

A photograph of a courtroom. In the foreground, a wooden jury box with glass panels is visible. In the background, there is a brick wall on the left with a flag. To the right of the brick wall is a framed portrait of a man. Further right is a doorway with a red 'EXIT' sign above it. The text 'Jury Trials in a Pandemic: What you need to know' is overlaid in white serif font on the left side of the image.

# Jury Trials in a Pandemic: What you need to know

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# The Pandora's Box Provisions

## Texas Government Code 418.016(a)

The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.

## Texas Government Code 22.0035(b)

Notwithstanding any other statute, the supreme court may modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor. An order under this section may not extend for more than 90 days from the date the order was signed unless renewed by the chief justice of the supreme court.



# Evolution of Supreme Court Emergency Orders

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FROM UH OH TO *UH OH*

# Texas Supreme Court Orders



# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 20-9059

## TWELFTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

### ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order, except for paragraph 9, is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The following Emergency Orders are renewed as clarified and amended: the First Emergency Order (Misc. Dkt. No. 20-9042 and Court of Criminal Appeals of Texas Misc. Dkt. No. 20-007), as amended by the Third Emergency Order (Misc. Dkt. No. 20-9044 and Court of Criminal Appeals of Texas Misc. Dkt. No. 20-008) and the Eighth Emergency Order (Misc. Dkt. No. 20-9051); the Second Emergency Order (Misc. Dkt. No. 20-9043); the Fifth Emergency Order (Misc. Dkt. No. 20-9046); the Seventh Emergency Order (Misc. Dkt. No. 20-9050); the Ninth Emergency Order (Misc. Dkt. No. 20-9052); and the Eleventh Emergency Order (Misc. Dkt. No. 20-9055).

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. Modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, specifically including those in Section 263.401 of the Family Code and in all proceedings under Subtitle E, Title 5, of the Family Code, for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted;

b. Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. Modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, specifically including those in Section 263.401 of the Family Code and in all proceedings under Subtitle E, Title 5, of the Family Code, for a stated period ending no later than 30 days after the Governor’s state of disaster has been lifted;

a. No trial, hearing, or other proceeding may be conducted, and all deadlines are tolled, until after May 18, 2020;

**April 27, 2020**

Emergency Order 12  
April 27, 2020

Allowed for remote  
participation by anyone  
involved in a court  
proceeding

No trials

## IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 20-9071

### SEVENTEENTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The Twelfth Emergency Order Regarding the COVID-19 State of Disaster (Misc. Dkt. No. 20-9059) issued April 27, 2020, Paragraphs 3, 4, 5, 6, and 9, are renewed as amended.

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:

a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;

b. in all proceedings under Subtitle E, Title 5 of the Family Code, specifically including but not limited to Section 263.401(b):

(i) modify or suspend a deadline or procedure—whether imposed by statute, rule, or order—for a stated period not to exceed 180 days;

(ii) extend the dismissal date for any case previously retained on the court's docket for an additional period not to exceed 180 days from the date of this Order.

c. Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court

5. Existing grand juries may meet remotely or in-person as long as adequate social distancing and other restrictions and precautions are taken to ensure the health and safety of court staff, parties, attorneys, jurors, and the public. Courts should consider extending the term of a grand jury under Section 24.0125 of the Texas Government Code and reassembling discharged grand juries under Article 19.41 of the Texas Code of Criminal Procedure.

8. A jury trial conducted as part of the limited number of jury trials permitted prior to August 1 must:

a. be at the request of the judge presiding over the case;

b. ensure adequate social distancing and other restrictions and precautions are taken to ensure the health and safety of court staff, parties, attorneys, jurors, and the public;

c. require the consent of all parties to the case except in a proceeding which is non-binding, in which case the consent of the parties is not required;

d. take all reasonable steps to protect the parties' constitutional and statutory rights;

e. require the admonishment of petit jurors as appropriate to ensure that proper attention is given by each juror and that outside influence is removed; and

f. permit the Office of Court Administration to observe the processes used during the proceeding in order for the Office of Court Administration to prepare its report to the Court and to develop best practices for other courts' use.

