



MACDL

Massachusetts Association of
Criminal Defense Lawyers

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Chief Justice Gants
Supreme Judicial Court
1 Pemberton Square
Boston, MA 02108

Chief Justice Carey
Office of the Trial Court
1 Pemberton Sq.,
Boston, MA 02108

July 14, 2020

Dear Chief Justice Gants and Chief Justice Carey,

Over the past few days, MACDL members have raised numerous serious concerns about “Phase 3” of the court reopening plan, most importantly the requirement of in-person hearings for all arraignments, as of July 13, 2020. Many defense attorneys are at high risk of suffering severe illness or death if they contract COVID-19 because they are either over 60 years of age, and/or have a pre-existing medical condition and/or live with someone in one or both of these categories.

Our members participated in the conference call on Monday July 13, 2020, with representatives of the judiciary which included a presentation about the various protective measures designed to alleviate concerns of attorneys, court personnel and the public, including oversight of the re-opening process by an epidemiologist, requirements of social distancing, PPE, temperature checks, and cleaning schedules. Despite assurances that these measures will be implemented uniformly across the Commonwealth, we remain concerned about several issues.

First, we are aware of no written protocol that establishes procedures to minimize the risk of exposure to COVID for attorneys, their clients and other witnesses — such as scheduling hearings for specific times to avoid unnecessary waiting, installation of plexiglass barriers in areas designed to separate parties, provision of cellphones to defendants in lock-up so that attorneys can speak to them by telephone rather than face to face in lock-up, and procedures to ensure social distancing for prisoners during transport to and from court.

Second, prisoners who are transported to court will be placed in segregation for two weeks after any in-person court appearance. Where attendance is made mandatory, this amounts to punishment for attending a court appearance.

Third, some courts have expressed an unwillingness to accommodate lawyers who face an elevated risk of serious illness or death if exposed to COVID-19 (or live with people in this category) by offering the option of a virtual hearing — which by now all courts are capable of providing.

Given the existing scientific evidence regarding airborne transmission of the virus, we are opposed to re-opening for mandatory non-emergency in-person appearances because it is not safe and it is not essential to do so. There is no specific reason that mostly routine appearances should endanger the health and well-being of anyone required to appear, including the parties and counsel. We oppose this plan and request that any such hearings be done by remote means unless the parties consent to an in-person appearance.

It is well established that the COVID-19 pandemic has had a disproportionate impact on low income Black and Brown people, the same community that is also disproportionately arrested and charged in the criminal courts of the Commonwealth and therefore will bear the brunt of this new policy. Therefore, unless adequate accommodations and safety measures are implemented, the policy is not only needlessly dangerous, but also unfair because of its racially disproportionate impact. These unfair and unnecessary risks are compounded by the potential transfer of the virus to family members and members of the public – putting Black and Brown communities in particular at risk of an illness that may have long-standing health complications and is potentially fatal.

Requiring clients to come to Court for a non-emergency matter is unjust and fails to recognize the enormous burden this places on them, their families and communities, as well as on defense counsel.

For all the above reasons, we ask for the following:

1. Suspend the plan to require in person appearances for non-emergency matters until all interested parties have the opportunity to work together to develop plans and protocols for returning to Court in a safe manner.
2. Permit attorneys and defendants with preexisting medical conditions, or who are over age 60, or who live with people in those categories to participate in court proceedings remotely in lieu of any in-person hearing.
3. Give prisoners the option of a virtual appearance, either because of a preexisting medical condition, or because they do not wish to be placed in segregation for two weeks following their appearance.
4. Provide the defense bar with all written safety protocols generated to date, the identity of the court’s epidemiologist, and a copy of the 60 questions presented to each court and their responses, so that our expert will have the opportunity to consult regarding the plans and protocols for returning to Court in a safe manner.

Sincerely,

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