PODCAST NOTES - COVID-19 EPISODE

*[Tain- I wrote out the intro again—feel free to go off script as much as you want. I will follow. You are in italics, I am in plain type]*

* Welcome everyone to another session of The Good Judge-Ment Podcast. I am Wade Padgett.
* *And I am Tain Kell.*
* In the middle of this unprecedented Judicial Emergency, we are still having to social distance. As we discussed in our last episode, Tain and I are not at the podcast studio at UGA but, instead, are the beneficiaries of a grant from the State Justice Institute that allowed us to obtain mobile podcasting equipment. So I am in Columbia County.
* *And I am in Cobb County. We hope we have improved the connection from last week so the recording quality is also better. Shout out to Stephen Turner and Kevin Holder for helping us get these episodes out quickly. We could not do it without them.*
* That’s right – Stephen really did fix it in the mix. Now Tain, in our last episode, we discussed how to handle “essential” matters that might arise during the judicial emergency. And we talked about some of the realities that our colleagues across Georgia are facing in several different classes of court.
* *But the reality is that this Judicial Emergency is going to end. We have been told to expect that it may extend beyond the current end-date of May 13th but it is pretty clear that the judicial emergency will end in phases. While each class of court is facing different hurdles in how they restart, we wanted to dedicate this episode to thinking aloud how we might handle jury trials when we are allowed to begin trying cases again. Whenever that is, we have to handle jury trials in light of everyone’s new reality of social distancing. So today are going to seriously kick around ideas for how we might conduct a jury trial when the Judicial Emergency is technically over but the reality of social distancing remains in effect.*
* I had the opportunity to be a part of the most recent Judicial Council meeting on April 24th. We learned that this Judicial Emergency is going to end but there may be a fairly immediate resumption of some activities and a delay to others. It was clear that the last thing we are going to resume are jury trials.
* *But the truth is that we are going to have to resume while still keeping in mind that we cannot have 12 people in the jury box. We are not going to be able to have 50 – 60 people in a courtroom to conduct general voir dire.*
* We still have to comply with the legal principle of “open courtrooms” but, at the same time, get to work on the trials that have been on hold during the Judicial Emergency. In short, we are going to have to innovate and think outside of the box.
* *Yeah – look what we have been able to do in the 6 weeks since the Judicial Emergency began. We are conducting court hearings via video; changing where people stand, how they handle paper. Those were innovations that some of us were reluctant to do. Frankly, we did not know how to do them and still comply with the law. But with the assistance of lawyers, courtroom staff and our colleagues, we have been able to keep the court open and in some level of functionality.*
* That’s true. But when we think about jury trials we have to consider another group – the jurors. Potential jurors have been told to shelter in place for a long time now and suddenly we are going to go from “no contact” to the rather close contact of a jury box or jury room. In Augusta, we have already been contacted by people who received a juror summons for jury weeks we had to cancel because of the Emergency. Several of those potential jurors expressed real concern about what type of exposure they might be facing if they served on a jury.
* *If we work hard to develop some strategies that will reassure jurors that we have thought of them in planning our “re-opening” of jury trials, we will have a far better outcome. So today’s episode is designed to present ideas and potential issues. Nobody has “approved” our ideas but we think they can comply with the law and also address social distancing concerns.*
* Recognize that everyone is struggling to apply old law to the new reality.
* But our truth is pretty plain: the way we did it before is going to have to change.
  + Judges are not known for their willingness to change procedure
  + But whether we want to or not, we are going to have to consider changes
* The Judicial Emergency did not change the law, only some deadlines and time limits.
* So the constitutional law and statutory law will remain in place and we are going to have to work within that framework. At the same time, we are under a duty protect the jurors/lawyers/courtroom staff/parties from undue exposure and personal contact.
* Let’s look at a typical jury trial:
  + - Summon jurors for the panel. Handle juror excuses.
    - Go through voir dire and pick the jury
    - Try the case
    - Jury deliberations
    - Verdict
* ANY SCREENING OF PEOPLE ENTERING COURTHOUSE?
* Is anyone screening people who come into the courthouse for fever, exposure to others who have been diagnosed with COVID-19, etc.?
  + Do you know?
  + Do you want to?
  + If not, what risk are you exposing others to?
  + Should your juror questionnaire include such questions?
* SUMMONING JURORS
* Let’s start at the beginning. Do we need to change the number of jurors we summon for a potential trial?
  + I think that most circuits have an approximate 50% “show-up” rate before the pandemic.
