

NC Bar Association Representative's Deadline Extension Recommendations

From: Patrick Weede

Sent: Monday, May 04, 2020 4:13 PM

To: Bridges, Forrest D.; Corpening, Julius H.

Subject: Re: Task Force - Feedback from Criminal Defense Lawyers

Judge Bridges and Judge Corpening:

Thank you very much for your leadership on the task force. It is a privilege to be a part of this group.

Following the meeting on Friday, I reached out to other criminal lawyers via several listservs in order to get feedback on some of our critical issues, including a filing deadline extension, best practices for safety, and innovations in court scheduling/operations.

I want to highlight some of the main themes in the feedback I received. I would be glad to discuss these issues at the appropriate time during Tuesday's meeting. Please let me know if you would like for me to send this email to the whole task force.

1) Jury Trials

The primary concern among criminal defense attorneys pertains to jury trials. Most attorneys believe that the Chief Justice should specifically order that no jury trials should begin until the fall at the earliest. Some attorneys have major trials set to begin in June/July and want direction ASAP.

In addition, attorneys who handle capital/potentially capital cases as well as non-capital first-degree murder cases noted issues unique to their work. These attorneys expressed concern that they have been unable to meet with clients in jails/prisons, review discovery with clients, and track down witnesses and other critical information. Attorneys who focus on this work often have numerous pending capital/potentially capital cases so there is a lot of catching up necessary for each case.

Further, many of these cases involve investigators, mitigation specialists, and other experts who have been unable to complete their work since mid-March. Thus, those handling capital/potentially capital cases believe that the Chief Justice should issue a directive that no capital or non-capital first-degree murder trial should begin for at least 4-6 months after the end of the stay-at-home directive unless both parties agree. Perhaps a directive on trials could separate capital/non-capital first-degree murder trials (and even some other serious felonies) from other types of cases. One public defender's office even recommended that no criminal defendant be required to proceed to trial for the remainder of 2020 without consent.

On the other hand, at least one attorney expressed concern about clients (who have already been in jail awaiting trial for a long time) remaining in custody for another extended period of time. Perhaps a directive that automatically prohibits any trial for at least several months and all capital/non-capital first-degree murder trials for a longer period of time without the consent of the defendant would balance these interests.

An additional jury trial issue pertains to the jurors themselves. Attorneys noted that (especially in more rural Eastern NC counties) a number of potential jurors may be in high-risk categories and may be very reluctant to serve on a jury for the foreseeable future (or even respond to a summons). This impact on a

potential jury pool could affect whether a jury is representative of the community and, consequently, a defendant's right to a fair trial.

2) Safety

As part of the jury trial issue, criminal attorneys expressed concern about safety since defense attorneys must have the ability to confer privately with clients at the counsel table, especially during a trial (whether in district court or a jury trial in superior court). Social distancing would not allow for defense attorneys to have close contact with their clients. On the other hand, requiring defense attorneys to sit next to clients puts the health of the attorney and the client at risk.

I have also heard from attorneys (including several over age 65) who are concerned about being in high-risk groups due to age and underlying health conditions. Attorneys who serve as the primary caregiver to a spouse or another individual in a high-risk category are also very concerned about exposing themselves and, consequently, their loved ones. As a result, they have the concerns listed above as well as concerns about the ability to meet safely with clients in custody. Although the use of masks and other protective equipment in court is not normal, it should be allowed (if not required) in every courthouse/courtroom.

Furthermore, some attorneys are concerned about the ventilation systems in courthouses and whether that could put individuals at risk (similar to a news report regarding the spread of the virus through A/C systems in restaurants).

3) Clarity

A third main theme is the need for clarity. Some attorneys indicated that there is confusion about some of the existing directives and some noted that counties are applying the directives in different ways. Criminal defense attorneys want consistency on these issues across the state.

4) Waiver of Appearances

Another common theme is a movement toward not requiring defendants with attorneys to appear in court for a large calendar call when the case is not going to be addressed that day (e.g. superior court administrative calendar call). This would keep a number of individuals away from the courthouse. Similarly, one attorney mentioned the possibility of defendants represented by counsel not having to appear in court to go over a deferred prosecution agreement after signing the agreement in an attorney's office. That attorney also suggested that the court system should allow more cases to be handled by waiver of appearance in district court.

Furthermore, some attorneys also want to encourage prosecutors to conduct negotiations outside court (by phone, videoconference, etc) and to allow more flexibility with certain requirements (e.g. community service and driving schools in district court).

5) Jails

As noted above, the virus has greatly impacted criminal defense attorneys' ability to meet with clients in custody and to do so safely. This issue will not automatically go away on June 1 or at any time in the near future. I know there are a few jails that utilize JurisLink in which attorneys may have a secure videoconference with clients in custody from their home/office without going to the jail. However, most of the ones I frequent do not, and I would like to see all county jails required to provide this technology. In addition, jails in smaller counties do not have spaces in which to meet with clients at

least 6 feet away. I believe that all jails should be required to provide inmates with masks when they meet with attorneys.

Please let me know if you have any questions. I look forward to our call tomorrow afternoon.

Thanks,

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