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How do we Resume Civil Jury Trials in the Vermont Courts?

📅 September 28, 2020 👤 Rich Cassidy 💬 Leave a comment

The Justice System is Struggling to Adapt to the COVID – 19 Pandemic

Here we sit in the seventh month of the COVID–19 pandemic. When will it end? No one knows. Optimists thought that it would end with warm weather. They were wrong. Now they think a vaccine is on the horizon. Maybe. More realistic observers suggest a successful vaccine won't be administered broadly enough to bring the pandemic under control until late 2021. And we don't actually know that any vaccine under development will prove safe and effective.



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We hope so, but hope is not a plan.

On Friday, September 26, Johns Hopkins University confirmed 55,054 new cases, the highest single day total since August 14.

Meanwhile, the justice system is only beginning to adapt to the current circumstances. Across the country, courts are reopening in fits and starts. A few handfuls of jury trials have been conducted. Here in Vermont, the courts are searching to regain their footing after closing to all but emergencies.

The First Vermont Jury Trial Since March Took Place Last Week

Last week a federal criminal jury trial was conducted in U.S. District Court in Rutland. It's the first jury trial in Vermont since March. Jury selection is *U.S. v. S. C.* began last Monday. One hundred and fifty potential jurors were summoned. Those claiming co-morbidities likely to heighten the risks of COVID 19 were excused. Fifty jurors appeared in 3 separate waves over the day. Jury selection proceeded in the 8,000 square foot former post office space on the first floor of the courthouse. A jury of 12 was selected and trial proceeded. Counsel were masked at all times. Witnesses sat in a plexiglass enclosed witness box and cleaned up for themselves after their testimony. By stipulation, out-of-state witnesses testified by telephone. By mid-afternoon Wednesday, testimony was complete, and deliberations began. A guilty verdict was returned Thursday morning.

Although bumps may yet appear, it looks like our federal courts are back in business, albeit in a slower and more cumbersome way. But the federal courts handle only a small fraction of state cases, and they are far better resourced than our courts.

There is no Near-Term Prospect for State Civil Jury Trials

No jury trial has yet begun in state court. Civil jury trials are suspended until January, and there's reason to doubt that they will begin even then.

Particularly in criminal matters, the courts are under considerable pressure to resume jury trials. The Supreme Court Jury Restart Committee: [Report on Resumption of Criminal Jury Trials](#) (July 20, 2020), suggests that as many as 10 of our fourteen counties have at least one courthouse that is large enough to accommodate 12- person juries. But various other problems besides overall size, as small jury rooms, and HVAC issues, are problematic.

Even if 12-person jury cases can be managed for criminal cases it's hard to imagine that our state courts can muster the resources for civil juries of 12 until the pandemic is over. The



Richard T. C

The Wit and Wisc Horace Rumpole

On an “agent provocatet foreign expression, for a thing. Spies and infiltrat disguise who worm their Englishman’s home and crime!”

— Horace Rumpole

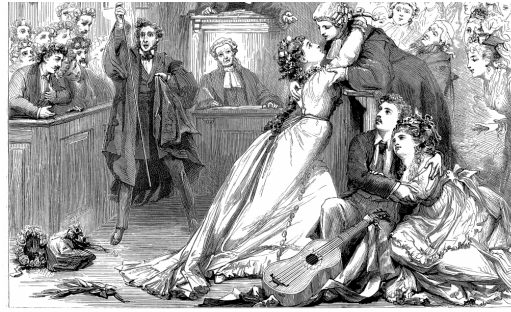
— *Sir John Mortimer*

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Perhaps other buildings, like gymnasiums or hotel conference facilities, can be used temporarily. Even then, significant fit-up would be required. And only a few Vermont communities have such resources.



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Alternative Dispute Resolution has Adapted

Meanwhile, alternative dispute resolution providers adapted quickly to the new conditions. Mediations and arbitrations have continued by videoconference with barely a stumble. These proceedings help to keep some pressure off the courts, but they rest on voluntary participation. While cases continue to settle in mediation and a few cases are being arbitrated, these processes are, by definition, alternatives to — not substitutes for — trial by jury.

Jury Trials Drive the Civil Docket

Unless steps are taken soon, we may face years without civil jury trials. Even in normal times relatively few civil trials are conducted, but the prospect of trial drives the entire civil docket. Without the realistic expectation of a jury trial, the civil docket will quickly develop a huge backlog. In almost every case, one party will be significantly advantaged by delay.

Absent the risk of a worst-case result before a jury, there is not much incentive for defendants to settle, except for a song.

Can we Move to 6-Person Civil Juries?

If we could conduct civil jury trials with 6 jurors instead of 12, the hurdles to resuming jury trials would be far lower. Unfortunately, *dicta* from an old Vermont Supreme Court case states that a 12- person jury is a constitutionally required:

“ We have no doubt, the ‘right of trial by jury’ spoken of in the constitution, and which it is said “ought to be held sacred,” means a jury as at common law, which consists of twelve men, and that **wherever a constitution guaranties ‘the right of trial by jury,’ it is not competent for a legislature to reduce that number to six, or any less number than twelve;** for the very theory of a trial by jury requires the unanimous consent of twelve men to the verdict.

Lincoln v. Smith, 27 Vt. 328, 358-9 (1855) (emphasis added). *See also*, *State v. Machia*, 155 Vt. 182, 194 (1990) (criminal cases).

Some Vermont lawyers are suggesting that the Vermont Supreme Court adopt an administrative rule limiting jury size to 6 persons. Will the Court exercise its administrative authority in that way in the face of the language of *Lincoln*? Any such rule would almost certainly face a constitutional challenge. That would leave the Court in the uncomfortable posture of determining the constitutionality of its own rule.

There’s another approach to advancing 6-person juries. Some brave lawyers must persuade Superior Court judges to order a 6-person jury trials.

No doubt any significant verdict would be appealed. Given the age of the decision in *Lincoln*, the outmoded thinking its language reflects, and the exigent need to get jury trials back on track, the prospects for success on appeal seem realistic.

Who is willing to give it a try?

Rich

📌 [Jury Trials, COVID-19, Legal Culture, The Future of Law Practice, Uncategorized](#) 🔖 [12-person jury trials, 6-person jury trials, COVID-19, Jury Trials, Lincoln v. Smith, U.S. v. S. C.](#)

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