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Indigent Defense Attorneys and COVID-19: Frequently Asked Questions About Practicing During a Pandemic

Ian A. Mance and John Rubin

A. Introduction

An article in the *Charlotte Observer* earlier this year told the story of a criminal defense attorney in federal court in Asheville who, in a motion to the court, raised the concern that she would be subjecting herself and her client to an unreasonable risk of contracting COVID-19 if the court were to hold a hearing on what she characterized as a relatively minor matter. Citing the pandemic, the attorney asked the court to resolve the matter on the briefs. The court denied the motion and scheduled two hearings, the first of which was to consider the client's alleged violation of the terms of his supervised release. The second, the court wrote, would determine "whether [the attorney's] fears about the coronavirus compromised her ability to represent her client, and whether she should be removed from the case." The order generated considerable discussion in the criminal defense community, with many attorneys saying that they shared their colleague's concerns and that they had increasingly found themselves facing similar dilemmas. Some saw the court's remarks "as a retaliatory threat against a lawyer who had raised legitimate concerns related to COVID-19."[1]

The pandemic has forced defense attorneys to confront even tougher choices than usual in a profession that is known for them. Face-to-face interactions during client meetings, witness interviews, court appearances, and simply running the business of an office are integral to most lawyers' practices, and the virus has upended the ability to do them all. Some defense attorneys, concerned they are in a cohort that makes them particularly vulnerable to the disease, have determined they will not return to a courtroom until a vaccine is available, regardless of when courts resume normal operations. Many who have resolved to continue

Ian A. Mance is a resource attorney in the UNC School of Government's Public Defense Education Group and works on issues related to the impact of COVID-19. John Rubin is a faculty member and the director of Public Defense Education at the School of Government.

1. *See* Michael Gordon, *In NC Federal Court, Jittery Attorneys Want to Know: Should We Even Be Here?*, Charlotte Observer, Apr. 17, 2020.

working are concerned about the impact that advocating for their own health and safety may have on their clients, cases, and standing with the court.

Through a series of questions and answers, this bulletin discusses and attempts to respond to many of the concerns that have been expressed by defense attorneys related to COVID-19 and in-person proceedings in courtrooms, which have continued to operate as vectors for the virus's spread even during a period of limited operations.[2] The questions and answers are broken into three main parts, in B. through D. below:

- rules, recommendations, and best practices for dealing with COVID-19 in the courtroom;
- availability of accommodations for attorneys; and
- courts' authority over attorneys.

B. Rules, Recommendations, and Best Practices

1. Are there mandatory rules designed to help mitigate the risk of contracting COVID-19 during court proceedings?

Yes. North Carolina Chief Justice Cheri Beasley has issued a series of orders imposing emergency directives, some of which pertain to courtroom settings. They can be found on the North Carolina Administrative Office of the Courts' COVID-19 web page. School of Government faculty have also written several summaries, available on the School's North Carolina Criminal Law blog.[3] The rules created by the chief justice's orders are binding on the trial courts under G.S. 7A-39(b)(2), which authorizes the chief justice to issue "emergency orders . . . in response to existing or impending catastrophic conditions."[4] The statute has been invoked on previous occasions by chief justices in response to hurricanes and other catastrophic conditions that have disrupted the operation of courts.[5] Readers should continue to monitor the chief justice's announcements, the North Carolina Administrative Office of the Courts website, and School blogs for information about additional rules and modifications to existing rules.

2. What are the rules?

The chief justice has issued multiple orders related to the impact of COVID-19 on court proceedings, including a suspension of jury trials statewide. Her May 21, 2020, order provided that "no session of court may be scheduled if doing so would result in members of the public sitting or standing in close proximity and/or for extended periods of time in contravention of current public health guidance," and it directed all senior resident superior court judges to

2. *See, e.g.*, Order of the Chief Justice of the Supreme Court of North Carolina at 1 (July 16, 2020) (stating that throughout June "dozens of court personnel . . . . contracted COVID-19 and numerous courts [were] forced to temporarily close").

3. For those handling civil proceedings, see the School's blog On the Civil Side, which includes summaries about the impact of the pandemic in civil cases.

4. *See also Hurley v. Leach*, 160 N.C. App. 595 (2003) (unpublished) (discussing emergency orders); *cf. Perry v. Tupper*, 71 N.C. 380, 381 (1874) (noting that refusal of trial judge to obey orders of higher court "would be judicial insubordination, not to be tolerated").

5. *See, e.g.*, Order of the Chief Justice of the Supreme Court of North Carolina (Chief Justice Mark Martin) (Oct. 8, 2018) (invoking statute to authorize the operation of courts in Jones and Onslow counties in the aftermath of Hurricane Florence).

ensure that social distancing and sanitization directives are followed in their courthouses.[6] Her July 16, 2020, order extended the suspension of jury trials and stated her intent to extend the prohibition "until at least the end of September."[7]

The July 16 order also imposed a new requirement that people in common areas of courthouses wear masks. In a set of emergency directives issued on July 20 and August 15, the chief justice reiterated that courts should not schedule proceedings if doing so would result in violations of public health guidelines. She further directed that "the maximum allowable occupancy of each courtroom or meeting space [be] established such that all persons who must sit or stand in such space may observe social distancing of at least six feet in every direction."[8]

These requirements do not just apply in the courtroom. In addition to the mask requirement, which applies in all common areas, the chief justice's July 20 order requires that intervals of at least six feet in every direction be marked "in all areas where the public is expected to congregate or wait in line."[9] As a result, courts may need to limit or sequence their dockets to reduce the number of people in the courthouse at the same time.

