

JURY MANAGEMENT ADVISORY COMMITTEE

Response to Public Comments

on the Report of the Jury Management Advisory Committee

to the Justices of the Supreme Judicial Court

on the Resumption of Jury Trials in the Context of the

COVID-19 Pandemic

Submitted September 1, 2020

The Jury Management Advisory Committee (JMAC) has thoroughly reviewed the comments received regarding its report to the Supreme Judicial Court of July 31, 2020 (“the Report”). After careful consideration, the JMAC modifies its recommendation regarding remote trials, as discussed in part 6 below. We do not change other recommendations, but take the opportunity for clarification, as set forth in this memorandum. We have reviewed and discussed all the comments, and we appreciate the contributions of all who commented. This memorandum will not discuss issues raised in the comments that the Report has fully addressed.

At the direction of the justices of the Supreme Judicial Court, the JMAC has also conducted the mock trial designated as “Phase 0” in the Report. A description of that process, and lessons learned, appears below.

Response to Comments:

1. Jury Composition

A number of attorneys and groups of attorneys express concern that the pandemic itself, and some of the steps recommended to accommodate jurors who may be at especially high risk,

will skew the racial, ethnic, and gender composition of jury pools.¹ The Report recognizes that possibility, indicating as follows:

“The OJC will track characteristics of jurors who are excused on these grounds, as well as those age 70 or over who elect not to serve, and those who defer for up to one year, in order to identify promptly any effect on the racial, ethnic, or gender composition of the jury pool. Any such effect identified may require adjustment in the excusal process, changes to the notice, or other measures to maintain jury pool composition consistent with the demographics of each judicial district.” (Report, p. 23).

The Committee for Public Counsel Services proposes that the OJC publish the data derived from this tracking process. The OJC intends to do so as promptly as feasible in light of its resources and the need for a meaningful statistical sample of data. It bears noting that, during the early stages of resumption of jury trials, the number of jurors required to appear in any county will be small, with that number increasing at later stages.² Small numbers may tend to obscure or distort any apparent change in the demographic composition of those appearing.

2. Case Scheduling and Priority

Several attorneys and groups of attorneys express views and seek clarification about how cases will be prioritized and scheduled for trial. Our expectation is that prioritizing and

¹ Race, Hispanic ethnicity, and gender are the demographic categories that courts have recognized as protected for purposes of the composition of jury pools. *Batson v. Kentucky*, 476 U.S. 79, 84-89 (1986); *Commonwealth v. Rodriguez*, 457 Mass. 461, 467 n.15 (2010) citing *Commonwealth v. Long*, 419 Mass. 798, 807 n. 9 (1995); *Commonwealth v. Soares*, 377 Mass. 461, 488-489 & n. 33 (1979) cert. denied, 444 U.S. 881 (1979); *see also Commonwealth v. Sanchez*, 485 Mass. 491 (2020).

² Because of the four-month lead time required, juror summonses have already issued for dates through the rest of 2020. Jurors over 70 may exercise their right to decline, and any juror may exercise the right to defer or may request to be excused on medical grounds, at any time after receiving the summons. As the reporting date approaches, the OJC notifies the remaining potential jurors through various means whether they must actually appear on the reporting date or not. The group that appears is the group from which any jury panel is chosen, and accordingly is the relevant group for comparison of jury pool composition under present circumstances with pre-COVID circumstances.

scheduling trials will be a collaborative process involving court leaders in each location and court department, bar leaders, and counsel in each case (see Report pp. 17-19).

Two District Attorneys suggest that relatively short, less serious cases should precede more serious cases, since less serious cases tend to resolve with a firm trial date, so that prioritizing them would serve to clear backlog. While we recognize that such cases do tend to resolve in that manner (see Report p. 6), we believe that the likely consequence of such scheduling – jurors who appear and are not utilized – would be unacceptable in the context of the pandemic. In this context, we believe that jurors should be required to report only for cases that actually need jury trials and are highly likely to proceed to trial as scheduled. As the Report indicates (p. 17), every case scheduled for trial should have an in-depth conference to resolve all potential pre-trial issues, which may include testimonial privileges and any other potentially dispositive legal issues, so that trial dates are as firm as they can ever be.

