

PHASING IN: RE-OPENING ARIZONA COURTS AFTER LOCKDOWN

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Last Friday the Arizona Supreme Court issued its latest order addressing how and when the courts will start to re-open after months of nearly total lockdown. The lengthy order contains extremely detailed instructions on how and when the state courts may begin allowing in-person proceedings and jury trials again.

Re-opening is keyed to three phases (I, II and III). According to the Supreme Court's order, we are currently in Phase 0. That means avoiding all in-person court proceedings to the greatest extent possible, following CDC social distancing guidelines, and limiting the number of persons in any court to 10 unless judicial leadership authorizes a larger group not to exceed 30.

Presiding superior court judges for each county, utilizing directives from the Supreme Court, must determine for the courts in their respective counties how and when in-person court proceedings and courthouse activities are to be phased-in and conducted, considering: (a) the physical space of individual courthouses and courtrooms, (b) the status of the pandemic in each local court jurisdiction, and (c) the number of judges and court staff in each location. This means that larger courts in dense metropolitan areas might start the re-opening process at different times than small, rural courts in sparsely populated areas. Or if they start the process at the same time, the details for doing so could look somewhat different from county to county. In any event, the order instructs judicial leaders to employ appropriate social distancing and other measures necessary to protect jurors and the general public.

Phase 1: Courts may begin transitioning to in-person proceedings on June 1, 2020 to the extent this can be safely accomplished. Whether any presiding judges will believe this can be "safely accomplished" by June 1 remains to be seen. We are in a very fluid situation that changes weekly and even daily. Even though the Supreme Court order authorizes certain activities to begin in the coming weeks, the actual course of the pandemic might not allow them to occur as quickly as authorized. In any event, during Phase 1, if the presiding judge approves, jury trials are authorized to begin on June 15, albeit if any do begin that early, virtual jury selection and virtual jury trials are likely to be the norm.

Importantly, the Supreme Court has modified three civil procedure rules that will affect how cases are tried in Phase 1 and possibly beyond, depending on how long Phase 1 lasts. First, the Court has suspended until December 31, 2020 the rule allowing a change of judge as a matter of right, so as to reduce any backlog and the risk of virus exposure inherent in out-of-county judges' travel. As such, parties in cases filed recently or in the coming months will not be able to have one automatic notice of change of judge. Second, for civil jury trials, the Supreme Court has reduced the number of peremptory strikes for potential jurors from four to two through December 31, 2020, so as to limit the number of citizens summoned to jury duty. Third, the Supreme Court's order allows trial judges, until August 1, 2020, to extend for 30 days the time for parties to file post-trial motions. Rule 6(b) would otherwise prohibit such extensions.

With respect to in-person attendances, during Phase 1, presiding judges must implement a staffing plan, if possible, to reduce the chance that all staff members might be infected or quarantined at the same time. In-person proceedings will be limited to parties, witnesses, jurors, court personnel, and any other necessary persons, no more than 10 at a time (capped at 30 with judicial authorization in extraordinary circumstances with social distancing). Courts cannot schedule multiple, simultaneous in-person proceedings that are inconsistent with these requirements. The use of virtual and electronic proceedings are encouraged, as is the use of retired judges, pro tem judges, and reassigned judges to ensure cases are disposed of as quickly as possible. All court participants must notify the court of any COVID-19 diagnosis, symptoms or exposure and make alternative arrangements to participate. In addition, courts must:

- subject all court staff and the public to a health screening protocol provided by the Administrative Office of the Courts to detect COVID-19 related symptoms;
- require face masks to be worn by all personnel in the courthouse;
- exclude from the courthouse those who fail the health screening protocol or who refuse to wear a mask or face covering; and
- follow social distancing recommendations.

Though we seem to be far from Phase II or III, Phase II envisions the resumption of in-person court proceedings, while still limiting the number of courthouse visitors during peak times, practicing social distancing, and limiting group events to 30 (no more than 50 with judicial authorization). Additionally, many Phase I protocols (such as the use of technology) will remain in place to maximize public safety.

Phase III envisions the full resumption of in-person court proceedings and full court staffing, and the relaxation of screening protocols and face mask requirements, while still maintaining social distancing and the use of technology.

Candidly, because the pandemic situation is so fluid, some of these protocols might be with us for the foreseeable future. We will continue providing updates and analysis regarding the re-opening of Arizona courts.

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