3. The governor has issued orders mandating masks. Do those apply in court?

No. By its own terms,[10] and according to a separate order of the chief justice,[11] the governor's order on masks does not apply to courthouses. However, the chief justice's July 16, 2020, order adopted the recommendation in the governor's order that state agencies adopt a mask requirement.[12]

4. Are there local rules of practice related to COVID-19?

The trial courts have authority to promulgate their own rules to promote the effective administration of justice.[13] Pursuant to this authority, many districts have adopted new local rules in response to the pandemic. These rules may vary to fit local needs and circumstances, but they may not set standards below the safety precautions in the chief justice's emergency directives, which by their terms establish minimum health and safety requirements for the operation of the courts.[14]

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6. Order of the Chief Justice of the Supreme Court of North Carolina at 1 (May 21, 2020).

7. Order of the Chief Justice of the Supreme Court of North Carolina at 2 (July 16, 2020).

8. Order of the Chief Justice of the Supreme Court of North Carolina at 2 (July 20, 2020); Order of the Chief Justice of the Supreme Court of North Carolina at 2 (Aug. 15, 2020).

9. *Id.*

10. *See* Gov. Roy Cooper, Executive Order No. 147, Extension of Phase 2 Order and New Measures to Save Lives in the COVID-19 Pandemic at 6 (June 24, 2020) (directing order to "government agencies headed by members of the Governor's Cabinet" and "strongly encourag[ing]" other "state and local government agencies . . . to adopt similar policies that require Face Coverings").

11. Order of the Chief Justice of the Supreme Court of North Carolina (July 16, 2020) (stating that "courthouses are exempt" from Executive Order No. 147).

12. *Id.*

13. G.S. 7A-34; N.C. Gen. R. Prac. Super. and Dist. Ct. Rule 2(d); *see also In re J.S.*, 182 N.C. App. 79, 84 (2007) (recognizing authority for local rules).

14. *Cf. In re J.S.*, 182 N.C. App. at 84 (recognizing judge's discretion in applying local rule where rule was not in contradiction of statutes); *In re B.P.*, 228 N.C. App. 281, at *5 n.2 (2013) (unpublished) ("Although local rules are, of course, of considerable value, they cannot supersede the legal principles set forth in decisions of the appellate courts.").

Some procedures intended to enhance safety may put defense attorneys and their clients at a disadvantage. For example, appointed attorneys, particularly in counties not served by public defender offices, rely on the ACIS (Automated Criminal/Infractions System) database in clerk's offices to verify the criminal histories of their clients. Limitations on access make it more difficult for attorneys to obtain this critical information and provide clients with effective representation. In some places, criminal courts are handling pleas remotely, but defense attorneys still must appear in the same physical space as their clients. This may occur in small offices, where attorneys are unable to maintain the distance that they would in a courtroom. Local rules and their effects are beyond the scope of this bulletin. As a general matter, if attorneys have concerns about the fairness of local rules or practices, they should bring their concerns to the attention of the senior resident superior court judge, who is charged with adopting local rules, or to the judge presiding in the case.[15]

5. In addition to the rules issued by the chief justice and local courts, are there other recommendations for mitigating the risk of contracting COVID-19 during court proceedings?

Yes. The chief justice convened a Judicial Branch COVID-19 Task Force to provide recommendations on best safety practices for in-person court proceedings, and it has produced multiple reports. The reports include several safety recommendations. They are not binding, but they reflect the collective views of the task force, which includes judges, prosecutors, and public defenders. The key recommendations include:

- staggering the court calendar to minimize the number of people in court at a time,
- installing physical barriers such as plexiglass shields in high-traffic areas,
- making personal protective equipment available to people who arrive without equipment, and
- conducting health screenings on court attendees and regularly sanitizing areas where they congregate.[16]

6. What have the courthouses in North Carolina been doing in practice?

Mitigation efforts have varied to some extent.[17] Before the chief justice's most recent order, some courthouses had already placed mandatory mask orders in effect, enforced social distancing, and limited courtroom capacity. As part of their safety measures, some districts have delayed in-person proceedings, deciding to forgo jury trials until January 2021 at the earliest and intending to address any backlog of criminal cases when a vaccine becomes available.

Other districts have been slower to adopt mitigation efforts. Some attorneys have reported that social distancing measures have not been maintained and at times more than fifty people have been allowed to congregate in courtrooms. Attorneys have reported being admonished by some judges that they could be held in contempt if they did not report to court for a hearing after expressing concerns regarding the need for increased mitigation measures. Even with a

15. *Cf. Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1049 (2d Cir. 1991) (stating that review of local rules of practice is best "framed in terms of fairness" to the adversarial parties).

16. *See generally* Judicial Branch COVID-19 Task Force, Report to the Chief Justice of the Supreme Court of North Carolina (June 12, 2020); Judicial Branch COVID-19 Task Force, Second Report to the Chief Justice of the Supreme Court of North Carolina (June 30, 2020).

17. Information in this section is based on the authors' conversations with public defenders and appointed counsel around the state during the months of June and July 2020.

mask order now in effect for courthouses statewide, there have been scattered reports of judges who have said they will not enforce it.[18] While the chief justice has said she will not permit jury trials until the end of September at the earliest, juror summons have been mailed in some districts in an effort to resume trials as soon as possible.

Most courts have strived to maintain a safe environment, preparing to resume trials once permitted by the chief justice but with a good deal of skepticism about when trials actually can occur. A complicating factor for all courts is that courthouses are the property of their respective counties,[19] and county budgets are strained more than ever this year. Some officials, knowing the virus is temporary, are skeptical about spending significantly to renovate courtrooms, particularly at a time when they face competing demands to retrofit schools. The court has the inherent authority to order the county to provide adequate facilities, but it cannot order the county to appropriate or expend funds.[20]

7. Who is responsible for enforcing the chief justice's orders and local orders?

Trial judges have the authority to enforce the chief justice's orders, as well as local orders, in their courthouses.[21] A judge may direct that people be removed from the courtroom if the judge concludes that their presence jeopardizes public health.[22] A judge's authority is not limited to the courtroom itself and may extend to areas outside the courthouse in exceptional circumstances.[23]

Clerks of court, as front-line employees, interact daily with the public and may be called on to communicate the new requirements. Bailiffs, who often enforce compliance with a court's orders in the courthouse, will likely play a key role.[24]

8. What recourse does an attorney have if court personnel are not enforcing and complying with the rules?

Attorneys should begin by communicating their concerns to court personnel, including the presiding judge, chief district court judge, and senior resident superior court judge. In districts with a public defender's office, attorneys may want to bring their concerns to the head of that office, who may be better positioned to raise concerns unrelated to individual cases. At least one public defender's office has adopted a written policy directing the attorneys in the office

18. *Cf. Perry v. Tupper*, 71 N.C. 380, 381 (1874) ("Take it to be true, for the sake of the argument, that this Court was in error in directing the Superior Court . . . , the question arises, what is the proper way to correct the error? Is it for the Judge below to refuse to obey the order because *he* thinks the Supreme Court erred? That would be judicial insubordination which is not to be tolerated[.]").