CPCS suggests a trial *de novo* system to resolve less serious cases and clear backlog. We view this topic as outside of our mandate.³

3. *Voir Dire*

Several attorneys and groups of attorneys express their strong preference for panel *voir dire*, and also express the importance to them of being allowed a wide scope of questioning. Some also propose the use of case-specific supplemental questionnaires. Our view is that the form and scope of *voir dire*, and the use of supplemental questionnaires, are and should remain within the discretion of the trial judge in each case.

³ The Superior Court is beginning to experiment in two counties with a trial *de novo* process for non-victim cases in which the parties agree to proceed in this manner. The Superior Court will compile data to evaluate the effectiveness of this process in resolving these cases, and inform decisions about potential expansion of the process.

4. Size of Juries

Civil attorneys express varying views about our recommendation to reduce the size of juries in certain civil cases, and a number of attorneys and attorney groups oppose our recommendation to reduce peremptory challenges. We stand by our recommendations on these points, for the reasons stated (Report p. 27-28). CPCS seeks clarification that Superior Court criminal and Juvenile Court youthful offender cases would continue to have juries of 12; we have not recommended any change to that practice.

5. Attorney-Client Communication

CPCS suggests a “closed-circuit two way audio system” for attorney-client communications during trials. We will look into whether such equipment is feasible and available for this purpose.

6. Remote Trials

One attorney, one juror, and a District Court administrator urge further consideration of remote trials. We are aware that some other jurisdictions are experimenting with conducting all or part of jury trial proceedings remotely, and we have given the idea careful consideration, both before issuing the Report and again in response to these comments. The Report recommends against this approach, and at this time we stand by that recommendation for resumption of jury trials in general, based on what appears to be the overwhelming opposition of the bar, as well as substantial constitutional concerns for criminal, youthful offender, and delinquency cases. We have discussed, however, the possibility of experimenting with remote trials of civil cases or small claims cases if parties were to volunteer. Such experimentation would require a substantial investment of resources, both technological and personnel. Our view is that, at this time, our

limited resources are better spent on preparing for in-person trials. That may change if conditions necessitate substantial further delay in reaching civil cases.

7. Locations

Two chief court officers question whether their locations provide adequate space; a clerk indicates that ventilation is inadequate in his building; and two District Attorneys point out competing uses of spaces identified as potentially available. Our review of courthouse spaces, as reflected in Appendices 1 and 2 to the Report, was based primarily on analysis of architectural plans by the Trial Court Facilities Department. As the Report indicates, “[b]efore any decisions are made about whether to send jurors to a particular courthouse, extensive consultation should occur among those who work in the building, including judges, clerks, security, facilities, and others, to gather and consider information” about additional factors, including space limitations, ventilation, and other uses of the spaces (Report, p. 37, see also pp. 17-18, 41).

8. Masks

A recently retired judge questions whether the Report sufficiently considers the effectiveness of various types of face masks, citing published reports regarding a paper on how to evaluate certain types of face masks. Our review of published information about that study confirms our recommendation of the use of three-ply paper surgical masks (Report p. 14), which was also the recommendation of the paper referenced in the comment. See

<https://olv.duke.edu/news/researchers-created-a-test-to-determine-which-masks-are-the-least-effective/>

9. Testing

A judge proposes mandatory, repeated, universal testing of everyone entering courthouses. The Report indicates that availability of rapid, reliable, affordable testing could

change many aspects of our recommendations (Report, pp. 21, 25, 62-63). Our review of recent publications indicates that such testing is not yet available. We are aware of news media reports indicating that some universities have contracted with laboratories to provide prompt results of PCR testing and have required all students, faculty, and staff to submit to such tests repeatedly. Such a process could significantly advance efforts to resume jury trials (as well as other court operations), if resources were available and if all participants, including everyone entering each courthouse each day, could be required to participate. In light of the uncertainties regarding both of these contingencies, we have not based our recommendations on them.

10. Sexually Dangerous Person (SDP) Cases

The Commissioner of Correction suggests use of the Bay State Correctional Center for trials of cases seeking annual review of SDP commitment under G. L. c. 123A, § 9. That site, which formerly operated as a prison and still has visible features of one, is among the non-courthouse locations that DCAMM is evaluating (Report p. 55). Although SDP cases are technically civil, our concerns about conducting criminal trials there apply to these cases as well because of the liberty interests at stake.

