

FACE IT:



Does Our New Normal Include Courts and Judges Requiring Face Masks in Courtrooms?

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“Don’t forget your mask” — this is a phrase that has become synonymous with 2020, as it has undoubtedly been a year of first for jurors, litigants, counsel, court employees, and the public at large, not only in Pennsylvania, but across the nation. In Pennsylvania, there are several issues that businesses and the courts are tackling to comply with the Pennsylvania Department of Health’s (DOH) mandate regarding facial coverings in order to gain admittance into businesses and courthouses. For instance, judges, counsel and litigants are dealing with new obstacles when conducting and resuming trials and in-court appearances. In the context of trials, concerns are arising regarding a jury’s ability to adequately hear witnesses, as well as fully view a witness’s facial expressions and mannerisms if required to wear a facial covering while testifying. Similarly, a trial attorney, who is already tasked with the difficulty of deciphering a juror’s body language and reactions to testimony and evidence presented, may now be forced to interpret a juror’s expressions through his or her facial coverings, arguably a virtually impossible task.

Related issues exist for judges and counsel during court appearances. For example, what used to be simple, run-of-the-mill interactions, such as oral arguments, now pose issues for not only the judges and counsel, but a court stenographer who has the challenge of compiling a transcript, despite the use of facial coverings obstructing the speakers. Unfortunately, it appears that this “new normal” is an issue that will plague courts for the near future based upon the governing Standing Orders and mandates issued in Pennsylvania. So how are courts coping with the added pressure of weighing the public’s health and safety with the burden of conducting productive, efficient, and safe court appearances? Well, the answer is not so clear.

In Pennsylvania, all of the Federal District Courts have issued Standing Orders that address the Pennsylvania DOH’s requirement for facial coverings in public, including courthouses.¹ For example, the Middle District of Pennsylvania made reference to the recommendations of the Centers for Disease Control (CDC) and the Pennsylvania DOH’s July 1, 2020 Order from the Secretary of Health for the Commonwealth of Pennsylvania, in

its COVID-19 Recovery Guidelines, emphasizing that "people must wear a face covering or mask to cover their noses and mouths in community settings because this helps protect people around you if you are infected but do not have symptoms."² The COVID-19 Recovery Guidelines include an Appendix titled "Face Coverings/Masking and Social Distancing Protocols" which contains instructions regarding "incourt face covering/masking and social distancing." These guidelines state, in part, that face covering/masking is required when entering and exiting the courtroom, when distributing paperwork/exhibits, and when moving around the courtroom, including when a witness moves to and from the witness stand. However, a witness is permitted to remove a facial covering during testimony so long as he/she is seated at least six feet from the judicial officer and other court employees. Counsel is also directed to question the witnesses from the counsel table to avoid moving throughout the courtroom. Additionally, face coverings/masks may be temporarily removed in court, at the discretion of the judicial officer, "when removal is necessary to effectively conduct the proceedings", so long as all participants are socially distant, maintaining at least six feet apart.³

Like the Middle District, the Western District of Pennsylvania has issued an Administrative Order speaking directly to the requirement of face coverings. The Administrative Order states, in part:

1. Members of the Court staff should wear a mask or face covering when in the common or public areas of the courthouse. Facial masks/coverings need not be worn in private work areas provided there is sufficient physical distancing from others.
2. Visitors to the Court, including vendors, contractors, litigants attorneys and other members of the public, shall be required to wear a mask or face covering when in the common or public areas of the courthouse.⁴

The Western District of Pennsylvania most recently issued an Administrative Order on August 27, 2020, which appears to provide similar discretion to the judges as that in the Middle District. The Order states in pertinent part:

Individual judicial officers may hold hearings, conferences, sentencings, change of plea hearings and bench trials in the exercise of their sound discretion and consistent with the principles of this Order and the sound administration of justice and after such reasonable consultation with counsel as they may deem appropriate.⁵

Like its sister districts, the Eastern District of Pennsylvania has also issued a Standing Order holding, in part:

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All in all, courts must continue to do their best to resume courtroom proceedings, while balancing their obligation to protect the health and safety of jurors, litigants, counsel, court employees and the public.”