19. G.S. 7A-302.

20. *In re Alamance Cty. Court Facilities*, 329 N.C 84 (1991); Michael Crowell, *Court Facilities and Local Support* at 4–6 (UNC Sch. Gov't, Jan. 2015) (updated Dec. 2016 by Ann Anderson).

21. *See* Art. 59 (Maintenance of Order in the Courtroom), G.S. 15A-1031 through G.S. 15A-1035; Michael Crowell, *Court Facilities and Local Support* at 8–9 (UNC Sch. Gov't, Jan. 2015) (updated Dec. 2016 by Ann Anderson).

22. *See* G.S. 15A-1034 (removal of people for safety reasons); G.S. 15A-1035 (inherent authority to maintain courtroom order); *see also State v. Lemons*, 348 N.C. 335, 349–50 (1998) (recognizing court's authority), *vac'd on other grounds*, 527 U.S. 1018 (1999).

23. *See State v. Grant*, 19 N.C. App. 401, 414 (1973).

24. *See* G.S. 17E-1 (stating that sheriff is responsible for acting as bailiff for court); Michael Crowell, *Court Facilities and Local Support* at 3–4, 6–7 (UNC Sch. Gov't, Jan. 2015) (updated Dec. 2016 by Ann Anderson).

not to put themselves in situations where they risk exposure to COVID-19. Such a directive may be useful when an attorney believes it necessary to approach the court on issues relating to courtroom safety. An attorney also may bring concerns about noncompliance with the chief justice's order to the North Carolina Administrative Office of the Courts, which may be willing to reach out to court personnel.

As for legal remedies, the Judicial Standards Commission may consider complaints against judges and make recommendations for discipline where appropriate. Grounds for discipline include, among other things, "persistent failure to perform the duties of office."[25] The appellate courts also may issue a writ of mandamus to compel compliance with their orders. An appellate court may issue a writ of mandamus or other prerogative writ "in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice."[26]

C. Accommodations

Some attorneys may need additional accommodations beyond those required by the chief justice's order and local rules. This section discusses possible accommodations, the authority for them, and ways to obtain them.

9. Do attorneys have the right to accommodations in the courtroom in light of COVID-19?

An attorney has the right to a reasonable accommodation if he or she has a disability within the meaning of the Americans with Disabilities Act (ADA). Title II of the ADA protects people with qualifying disabilities. The operative language of the ADA states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from . . . a public entity, or be subjected to discrimination by any such entity.[27]

Recognizing the applicability of the ADA to state courts, the North Carolina Administrative Office of the Courts issued a memo to all court officials, in which it stated that courts have an "affirmative obligation [under the ADA] . . . to make 'reasonable modifications' . . . to enable disabled individuals to receive services or participate in programs or activities."[28] This broad requirement covers attorneys with qualifying disabilities whose access to the courts may be inhibited by the pandemic. The memo recognizes that qualifying disabilities "include health conditions . . . known to place an individual at high risk for serious illness from COVID-19, such

25. G.S. 7A-376; *see also* Michael Crowell, *Removal of Court Officials*, Administration of Justice Bulletin No. 2015/08 (Nov. 2015); Michael Crowell, *What Gets Judges in Trouble*, Administration of Justice Bulletin No. 2015/01 (Jan. 2015).

26. G.S. 7A-32(b), (c); *In re T.H.T.*, 362 N.C. 446, 453 (2008) (discussing authority). For a discussion of the circumstances in which a party may petition for a writ of mandamus, see 2 Julie R. Lewis & John Rubin, North Carolina Defender Manual § 35.7A, Extraordinary Writs: Mandamus (May 2020).

27. Title II of the Americans with Disabilities Act of 1990, 104 Stat. 337, 42 U.S.C. § 12132; *see also Tennessee v. Lane*, 541 U.S. 509, 513 (2004) (recognizing ADA requirement).

28. N.C. Admin. Office of the Courts, Office of General Counsel, Memorandum, *The Americans with Disabilities Act and Requests for Reasonable Accommodations to Access Courts During the COVID-19 Pandemic* at 1, June 4, 2020 (hereinafter ADA Memo) (citing 28 C.F.R. § 35.130(b)(7)(i)).

as diabetes and heart disease."[29] The memo further advises that "the requested accommodation should be provided if possible even if inconvenient to court operations." A public entity is not required to provide the requested accommodation or may provide an alternative accommodation if it demonstrates that the requested accommodation "would *fundamentally alter* the nature of its service, program, or activity."[30] A person need not have a history of these conditions to be protected by the ADA. They need only show they have the condition at the time they request an accommodation.[31] Possible accommodations are discussed in Question 11, below.

An attorney seeking accommodations in the courtroom may place a request with the courthouse's designated ADA coordinator, who may be able to facilitate their implementation.[32] In May, Chief Justice Beasley issued an emergency directive ordering each senior superior court judge to either serve as or designate a COVID-19 coordinator for their courthouse.[33] A list of coordinators is posted on the North Carolina Administrative Office of the Courts website along with an explanation of how to request a reasonable accommodation and a grievance procedure if an individual is not satisfied with the local resolution of an accommodation request. An attorney seeking an accommodation also should consider making a motion to the presiding judge.