Phase 0 Mock Trial

Attached is a detailed summary of the Phase 0 mock trial conducted on August 27, 2020, at Middlesex Superior Court in Woburn. As the summary indicates, our overall impression of the experience is that it was a great success: We were able to conduct a criminal trial with a jury of 14 (12 and two alternates), following the practices recommended in the Report, in a manner that the participants perceived as minimizing risk to an acceptable level, meeting constitutional requirements, and providing a fair and reasonably efficient process. The detailed summary identifies certain issues and areas for potential improvement, set off by italics. In addition to the specific comments reflected in the summary, we make the following overall observations:

First, the Phase 0 exercise was such a success in substantial part because of a careful, collaborative, and intensive process of planning and preparation conducted by leaders in that court. The clerk, criminal and civil Regional Administrative Justices, Security Department, private landlord, and cleaning contractor all worked together to organize and implement every detail. The private landlord made physical adjustments to two courtrooms, and the private cleaning contractor provided a staff person who was present, active, and visible throughout. The clerk and his staff obtained and operated an FTR Rover device in the jury pool room, set up a computer on a mobile cart with a Zoom link to provide remote access, and obtained and set up an ELMO device for display of trial exhibits. The many court officers present clearly knew exactly what to do, and did exactly what was planned.

There is no reason to think that other courts cannot do the same, with careful and collaborative planning. It should be anticipated, however, that such planning will require time and extensive communication in each location, with attention to the particular conditions in each place. The JMAC and OJC are prepared to assist in this process.

Second, the process as conducted in Phase 0 was extremely resource-intensive, particularly with respect to court officers and facilities personnel. We are not in a position to evaluate whether the number of officers who participated in this exercise was necessary, or whether fewer could manage; that determination requires the expertise of the Trial Court Security Department. We recognize, however, that in most if not all court locations, it is not feasible for so many officers to be allocated to each trial, with other court functions occurring at the same time.

As to facilities, as detailed in the attached summary, the private landlord in Woburn rearranged furniture and fixtures, installed plexiglass, built a platform for juror seating, and, through a private cleaning contractor, supplied a cleaning staff person who was active and visible throughout. Whether equivalent physical rearrangements are necessary depends on conditions in each location. Visible cleaning during the process is essential, both for actual risk reduction and for the confidence of jurors and all other participants. It is not our role to determine which court personnel are responsible for this function, but that determination must be made.

Third, we recognize that the process of air quality evaluation is in progress. For the purpose of this exercise we assumed appropriate air quality for the number of people present. That issue needs to be determined in each location before jury trials proceed.

Phase 0 Mock Trial – August 27, 2020 Middlesex Superior Court, Woburn

The mock jury trial described in the JMAC's Report to the SJC was conducted at Middlesex Superior Court at Woburn on August 27, 2020. Special recognition is due to the team at the courthouse for planning and executing a very well-designed exercise that was useful, informative, and realistic.¹ It was both reassuring in its demonstration that safe and efficient jury trials are possible in the context of COVID-19, and instructive of areas for potential improvement.

Screening and Entry:

The day began with volunteer "jurors" – all court employees – having been told to report to the courthouse at 8:30 a.m. As happens with real jurors, many if not most showed up before the specified time. For the exercise, the court decided that jurors would be asked to wait outside the building until the doors opened at 8:30 a.m., although in the normal course there is a policy in place that prospective jurors are to be admitted to the building and to the jury pool starting 15 minutes before the courthouse opens to the public. Although most jurors made efforts at social distancing, by 8:15 a.m. a number of them were clustered in a group outside the doors, and not all were 6 feet apart. All were wearing masks, although a few at times removed or lowered their masks to converse while waiting outside.²

The Middlesex Superior Courthouse is particularly well suited to accommodating a large group of potential jurors and others waiting for admission to the courthouse, because there is an attached free parking garage immediately adjacent to the entrance to the building. The court set up a waiting area within the parking garage for people to line up appropriately spaced, sheltered from the elements (although it would not be heated in cooler weather).