May 26, 2020

Emergency Order 17

May 26, 2020

Allowed for remote  
participation by anyone  
involved in a court  
proceeding

Trials by consent only



# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 20-9080

## EIGHTEENTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

### ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The Seventeenth Emergency Order Regarding the COVID-19 State of Disaster (Misc. Dkt. No. 20-9071) issued May 26, 2020, paragraphs 3-12, are renewed as amended.

3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020;

b. in all proceedings under Subtitle E, Title 5 of the Family Code:

(i) extend the initial dismissal date as calculated under Section 263.401(a) only as provided by Section 263.401(b) or (b-1);

(ii) for any case previously retained on the court’s docket pursuant to Section 263.401(b) or (b-1), or for any case whose dismissal date was previously modified under an Emergency Order of this Court related to COVID-19, extend the dismissal for an additional period not to exceed 180 days from the date of this Order;

8. A jury trial conducted as part of the limited number of jury trials permitted prior to September 1 must:

a. be at the request of the judge presiding over the case;

b. ensure adequate social distancing and other restrictions and precautions are taken to ensure the health and safety of court staff, parties, attorneys, jurors, and the public;

c. take all reasonable steps to protect the parties’ constitutional and statutory rights;

d. require the admonishment of petit jurors as appropriate to ensure that proper attention is given by each juror and that outside influence is removed; and

e. permit the Office of Court Administration to observe the processes used during the proceeding in order for the Office of Court Administration to prepare its report to the Court and to develop best practices for other courts’ use.

**June 29, 2020**

Emergency Order 17  
June 29, 2020

Allowed for remote  
participation by anyone  
involved in a court proceeding

Trials permitted,  
no consent required

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 20-9112

## TWENTY-SIXTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

### ORDERED that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent:

a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than December 1, 2020;

b. in all proceedings under Subtitle E, Title 5 of the Family Code:

(i) extend the initial dismissal date as calculated under Section 263.401(a) only as provided by Section 263.401(b) or (b-1);

(ii) for any case previously retained on the court’s docket pursuant to Section 263.401(b) or (b-1), or for any case whose dismissal date was previously modified under an Emergency Order of this Court related to COVID-19, extend the dismissal for an additional period not to exceed 180 days from the date of this Order;

c. except as this Order provides otherwise, allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a

a. the local administrative district judge for the county in which the court is located has, before the jury proceeding and after conferring with the judges in the county and the local public health authority, submitted a plan for conducting jury proceedings consistent with the Guidance issued by the Office of Court Administration for conducting jury proceedings;

b. to assist with coordination of local resources and to manage capacity issues, the court has obtained prior approval for that jury proceeding from the local administrative district judge and Regional Presiding Judge;

c. not more than five days before the jury proceeding, the local administrative district judge has consulted the local public health authority and verified that local health conditions and plan precautions are appropriate for the jury proceeding to proceed;

d. the court has considered on the record any objection or motion related to proceeding with the jury proceeding at least seven days before the jury proceeding or as soon as practicable if the objection or motion is made or filed within seven days of the jury proceeding; and

e. the court has established communication protocols to ensure that no court participants have tested positive for COVID-19 within the previous 30 days, currently have symptoms of COVID-19, or have had recent known exposure to COVID-19.

September 18, 2020

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 20-9112

## TWENTY-SIXTH EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER

**ORDERED** that:

1. Governor Abbott has declared a state of disaster in all 254 counties in the State of Texas in response to the imminent threat of the COVID-19 pandemic. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public without a participant’s consent:

a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than December 1, 2020;

b. in all proceedings under Subtitle E, Title 5 of the Family Code:

(i) extend the initial dismissal date as calculated under Section 263.401(a) only as provided by Section 263.401(b) or (b-1);

(ii) for any case previously retained on the court’s docket pursuant to Section 263.401(b) or (b-1), or for any case whose dismissal date was previously modified under an Emergency Order of this Court related to COVID-19, extend the dismissal for an additional period not to exceed 180 days from the date of this Order;

c. except as this Order provides otherwise, allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a

7. In criminal cases where confinement in jail or prison is a potential punishment, remote jury proceedings must be conducted without appropriate waivers and consent obtained on the record from the defendant and prosecutor. In all other cases, including cases in justice and municipal courts, remote jury proceedings must not be conducted unless the court has complied with paragraph 6(d).

