

Dear Judges, Clerks and Court Staff:

Below is a missive from me, as Presiding Statutory Probate Court Judge of Texas, to the State's 18 statutory probate courts. Who are primarily located in most of the State's largest urban counties. Every county is different from every other and the judicial system of each county has its own idiosyncrasies. Feel free to consider and adopt and/or adapt from the approach suggested in the letter below.

Judge Guy Herman

I have received calls from some of you seeking guidance about how to handle court procedures for the current COVID-19 health crisis. I wanted to wait until the Office of Court Administration offered guidance, which they did last night and which is copied at the bottom of this email, before sending out additional guidance to the statutory probate courts. I encourage each court to follow OCA's recommendations. I also wanted to provide additional guidance specific to guardianship, probate, and mental health proceedings, as well as clarify certain recommendations made by OCA. First and foremost, to echo OCA, when implementing policies to minimize the spread of COVID-19, consult with your local health authority for additional guidance as conditions in the local community may vary from county to county. Further, county government, including some courts, has to continue to operate in order to perform essential functions and to engender confidence in the public in the face of the current health crisis. Probate courts are essential to the functioning of county government. You cannot shut down the probate court, but you can proceed in a manner that will minimize risk to the public and court staff.

- In addition to the essential proceedings listed by OCA in its guidance - criminal magistration proceedings, CPS removal hearings, temporary restraining orders / temporary injunctions, juvenile detention hearings, family violence protective orders, and mental health proceedings – the following proceedings are essential - temporary guardianships (when needed), temporary administrations, creation of guardianships (not administration), and all mental health proceedings. It is imperative that no mental health proceeding is cancelled or delayed given the strict statutory time constraints as to when a probable cause hearing and final hearing must be held. In addition, proposed patients will continue to enter facilities during this health crisis, particularly in Emergency Departments, so it will be important to continue to have these hearings to avoid creating barriers to mental health treatment for those new proposed patients. Further, the hospitals will need to be able to dedicate as much space in their Emergency Departments to treat non-psychiatric medical situations as the current health crisis increase sas expected. We cannot take actions that would force inpatient psychiatric facilities to hold patients no longer needing services beyond what the law requires because of the continuing need to treat new patients.
- OCA recommends that courts should consider implementing telephonic or video remote appearances for all proceedings which may occur remotely. To clarify, you cannot conduct a telephonic hearing in mental health cases (probable cause hearings and final hearings on applications for court-ordered mental health services). If you are going to use electronic means to conduct mental health hearings be sure to follow the law. Be sure to follow § 574.202 (permitting a doctor or nonphysician mental health professional to testify by video) and §

574.203 (use of video for probable cause hearings and final hearings) of the Health & Safety Code when applicable.

- A court can allow a doctor to testify by closed-circuit video teleconferencing as long as the requirements are satisfied under section 574.202. In order for a doctor or nonphysician mental health professional to testify by video, all parties must agree (neither the proposed patient nor the proposed patient's attorney file a written objection) and the proposed patient and the proposed patient's attorney can communicate privately without being recorded or heard by the judge or the attorney representing the state.
- The court can conduct a probable cause hearing or final hearing on an application for court-ordered mental health services via closed-circuit video as long as the requirements are met under section 574.203 of the Mental Health Code. Similar to section 574.202 above, the proposed patient and the proposed patient's attorney must be able to communicate privately without being recorded or heard by the judge or the attorney representing the state, and all parties must consent in writing (the proposed patient's attorney can consent on the proposed patient's behalf).
- Following on OCA's recommendation to avoid unnecessary or unreasonable risk to participants, court staff, or the public, I highly recommend the temporary (if not permanent) stoppage of utilizing emergency detentions of a person with a warrant. Law enforcement can do these interventions without a warrant. Nothing is lost by stopping the process of emergency detentions with a warrant as law enforcement has the authority to do an emergency detention without court intervention. Do not worry - law enforcement will step up. This will allow the court to avoid requiring persons from having to come to the courthouse to file an application in person and having a peace officer execute a warrant. In addition, the probate judge or judges have the ability to control the use of emergency detentions with a warrant throughout the county to prevent other judges in their magisterial duty from issuing emergency detentions with a warrant through an administrative order pursuant to § 573.012 of the Health & Safety Code. **Instead, rely on warrantless detentions that limit the number of people who need to come in contact with your court staff or the staff of other courts.**
- Avoid unnecessary court visits of wards, particularly those wards who are elderly, who have fragile medical conditions, or who reside in nursing homes or assisted living facilities.
- In attorney-filed applications to establish a guardianship, avoid having your court investigator meet with the proposed ward in person prior to the guardianship hearing in order for the court investigator to fulfill his or her statutory duty to determine whether less restrictive alternatives are available. Instead, have the court investigator rely on the pleadings to make that determination. The court investigator can use that time saved to review the pleadings to ensure that the application and medical certificate conform to the statutory requirements. The attorney ad litem should be the person visiting the proposed ward and has a duty to investigate and argue for less restrictive alternatives.
- I would recommend that probate courts continue to hear applications to probate estates and to establish administrations, but encourage modifying any current processes in order to minimize the risk of the spread of COVID-19 between participants, court staff, and the public. To echo