***Issue:** One prospective juror noted that although there was space set aside for people to line up at 6-foot intervals before entering the building, not everyone who was waiting could fit into that space, and once people started gathering beyond that space, they did not all observe social distancing, and were not initially supervised or instructed by court personnel to keep their distance. Since few courthouses have as good a space as Middlesex Superior does for this purpose, other courts will need to give careful consideration to how they will keep prospective jurors properly distanced as they wait to enter the building.*

As jurors entered the building, they were greeted by a large number of court officers. One stood outside the door and admitted each juror one at a time, taking each juror's temperature. Another greeted each juror in front of the security scanner and asked the COVID-19 screening questions. There was also hand sanitizer available at this station, which was useful because all jurors were touching the same door handle to get into the building. A third instructed them to put their belongings through the scanner, and a fourth used the wand on those who set off the alarm. A fifth directed them how to proceed into the building, a sixth greeted them at the stairwell and told them their options for reaching the third-floor jury pool room, and a seventh stood by the elevators to make sure that only two people entered each elevator. There was also a court officer on the third floor directing jurors into the jury pool room, and two officers behind the counter checking them in. Finally, a court officer in the jury pool room directed jurors to their assigned seats after they checked in.

¹ We thank Superior Court Regional Administrative Justices Laurence Pierce and Helene Kazanjian, Clerk of Courts Michael Sullivan and First Assistant Clerk Daniel Flaherty, Regional Security Director Michael McPherson and Chief Court Officer Kevin Tkachuk, Regional Facilities Manager Scott Arneil, and all the staff of the Middlesex Superior Courthouse for their excellent work in planning and executing this exercise.

² Many of those serving as jurors work together, so the impulse to socialize while waiting was likely stronger than it would be among real jurors, although the tendency to follow instructions previously provided in written communications may also have been stronger than it would be among real jurors.

Issue: The court kept jurors waiting outside and admitted them one at a time, with the door shutting automatically after each, so that jurors would have privacy as they answered the health questions just inside the door. As a result, each juror touched the door handle to enter the building. Hand sanitizer was available inside the entrance; a sign instructing its use would be advisable.

Issue: A very large number of court officers participated in this exercise; each prospective juror interacted with ten different court officers before taking a seat in the jury pool room. At least three more officers were in the courtroom at all times, and sometimes more. It seems unlikely that Trial Court Security resources would support this level of court officer involvement for every trial. Court leaders in each location will need to discuss how these tasks might be reallocated to allow trials to proceed with fewer court officers.

Middlesex Superior is a leased property, and the landlord (Cummings Properties) contracts with a cleaning company (Compass). The cleaning company sent a cleaner who was very visible throughout the process, moving through the building and cleaning high-touch areas throughout the time the jurors were there.

Issue: The visible presence of a cleaning staff person throughout the process was an essential aspect of this exercise. How that function will be performed in state-owned buildings remains unclear.

Jury Pool Room:

As jurors checked in to the jury pool room, they were given their numbered juror cards and directed to find and sit in an appropriately distanced seat that had the same number taped to the arm of the chair. Court officers helped them find their seats. The court also had a table near the entrance to the room with small bottles of water on it for jurors' use, since water fountains were disabled.

Issue: The court had small bottles of water for jurors on a table near the entrance to the jury pool room, which was a welcoming touch, but had the potential disadvantage of encouraging jurors to remove their masks to drink while seated in the jury pool. It might be safer to provide water after impanelment is complete and the impaneled jurors are in the room to be used as the deliberation room, with a smaller number present.

Issue: Although there was hand sanitizer in the ladies' room in the jury pool room area, it was unclear whether there was soap in the motion-operated dispenser. One juror's effort to use the dispenser was unsuccessful; after the juror inquired, a court officer reported that the dispenser had soap but required more vigorous motion to operate. Instructional signs might address this issue. Jurors will be told in their COVID-19-related communications that both hand sanitizer and soap and water will be available at the courthouse.

Issue: At various times several potential jurors were observed with their masks not covering their noses. The court officer made an announcement and they complied, but some pulled them down again a few minutes later. Court officers must monitor proper mask-wearing continuously.

The clerk reported that it took 32 minutes to get 34 potential jurors from the front door, through security, to the third floor, checked in and sitting in their seats. He noted that during this time there were other actual court users (attorneys, members of the public) who were also being screened into the building.

Issue: The seats in the jury pool room were arranged in straight lines, with people sitting directly behind the person in front of them (at a distance of six feet). People might feel more comfortable with alternating rows, so the person behind each juror would be two rows back:

Like so:	x		x	As opposed to:	x		x
		x			x		x
	x		x		x		x

To the court officers' credit, they demonstrated throughout the day that they were very mindful of keeping the jurors physically distanced. When jurors got within six feet of each other, a court officer intervened and corrected the situation.

