

# In the Supreme Court of the State of Idaho

**RE: EMERGENCY ORDER** )  
**REGARDING COURT** )  
**SERVICES** )  
\_\_\_\_\_ )

**ORDER**  
**September 22, 2021**

Over the last 18 months, this Court has issued a series of emergency orders intended to address the substantial health and safety risks faced by the public accessing the courts, court personnel, and participants in court proceedings caused by the community spread of COVID-19. Since the issuance of this Court’s Amended Order Re: Emergency Order Regarding Court Services, issued June 25, 2021, the incidence rate of COVID-19 infection throughout the state has substantially increased from a seven-day moving average incidence rate of confirmed or presumed cases of COVID-19 of under 5 per 100,000 population, to over 60.7 per 100,000 population<sup>1</sup>. Since June 7, 2021, the weekly average of hospitalized patients with suspected or confirmed COVID-19 in the state has increased 570%, and the weekly average of patients hospitalized in the Intensive Care Unit with confirmed COVID-19 has increased 434%. *Id.* The current number of positive cases is approaching or equivalent to the number of positive cases during the December 2020 surge, and current hospitalizations exceed the number of hospitalizations during last December’s surge. *Id.* Most of this increase is due to the spread of the highly contagious Delta variant of the COVID-19 virus over the summer of 2021.

This dramatic increase has overburdened Idaho’s health care system. As a result, on September 16, 2021, the Idaho Department of Health and Welfare issued a Declaration of Crisis Standards of Care, activating crisis standards statewide in response to the surge of COVID-19 patients that has “exhausted the supply of staff, available beds and necessary resources to adequately address the increased demand for healthcare services.” “Implementation of crisis standards of care are meant to be a measure of last resort. Activation of the crisis standards of care . . . means that all other options for addressing resource limitations have been explored.” See Idaho Dept. of Health and Welfare, Declaration of Crisis Standards of Care, September 16, 2021.

Pursuant to this Court’s June 25, 2021, emergency order, if “a county’s seven-day moving average incidence rate of confirmed or presumed cases of COVID-19 is 25.0 or greater per 100,000 population, the Administrative District Judge shall enter an administrative order defining the safety protocols that will be required in the county’s courthouse.” Likewise, jury trials may only commence in counties with an incidence rate of lower than 25.0 per 100,000 population. On the date that amended order issued, only one of Idaho’s forty-four counties exceeded that incidence rate. Recently, the number of counties with an incidence rate exceeding 25.0 per 100,000 has risen

<sup>1</sup> See <https://public.tableau.com/app/profile/idaho.division.of.public.health/viz/DPHIdahoCOVID-19Dashboard/Home>, data downloaded September 17, 2021).

dramatically, such that data available on September 17, 2021, shows 38 of Idaho's 44 counties exceeded that rate.<sup>2</sup>

In light of these concerning developments, we have concluded that further modification of our emergency orders is now warranted. In order to continue to foster public safety, reduce the risk of the spread of COVID-19 and its variants, and preserve access to Idaho's healthcare system, court operations shall be governed by the following rules until further order of the Court:

**1. Courthouse and Courtroom Risk Reduction Protocols:**

- a. **Single-Purpose Building.** All persons in publically accessible spaces of a building being used solely for court business shall wear a mask that covers the nose and mouth, maintain six feet of social distance from anyone that does not live in their household, and comply with all other court orders restricting the number of persons that may gather together.
- b. **Mixed-Use Buildings.** In a building that houses both court operations and other, non-court operations, all persons entering a courtroom, a clerks' office or clerks' counter area, or a space designated for court business, such as public areas adjacent to the previously mentioned areas or secured areas adjacent to the previously mentioned areas, shall wear a mask that covers the nose and mouth, maintain six feet of social distance from anyone that does not live in their household, and comply with all other court orders restricting the number of persons that may gather together.
- c. **Court Proceedings.** During any proceedings in a courtroom or other space designated for court or grand jury proceedings, all persons in the room must wear a mask approved by the presiding judge unless the presiding judge has granted an exception. If a witness, while testifying, cannot maintain a six-foot distance from all other courtroom participants, the assigned judge may require the witness or an interpreter while interpreting, to wear a face shield or to testify from behind a transparent barrier.
- d. **Further Restrictions and Limitations.** The Administrative District Judge has the discretion to impose further restrictions and limitations on the manner in which courthouses, spaces designated for court and grand jury business, and courtrooms are used, including restrictions and limitations on in-person proceedings. The Administrative District Judge is responsible for ensuring adequate measures are in place so that while in a courthouse all persons participating in a court proceeding or doing court business have easy access to sanitation stations where hand sanitizer, bleach wipes, or handwashing is available and can maintain appropriate social distance of at least six (6) feet from any persons not living in their household.