**September 18, 2020**

Emergency Order 26  
September 18, 2020

No zoom jury trials unless  
everyone consents

Trials permitted,  
no consent required,  
but must obtain approvals

# *Ex parte Sheffield*

No. 07-20-00216-CR

2020 WL 5581365

(Tex. App.—Amarillo Sept. 17, 2020)

The declaration of a state of disaster may impact the judiciary and its disposition of cases pending before it. Nonetheless, “[t]he Constitution is not suspended when the government declares” such a disaster. *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020). Nor has anyone cited us (or have we discovered) authority permitting the “Office of Court Administration,” the “[Presiding Judge] of the Texas Court of Criminal Appeals,” or the “Chief Justice of the Texas Supreme Court” to unilaterally suspend the Constitution. That the Supreme Court deems this true is exemplified by its caveat in paragraph 2 of its First Emergency Order subjecting the restriction imposed therein to “constitutional limitations.”

The background features a complex geometric design. It consists of several overlapping, angular shapes in a vibrant orange color. Interspersed among these are patterns of thin, parallel grey lines that form a sense of depth and movement, resembling architectural elements or data paths. The overall composition is dynamic and modern.

# Trials During COVID

IN PERSON AND ONLINE

# Two-Headed Problem



## IN PERSON TRIALS



## ZOOM TRIALS







# In-Person Trials

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<https://www.youtube.com/watch?v=dyC9r1tY-48>



# Zoom Trials

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<https://www.fox7austin.com/video/839547>



# Problems with Trials During COVID

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FOR ONE, THEY MAKE JOHN ADAMS TURN OVER IN HIS GRAVE

## JP5 Jury Check In: Jury Duty Justice of the Peace, Pct. 5



# Problems with Zoom Trials

It's "Virtually" Due Process

# Zoom Trials: Jury Selection

## Voir Dire

Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

*Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992)

# Zoom Trials: The Rule

## Witness Sequestration



At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own . . .

TEX. R. EVID. 614

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- No way to monitor witnesses at remote location
  - No way to monitor who is viewing the live stream of the trial

# Zoom Trials: Evidence Presentation The Constitutional Angle

## Right to Compulsory Process

Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19 (1967)

# Zoom Trials: Evidence Presentation The Constitutional Angle

## Right to Confrontation

the “literal right to confront the witness at the time of trial” is at “the core” of the Confrontation Clause.

[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.

*Coy v. Iowa*, 487 U.S. 1012, 1016-17 (1988)

- 
- Attorneys cannot observe witnesses or jurors
  - Jurors may not be able to observe witness’s demeanor



A photograph of a courtroom. The room features wood-paneled walls and a wooden witness stand with a glass enclosure. In the foreground, there is a wooden desk with a computer monitor and keyboard. A black office chair is positioned in front of the desk. The text "Problems with In-Person Trials" is overlaid on the image in white, serif font. Below the title is a horizontal line, followed by the text "THERE'S A PANDEMIC, HOW IS THIS NOT OBVIOUS" in a smaller, white, sans-serif font.

# Problems with In-Person Trials

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THERE'S A PANDEMIC,  
HOW IS THIS NOT OBVIOUS

# In Person Trials: Attorney-Client Relationship

## Pretrial Preparation

### **Pretrial Consultation**

- Case review with your client
- Assessment of your client's likely demeanor on the stand
- Make sure your client understands the risk of exposure for trial participants

## Trial Interaction

### **Defense Attorney's Are Not Immune**

- Preexisting conditions of the attorneys or their close family members

### **Interacting with the Client in the Courtroom**

- Communicating with the defense team
- Communicating with the client

TRPC 1.01 – Diligent Representation  
TRPC 2.01 – Advisor

# In Person Trials: Trial Procedure

## Trial

- What are the trial protocols
  - Where will voir dire take place and is it convenient to the populace
- How will you present and publish evidence
- How will you, your client, the prosecutor, and the witnesses interact with the jury
  - Wearing masks, socially distanced, via closed circuit tv, other methods?
- Discussions at the bench

