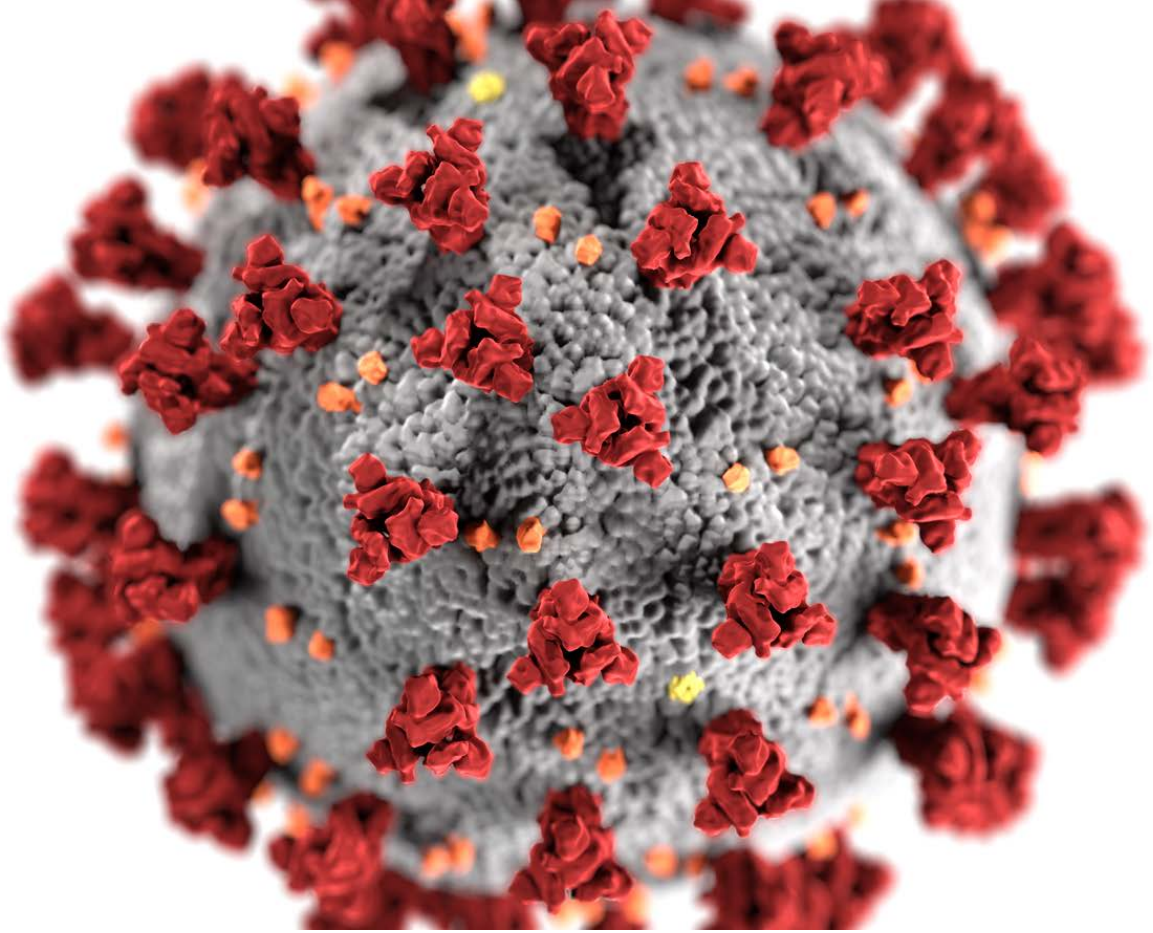

REPRESENTING YOUR DETAINED CLIENT DURING A PANDEMIC

Presented by Ronni Sheets, Chief Defender, 13th Judicial Circuit Public Defender Corporation.

Rules of Professional Conduct

Rule 1.1 Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- A lawyer must adhere to the general standards expected of an attorney appointed to represent a client in a criminal matter.