If a person believes a reasonable accommodation is improperly denied, the traditional remedy is to file a civil suit for relief.[34] In these unprecedented times, an attorney could conceivably petition the North Carolina Court of Appeals for a temporary stay of proceedings and a writ of certiorari,[35] and ask the court to grant an expedited hearing on the matter.[36] Grounds may include a violation of the client's right to counsel if the denial of an accommodation would result in unwarranted removal of the attorney from the case. These kinds of pretrial petitions and motions are unusual, but they are permissible and are sometimes granted.[37]

29. ADA Memo at 1 (citing 28 C.F.R. § 35.108).

30. ADA Memo at 2 (citing 28 C.F.R. § 35.130(b)(7)(i)) (emphasis in original).

31. *See, e.g.*, *Green v. Am. Univ.*, 647 F. Supp. 2d 21, 28 (D.D.C. 2009) ("To receive ADA . . . protection, the existence of a disability must be demonstrated at the time the plaintiff requested . . . a reasonable accommodation.").

32. *See Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1134 (9th Cir. 2001) (discussing superior court ADA coordinator's authority to arrange courtroom accommodations for individuals with disabilities).

33. Order of the Chief Justice of the Supreme Court of North Carolina (May 21, 2020).

34. *See generally Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004) (allowing suit for violation of ADA requirements for access to courts).

35. *See* N.C. R. App. P. 21 (stating that "writ of certiorari may be issued . . . to permit review of . . . orders of trial tribunals . . . when no right of appeal from an interlocutory order exists"). The superior court has the analogous power to issue a writ of certiorari to review district court proceedings. N.C. Gen. R. Prac. Super. & Dist. Ct. 19; *see also* 2 Julie R. Lewis & John Rubin, North Carolina Defender Manual § 35.7D, Extraordinary Writs: Certiorari of Trial Court Orders and Judgments (May 2020).

36. *Cf. State v. Robinson*, 641 S.E.2d 808 (N.C. 2007) (Mem.) (granting defendant's motion for expedited hearing).

37. *See, e.g.*, *State v. Schalow*, 251 N.C. App. 334, 338 (2016) (noting that the defendant filed a pretrial motion for a temporary stay and a petition for writ of certiorari, that the Court of Appeals allowed the motion, and that it entered the stay while considering the petition).

10. If an attorney does not have a qualified disability under the ADA, can they still request accommodations relative to COVID-19 in the courtroom?

Yes. Attorneys without an enforceable right to accommodations may still request them. Accommodations might be obtained through agreement with the prosecutor, in the discretion of the presiding judge, or at the direction of the ADA coordinator or other court administrator. Even without a legal mandate, court personnel may be willing to make modifications. In other contexts, courts have considered and, in some instances, granted motions to modify the courtroom setting.[38]

11. What are possible accommodations for courtroom proceedings?

Courtroom procedures and configurations vary greatly, so the accommodations necessary to mitigate risks from the virus will as well. Attorneys should think creatively about solutions that might be acceptable. Those who wish to have input about court proceedings in which they will appear should identify the matters of greatest risk as well as the adjustments they deem necessary to mitigate them.

In the context of a public defender's office, a reasonable accommodation might include the reassignment of attorneys so that those with qualifying conditions assume more responsibilities for out-of-court work while those who are able to go to court assume more of that responsibility. In the context of a courtroom setting, an accommodation might be the scheduling of an attorney's cases when the courtroom has the least number of people present, or the issuance of an order instituting social distancing standards that exceed the distancing requirements set by the chief justice's order.

In one of the only jury trials to occur in the state during the pandemic, trial participants agreed to reverse the courtroom to create more space for social distancing, with the area generally reserved for public seating used instead as a juror box and with each juror receiving multiple pews. The presiding judge also closed the courtroom to nonessential people but kept the proceedings public by streaming them digitally into an adjacent courtroom.[39]

12. Can a judge limit hearing participants to essential parties to mitigate risk?

Yes. Although the United States and North Carolina constitutions generally require that court proceedings be open to the public, a judge may exclude people from the courtroom and even close the courtroom based on overriding reasons or interests.[40] The chief justice's orders

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38. *State v. Ramseur*, ___ N.C. ___, 843 S.E.2d 106, 109 (2020) (trial judge blocked off three rows behind defense table to remain vacant); *United States v. Wilson*, No. 04-CR-1016 NGG, 2013 WL 2396086 (E.D.N.Y. May 31, 2013) (denying request in this instance); *Dickens v. Taylor*, No. CA 04-201-LPS, 2013 WL 1458904 (D. Del. Apr. 10, 2013) (inviting parties to raise any concerns about layout of courtroom).

39. *See* Remarks of Attorney Taylor Goodnight, *Successes in Practice During the Pandemic for Criminal Defense Attorneys*, Continuing Legal Education Seminar, N.C. Advocates for Justice, July 10, 2020. Texas courts have taken a similar approach and now regularly stream proceedings live on YouTube. *See* Texas Judicial Branch, *Court Coronavirus Information: Electronic Hearings (Zoom)*; YouTube channel: Texas Courts.

40. *See* Michael Crowell, *Closing Court Proceedings in North Carolina* (UNC Sch. Gov't, Nov. 2012); *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (stating that "the right to an open trial may give way in certain cases to other rights or interests"); *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 510 (1984) (stating presumption of openness can be overcome by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest").