The jury pool room was set up to serve as a courtroom if necessary, and was used on this occasion to conduct some of the preliminary parts of the impanelment process. The jury pool room in the Woburn Superior Court building is large enough for this purpose, with some 30 potential jurors, trial participants, and necessary court personnel present; different arrangements would be necessary in buildings with smaller jury pool rooms.

After the Jury Pool Officer's initial greeting, the orientation video, the judge's welcome, and a short break (during which jurors did not move around except to use the facilities), the judge returned to the jury pool room with the clerk, parties, monitor, and attorneys. The court had set up a portable FTR recording device known as a Rover in the jury pool room to record the proceedings.³ The clerk called the case, and the judge introduced the trial participants, described the case, and gave preliminary instructions, including detailed and very reassuring information about the steps being taken to minimize risk. The judge then read the witness list, and asked the statutory questions. The court officers read aloud the juror numbers of those answering affirmatively, and the clerk noted the numbers. The judge then told the jurors that the impanelment would continue in the courtroom, and the trial participants left the jury pool room.

Issue: *The Rover system in the jury pool room records but does not amplify, so that some of the trial participants were difficult to hear from the back of the room when they introduced themselves, particularly the ones who were standing behind plexiglass.*

Issue: *The judge directed only the defendant to remove his mask when he was introduced, so jurors could determine whether they knew him. In subsequent discussion, some expressed the view that each participant should remove the mask briefly when introduced to enable jurors to identify any participant jurors may know.*

Individual Voir Dire:

After the first few jurors moved to the 5th floor, the judge resumed the impanelment process in the courtroom with one juror at a time. Other jurors were directed to another nearby courtroom, which was used as the jury room. That courtroom was set up so that 14 jurors could be present with social distancing, seated in numbered chairs as directed by the court officers as each person entered the room.

At the outset of the process in the courtroom, the judge made findings on the record about available space for spectators, and explained how access was being provided to the public by multiple means: a limited number of spectators physically present (including media); audio access by bridge line; and access via Zoom link through a computer on a mobile cart set up to show the judge and witness, but not recording.

³ The Rover in use was about the size of a large speaker, connected to a desk-top size computer. The Clerk reported his understanding that this device was somewhat old, and that more recent versions are the size of a laptop computer, and are capable of recording throughout a room the size of this jury pool room, which would mean that panel voir dire could be conducted there.

Each juror was brought into the courtroom individually, and directed to the witness box, which was enclosed by plexiglass on three sides. The judge explained the process to each individual juror, including the public nature of the process, and the option of answering certain questions in a less public setting, on the record, if the juror felt that the public setting would unduly intrude on the juror's privacy. In each instance the judge asked whether the juror was comfortable removing the mask in the plexiglass enclosure, and each juror did so, enabling counsel and the defendant to see the juror's face during the questioning.

Individual *voir dire* of each potential juror in the courtroom took between 6 and 11 minutes. With that timing, impanelment with attorney participation in a more complex case might take several days. The timing meant that once the court officers had directed the first few jurors upstairs to the 5th floor courtroom, they had ample time to transport all the rest of the potential jurors upstairs to the nearby jury room, via either the one-way stairwell or the 2-person-occupancy elevators.

Issue: *The clerk noted that the microphone in the witness box is directional, and when one of the potential jurors turned his head toward the judge while answering questions, he could not be heard well elsewhere in the room because of the plexiglass enclosure. The judge directed him to speak into the microphone.*

After each juror (and later each witness) left the box, the cleaning person supplied by the private cleaning contractor sprayed and wiped the entire area, including the chair back and seat, arm rests, counter surface, microphone, and all three sides of the plexiglass enclosure. This process was fully visible to everyone present, and very reassuring.⁴ When each new juror entered the box, the judge informed the juror that the area had been cleaned thoroughly after the last person left. In later discussion, participants in all categories remarked approvingly on the value of observing the cleaning process.