OCA, avoid the gathering of large groups of people for now, such as an uncontested docket. There should be no “cattle call” probate or guardianship dockets. Schedule time certain hearings about 15 minutes apart.

- Hold telephonic hearings when possible to minimize social contact. Hearings still need to be held in open court as required by statute to allow the public to attend the hearing if they so choose as they have a right under the Open Courts provision of the Constitution. For hearings to probate a will and/or to establish an administration, a good method to handle telephonic hearings is to have the applicant and any witnesses meet at the attorney’s office to call in to the courtroom to avoid unnecessary complications. Once the hearing is concluded and the order has been signed, the witnesses can execute their proof of death testimony and other relevant testimony, and the appointed personal representative can take the oath, all of which is then e-filed. The documents can be executed in front of a notary or done with an unsworn declaration. Be sure to tell the attorneys not to execute any documents prior to an order being signed.
- There has to be cooperation between the probate courts within a county in order to properly execute any new policies in order to avoid confusion amongst the bar and the public. Keep this in mind as we proceed forward.
- There are a few statutory probate court counties in our system that have placed responsibility for mental health cases in one or more of the statutory probate courts in that particular county. All statutory probate courts have mental health jurisdiction and if necessary may need to help develop and be involved in resolving the mental health issue approach for a particular county. I am more than willing to help facilitate in the creation of an approach for those counties. For those counties with one statutory probate court or those counties in which all judges have a mental health docket, it will be easier to develop an appropriate mental health system response to the current health crisis.

I will be back in touch with you next week to see where we are and to address any additional changes in this continually evolving situation. You can contact me on my cell phone. Thank you for your service to the community.

Thank you,

Guy Herman
Presiding Statutory Probate Judge of Texas

From the OCA:

Updated Guidance #1 (Issued 3/12/2020):

- If a court deems that non-essential (see below), in-person proceedings may pose an unnecessary or unreasonable risk to participants, court staff, or the public, the court should avoid that risk, when possible, by simple delay or by a telephone or video remote appearance. Our suggestion is that you follow this practice until at least April 1.

- Essential proceedings include, but are not limited to, criminal magistration proceedings, CPS removal hearings, temporary restraining orders / temporary injunctions, juvenile detention hearings, family violence protective orders, and certain mental health proceedings.
- Courts should schedule or suspend proceedings to avoid the gathering of large groups of people until at least April 1, including jury trials and large docket calls.
- Courts should publicly encourage persons with COVID-19 or flu-like symptoms, a fever, or who are coughing or sneezing, to contact the court before appearing. Courts should also publicly encourage attorneys who know that clients, witnesses, or others have such a condition to alert the court in advance. The court should make reasonable accommodations and reschedule appearances and hearings as needed.
- You may wish to consult with your local health authority for additional guidance on the timing of the suspension of proceedings as conditions in the local community may vary from jurisdiction to jurisdiction.
- Courts should implement telephonic or video remote appearances for all proceedings which may occur remotely.
- Please be aware that the Open Courts provision of the Constitution will generally require that the public have access to proceedings. If you hold telephonic or video remote hearings, you should consider a method by which the public can have access.

Request for Notice

Should your court choose to suspend proceedings for a period of time, please notify OCA by email at court closures@txcourts.gov with information about the closure or fill out the webform at <https://www.txcourts.gov/programs-services/court-security/emergency-court-preparedness/closures/report-a-closure/>. OCA will post the information on our court closure [website](#) in an effort to provide public notice of the suspension.

As this situation unfolds, we will keep you informed and provide updated guidance as appropriate. If you have any questions, please feel free to reach out via email (david.slayton@txcourts.gov) or by phone (512-463-1625).