(discussed in Questions 1 and 2, above) recognize the overriding interest in mitigating the risk of contagion and require that trial courts limit the number of people in courtrooms during the pandemic. In prior decisions, the North Carolina Supreme Court has recognized that the right to a public trial is subject to the trial court's discretion "to monitor admittance to the courtroom, as the circumstances require, in order to prevent overcrowding, to accommodate limited seating capacity, to maintain sanitary or health conditions, and generally to preserve order and decorum in the courtroom."[41] Courts have sometimes deviated from normal procedures in service of the compelling interest in maintaining courthouse safety and required other interests to yield.[42]

13. What are defense attorneys' ethical responsibilities to clients when seeking accommodations?
Like others who are providing services during the pandemic, attorneys should not have to sacrifice or jeopardize their health to do their jobs. However, attorneys' ongoing ethical obligations to their clients require them to consider whether their reluctance to proceed without accommodations, or the accommodations themselves, might create a conflict between the attorney's interests and the client's interests. Rule 1.7 of the North Carolina Revised Rules of Professional Conduct provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which includes situations where the representation may be materially limited by a personal interest of the lawyer.[43]

Ordinarily, an attorney's concern for his or her own safety will not create a conflict.[44] The provision of a safe environment for court personnel, including defense attorneys, is not generally inconsistent with a client's interest.

The possibility of a conflict is most likely to arise in situations in which the resolution of a client's case may be delayed because of the attorney's concerns about proceeding. Scheduling is ordinarily the province of counsel because it involves tactical questions about whether the defense is prepared to proceed.[45] A conflict may arise, however, if a client wants to go forward with the case and an

41. *State v. Lemons*, 348 N.C. 335, 349–50 (1998) (quoting *People v. Colon*, 71 N.Y.2d 410, 416 (1988)), *vac'd on other grounds*, 527 U.S. 1018 (1999); *see also* G.S. 15A-1034(a) (authorizing presiding judge to impose reasonable limitations on access to the courtroom to assure safety of people present).

42. *See, e.g.*, *Bobb v. Senkowski*, 196 F.3d 350, 352–54 (2d Cir. 1999) (upholding trial court's decision to grant State's motion to close courtroom in response to heightened safety risk in narcotics and firearms trial); *cf. Spanks-El v. Finley*, No. 85 C 9259, 1987 WL 10307, at *3 (N.D. Ill. Apr. 30, 1987) (holding that "as sensitive as this court is to the need to protect the right of an individual to freely exercise her or his religion of choice, that right must give way to the state's compelling interest in maintaining courthouse safety"), *aff'd*, 845 F.2d 1023 (7th Cir. 1988).

43. *State v. Taylor*, 155 N.C. App. 251, 262 (2002) (observing that Rule 1.7 is the general North Carolina ethics rule on conflicts of interest); *North Carolina State Bar v. Merrell*, 243 N.C. App. 356, 369 (2015) (stating "a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other . . . interests").

44. *Cf. Mickens v. Taylor*, 535 U.S. 162, 174–75 (2002) (holding that counsel is ineffective where conflict of interest adversely affects counsel's performance and indicating that this standard of ineffectiveness is not necessarily met "when the representation of the defendant somehow implicates counsel's personal . . . interests").

45. *New York v. Hill*, 528 U.S. 110, 115 (2000) (stating that on matters of scheduling, the views of counsel "plainly" prevail, as "only counsel is in a position to assess whether the defense would even be prepared to proceed"). Under North Carolina case law, even a scheduling matter may be the client's

attorney's health precludes the attorney from proceeding, notwithstanding compliance with the chief justice's orders and the implementation of reasonable accommodations. In that circumstance, the attorney should discuss available options with the client, including the possibility that the attorney may need to make a motion to withdraw if the client wants to go forward with the case.

D. Courts' Authority over Attorneys and Cases

The following discussion tries to anticipate questions that may arise if an attorney is unable to attend court proceedings or continue with representation of clients.

14. If a defense attorney fails to appear at a proceeding because of concerns about COVID-19, may the court proceed with the case without counsel present?

No. A defendant has the right to appear through counsel at every critical stage of criminal proceedings.[46] Proceeding against a represented defendant in their attorney's absence amounts to a denial of counsel and is presumptively prejudicial.[47] The U.S. Supreme Court has "uniformly found constitutional error without any showing of prejudice when counsel was . . . totally absent . . . during a critical stage of the proceeding."[48]

Courts have recognized two instances, waiver and forfeiture, in which a court may proceed against a person without counsel when the person is otherwise entitled to counsel.[49] For a defendant to waive counsel, the court must find that the defendant knowingly and voluntarily chose to proceed without them.[50] For a defendant to forfeit counsel, the defendant must have engaged in "egregious misconduct."[51] In a case in which a defendant's attorney does not appear because of concerns related to COVID-19, the defendant will have neither waived nor forfeited counsel.

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decision if the lawyer and client reach an absolute impasse and the client chooses to go forward. *See State v. Ali*, 329 N.C. 394 (1991).

46. *See* G.S. 7A-451(b); *Iowa v. Tovar*, 541 U.S. 77, 87 (2004); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

47. *Woods v. Donald*, 575 U.S. 312, 315 (2015). Some narrow exceptions exist to this general rule, such as if counsel fails to appear for a presentencing interview with a defendant and the defendant makes uncounseled statements used to support sentencing enhancements. *United States v. Hicks*, 948 F.2d 877, 885 (4th Cir. 1991). A different set of rules applies postconviction. For example, multiple circuit courts of appeal have held that the failure of appellate counsel to appear at oral argument does not warrant application of a per se rule of prejudice. *See United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986) (collecting cases). Similarly, in the deportation-defense context, an attorney's failure to appear at a hearing can result in its proceeding without the attorney, since there is no Sixth Amendment right to counsel in deportation hearings. *E.g.*, *Gor v. Holder*, 607 F.3d 180 (6th Cir. 2010).

48. *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). In civil cases, in which clients more often must bear the consequences of their attorneys' failures (*see Link v. Wabash R. Co.*, 370 U.S. 626, 633–34 (1962)), courts have distinguished the unexpected absence of an attorney from other matters. Clients have been found not to be bound by the actions of their attorneys when attorneys have gone missing, suffered significant family tragedies, or experienced debilitating medical conditions. *See, e.g.*, *Hildebrand v. Allegheny Cty.*, 923 F.3d 128, 133 (3d Cir. 2019); *United States v. Cirami*, 563 F.2d 26, 34 (2d Cir. 1977); *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964).