Rule 1.3 Diligence

- A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

- Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions… unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 3.2 Expediting Litigation

- A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

- On March 30, the New York Times reported that a Chicago jail went from two diagnoses to 113 diagnoses within a week.
- Michigan prisons have 78 positive cases.
- A New York City jail complex had 167 confirmed cases.
- The First COVID detainee death in Rikers was April 6. He was in jail on a parole violation for failure to report.
- First inmate death in Chicago was April 7. The defendant had been awaiting trial since July 2018.
- First federal inmate died April 7, after serving ½ of a 30-year sentence for non-violent drug offense
- As of Sunday 237 detainees, 321 corrections personnel, and 53 jail health staffers had tested positive in New York

West Virginia Indigent Defense Standards

- Located on the PDS Website:

https://pds.wv.gov/Continuing%20Education/Annual-Conference/Archive/2017-Conference/Documents/IDC%20-%20Standards%20(Adopted%20-%202017).pdf

In every case where the client is detained, defense counsel **should discuss with the client, as promptly as possible, the client's custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions should be sought**. Defense counsel should be aware of applicable statutes and rules and all alternatives less restrictive than full institutional detention. Defense counsel should investigate community and family resources that might be available to assist in implementing such alternatives.

Defense counsel should reevaluate the client's eligibility for release, or for reduced release or custodial conditions, at all significant stages of a criminal matter and when there is any relevant change in facts or circumstances. Defense counsel should request reconsideration of detention or modification of conditions whenever it is in the client's best interests.

COVID-19: What We Know

- What is COVID-19?

- COVID-19 is shorthand for coronavirus disease 2019

- COVID-19 disease is a global pandemic and has been termed a global health emergency by the WHO. Cases first began appearing sometime between December 1, 2019 and December 31, 2019.
- Generally it expresses in flu-like symptoms.
- An individual may be at their most contagious BEFORE they show symptoms

- How serious is it?

- COVID-19 is a serious disease. The overall case fatality rate has been estimated to range from 0.3 to 3.5%, which is 5-35 times the fatality associated with influenza infection.

- COVID-19 is characterized by a flu-like illness. While more than 80% of cases are generally mild, overall some 20% of cases will have more severe disease requiring medical intervention and support.

- The case fatality rate is higher in men, and varies significantly with advancing age, rising after age 50, and above 5% (1 in 20 cases) for those with pre-existing medical conditions including cardio-vascular disease, respiratory disease, diabetes, and immune compromise.

- Why is it worse in detention facilities?

- Infections that are transmitted through droplets, are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible.

- The nature of detention creates a heighten risks for exposure, acquisition, transmission, and clinical complications of these infectious diseases.
- Overcrowding, population density in close confinement, insufficient ventilation, shared toilet, shower, and eating environments and limits on hygiene and personal protective equipment such as masks and gloves put the incarcerated population at enormous risk

Facts About the Coronavirus

- National Association for Public Defense COVID19 page

https://www.publicdefenders
us/covid

- National Association of Criminal Defense Lawyers COVID 19 page

https://www.nacdl.org/conte
nt/coronavirusresources

Supreme Court Action

- March 12, 2020 Covid-19 Planning Document/Court Protocol
  - Nature of virus, guidance regarding self-isolation
- March 16, 2020 Administrative Order
  - All criminal trials and jury orientations continued, except where speedy trial rights may preclude continuation
  - Emergency matters must be heard, including arraignments, criminal hearings with statutory requirements

Supreme Court Action- cont.

- March 22, 2020 Judicial Emergency Declared
  - COVID-19 crisis creates an unprecedented public health emergency
  - All proceedings, from March 23-April 10 are stayed, including jury trials
  - Exempted from stay- domestic violence, child abuse and neglect, infant guardianship, certain physical custody cases, juvenile detention and placement, criminal initial appearances, bond hearings, search warrants, criminal preliminary hearings, and mental hygiene
  - Proceedings should utilize available technology, telephonic or video, to limit in-person contact

Supreme Court Action-cont.

- March 27, 2020 Memorandum COVID-19 and Pre-trial Release
  - **Clarifies that bond hearings are emergency matters** that can proceed during the Judicial Emergency
  - Judges and Magistrates are to contact Prosecuting Attorney in each county, requesting they review pretrial detainees to identify those who do not constitute a public safety risk and may be appropriate candidates for PR or reduced bond by close of business March 30
  - Parties to submit agreed orders
  - **Judicial officers should deem such requests emergency, time-sensitive matter**s
  - When considering new incarcerations, judicial officers "**may consider, balancing the safety of the public and victims, whether a PR or reduced bonds are appropriate to address concerns related to COVID-19"**

Supreme Court Action-cont.