TRPC 1.01 – Diligent Representation

# In Person Trials: Jury

## Fair Cross-Section



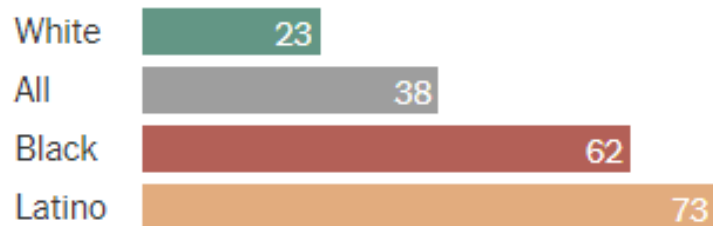
The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community.

*Berghuis v. Smith*, 559 U.S. 314, 319 (2010).

## The New York Times

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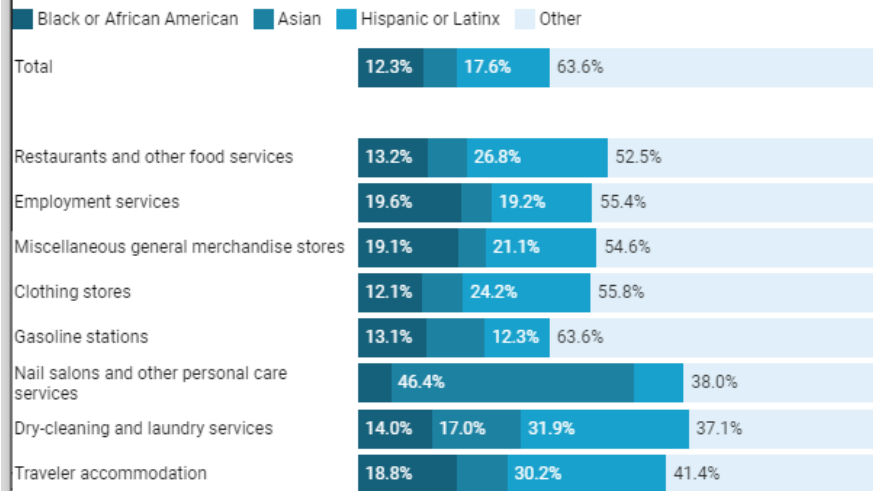
### Coronavirus cases per 10,000 people



The Fullest Look Yet at the  
Racial Inequity of Coronavirus

## Workers of color are overrepresented in many of the low-wage jobs that are most vulnerable to potential layoffs during the coronavirus pandemic

Share of total employed people over 16 years old by detailed industry, race, and ethnicity, 2019



Hover or click on bars to see values.

Chart: Center for American Progress

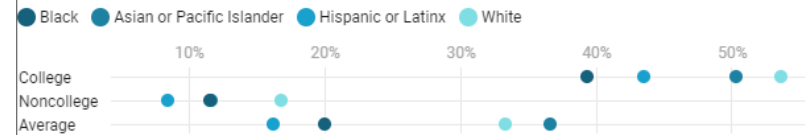
Source: U.S. Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey: Employed persons by detailed sex, race, and Hispanic or Latino ethnicity," available at <https://www.bls.gov/cps/cpsaat18.htm> (last accessed April 2020); U.S. Private Sector Job Quality Index, "Statement from the U.S. Private Sector Job Quality Index (JQI) Team on Vulnerabilities of Jobs in Certain Sector: Covid-19 Economic Shutdown," available at

[https://d3n8a8pro7vnm.cloudfront.net/prosperousamerica/pages/5561/attachments/original/1584703152/JQI\\_Team\\_Statement\\_19\\_Economic\\_Shutdown\\_Job\\_Impact\\_031920.pdf?1584703152](https://d3n8a8pro7vnm.cloudfront.net/prosperousamerica/pages/5561/attachments/original/1584703152/JQI_Team_Statement_19_Economic_Shutdown_Job_Impact_031920.pdf?1584703152) (last accessed April 2020).

