

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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As in-person jury trials sputter forward, we set forth here some potential pandemic-related challenges for you to consider making in the course of your trial, depending on the circumstances of your case.

Jury-related

Is the court applying a blanket-rule excusing in pre-voir dire screening any prospective juror with a pandemic-related concern, without assessing the nature and scope of the individual concern?

Argue that such categorical exclusion instead of rendering individual determinations as to juror hardship violated your client's constitutional and statutory rights to a jury selected in accordance with the law.

The pandemic has hit older people and Black and Brown communities disproportionately hard, in terms both of health and economic suffering. Is the court excusing for pandemic-related hardship reasons, at a disproportionate rate, Black and Brown and/or people over 65 who report for service?¹

Argue that your client is being deprived of a jury of his or her peers as guaranteed by the Sixth Amendment. To establish the disproportionate excusals, use a similar approach to establishing a numbers-based prima facie case in the *Batson* context: e.g., of the 20 Black and Brown prospective jurors in the pool, 15 of those jurors, or 75% were struck on hardship grounds, even though Black and Brown jurors made up only 1/3, or 33%, of the 60-juror pool.

If the court follows a procedure whereby it seeks your consent before excusing individual jurors, you can oppose for the reasons stated (outside the juror's hearing of course).

¹ We do not here recommend challenging the cross-section of the jury pool. This is a complex, statistics-based challenge that, according to NYU's Civil Jury Project, would be unlikely to succeed with respect to in-person trials. See Civil Jury Project at NYU School of Law, *The Law Regarding Fair Cross Section Guarantee* (Part 1), available at <https://civiljuryproject.law.nyu.edu/i-the-law-regarding-the-fair-cross-section-guarantee/> and *The Challenge of Achieving a Representative Cross-Section of the Community for Jury Trials during the Pandemic* (Part 2), available at <https://civiljuryproject.law.nyu.edu/3200-2/>

Are you concerned that jurors, once selected, will be distracted or rush to verdict for pandemic-related reasons? Health, work, or family concerns?

Ask the court for additional time to probe prospective jurors' attitudes and concerns about Covid because of the relevance of these concerns to the jurors' ability to serve. Cite CPL § 270.15 (individual attorney voir dire); *People v. Steward*, 17 N.Y.3d 104 (2011) (abuse of discretion under circumstances of case to restrict counsel to five minutes per round). Object if denied or unduly curtailed.

Bear in mind and cite where relevant Judiciary Act § 2-b, which authorizes courts "to devise new and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."

Are prospective jurors expressing pandemic-related concerns that do not rise to a for-cause challenge but lead you to exercise peremptories you would not otherwise be exercising?

Ask the court to grant you additional peremptory challenges. The court has authority to do this. See *People v. Hines*, 109 A.D.2d 893 (2d Dep't 1985).

Are prospective jurors masking during voir dire?

Outside the jury's presence, argue that masking impedes your ability to effectively voir dire in violation of your client's statutory and constitutional rights to the selection of an impartial jury because you cannot fully assess a juror's candor. *Obviously a sensitive issue raising health concerns. Suggest plastic face shields or clear masks as an alternative.*

Are you losing selected and sworn jurors due to positive Covid tests or exposure?

Argue that your client is being denied the jury of his or her choice, in violation of the Sixth Amendment.

Confrontation

Are witnesses masking?

Argue that masking violates your client's right to confrontation under the state constitution and Sixth Amendment. Again, to address safety concerns, propose clear masks or face shields if a viable alternative.

Counsel and Communication with Client

Have you had difficulty meeting with your incarcerated client due to dangerous/appalling conditions and Covid outbreaks at Rikers? Have you had difficulty communicating via video-conference?

Argue that you are unable to provide effective representation and your client has been denied the

assistance of counsel because you have not been able to meet and consult with your client due to Covid-related issues.

Has Covid necessitated a different courtroom configuration that impedes your ability to communicate with your client during trial/Is masking affecting your ability to communicate with your client and the court?

Argue that these circumstances impede your ability to provide effective representation and violate your client's right to assistance of counsel. Try to provide specifics - are you able to consult with your client about picking jurors? Questioning witnesses?

Conduct of Trial

Is the trial being interrupted because of court staff shortages or for other Covid-related reasons?

Argue that the delay violates your client's right to the "orderly, fair, and prompt progress" of their trial. *People v. Page*, 72 N.Y.2d 69, 73 (1988).

Is the court limiting or precluding sidebars?

Object that this impacts your ability to provide effective representation. Sidebars need to happen during the trial, with a court reporter present.

Public Trial

Is the courtroom closed to the public? Are there limits on who can attend?

Argue that, unless all proceedings are live-streamed AND there is a mechanism for a screen to display that members of the public are watching (the real point of a public trial), such restrictions violate your client's constitutional right to a public trial. See Waller v. Georgia, 467 U.S. 39 (1984).

Specifically argue that your client's family must be permitted to attend in person. See People v. Nieves, 90 N.Y.2d 426 (1997).

Plea bargaining

Are the offers unreasonable?

Make a record that the District Attorney is using the desperate conditions at Rikers to leverage a harsher plea than is reasonable.

Has your client agreed to a plea because of conditions at Rikers?

Make a record to that effect, but be prepared for the court to reject the plea as involuntary.

For these plea-related claims, you can cite Justice Newbauer's writ grant citing squalid and dangerous conditions at Rikers in People ex. rel Burse v. Schiraldi, 2021 WL 606159 (Dec. 22, 2021).

Wishing all our friends, colleagues, and clients a safe and healthy New Year!