49. *See, e.g.*, *State v. Blakeney*, 245 N.C. App. 452, 459 (2016) (finding error where defendant was required to proceed pro se; defendant did not ask to represent himself, was not warned that he might have to represent himself, and had not engaged in egregious conduct that would justify forfeiture of his right to counsel).

50. *State v. Thacker*, 301 N.C. 348, 354 (1980).

51. *State v. Simpkins*, 373 N.C. 530, 535 (2020).

15. Can a judge hold an attorney in contempt if the attorney declines to appear in court because of concerns about COVID-19?

In most instances, it seems unlikely that contempt would be an appropriate remedy. Most courts that are informed an attorney is concerned about appearing in the courtroom are likely to try to coordinate with that attorney to identify a solution and, if one cannot be found, to reschedule until alternative counsel can be identified. The U.S. Supreme Court has repeatedly recognized the "equitable principle that only 'the least possible power adequate to the end proposed' should be used in contempt cases."[52] The Court has also observed, in a case overturning a North Carolina judge's finding of contempt, that the "fires which [contempt] kindles must constitute an imminent, not merely a likely, threat to the administration of justice,"[53] and it has cautioned that trial courts "must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice."[54]

Some attorneys have reported that judges have threatened to hold them in contempt when they have been unwilling to come into the courtroom during an ongoing session of court—for example, when an attorney believes that too many defendants, witnesses, and others are in the courtroom in violation of the chief justice's order or local rules. Does a judge have the authority to follow through on warnings that he or she will hold an attorney in contempt and possibly even jail the attorney? For attorneys practicing in these courts, this scenario is no small concern. This bulletin cannot predict the outcome in specific cases, but the discussion below lays out the controlling principles.

G.S. 5A-11(a) specifies the grounds for criminal contempt in North Carolina, which include willful disobedience of a court's order, willful failure to perform one's duties, and willful failure to comply with the court's schedule.[55] Appellate courts have affirmed the power of trial courts to control the conduct of attorneys through the use of contempt powers after providing proper notice and an opportunity to be heard.[56] However, it is questionable whether the failure to obey a court order because of concern for one's health would amount to contempt. Further, there is a serious question whether a court acting in violation of the chief justice's orders may hold an attorney in contempt for seeking that they be followed. *Willfulness* means an act "done deliberately and purposefully in violation of law, and without authority, justification, or excuse."[57] The term has "been defined as 'more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.'"[58]

Most contempt cases involving an absent participant have turned on the impact to the proceedings when the person waited unreasonably long to disclose that he or she would not participate.[59] That is unlikely to be the case when attorneys react to real-time conditions that

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52. *Pounders v. Watson*, 521 U.S. 982, 990 (1997) (quoting *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821))).

53. *In re Little*, 404 U.S. 553, 555 (1972) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

54. *In re Little*, 404 U.S. at 555 (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)).

55. G.S. 5A-11(a)(3), (6), (7).

56. *Williams v. Hinton*, 127 N.C. App. 421, 426 (1997).

57. *State v. Chriscoe*, 85 N.C. App. 155, 158 (1987).

58. *State v. Phair*, 193 N.C. App. 591, 594 (2008) (quoting *Forte v. Forte*, 65 N.C. App. 615, 616 (1983)).

59. *See United States v. Wilson*, 421 U.S. 309, 315–16 (1975) (holding that contempt finding for witnesses was appropriate where their "refusals [to testify after grant of immunity] . . . were intentional obstructions of court proceedings that literally disrupted the progress of the trial"); *United States v. Lespier*, 558 F.2d 624, 627–28 (1st Cir. 1977) (affirming contempt in case of attorney who "at the last moment subordinate[d] the interests of all others to [his] personal plans . . . [and] who had not taken the smallest step of giving notice earlier"); *In re Jackson*, 592 F. Supp. 149, 153 (S.D. Fla. 1984) (finding

may jeopardize their health. If attorneys anticipate that court conditions will be unsafe, they should explore options for ensuring that the rules are being followed (discussed in Part B., above) and possible accommodations (discussed in Part C., above).

Nevertheless, because the contempt statute empowers a court to hold attorneys as well as others in contempt for violations of the court's orders, attorneys need to take this issue seriously. If a court is determined to proceed with contempt, it must follow the standards and procedures appropriate to the contempt alleged.[60]

16. Can the court remove appointed counsel from a case and appoint new counsel if the attorney's concerns about the virus or willingness to appear in court delay the proceedings?

Maybe. Trial courts have authority to remove attorneys in some circumstances, such as where necessary to ensure that attorneys practicing before them do not have conflicts with their clients.[61] However, a court must have justifiable cause to remove an attorney, including appointed counsel, from a case.[62] Standing on its own, an attorney's expression of concern or request for accommodation (a situation described in the introduction to this bulletin) should not suffice, because it would not necessarily result in undue delay or conflict with a client's interests.

A court contemplating removing an attorney from a case must account for potential prejudice to the client. For this reason, the stage of the proceedings and readiness of replacement counsel is a factor.[63] Removal that does not meet a justifiable cause standard violates the Sixth Amendment right to counsel.[64] A court also must consider the defendant's wishes and whether the defendant supports, objects, or is indifferent to the attorney's actions and would like to continue with the attorney's representation. When a defendant has retained counsel, the defendant's wishes have particular significance, and courts "are afforded little leeway in interfering with that choice," at peril of triggering structural error.[65] The courts have stated that indigent defendants do not have a constitutional right to counsel of their choosing.[66] They

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attorney in contempt where attorney on first day of trial of nine defendants on 35-count indictment, which had been scheduled almost two months earlier, notified court that he was unwilling to attend the next four days of trial because of Passover and, despite assurances from court that it would recess early on Passover and warnings about consequences of not appearing, attorney failed to appear on subsequent days), *aff'd sub nom.*, *United States v. Baldwin*, 770 F.2d 1550 (11th Cir. 1985).