1. Members of the Court staff and members of the staff of other tenants of the Edward N. Cahn U.S. Courthouse and Federal Building shall be required to wear a mask or face covering when entering the building and when in common or public areas of the building. Court staff and staff of other building tenants need not wear a mask or face covering in private work areas, provided that six-foot physical distancing from others can be maintained. ⁶

Reviewing these Administrative and Standing Orders, it appears that courtroom procedures pertaining to facial masks will fall largely under each individual judge’s discretion. Therefore, while the courts have provided guidance on this issue, moving forward during this uncertain time will pose additional obstacles for courts and counsel. It is likely that other issues will stem from

the mere uncertainty of the virus in and of itself, regardless of whether individuals are forced to wear facial masks, such as a juror’s reluctance and failure to attend jury selection due to healthrelated concerns, child care obligations, fear of added exposure to the virus, and other reasons. As Pennsylvania Courts begin to reopen, judges will also be faced with conflicts among counsel, litigants, and witnesses, who may refuse to remove a mask while in court, which will raise the subsequent question — can/will a judge force a witness or attorney to remove his or her mask in his/her courtroom? All of these issues are not unique to Pennsylvania and have been raising concerns across the country.

For instance, Texas courthouses require anyone entering the court to wear a face covering or they will be refused entry. In a letter from the county attorney’s office to the attorney general’s

A dark blue rectangular graphic with a repeating pattern of the words "PARTNERSHIP", "SHARED PRIORITIES", "SINCE", and "1877" in a lighter blue, semi-transparent font. In the center, the word "PARTNERSHIP" is written in large, white, serif capital letters. Above it, "SHARED PRIORITIES" is written in a white, sans-serif font, following a slight upward curve. Below "PARTNERSHIP", the word "SINCE" is written in a small, white, sans-serif font, and "1877" is written in a white, sans-serif font. Below "1877", "SHARED SUCCESS" is written in a white, sans-serif font, following a slight downward curve. In the bottom left corner, the text "Equipment Breakdown Solutions" is written in a white, sans-serif font, with "MutualBoilerRe.com" written below it in a white, sans-serif font. In the bottom right corner, the text "Mutual Boiler Re®" is written in a white, serif font, with a white horizontal line underneath it. Below the line, the text "Member of the FM Global Group" is written in a small, white, sans-serif font.

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office, Harris County Attorney Vince Ryan noted that one order by Texas Governor Greg Abbott encouraged Texans to wear face coverings, but prohibited local governments from imposing civil or criminal penalties for refusing to wear them. Ryan additionally asked the attorney general's office for an opinion about whether a county judge could use emergency powers to require visitors to courthouses and county buildings to wear masks, and if they failed to wear one, whether the county could prohibit them from entering or make them leave. The letter explained that commissioners' courts have authority to regulate the use of county buildings. Ryan also wanted to know if a person who declines to wear a facial covering is either barred entry or asked to leave the courthouse, or if that person may be charged with criminal trespass if they refuse to do so.⁷

Judges have also been implementing their own criteria regarding whether or not masks are required to be worn in their courtrooms and if other resources should or should not be used. "This court's number one priority is the health and safety of those who enter the courthouse and the prisoners in county jails," San Francisco Superior Court Judge Vedica Puri said at a pretrial hearing at the Hall of Justice earlier this month. Judge Puri had a lot to say when Deputy Public Defender Sierra Villaran filed a motion to allow face shields to be used during critical moments of a jury trial. Villaran asked that the court require both cloth face masks, and for confrontation right purposes, transparent shields for witnesses to testify, so jurors could still read their facial expressions and assess their credibility. Judge Puri found that transparent masks were sufficient to protect an individual's right to confrontation, and stated that the pandemic takes precedence over reading a juror's expression. Villaran additionally objected to Judge Puri's requirement that counsel sit six feet away from his or her client, arguing there could not be a fair trial from such a distance and that there would be an implication of guilt. Judge Puri, however, stood her ground on her guidelines to help reduce the risk of COVID-19. "Nothing is the same," she said. "The days of counsel whispering to a client seated next to them with the pandemic is bluntly, over. I cannot take a chance at allowing a break in social distancing."⁸