Issue: *The cleaning of the witness box took about 45-60 seconds each time. There was some discussion afterward about whether this type of cleaning would address potential buildup of aerosols in the enclosed space, and the question was raised whether a court officer (or other staff person) might be able to use a fogger to disinfect both the surfaces and the air, or whether an air purifier with HEPA filter in the witness box would assist. Trial Court Facilities needs to resolve these questions, taking into consideration the on-going courthouse air quality evaluations.*

Several jurors requested the opportunity to answer certain questions privately. The judge, attorneys, defendant, court officers, and monitor with a portable handheld FTR "Zoom" recording device left the courtroom and adjourned to a conference room just behind the courtroom (ordinarily a jury deliberation room) where participants stood physically distanced. This process was not visible to spectators. The same process occurred later, at the stage of the defendant's motion for required finding.

Issue: *Case law authorizes conducting individual voir dire at side bar, visible but not audible to the public, but there may be room for doubt about doing so in a location not visible to spectators. See Commonwealth v. Cohen (No. 1), 456 Mass. 94, 117 (2010) (individual juror voir dire conducted out of hearing of public permissible if conducted in open court where public may observe process). When this process occurs in a separate room in this manner, it may be advisable either to make more detailed findings, or to permit spectators and/or media representatives to be within sight upon request. The same issue may arise with respect to conferences between counsel and the judge, as occurred at the time of the motion for required finding.*

Issue: *There was a tendency for people on the move to bunch together briefly. It happened when jurors entered or left the room, and also when the participants left the courtroom for a conference in the neighboring room. The court officers made a concerted effort to control this tendency, but the effort*

⁴ It is our understanding that the Trial Court has not yet resolved the question of who will perform this function in court-owned facilities.

was not always successful: people would speed up to hurry to their seats, or the defendant and his attorney would walk out together. Court officers will have to monitor this tendency carefully.

After the jury was impaneled, each juror was given two sheets of printed instructions on juror conduct, one on how to behave in the courthouse, and later, one on how to behave after being dismissed for the day and how to return to the courthouse the next day. Also after impanelment, the judge told the jurors that he was going to allow them to take notes, and made a point of saying that the pens and pad would be distributed fresh out of the packaging by court officers with new gloves on their hands. During discussion later, one of the jurors suggested that each juror could have a bag placed in advance on each seat with the pad, pen, hand sanitizer, written instructions, and a surgical mask for the juror to wear to court on the second day. The judge could assure the jurors that the bags had been prepared in a sanitary fashion, with each item taken directly out of the packaging and placed in the bag with gloved hands.

Issue: *In this exercise, the court did not give the jurors three-ply paper surgical masks, although they were available. Jurors all wore their own masks, none of which had inappropriate graphics or the like. A more reliable (but more costly) approach would be for court officers at the entrance to provide three-ply surgical masks to any juror who comes with another type of mask. This would provide uniformity, and ensure that everyone is wearing the most effective type of mask.*

Courtroom Seating:

In the courtroom, there were seats for up to 16 jurors spread along the length of one side of the courtroom. The benches had been removed from one side of the gallery to extend the area for jury seating, and the private landlord had constructed a raised platform along the wall to elevate the seating for the back row of jurors. Sightlines and audibility were generally excellent, although in discussion later one juror sitting in the rear row expressed some difficulty seeing everyone. It was suggested that, as in any jury trial, jurors should be encouraged to express any difficulty they may have seeing or hearing.

The attorneys sat at tables at an angle to the jury box, with the judge's bench to their left. There were plexiglass dividers separating the people at the tables from each other (two ADAs at one table, and defense counsel and defendant at the other). The attorneys spoke from a stationary podium at an angle toward the jury box and the witness stand. A court officer wiped down the surface of the podium and the microphone each time an attorney finished at the podium.

There was ample empty space in the spectators' gallery, and many signs saying "sit here" where no one was sitting. However, due to the number of jurors, court officers, and trial participants, the room was at capacity, so court officers at times asked spectators to leave if someone else had to enter the room.

Issue: *Court officers will have to monitor the maximum capacity of the courtroom, as they did here.*

Issue: *In discussion later, one of the attorneys noted that if an interpreter were needed for a defendant or witness, safe space would need to be set aside for the interpreter. An interpreter made a similar comment on Courtyard after seeing pictures of the exercise that were posted there. Space was available in the courtroom but not specifically designated for this purpose.*

When each witness sat in the plexiglass-enclosed witness stand, the judge made a finding of substantial necessity that witnesses remove masks while testifying, and each witness did so.