Get the data

## Workers of color are less likely to be able to telework

Share of workers by race who could work at home from 2017 to 2018



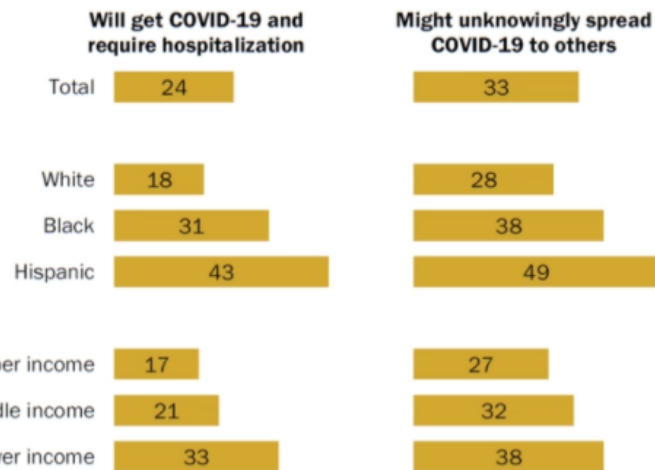
Hover or click on dots to see values.

Note: The estimate for noncollege Asian or Pacific Islander workers has a relative standard error of greater than 25 percent

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## Racial and income differences in concerns over contracting COVID-19, spreading it to others

*% who say they are **very** concerned that they ...*



Notes: Whites and blacks include only those who are not Hispanic; Hispanics are of any race. Family incomes are based on 2018 earnings and adjusted for differences in purchasing power by geographic region and for household size.

Source: Survey of U.S. adults conducted April 7-12, 2020.

**PEW RESEARCH CENTER**

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BUSINESS

# Harris County juries projected to be whiter, more conservative as pandemic persists

By Mark Curriden, The Texas Lawbook | July 2, 2020 | Updated: July 3, 2020 5:49 p.m.

Many potential jurors in Houston and Dallas say they wouldn't show up if called for jury duty because of the coronavirus pandemic, and those that would are likely to be white and more conservative, according to a new study.

A survey by the Tillotson Law Firm of 650 potential jurors in Houston and Dallas found that more than two-thirds said they either would refuse to show up for jury duty if called or would want a significant amount of assurance that their personal health would not be at risk before they would agree to attend.



# In Person Trials: Right to Confrontation

## Right to Confrontation

The Sixth Amendment secures to criminal defendants...the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Mattox v. United States*, 156 U.S. 237, 242 (1896)

Stu's Views

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# In Person Trials: But Wait, There's More

- Right to Compulsory Process, to Present Evidence, and to Testify
- Right to be Present and to be Judged Without the Effect of a Prejudicial Face Covering
- Right to Trial by an Impartial Jury and an Uncoerced Verdict
- Right to be Free of Coercive Pressure to Plead Guilty
- Right to the Exercise of Reasonable Care Toward the Health and Safety of Persons Confined by State Action

# In Person Trials: Other Practical Considerations

- File your motion for continuance
- Has your trial been approved by the OCA?  
<https://www.txcourts.gov/court-coronavirus-information/approved-jury-trials/>
- Your client's health
  - Has he been tested?
  - Has he been quarantined since testing?
  - What's the situation at the jail like?
    - [https://www.tcjs.state.tx.us/wp-content/uploads/2020/09/TCJS\\_COVID\\_Report.pdf](https://www.tcjs.state.tx.us/wp-content/uploads/2020/09/TCJS_COVID_Report.pdf)
- Check the jury summons
- Courtroom
  - Get it on the record
- Motion to challenge the array
- Make sure everyone can see everyone



# Resources

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Motions and Forms regarding trial by zoom and trial in person:

<https://tcdla.com/TCDLA/COVID.aspx>

List of trials currently scheduled:

<http://txcourts.gov/court-coronavirus-information/approved-jury-trials/>

OCA's discussion of Travis County zoom jury trial:

<https://www.youtube.com/watch?v=Eg-xvT8wmLw&t=20s>



# Questions

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