60. *See* Michael Crowell, *Contempt*, Administration of Justice Bulletin No. 2015/03 (Dec. 2015) (discussing requirements for and differences between criminal and civil contempt and between direct and indirect contempt).

61. *See Wheat v. United States*, 486 U.S. 153, 160 (1988); *United States v. Basham*, 561 F.3d 302, 323 (4th Cir. 2009); *State v. Rogers*, 219 N.C. App. 296 (2012); *State v. Scott*, No. COA18-744, 2019 WL 6875339, at *2 (N.C. Ct. App. Dec. 17, 2019) (unpublished), *review denied*, 840 S.E.2d 789 (N.C. 2020).

62. *State v. Nelson*, 76 N.C. App. 371, 373–74 (1985), *aff'd as modified*, 316 N.C. 350 (1986).

63. *Basham*, 561 F.3d at 325 (stating that the replacement of court-appointed counsel at a late stage may violate Sixth Amendment); *Nelson*, 76 N.C. App. at 373–74 (finding a Sixth Amendment violation and ordering a new trial where appointed counsel was removed at a late stage and the record did not reflect that new counsel had participated in preparing the case for trial).

64. *Nelson*, 76 N.C. App. at 373–74.

65. *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978) (collecting cases). In *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), the U.S. Supreme Court held that the erroneous removal of retained counsel constitutes structural error and necessitates a new trial. *See also State v. Yelton*, 87 N.C. App. 554 (1987) (finding violation by removal of retained attorney in a case in which attorney represented codefendants).

66. *See State v. Thacker*, 301 N.C. 348, 351–52 (1980).

also have recognized, however, that once an indigent defendant has appointed counsel, the defendant's perspective is a significant factor in determining whether removal of the attorney violates the Sixth Amendment.[67]

In *State v. McFadden*, the North Carolina Supreme Court's most frequently cited case on removal of counsel, the court emphasized that a trial court should "keep to a necessary minimum its interference with the individual's desire to defend himself in whatever means he deems best," and held that it should come between attorneys and their clients only when there is a "significant . . . disruption of the orderly processes of justice [that is] unreasonable under the circumstances."[68] The U.S. Supreme Court has observed that when the right to counsel is asserted to conflict with the court's interest in proceeding to trial, the court should not let a "'myopic insistence upon expeditiousness in the face of a justifiable request to delay . . . render the right to defend with counsel an empty formality."[69] These cases suggest that courts faced with delays related to concerns about COVID-19 in the courtroom should explore continuances and possible accommodations before resorting to removing and replacing counsel. While motions to continue are not generally reviewable absent a gross abuse of discretion, they are fully reviewable on appeal if they implicate the Sixth Amendment.[70]

17. Can a court remove from an appointment list or otherwise seek to restrict the practice of an attorney who is unwilling to appear in court because of concerns about COVID-19?

A court may recommend that an attorney be removed from an appointment list, but it does not appear to have the authority to remove them. The authority to remove someone from an appointment list ultimately rests with the North Carolina Office of Indigent Defense Services, which has authorized public defender offices and local bars to create appointment lists and maintain them, including removing attorneys when necessary.[71]

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67. *See Nelson*, 76 N.C. App. at 373 ("Whether a defendant in a criminal case receives effective assistance of counsel does not depend entirely upon counsel's ability. . . . The quirks of human nature are such that some people simply cannot communicate well with some others, and for no good reason will confide in and trust one lawyer, but not others of like or superior ability."), *aff'd as modified*, 316 N.C. 350 (1986); *cf. Morris v. Slappy*, 461 U.S. 1, 25 (1983) (Brennan, J., concurring) ("In light of the importance of a defendant's relationship with his attorney to his Sixth Amendment right to counsel, recognizing a qualified right to continue that relationship is eminently sensible.").

68. 292 N.C. 609, 613–14 (1977) (citations omitted). Decisions that have considered the question suggest that trial courts may not generally discharge appointed counsel over the objections of the attorney and the defendant under circumstances where the removal of retained counsel would not be justified. *See, e.g., Harling v. United States*, 387 A.2d 1101, 1104–05 (D.C. 1978); *Stearnes v. Clinton*, 780 S.W.2d 216, 222 (Tex. Crim. App. 1989) (en banc); *In re Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987); *In re Civil Contempt Proceedings Concerning Richard*, 373 N.W.2d 429, 432 (S.D. 1985).

69. *United States v. Inman*, 483 F.2d 738, 739–40 (4th Cir. 1973) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

70. *State v. Taylor*, 354 N.C. 28, 33 (2001) ("When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal.").

71. G.S. 7A-452(a) (providing that counsel is appointed in accordance with rules adopted by the Office of Indigent Defense Services); G.S. 7A-498.3(c) ("appointment of counsel . . . shall be in accordance with rules and procedures adopted by the Office of Indigent Defense Services"); Rules of the North Carolina Office of Indigent Defense Services, Part 1: Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level, Rule 1.5 (Appointment Procedure). In districts without a public defender office and in some instances in public defender districts, the court assigns

Courts have concurrent authority with the State Bar to impose discipline.[72] Thus, courts could theoretically discipline attorneys, including suspending their licenses and effectively barring them from appointed cases. However, such a reaction to an attorney's decision not to appear because of safety concerns would seem drastic and unjustified.

A court may run afoul of the First Amendment if it seeks to discipline or otherwise restrict an attorney's practice because of that attorney's argument that mitigation efforts are needed to do their job safely.[73] As one judge put it, "It would be ironic if the Constitution failed to protect its professional defenders—the lawyers—in the very forum dedicated to the Constitution's doctrine."[74]

E. Conclusion

COVID-19 has caused unprecedented disruption to the North Carolina criminal courts. Defense attorneys navigating the pandemic must weigh their clients' interests with the demands of courts and prosecutors and find ways to keep themselves safe, all while regularly working in environments that expose them to infection. The job is not easy in normal times, but it has perhaps never been so challenging as it is today.