At one point during the trial, a spectator took a seat in the courtroom and removed his mask. He refused to wear it when asked to do so by a court officer, and made a brief scene. He was removed from the room by a second court officer, and the trial resumed.⁵

Evidence:

The evidence at trial included two photographs, and a gun, ammunition and feeding device, the latter three placed in one box and marked as a single exhibit.⁶ Before offering each exhibit, the prosecutor approached the witness stand and showed the exhibit to the witness by placing it on the outside of the plexiglass, so that the witness could see and acknowledge it from inside the enclosure. Counsel used an ELMO device to display the photographs to the jury, leaving the tangible items in the box on the table in front of the clerk.

When the judge sent the jury out to deliberate, he instructed them that the photographs would be placed on a table in the jury room, where the jurors could view them one person at a time, and that the box would not be sent into the jury room unless the jurors so requested, which they did not. The judge further instructed that if jurors did handle exhibits they should use hand sanitizer before and after touching the exhibit. In discussion later, the consensus among participants was that the tangible items were unnecessary in this case, although judges should retain discretion to permit such items in evidence on a finding of necessity.

Deliberations:

The judge instructed the jurors to keep their masks on during deliberations, and to tell the court officer if someone needed to remove their mask. Lunch was brought in for everyone, based on requests made on a written form provided in advance and handed in upon each person's entry. The judge gave the jury the option of taking a break to eat lunch or deliberating over lunch. Although they chose the latter, several later said that they felt uncomfortable with the spacing in the deliberation room when everyone had removed their masks to eat, so having a separate lunch break with people spaced further apart is probably preferable.

***Issue:** Given the recurring issues with participants uncovering their noses and getting too close to one another, it would be helpful for judges to instruct the foreperson, in the presence of the other jurors, to ensure that during deliberations all jurors keep their masks over their mouth and nose and remain socially distanced.*

The jury deliberated in the separate courtroom being used as the jury room. Spacing in that room was such that most jurors were facing each other along one side of the room. In discussion later, jurors observed that it was hard to converse well with people spread out at such length, and it would be preferable to be seated in a big square or circle in the middle of the courtroom (still appropriately spaced). The room seems large enough to permit that arrangement.

Debriefing:

Participants conducted a debriefing afterward in the jury pool room. Chief Justice Fabricant and others lauded the planning and execution of the exercise by the Middlesex Superior Court team. Particularly noteworthy was the way the jury pool officer and Judge Pierce repeatedly reminded jurors of

⁵ We were advised later that the Security Department had planned this event to test the court officers' response. They passed the test, responding exactly as we would have hoped they would.

⁶ The charge was unlawful possession of a firearm, ammunition, and a large capacity feeding device. The parties stipulated that each item met the applicable legal definition.

the safety protocols throughout the day. Comments in the discussion, in addition to those referenced above, included the following:

- It might be beneficial to have a judge available to conduct judicial discretion hearings at or near the security check-in station, to keep people from coming upstairs unnecessarily.
- Counsel were asked about the plexiglass barriers that were placed between the two ADAs, and between the defense counsel and the defendant. Defense counsel had no problem with the barrier and the defendant said he could hear his attorney very well, but the two ADAs said they could not communicate well with each other and did not like the barriers. This may be a matter that each trial judge should discuss with counsel prior to trial. Regarding defendant being masked, defense counsel expressed her preference that her client appear like everyone else in the courtroom – masked if everyone else is.⁷
- A Chief Court Officer from another location commented on the large number of court officers participating, which other locations would have difficulty matching, particularly with other sessions operating.
- Jurors commented that the handouts the court had prepared were very helpful. Copies of the handouts are attached to this summary.

All in all, the Phase 0 mock trial was an exceptional success, both for its demonstration that juries of 12 can resume successfully and for the insights gained about potential improvements. The JMAC is very encouraged by the overall positive experience of the mock trial at Middlesex Superior Court, and stands ready to work with other courthouses to address their unique challenges.

⁷ The individuals who played the roles of the attorneys were assistant clerks who had previously worked in those roles – two as ADAs and one as a CPCS staff attorney. Their feedback reflected that experience.

INSTRUCTIONS FOR JURORS

As a juror, you must follow these instructions at all times during your jury service. These instructions remain in full force, whether or not the trial is in session, until your jury service is completed.