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<sup>2</sup> See <https://public.tableau.com/app/profile/idaho.division.of.public.health/viz/DPHIdahoCOVID-19Dashboard/Home>, data downloaded September 17, 2021).

2. **Court Proceedings Other Than Jury Trials and Grand Jury Proceedings:** Other than for on-going jury trials and grand jury proceedings, court rules which prohibit hearing any case or part thereof remotely are suspended during the effective term of this order. All court proceedings shall be held remotely, i.e., with all participants utilizing remote technologies including teleconferencing and video conferencing, subject to the following conditions and requirements:
- a. All trials on a petition to terminate parental rights shall be held in person.
  - b. All felony sentencing hearings shall be held in person with the defendant and counsel present in the courtroom.
  - c. Any party intending to offer documentary evidence during a hearing held remotely must provide the court and all parties a list of such exhibits and copies thereof at least seventy-two hours before such hearing unless the assigned judge modifies the time for good cause shown.
  - d. An audio recording of all court proceedings must be created in For The Record (FTR) software recording or in Zoom software recording. For court proceedings in district court, the official record may be kept by a court reporter in addition to the audio recording. With the permission of the assigned judge, a court reporter may report proceedings remotely.
  - e. To protect the integrity of the remote proceeding, an assigned judge has the discretion to enter other orders or impose other requirements to promote the safety of participants or to promote efficiency.
  - f. A presiding judge may, in the exercise of discretion and after making findings on the record, determine that a proceeding, including a bench trial or an evidentiary hearing in a juvenile case, must be held in person because of the court's needs or to prevent prejudice to a party. In such a case, the assigned judge may postpone the hearing of the matter or allow an in-person hearing to the extent necessary to enable the court to consider the matter.
  - g. If a proceeding is held in person, the safety protocols set forth in section one of this Order shall be followed.
  - h. Any portion of a proceeding otherwise open to the public pursuant to law may be live streamed subject to the conditions in section nine of this order.
3. **Conduct of Jury Trials:** No jury trial, whether civil or criminal, shall commence between September 27, 2021, and December 6, 2021. As used in this order, the word "commence" means the first day members of a jury venire are required to physically appear at a courthouse or designated facility. Any jury trial that commenced prior to September 27, 2021, shall be subject to the following conditions:
- a. Once a trial has commenced, it should continue to verdict unless, in the discretion of the assigned judge, a significant increase in the county's weekly COVID-19 incidence rate or other local coronavirus exposure or public health action justifies

- a temporary suspension of the trial. Any order in this regard must be supported with written findings.
- b. All provisions of I.C.R. 24 and I.R.C.P. 47, not otherwise modified in this order, shall remain in force and effect.
  - c. In a criminal jury trial, with the judge's approval, counsel for both parties and defendant may stipulate that a witness may testify remotely. If the defendant is not present pursuant to Idaho Criminal Rule 43, counsel for the defendant may stipulate on his behalf.
  - d. In civil jury trials, with the assigned judge's approval, counsel for the parties may stipulate to offer any or all testimony remotely.
  - e. At no time shall a juror be asked or required to remove a mask against their wishes.
4. **Grand Juries**: No new grand jury may be impaneled between September 27, 2021, and December 6, 2021. Existing grand jury panels may be extended, through written order, at the discretion of the court that summoned the grand jury. All provisions in Idaho Criminal Rules 6-6.5 remain in full force and effect except to the extent modified by this order. If sufficient space to allow for adherence to safety requirements for grand jurors is unavailable in the county courthouse, alternative locations with sufficient space may be utilized at the discretion of the Administrative District Judge for each district.
  5. **Preliminary Hearing Timelines**: The 21-day preliminary hearing requirement for out-of-custody defendants under Idaho Criminal Rule 5.1 is waived until further order of this Court.
  6. **No Judge Disqualification Without Cause**: No judge shall be disqualified without cause from any proceeding pursuant to Idaho Criminal Rule 25(a), Idaho Rule of Civil Procedure 40(a), or Idaho Rule of Family Law Procedure 109 during the effective term of this order. When this order is lifted, disqualification without cause rules will only operate prospectively and may not be exercised retrospectively in any existing case.
  7. **Trial Court Discretion to Commence or Discontinue Jury Trial**: Nothing contained in this order shall be construed to limit or expand an assigned judge's discretion to commence or suspend an on-going jury trial for reasons unrelated to COVID-19.
  8. **Tolling of Speedy Trial**: If this order, any previous COVID-19 emergency orders of this Court, or any orders entered by an Administrative District Judge in response to conditions related to the incidence rate of COVID-19, result or have resulted in any delay in the commencement of jury trials, the time used to calculate the right to a speedy trial pursuant to Idaho Code Section 19-3501 shall be deemed to have been tolled for the duration of this order.
  9. **Live Streaming of Proceedings**:
    - a. Idaho Court Administrative Rule 45 shall be applied when a camera in the courtroom supplements public attendance.

