

October 26, 2020



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By First Class Mail and Email: patty.macke.dick@renogov.org

Chief Judge Patricia Macke Dick
27th Judicial District Court
206 W 1st Avenue
Hutchinson, KS 67501

Re: Reno County Jury Trial Protocol During COVID-19

Dear Chief Judge Macke,

We write to express concerns regarding your COVID-19 Jury Trial Protocol and public access to court proceedings. The First and Sixth Amendments to the U.S. Constitution guarantee the right of public court proceedings. As you begin to reopen the Reno County Courthouse, we are concerned that your published protocols do not properly protect these important, fundamental rights.

I. Factual Background

It is our understanding that you have called for jury trials to resume for the 27th Judicial District and that you promulgated new COVID-19 specific protocols containing various safety measures intended to protect litigants, counsel, court staff, and jurors. However, these protocols contain no provision to address the general public's First Amendment right of access to court proceedings, nor the criminal defendants' Sixth Amendment right to a public trial.

We recognize the challenges courts are facing amid a global pandemic and appreciate your attempt to ensure that defendants' right to a jury trial remains protected. However, your current plans make no accommodation for public access. Your protocol provides only that proceedings will be streamed into the atrium of the courthouse.¹ Our understanding is that this area is not open to the general public, but rather used for the venire of those called for jury duty.² Your protocol gives no further indication of plans to stream proceedings publicly or any process for members of the public, including the friends and family of the accused, who wish to be

¹ Jury Protocol ¶ 34.

² See Jury Protocol ¶ 11.

physically present in the courtroom,³ nor does your protocol make clear that members of the press will retain unfettered access to cover criminal proceedings.

II. Legal Analysis

We understand that court operations likely look much different now than they did before the pandemic began, and that you and your staff are working hard to ensure that trials can continue unimpeded with everyone's rights and safety in mind. However, based on the above, current Court operations are interfering with the constitutional rights to a public trial.

A. The Court's practices infringe on the public's First Amendment right of access to court proceedings.

The public's right of access to court proceedings is essential not only to the functioning of the judiciary, but to representative democracy writ large. *See, e.g., Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) (openness in judicial proceedings 'enhances both the basic fairness of the [proceedings][and the appearance of fairness so essential to public confidence in the system'); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 556-57 (1980) (right to attend criminal trials is "implicit in the guarantees of the First Amendment"). People have a general constitutional right and interest in watching criminal proceedings as a means of providing a check on court operations. Moreover, family members and friends of the accused, as well as other members of the public, may also want to attend criminal proceedings in person to offer support. Current policy prevents people from doing so and impermissibly infringes on their First Amendment rights.

The First Amendment also protects the right of the press to attend criminal proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers*, 448 U.S. at 573. Journalists often act as "surrogates" for the public by reporting on court proceedings of public interest or importance. *Richmond Newspapers*, 448 U.S. at 573; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (because individuals cannot always attend court proceedings or comb through court documents, news organizations play a vital role in calling attention to specific cases of importance or flaws in the justice system by attending proceedings and reviewing documents on the public's behalf).

³ Your Jury Protocol raises other significant concerns about how the revised processes will impact *voire dire*, the right to counsel, and the ability of counsel to interact with the jury during criminal proceedings. Although we do not address those concerns in this correspondence, we encourage you to reexamine the protocols you issued with an eye towards whether the alterations you made to court practices fundamentally infringe upon a defendant's right to a fair trial.



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B. The Court’s practices infringe on Defendants’ Sixth Amendment right to a public trial.

Likewise, criminal defendants are entitled to a public trial under the Sixth Amendment of the U.S. Constitution. *See* US. CONST. AMEND. 6 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy *and public* trial”) (emphasis added); *see also* *State v. Reed*, 302 Kan. 227, 237 (2015). This right extends not only to jury trials, but to all proceedings throughout the case in which the public would have an interest. *See generally* *Press-Enterprise Co.*, 464 U.S. at 508.

Public proceedings are essential to ensure fair trials, allow for a public check on the judicial and prosecutorial functions, encourage witnesses to come forward, and to discourage perjury. *See* *State v. Reed*, 302 Kan. at 240-41. For these reasons, “trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.” *Presley v. Georgia*, 558 U.S. 209, 215 (2010). Courts should only close proceedings to the public where there is an overriding interest that would be prejudiced by public attendance, the closure is no broader than necessary to protect that interest, and reasonable alternatives to closing the proceeding are unavailable. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

We are sympathetic to the Court’s valid public health and safety interests and the need to protect all those who enter the courthouse doors. However, the Court need not choose between public health and constitutional public access rights. Even at this difficult and operationally complex point in time, the Court cannot set aside fundamental constitutional rights.

We are eager to assist you with the development of revised protocols and plans for safely reopening public proceedings. Should you wish to discuss this matter more, please do not hesitate to reach out.

Kind regards,


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