1. **Keep an open mind.** Do not form any judgment, conclusion, opinion, belief or view as to any issue in this case until after you have heard all the evidence and the law which applies, and the case is given to you for deliberation at the end of the trial.
2. **Do not talk about any aspect of this case to anyone. You may not even discuss the case with your fellow jurors until you are instructed to deliberate at the end of the trial.** You may explain to others that you are seated as a juror for a Superior Court trial, and the anticipated schedule. Please do not mention the name of the case, the type of case, the names of the attorneys, the judge's name or the names of prospective witnesses or trial participants.
3. **Do not talk with or interact with any of the witnesses, attorneys or anyone involved in this case.**
4. **Do not read or consult any books, materials or other written sources,** about any issue or aspect of this case or any participant in the case, at any point during the trial or during your deliberations, and do not allow anyone else to do so for you.
5. **Do not read or consult any electronic source,** including email, text messages, chat rooms, blogs, reference sites or social media sites, via the internet or otherwise, about any issue or aspect of this case or any participant in the case at any point during the trial or during your deliberations, and do not allow anyone else to do so for you.
6. **Do not read, watch or listen to any account of any aspect of this case,** or any matter related in any way to the case, or to parties or attorneys or participants involved in the case.
7. **Do not stop in any of the public areas of the courthouse.** Leave the courthouse directly and follow the court officers' instructions about returning the following day.
8. **If you have any concerns about any aspect of your jury service, including any concerns related to the COVID-19 pandemic,** please inform a court officer privately, or send the judge a note through a court officer. Do not discuss your concerns with your fellow jurors.
9. **Do not visit any location referred to during the trial,** and do not allow anyone to do so on your behalf.

The reason for these instructions is to insure a fair, just and equitable trial. The jury must decide this case based SOLELY on evidence that is presented in this courtroom, and the law as instructed by the trial court judge, NOT based on information obtained from any other source.

Juror Attire: There are some occasions in life where a level of formality and decorum is necessary. A jury trial in the Superior Court is such an occasion. Therefore, please dress appropriately during the trial to reflect the dignity and seriousness of this proceeding. **Casual clothing such as shorts, jeans, tank tops, sweatshirts, sweatpants or flip-flops should not be worn to court.**

Masks and Social Spacing: Masks must be worn (over your mouth and nose) at all times while you are in the courthouse, and please maintain social distancing of at least six feet.

Health Status: If you experience any change in your health status, or develop symptoms consistent with COVID-19, or have direct contact with anyone who has tested positive for COVID-19, please advise a court officer immediately.

Food and Beverages: Bottled water may be brought into the courtroom. Other beverages, food, candy and gum are prohibited, unless approved by the trial court judge in advance.

Middlesex Superior Court
200 Trade Center
Woburn Ma. 01801
Juror Information

Judge: Laurence Pierce
Clerk: Christina Lucci (781) 939-2700 x2778
Court Officers: Chief Kevin Tkachuk; Assistant Chief Mark Pacheco
(781) 939-2700 x2906 & x2907

Reporting

You are seated as a juror in courtroom 540. Court will resume tomorrow at 9:00 AM. We ask that you report at 8:45AM to the secure door adjacent to the parking area on the 5th floor. From there Court officers will escort you to the jury deliberation room.

IMPORTANT: If you are experiencing any symptoms of COVID-19, including but not limited to: temperature over 100 degrees, nausea, vomiting, cough, shortness of breath or difficulty breathing, and/or loss of taste or smell, please do not come to the courthouse and instead call the Clerk, at the number listed above as soon as possible. If you are unable to reach the Clerk, please contact the Chief Court Officer or Assistant Chief Court Officer at the numbers listed above.

Dress code

Please adhere to the Court's instructions regarding dress. Due to the variations in courtroom temperatures, we suggest that you bring layers.

At the Courthouse

- Once you have been escorted to the deliberation room, please do not leave the room without permission of a Court Officer.
- Food and drink (other than water) are not allowed in the courthouse, without permission of the judge. If you have particular dietary needs, please speak with a Court Officer.
- All electronic devices, including cellular telephones, must be turned off in the courtroom. Please discuss the use of electronic devices during breaks in the proceedings with a Court Officer.

Please continue to follow all of the INSTRUCTIONS FOR JURORS, distributed by the Judge.