  + Look at what we need. Each party has 9 strikes (assuming 1 defendant). O.C.G.A. §15-12-165. You have to have a jury of 12. So there must be 30 qualified jurors. O.C.G.A. § 15-12-160.1.
    - I used to call in 42 jurors if I wanted an alternate or two. What about you?
  + So if we assume that 50% response rate, we needed to summon 100 potential jurors in hopes of having 50 appear. Then we could use 42 for general voir dire, keeping a few in reserve
  + Remember you are going to have to have 3 qualified jurors for each alternate juror you want to have (§15-12-168 says judge’s discretion)
  + If our response rate is now going to be less than 50%.....
* JUROR EXCUSES
* What about jurors who ask to be excused because they are concerned about close contact with others? What about jurors who were furloughed or laid off during the shut-down and are just starting to earn a living again when they get hit with a jury summons? What about parents who have school-aged children who are now out of school for an extended period of time?
  + O.C.G.A. §15-12-1.1 These are the “existing” excuses:
    - Jurors whose work is necessary to public health, safety, or good order
      * Doctors, nurses, Paramedics, etc.
    - Full-time college student
      * Well, school is out and has been for a minute – I guess that’s good
    - Primary caregiver with child age 6 or younger
    - Home school teacher
    - Primary caregiver for a person who has physical or cognitive limitations
    - Person aged 70 or older
      * We are repeatedly told this might be the most vulnerable population
    - Military member or spouse on “ordered military duty” [defined in statute]
      * Would include any National Guard members who were activated to help with pandemic.
* Voir Dire
  + Juror questionnaires for the basic background data from jurors
    - Send them out ahead of time and hope for response via mail or simply have the jurors complete them upon arrival?
  + Consider having lawyers submit their proposed voir dire questions in advance of trial to eliminate improper questions. *Wilkins v. State*, 246 Ga. App. 667 (2000); *Allen v. State*, 239 Ga. App. 899 (1999).
  + Using juror numbers instead of names
  + Probably are going to need to handle voir dire more like it is done in death penalty cases
    - During general voir dire, let lawyers ask questions and if a juror responds, tell them to hold follow-up until individual voir dire
  + The put the jurors in panels of 10 or 12 and conduct individual voir dire (don’t wait for a request under O.C.G.A. §15-12-131)
    - This is obviously going to take longer than normal – but it is probably the responsible thing to do from a juror’s perspective
  + Assign each juror to a panel. Tell panel 1 to remain in the room. Send the remaining panels to the jury assembly area (or another courtroom/room in the courthouse).
    - Maybe even allow some panels to take an early lunch and be back at an appointed time
  + The allow individual voir dire by panels – but allow them to remain in gallery instead of placing them in the jury box.
* Still not comfortable with putting the jurors in the jury box – even with a couple of extra chairs, they are too close to one another
  + Use the gallery for voir dire – and even during the trial itself? [discuss later]
* If the judge wants to conduct general voir dire in the larger group, consider using a larger room (if you have a juror assembly room or vacant courtroom)
  + - Using an existing room in the courthouse will obviously be easier than trying to designate some other building like the civic center or a high school gym/lunch room as a courtroom requires work – and may not be a possibility
* [*WAY* OUTSIDE OF THE BOX CONVERSATION]
  + I asked Justice Melton, and Justice Nahmias got involved, if we could conduct voir dire via video. That answer is being pondered as we speak – literally
    - But think how you might be able to leave the jurors in the jury assembly room for general voir dire – with space between them
    - Maybe even for individual voir dire by panels
    - You start a “meeting” via Zoom, Webex, Microsoft Teams, or other software with a computer with a web camera in the jury assembly room and one in the courtroom
    - The jurors who respond to a question stand and their juror number is noted by the lawyers
      * (I am suggesting stand instead of hand raising because easier to see and not overlook anyone)
* DESIGNATING ANOTHER LOCATION A “COURTHOUSE”
* See O.C.G.A. §15-6-18 and *Osborn v. State*, 310 Ga. App. 856 (2011). In *Osborn*, a bomb threat was made at the courthouse so the judge conducted voir dire at a local church. The defendant objected. On appeal, it was noted that an alternate location can only be used where the population of the county is 50,000 or less and where the governing authority (commissioners) designate the other location as a temporary courthouse. The statute formerly required consent of defendant. No longer a part of statute but the “other location” must be owned or leased by the county. See *Goodman v. State*, 293 Ga. 80 (2013) (Supreme Court found that because courthouse was under renovation and commissioners designated the county senior center as a “courthouse,” the fact that the court did not get defendant’s consent was harmless error); *Dubose v. State*, 294 Ga. 579 (2014) (defendant consented but commissioners did not make the designation – harmless error).
