In the Supreme Court of the State of Idaho

RE: EMERGENCY ORDER REGARDING COURT SERVICES

Order
February 17, 2022

This Court has previously issued a series of emergency orders intended to address the substantial health and safety risks faced by the public accessing the courts, court personnel, and participants in court proceedings caused by the community spread of the coronavirus. On November 29, 2021, this Court issued an amended administrative order regarding procedures to be followed if a county was subject to crisis standards of care as determined by the Idaho Department of Health and Welfare or if the seven-day moving average incident rate of confirmed or presumed cases of COVID-19 was 25 or greater per 100,000 population.

As of February 17, 2022, no counties in Idaho are currently subject to crisis standards of care and incident rates are on a downward trend across the state. Additionally, as of that same date, the Idaho Department of Health and Welfare reports there is currently a backlog of 29,800 COVID-19 tests which have not been processed, rendering the seven-day moving average incident rates incomplete. Therefore, we have concluded that further modification of our safety protocols is warranted. In order to begin the process of returning the courts to regular operation, while continuing to foster public safety, court operations shall be governed by the following rules until further order of this Court.

1. **Weekly Publication of COVID-19 Incidence Rates:** The Data and Evaluation Unit of the Administrative Office of Courts shall utilize data obtained from the Idaho Department of Health and Welfare's COVID-19 Data Dashboard, and shall determine the weekly COVID-19 incidence rates for each county every Thursday evening after 5:00 p.m. Mountain Time. The weekly COVID-19 incidence rates shall be published on the following Friday morning of each week and disseminated to the Administrative District Judges and Trial Court Administrators as soon as practicable once they are published.
2. **Administrative District Judges Authorized to Issue Orders Regarding Courthouse and Courtroom Risk Reduction Protocols in Their Districts:** The Administrative District Judge shall be responsible for ensuring appropriate measures are in place in each courthouse in their district to reduce the risk of transmission of the coronavirus to persons participating in a court proceeding or conducting court business. In the discretion of the Administrative District Judge, appropriate measures may include, but are not required or limited to, social distancing, masking, and the use of remote proceedings. In determining appropriate measures, the Administrative District Judge should consider local conditions including, but not limited to, the COVID-19 incidence rate of the county as reflected in the weekly incidence report described in paragraph one and whether crisis standards of care have been activated in the health district. At no time shall a person who is not a testifying witness, while in the portions of the courthouse where court business is conducted, be asked or required to remove a mask against their wishes.

3. **Court Proceedings Other Than Jury Trials:** Other than jury trials, court rules which prohibit hearing any case or part thereof remotely remain suspended during the effective term of this order. Subject to the approval of the district's Administrative District Judge, an assigned judge has the discretion to hold proceedings in person or remotely, i.e. with all participants utilizing remote technologies including teleconferencing and video conferencing, pursuant to the following conditions and requirements:

    a. All trials on a petition to terminate parental rights shall be held in person.

    b. All felony sentencing hearings in which the crime the defendant is being sentenced carries a possible sentence of life and the assigned judge has not previously agreed to impose a sentence of less than life, shall be held in person with the defendant and counsel present in the courtroom.

    c. All felony sentencing hearings in which the crime the defendant is being sentenced carries a maximum sentence of less than life imprisonment or in which the assigned judge has previously agreed to impose a sentence of less than life, may be held remotely only if:

        i. both parties stipulate, and the judge agrees, to hold the sentencing remotely, and

        ii. the defendant provides, on the record, a knowing, intelligent, and voluntary waiver of all the rights granted by Idaho Code section 19-2503.

    d. Any party intending to offer documentary evidence during a hearing held remotely must provide the court and all parties a list of such exhibits and copies thereof at least seventy-two hours before such hearing unless the assigned judge modifies the time for good cause shown.

    e. An audio recording of all court proceedings must be created in For The Record (FTR) software or in Zoom software. For court proceedings in district court, the official record may be kept by a court reporter in addition to the audio recording. With the permission of the assigned judge, a court reporter may report proceedings remotely.

    f. To protect the integrity of the remote proceeding, an assigned judge has the discretion to enter other orders or impose other requirements to promote the safety of participants or to promote efficiency.

4. **Conduct of Jury Trials:** All provisions of I.C.R. 24 and I.R.C.P. 47, not otherwise modified in this order, shall remain in force and effect. Provided, any jury trial shall be subject to the following conditions:

    a. In a criminal jury trial, with the judge's approval, counsel for both parties and defendant(s) may stipulate that a witness may testify remotely. If the defendant(s) is/are not present pursuant to Idaho Criminal Rule 43, counsel for the defendant may stipulate on his or her behalf.

    b. In civil jury trials, with the assigned judge's approval, counsel for the parties may stipulate to offer any or all testimony remotely.

    c. Peremptory Challenges.

i. Pursuant to I.C.R. 24(d), if the offense charged is punishable by death and the state is seeking a death sentence when voir dire commences, each party, regardless of the number of defendants, is entitled to 10 peremptory challenges.

ii. Pursuant to I.C.R. 24(d), in all other felonies, each party, regardless of the number of defendants, is entitled to three peremptory challenges; however, if there are co-defendants and the court determines that there is a conflict of interest between them or among them, the court may allow one additional peremptory challenge (total of four), and permit them to be exercised separately (e.g. two each), or jointly.