Many defense attorneys have also experienced significant economic disruption during the pandemic. Financial issues are beyond the scope of this bulletin, but attorneys experiencing such hardship may consider a few resources. Attorneys at public defender offices who are impacted by the virus may be eligible through the end of the year for paid leave.[75] Eligibility criteria for unemployment benefits have been relaxed in recent months to include self-employed people, such as solo practitioners, who have been unable to work because of the pandemic.[76]

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cases to attorneys on the appointment list. Generally the court must make assignments in the sequence in which the attorneys appear on the list; however, the court may appoint an attorney who is not next in sequence if, among other reasons, the attorney who is next in sequence is unavailable or has a conflict. The Uniform Appointment Plan issued by the Office of Indigent Defense Services reflects this scheme

72. *See* Michael Crowell, *The Court's Inherent Authority to Discipline Lawyers* (UNC Sch. Gov't, Oct. 2013); *see also United States v. Dinitz*, 424 U.S. 600, 611 (1976) (recognizing that court may order removal of attorney from courtroom for improper conduct).

73. *Compare* Michael Crowell, *Free Speech Rights in Courthouses* at 4–5 (UNC Sch. Gov't, Nov. 2012) (discussing cases holding that a courtroom is a nonpublic forum, where First Amendment rights are at their "constitutional nadir") *with* Michael Kagan, *The Public Defender's Pin: Untangling Free Speech Regulation in the Courtroom*, 111 Nw. U. L. Rev. Online 125, 128–29 (2017) (stating that from a First Amendment perspective, a court is closest to a limited public forum, reserved for certain groups or for the discussion of certain topics, and that "the government violates the First Amendment when it . . . suppress[es] the point of view" of "a member of the class of speakers for whose especial benefit the forum was created" (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)).

74. *Zal v. Steppe*, 968 F.2d 924, 934–35 (9th Cir. 1992) (Noonan, J., concurring in part); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1072 (1991) (observing that although the First Amendment rights of lawyers are "extremely circumscribed" in judicial proceedings, "a lawyer is a person and he too has a constitutional freedom of utterance" and even "may exercise it to castigate courts and their administration of justice") (quoting *In re Sawyer*, 360 U.S. 622, 666 (1959) (Frankfurter, J., dissenting)).

75. Judicial Branch of North Carolina, Human Resources Division, Public Health Emergency Leave (Sept. 2020); Judicial Branch of North Carolina, Families First Coronavirus Response Act FAQs (Sept. 2020); Judicial Branch of North Carolina, FFCRA Leave Availability Comparison (Sept. 2020).

76. *See* Gov. Roy Cooper, Executive Order No. 118, *Limiting Operations of Restaurants and Bars and Broadening Unemployment Insurance Benefits in Response to COVID-19* at 4 (March 17, 2020) (directing Department of Commerce to "ensure that individuals who, as a result of COVID-19, are separated from employment . . . or are prevented from working due to . . . communicable disease control measures, shall be eligible for unemployment benefits to the maximum extent permitted by federal law").

Law offices that are unable to identify reasonable accommodations for attorneys who cannot safely attend court may be able to temporarily furlough them, during which time they could qualify for unemployment under the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act.[77] (The CARES Act would have to be renewed by Congress following its expiration at the end of July. Democrats and Republicans have both indicated that some version of the act, to include unemployment benefits, is likely to be renewed. So far it has not, and it seems unlikely to happen before mid-September.)[78] Solo and small law firms also generally qualify for relief under the CARES Act and can seek federal disaster assistance,[79] including an Economic Injury Disaster Loan,[80] as well as support from the federal Paycheck Protection Program.[81] The CARES Act and presidential executive orders also include relief provisions regarding student loans, zeroing out both payments and interest on all federal loans until the end of the year, during which time the loans are deemed "in repayment" and in good standing, regardless of whether payments are made.[82] During this period, governmental and nonprofit attorneys participating in the federal Public Service Loan Forgiveness program may continue to have their suspended payments credited toward the 120 payments necessary to secure debt forgiveness.[83]

The UNC School of Government's Public Defense Education Group will continue to develop, publish, and highlight resources for indigent defense attorneys during the COVID-19 pandemic. Attorneys should continue to consult the School's online COVID-19 Defense Tool Kit, which will be updated throughout the year with new materials.

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77. *See* CARES Act, Pub. L. No. 166-136, 134 Stat. 281 (Mar. 27, 2020) (defining eligible recipient as person "who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, [or] being unable to work due to lack of child care due to such virus or disease").

78. Marianne Levine, Heather Caygle, & John Bresnahan, *Pelosi and McConnell Hurtling Toward Coronavirus Relief Showdown*, Politico, July 15, 2020 (stating "both parties privately believe they'll reach a deal at some point: the stakes are too high for the nation's health and economic well-being"); Rebecca Rainey, *Recovery Stagnates Weeks After Weekly Aid Expires*, Politico, Aug. 24, 2020 (stating both chambers remain in recess until mid-September and "there is little hope a deal can be reached before then").

79. U.S. Small Business Administration, Coronavirus (COVID-19), *SBA Disaster Assistance in Response to the Coronavirus* (last visited July 16, 2020).

80. U.S. Small Business Administration, *Economic Injury Disaster Loans* (last visited July 16, 2020).

81. U.S. Small Business Administration, *Paycheck Protection Program* (last visited July 16, 2020); *see also* Matthew Mitchell, Massachusetts Bar Association, Tips to Secure Second Round PPP Funds (archived webinar).

82. *See generally* Karen Sloan, *Here's What Lawyers Need to Know About Student Loan Relief*, Law.com, April 1, 2020; U.S. Dept. of Educ., *Secretary DeVos Fully Implements President Trump's Presidential Memorandum Extending Student Loan Relief to Borrowers Through End of Year*, Aug. 21, 2020.

83. Caitlin See, *Here's How Student Loan Payments Suspended for COVID-19 Can Still Count Toward Loan Forgiveness in 2020*, StudentLoanPlanner.com, July 8, 2020.