Thanks,
David Slayton
Administrative Director

Texas Office of Court Administration

Previous week's guidance (issued on 3/5/2020):

Previous Preparation Work: The Supreme Court of Texas established the Task Force to Ensure Judicial Readiness in Times of Emergencies (JRITE) in 2008 and charged the Task Force with reviewing and updating its plan in 2016. Included in JRITE's work is an interim plan and other resources, including resources for preparing and responding to pandemics such as COVID-19. To view these resources, please

visit <http://txcourts.gov/organizations/policy-funding/task-force-on-judicial-emergency-preparedness/jrite-resource-archives/>. The ultimate goal of the preparedness plan is to allow courts to operate in a way that protects the health and safety of everyone at the court facilities and to keep courts open to ensure the justice system continues.

Personal Protection/Prevention:

The most important steps in responding to the virus is prevention. The CDC has issued the following prevention tips:

- Avoid close contact with people who are sick.
 - DSHS has recommended to OCA that you maintain at least 6-8 feet between you and a person who is symptomatic to reduce the risk of spread of the virus.
 - DSHS has indicated that evidence shows that the virus is not able to survive in the ventilation system.
 - If you have a proceeding involving a person who is symptomatic and the proceeding must continue, attempt to isolate that proceeding to reduce the risk of interaction with others.
- Avoid touching your eyes, nose, and mouth.
- Stay home when you are sick.
 - Judges, court employees, attorneys, or litigants who are sick should be encouraged to stay home and to seek medical attention.
- Cover your cough or sneeze with a tissue (or into your arm if a tissue is not available); then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces using a household cleaning spray or wipe. A list of products recommended by DSHS for this purpose is available at <https://www.americanchemistry.com/novel-coronavirus-fighting-products-list.pdf>.
- While some might think that the use of a facemask is necessary or advisable, CDC does not recommend the use of a mask for people who are well, as they are less effective at preventing infection and are in short supply for health care workers. However, CDC and DSHS has recommended that courts consider providing facemasks (the common surgical masks can be used) to individuals who are showing symptoms of COVID-19 to help avoid spread of the virus to others.
- Wash your hand often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing.
 - If soap and water are not available, use an alcohol-based hand sanitizer with at least 60% alcohol.

Preparation:

While there is currently no need for alarm, courts should prepare now to ensure a proper response if an outbreak occurs.

- Courts should consider and identify who is authorized to make decisions in an emergency including evacuation (partial or total) and the closing of court operations.
- Courts should consider which functions are essential and must continue if an outbreak occurs.
 - Essential functions are typically divided into those that are necessary in the first 7 days, 7-30 days, 30-90 days, and 90+ days.
 - Examples of essential functions that must occur in the first 7 days include: criminal magistration proceedings, CPS removal hearings, temporary restraining orders/temporary injunctions, juvenile detention hearings, family violence protective orders.

- Courts are encouraged to delay non-essential functions in the event of an outbreak and to reduce the need for large numbers of possibly infected people to congregate. This may include the need to consider delay of jury trials.
- Courts should consider which staff are essential and which staff could stay home if court functions are to be continued.
 - Courts should prepare now for the possibility of permitting staff to work remotely, including considering the technology needs for that to occur.
- Courts should consider which proceedings could occur by telephonic or video remote appearances. This may include using “low-tech” solutions such as teleconferencing, Facetime, Skype, or some other common remote appearance tool.
 - Courts should plan how to notify self-represented litigants, witnesses, and others of the remote appearance technology.
 - Some courts have begun to place wording on orders setting hearing and docket notices reminding attorneys/parties to contact the court if they are ill.
- Courts should consider how to promptly communicate the activation of plans to judges, courts staff, and the public.
 - The Office of Court Administration and the State Bar of Texas have a communication plan that allows for prompt notification of the bar and public notices; however, additional local notifications will likely be necessary.
 - Some courts have posted notices or entered orders encouraging or requiring attorneys and parties to notify the court if they (or their clients) are experiencing symptoms.

Quarantine:

While the state and local health authorities generally have responsibility for establishing quarantine control methods, a court may need to become involved if a person does not comply with those control orders from the health authority. Chapter 81, Health and Safety Code, sets out the procedures in such cases. A bench book at <https://www.law.uh.edu/healthlaw/HLPIBenchBook.pdf> provides guidance and forms for district judges who are responsible for hearing these cases.

To ensure quick response and continuity, the Regional Presiding Judges and Chief Justice Nathan Hecht have identified several judges from each region of the state who are being assigned to hear proceedings under Chapter 81, Health and Safety Code. These judges will be on-call for the proceedings should the need arise in an emergency or after-hours situation. Your regional presiding judge can provide you additional information on the assignments in your region.