iii. Pursuant to I.C.R. 24(d), in all misdemeanors, each side, regardless of the number of defendants, is entitled to two peremptory challenges.

iv. Pursuant to I.R.C.P. 47(r), in every civil case, each party is entitled to two peremptory challenges. If there are co-parties the court must determine the degree of conflict of interest, if any, among the co-parties and may allocate no more than two peremptory challenges to the co-parties, not to exceed a total of four, to be apportioned as determined by the court.

v. Pursuant to I.C.R. 24(e) and I.R.C.P. 47(j), no additional peremptory challenges are authorized for alternate or additional jurors, irrespective of the number of additional or alternate jurors which are used.

5. **Preliminary Hearing Timelines:** The 21-day preliminary hearing requirement for out-of-custody defendants under Idaho Criminal Rule 5.1 is waived until further order of this Court.

6. **No Judge Disqualification Without Cause:** No judge shall be disqualified without cause from any proceeding pursuant to Idaho Criminal Rule 25(a), Idaho Rule of Civil Procedure 40(a), Idaho Rule of Family Law Procedure 107 (2015), and Idaho Rule of Family Law Procedure 109 during the effective term of this order. If this order is lifted, disqualification without cause rules will only operate prospectively to new cases and may not be exercised retrospectively in any existing case.

7. **Jury Trial Postponements:** On or after February 28, 2022, jury proceedings, including jury trials and grand jury proceedings, may commence any time during a calendar week unless the Administrative District Judge issues an order postponing such jury proceedings. In determining whether to issue such an order, the Administrative District Judge should consider local conditions including, but not limited to, the COVID-19 incidence rate of the county as reflected in the weekly incidence report described in paragraph one and whether crisis standards of care have been activated in the local public health district. Such an order shall be in writing and contain the factual basis for the determination and shall upon entry be submitted via email to the Administrative Office of the Courts.

   Once a trial has commenced, it should continue to verdict unless, in the discretion of the assigned judge, a significant increase in the county's weekly COVID-19 incidence rate or other local coronavirus exposure or public health action justifies a temporary suspension of the trial. Any order in this regard must be supported by the assigned judge's written findings.

8. **Trial Court Discretion to Commence or Discontinue Jury Trial:** Nothing contained in this order shall be construed to limit or expand an assigned judge's discretion to commence or suspend a jury trial for reasons unrelated to COVID-19.

9. **Tolling of Speedy Trial:** If this order, any previous COVID-19 emergency orders of this Court, or an order entered by an Administrative District Judge pursuant to paragraph seven above result in any delay in the commencement of a jury trial due to COVID-19, the time used to calculate the right to a speedy trial pursuant to I.C. § 19-3501 shall be deemed to have been tolled for those counties affected by said order.

10. **Live Streaming of Proceedings:** Idaho Court Administrative Rule 45 shall be applied when a camera in the courtroom supplements (is in addition to) the physical presence of the public in any proceeding. Any portion of a proceeding traditionally open to the public may be live-streamed rather than allowing the physical presence of the public only when the assigned judge finds that:

    a. Health or safety concerns override other interests in allowing the public to be physically present in the courtroom;

    b. Denial of the public's physical presence in the courtroom is necessary to protect the health or safety of those participating in the proceeding, including, if applicable, a lack of sufficient physical space for adherence to any social distancing requirements;

    c. The assigned judge has considered other reasonable alternatives to allow the physical presence of the public;

    d. The assigned judge has made findings on the record that live streaming is an appropriate alternative because:

        i. No reasonable in-person alternative is available that would sufficiently ensure the health or safety of those participating in the trial; and

        ii. The available live streaming capability is a narrowly tailored and reasonable alternative.

    e. If the public cannot be physically present in the courtroom, a publically accessible live audio and video stream of the proceedings must be provided. Such live stream may be publically accessible either:

        i. Via transmission to the internet, or

        ii. By transmission to a separate room in the courthouse. Any live stream of a Court proceeding shall not be a part of the official court record.

    f. There shall be no live-streaming of the following:

        i. Images of jurors, unless the live streaming is by transmission to a separate room in the courthouse;

        ii. Audio of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench;

        iii. Images of notes upon the counsel table, nor of any exhibits before they have been admitted into evidence;

iv. Audio or images of off-the-record, in-chambers sessions or judicial deliberations;

v. Audio or images of proceedings in which jurors may have to disclose personal, embarrassing, or prejudicial information that traditionally would be addressed outside of the presence of the other jurors and the public.

11. **Courthouse Signage:** Signage shall be conspicuously posted at all public entry points of a courthouse or other locations designated for court business defining the health or safety protocols required in the county's courthouse by any order issued by the Administrative District Judge pursuant to paragraph 2.

12. **Effective Date:** Unless specifically stated otherwise, the terms of this order are effective on February 28, 2022. This order supersedes the Court's amended order entered on November 29, 2021.

DATED this 17th day of February, 2022.

By Order of the Supreme Court

G. Richard Bevan
Chief Justice, Idaho Supreme Court

ATTEST:

Melanie Gagnepain, Clerk