A substitute Judge presiding over Judge Greg Pinski's courtroom in Great Falls, Montana, ruled a man was in contempt of court for refusing to wear a mask earlier this month. Cascade County resident, Phillip Dupaul, reported for jury duty for a trial being held before Judge John Larson of Missoula, who was filling in for Pinski. Dupaul entered the room at the Hilton Garden Inn, took his seat, and Larson asked him to put on a mask, as they were government-mandated for court officials and the public during all court hearings and trials. When he refused, Judge Larson issued a contempt of court order for Dupaul to be jailed for 24 hours.⁹

Judges have also been frustrated with the new criteria of wearing face masks in public. District Court Judge Sean Smith in North Carolina asked two attorneys to lower their masks inside his courtroom, telling them he needed to see their faces. While the Judge stated that he did not consider his request an order

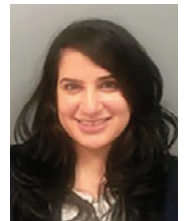
and did not find it to be adversarial, the public found his request to be controversial. "I'm trying to do my job, which is hard enough as it is," Judge Smith said. "Sometimes, it comes down to whom you believe more, who's telling more of the truth. ... It seems to become more difficult to decide if you add an obstruction (such as a mask). You're allowing people to hide. But we also have to do what we can to keep people safe. And we're doing the best we can to balance that."¹⁰

The rules of courts are being amended all over the country in order to properly address health and safety concerns during court proceedings. The most effective method of protection is yet to be determined. Many new guidelines have created a new form of unity within the judicial system, while others have called our differing views regarding public health and safety into question. All in all, courts must continue to do their best to resume courtroom proceedings, while balancing their obligation to protect the health and safety of jurors, litigants, counsel, court employees and the public.

Lara K. Bream is an associate in the Professional Liability Department in the Camp Hill, Pennsylvania office of Marshall Dennehey Warner Coleman & Goggin. She focuses much of her practice on the representation and defense of licensed and certified professionals in claims and suits brought against them in federal and state courts throughout the state. She may be reached at lkream@mdwgc.com.



Shaivya Singh is a Law Clerk in the same office, where she assists attorneys in various practice groups. She is a current third year law student at Penn State Dickinson Law and is anticipated to graduate in May of 2021.



RESOURCES

- 1 July 1, 2020 Department of Health Order Requiring Universal Face Covering.
- 2 Pennsylvania COVID-19 Recovery Guidelines (Amended July 9, 2020).
- 3 Id. at Appendix 3, p. 12.
- 4 April 21, 2020 Administrative Order of the Western District of Pennsylvania (quotations omitted).
- 5 August 27, 2020 Administrative Order of the Western District of Pennsylvania (quotations omitted).
- 6 June 19, 2020 Standing Order of the Eastern District of Pennsylvania (quotations omitted).
- 7 <https://www.law.com/texaslawyer/2020/06/23/can-judges-force-people-to-wear-face-masks-in-court-this-texascounty-wants-to-know/>
- 8 <https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/>; <https://abc7news.com/covid-19-court-face-masks-coronavirus/6321045/>
- 9 <https://www.krtv.com/news/crime-and-courts/dupaul-talks-about-being-charged-with-contempt-of-court-for-notwearing-a-mask>
- 10 <https://www.charlotteobserver.com/news/coronavirus/article243567332.html>