- b. Any portion of a proceeding traditionally open to the public may be live streamed rather than allowing the physical presence of the public only when:
  - i. the assigned judge finds that:
    - 1. health and safety concerns override other interests in allowing the public to be physically present in the courtroom; and
    - 2. denial of the public's physical presence in the courtroom is necessary to protect the health and safety of those participating in the proceeding, including, if applicable, a lack of sufficient physical space for adherence to any social distancing requirements; and
  - ii. the assigned judge has considered other reasonable alternatives to allow the physical presence of the public; and
  - iii. the assigned judge has made findings on the record that live streaming is an appropriate alternative because:
    - 1. no reasonable in-person alternative is available that would sufficiently ensure the health and safety of those participating in the trial; and
    - 2. the available live streaming capability is a narrowly tailored and reasonable alternative.
- c. If the public cannot be physically present in the courtroom, a publically accessible live audio and video stream of the proceedings must be provided. Such live stream may be publically accessible either:
  - i. via transmission to the internet, or
  - ii. by transmission to a separate room in the courthouse. Any live stream of a court proceeding shall not be a part of the official court record.
- d. There shall be no live streaming of the following:
  - i. images of jurors, unless the live streaming is by transmission to a separate room in the courthouse;
  - ii. audio of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench;
  - iii. images of notes upon the counsel table, nor of any exhibits before they are admitted into evidence;
  - iv. audio or images of off-the-record, in-chambers sessions or judicial deliberations;
  - v. audio or images of proceedings in which jurors may have to disclose personal, embarrassing, or prejudicial information that traditionally would be addressed outside of the presence of the other jurors and the public.

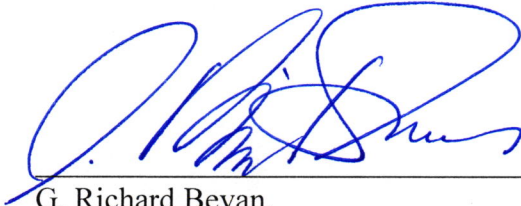
10. **Signage:** Signage shall be conspicuously posted at all public entry points of a courthouse or other location designated for court business, including grand jury proceedings. The signage shall:

- a. state the proper standard for wearing a mask covering one's nose and mouth and practice social distancing as defined in section one of this order;
- b. strongly advise individuals not to enter the building (if a dedicated courthouse) or to approach the courtrooms or court services offices (if a shared courthouse) if they:
  - i. have been asked to self-isolate by any doctor, hospital, or health agency;
  - ii. have been diagnosed with, but have not yet recovered from, COVID-19; or
  - iii. are experiencing any signs or symptoms of illness including: fever, cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache, or new loss of taste or smell.

This order supersedes the Court's emergency order entered on June 25, 2021, and shall take effect on September 27, 2021.

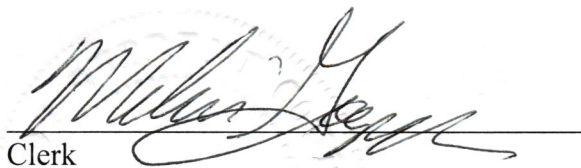
IT IS SO ORDERED.

DATED this 22<sup>nd</sup> day of September 2021.



G. Richard Bevan,  
Chief Justice, Idaho Supreme Court

ATTEST:



Clerk