom layouts in the Statesville courthouse. (From the District Clerk).

References:

1. NCAOC-COVID-19-Field-Guidance-07-29-2020-update.pdf.