- April 3, 2020 Judicial Emergency extended through May 1, 2020
- April 3, 2020 Memorandum Guidance re: Emergency Order
  - Certain non-emergency hearings now permitted
  - Guidance regarding the “Term Rule Question”

"Term Rule"

"Two term rule"

- Generally, a person in jail, on a criminal charge, shall be discharged from imprisonment if he be not indicted before the end of the second term of the court, at which he is held to answer W.Va. Code §62-2-12

"Three term rule"

- Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial W.Va. Code §62-3-21

Term Rule-cont.

According to the April 4, 2020 memo:

- The original and Amended Order, in effect, also tolls the "three-term" speedy trial requirement, because the State is unable to empanel a jury or try a criminal defendant during the period of judicial emergency.
- Judges should make rulings consistent with applicable statute, case, law, and the Court's previous orders, and the *Baker* factors
- *Baker v. Wingo* 407 U.S. 514 (1972) sets forth factors courts should consider in determining speedy trial violations;
  - *Length of delay*
  - *Reason for delay*
  - *Defendant's assertion or abandonment of right*
  - *Prejudice to the defendant*

Term Rule-cont.

- For some judicial circuits, term ends May 8
- Prepare bail motions and orders
- Prepare dismissal motions and orders

What is being done?

Various social justice and public interest agencies have taken action

- Mountain State Justice filed injunction in federal court *Baxley v. Jividen*
- ACLU has made efforts to open dialogue with the Governor and Supreme Court
- ACLU and Public Defender Services are preparing to file habeas petitions
- Trial counsel filing motions for release
- Op-eds, press releases

What Can You Do?

Moving for Release of Detained Clients

- Pretrial
- Post conviction
- Parole
- Civil Contempt

Pretrial Detainee

- File for reduction of bail in court of original jurisdiction
  - Use sample motions
  - Focus on risk factors of client
  - Continue to update with new information
    - in hotspot areas only 2 people per 1,000 sq ft
    - Masks are recommended
    - DOC plan just released
    - Jail “locking down” pods when someone is symptomatic

Pretrial Detainee- cont.

- File for reduction in higher court
  - Petition Circuit Court for bail in magistrate court cases
  - File summary petition for bail with the Supreme Court of Appeals

Post Conviction: Bail and Reconsideration

- Post conviction bail
- Motion to stay the sentence until after the health crisis
- Motion to reduce sentence
  - Probation
  - Home confinement
  - Jail sentence (if jail credit will result in release)
  - Fine

Post Conviction: Parole

- Parole officer sanction
  - Contact officer
  - Contact DOCR
- Pending Revocation
  - Letter to Parole Board Chair seeking release pending revocation hearing
  - Motion for bail

    During the period of custody, the parolee may be admitted to bail by the court before which the parolee was sentenced W.Va. Code §62-12-19

Post Conviction: Compassionate Release

- West Virginia provides compassionate release to eligible prisoners with serious medical conditions through
  - Executive Clemency (W.Va. Code §51-1-16) and
  - Medical Respite (W.V. Division of Corrections and Rehabilitation Policy directive 410.12)

Post Conviction: Work Release Furloughs

- Currently most work release inmates are on furlough until April 24
- Make formal request to DOCR to continue furlough through pendency of the state of emergency

Civil Contempt

- Through habeas petition to Circuit Court, 16 people held on civil contempt for failure to pay child support released
- Heidi Talmage, general counsel, Bureau for Child support enforcement, Heidi.L.Talmage@wv.gov

Juvenile Clients

- Special considerations
- Are some better off where they are with the instability of a home plan during the crisis
- Overcrowding generally not an issue

Recent Developments in Law & Procedure

- House Bill 2419 provides presumptive personal recognizance bond for non-violent property crimes
- Senate Bill 620 authorizes DOCR to approve home plans for inmates, creating almost presumptive parole for some

General Considerations if Client Contracts the Virus

or Specific Questions,
lease Email Ronni Sheets

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