  + - * But the statute does allow for the “governing authority” to designate another county-owned or leased building as an “annex” or “satellite” courthouse.
* CHALLENGES OF THE OPEN COURTROOM REQUIREMENT
* Start this analysis with the decision in *Jackson v. State*, 339 Ga. App. 313 (2016) authored by (now Justice) Peterson.
* So consider this scenario – the judge needs to use all or a large part of the gallery to conduct voir dire. But there are friends, family, public, media – or any one of these groups – who want to observe the proceedings. What to do?
  + Law is clear that judges have power to control the proceedings – but cannot do so in a way that interferes with the First Amendment rights of parties or the media. *Csehy v. State*, 346 Ga. App. 747 (2018).
  + The court’s discretion in controlling proceedings does not extend to allow infringement upon the defendant’s 6th Amendment rights to a public trial. *Jackson v. State*, 339 Ga. App. 313 (2016). Georgia’s constitution grants even more rights to a public trial than does the 6th Amendment. *Purvis v. State*, 288 Ga. 865, 869 (2011).
  + Judges also have great discretion in the manner in which voir dire is conducted. *Wilkins v. State*, 246 Ga. App. 667 (2000). But voir dire is a “critical stage” of the trial.
* Consider using closed circuit broadcast of voir dire in another courtroom. Or even live streaming the voir dire on one of several different platforms.
* If you elect to do this, ensure you still are able to maintain sequestration of witnesses and they are not watching the trial while they are under sequestration
* DURING THE TRIAL
* While we normally put jury in the jury box, no requirement that we do so
  + What if the jury box was the first row of the gallery?
    - While it would be strange for the lawyers to turn their back to the judge during argument, there is nothing illegal or improper about that
  + Handling exhibits – this issue might arise during the trial and during jury deliberations
    - Make copies of the paper/photo exhibits? (does that even solve the potential problem?)
* JURY DELIBERATION
* Do you send the exhibits out with the jury? Does it really solve any issues if you make copies of them?
* This probably raises one of the biggest issues we are going to be expected to solve – PPE
* Personal Protective Equipment (“PPE”) is difficult for hospitals to obtain – so is going to be difficult for us to obtain
  + Usually consists of masks and gloves
  + Your county may have a stash somewhere as part of emergency management
  + But this is something we probably need to have people trying to obtain now, in case there is a 4 – 6 week wait
* MULTIPLE JURY TRIALS AT THE SAME TIME
  + While we might be able to get through a single jury trial under these new conditions, the truth of the matter is that you only have one jury assembly room or similar room
  + And if you have more than one judge attempting to have a jury trial during the week, you cannot use the jury assembly room as your jury deliberation room if it is being used by another panel to select the jury
  + If another judge is using that courtroom that was vacant when you started the trial, you cannot use it as a makeshift jury room
  + Do you have a grand jury room that is not being used?
  + Consider the size of the room and the available distance between 12 or 13 jurors if you put them in that room. Not suggesting you walk around with a ruler or yardstick but can it be sufficient?
* OTHER TYPES OF HEARINGS
  + I recognize we told you we were dedicating this episode to jury trials, but think about how you can handle other types of trials once we are allowed to start working again
    - The video hearing option has worked well for me. I have conducted full domestic relations hearings, held 404(b) hearings, conducted hearings on Motions for Summary Judgment – all by video
    - We discussed this in our last episode but have the parties mark any potential exhibits and share them via e-mail in advance of the hearing.
    - That has really been the only thing I needed to work around and it has proven rather successful.
* Wrap Up
  + Things have changed. That is a “done deal”
  + While you may not have access to some of the “jury assembly rooms” or other things we discussed today, please let this episode get you thinking about options in this new world we all face
  + It was suggested that we might not be able to return to “business as usual” for several years or at least until an effective vaccine is developed
  + And if there is a reoccurrence in the Fall, as some have predicted, we need to be better prepared than we were this time
  + Get with your colleagues in your circuit and consider your options, given the backlog everyone is experiencing, your facilities and how you might develop new solutions
    - Understand that Magistrate Court, Probate Court, Juvenile Court and State Court have all been under these same restrictions during the Judicial Emergency
      * So they are going to be looking to schedule more court than usual as well
* If you have other ideas or see problems with those we have discussed, please reach out to us at [goodjudgepod@gmail.com](mailto:goodjudgepod@gmail.com) and tell us about them. We would love to share this platform with others who are trying to find solutions.