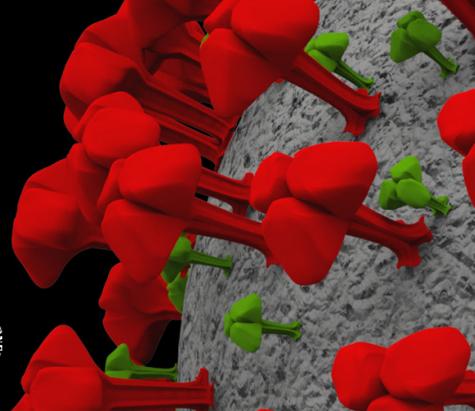


COVID-19

Virtual Grand Jury Q&A



CNA, together with the National District Attorneys Association (NDAA), have partnered to actively develop and disseminate useful COVID-19 response resources to prosecutors and courts to support them during the COVID-19 Pandemic. During the past two months, we have received many questions about the mechanics of conducting virtual proceedings. On June 19, 2020, the Shelby County District Attorney's Office, located in Memphis, Tennessee, began conducting virtual Grand Jury proceedings. This Q&A focuses on its experiences and proceedings as it adapts to its mission of promoting justice in response to social distancing requirements.

QUESTION: FIRST, CAN YOU PLEASE PROVIDE US WITH SOME BACKGROUND INFORMATION ABOUT YOUR OFFICE AND YOUR GRAND JURY PROCEEDINGS?

The office serves all of Shelby County, including the City of Memphis and many unincorporated areas and suburbs. The Shelby County DA's office has 230 employees, 110 of whom are attorneys. The ADAs appear in front of 22 different courts; about 220,000 cases come through the system each year; and the DA's office presents between 8,000 and 10,000 indictments to the grand jury each year.

QUESTION: HOW IS THE OFFICE IS STRUCTURED? HOW DOES THE GRAND JURY UNIT FUNCTION?

The Grand Jury meets 3 days a week, Tuesday through Thursday, unless there is a holiday or for some other reason. The forepersons are appointed by the Criminal Court judges for 2-year terms. These forepersons can be removed by the judges, or they can serve multiple terms.

The office has prosecuted cases vertically for about a year, transitioning in June of 2019.

QUESTION: HOW DID COVID-19 AFFECT THE DAY-TO-DAY OPERATIONS OF YOUR GRAND JURY UNIT? HOW DID YOUR OFFICE WORK WITH OTHER CRIMINAL JUSTICE AGENCIES AND ACTORS IN PREPARATION FOR THESE VIRTUAL PROCEEDINGS?

COVID-19 shut down the entire court system, at first. The Grand Jury was closed down for about 2 months, with their last Grand Jury being March 17th and their first "post-pandemic" Grand Jury convening May 19th. The decision to re-convene was made by the administrative judge of the Criminal Court of Shelby County, the District Attorney General, the Grand Jury forepersons and the jury commissioner. It was part of an overall plan submitted to The Supreme Court of Tennessee. It was unclear when the jurisdiction would be able to conduct various court proceedings and trials again, but it was decided that convening grand juries would be the right step in anticipation of later opening up court.

QUESTION: WHEN DID YOU BEGIN CONDUCTING VIRTUAL GRAND JURY PROCEEDINGS AND WHAT DECISIONS WERE MADE PRIOR TO BEGINNING THESE VIRTUAL PROCEEDINGS?

The office uses Zoom exclusively – it has licenses for each staff member. Since the DA's Office provided the video equipment for the virtual Grand Jury, all agencies were required to testify via ZOOM. That technology is installed and currently used in the Grand Jury room. The office is aware that certain organizations are opposed to using Zoom because of security issues. However, because agencies were using a variety of platforms, the office decided to require everyone to use Zoom, and it has not been much of a problem. The office has an IT liaison that works with agencies to install it when necessary.

QUESTION: ARE ALL PARTIES REMOTE? ARE THE ADAS IN THE OFFICE? ARE THE WITNESSES REMOTE?

The jury is on site, along with the foreperson, but the witnesses are remote.

Grand jurors are physically in the building; Mr. Hayes acts as their legal advisor if they have a question; and, on Grand Jury days, he is on site in the same suite of offices. Mr. Hayes has a staff of two attorneys who prepare witnesses, which has been the most difficult aspect. The Grand Jury frequently calls Mr. Hayes for technology troubleshooting and other issues.

The office considered new Grand Jury rooms, where they might be able to spread out jurors and comply with social distancing guidelines. However, it ended up re-configuring the same room it had in the past to allow for more distancing.

In Tennessee, Grand Jury proceedings are secret, and they are not recorded. Sometimes for investigative grand juries, there may be a court reporter, but, for standard day-to-day grand juries, no court reporters, stenographers, or videographers are in the room. There are notations made in minute books about who testified, what charges were considered, what the vote was, etc. Tennessee state law requires that everything in that room be done in secret and in an atmosphere where the jurors can be free to make their own decision.

QUESTION: WHAT CASES, IN SHELBY COUNTY, REQUIRE A GRAND JURY INDICTMENT?

All cases destined for the Criminal Court of Shelby County, which is the trial court, and the court of record, must first be presented to the Grand Jury. In Tennessee, every criminal defendant one has the constitutional right to go have his/her case presented to the Grand Jury, even for misdemeanors. A Grand Jury has 12 jurors and a foreperson, and it takes 12 votes to return an indictment or a true bill. If the jury vote is 11-1, the foreperson can cast the 12th vote.

QUESTION: WHAT SAFETY MEASURES WERE PUT IN PLACE FOR GRAND JURORS?

The jurors must wear masks, which are provided if jurors do not have one. The Grand Jurors are also practicing social distancing, and hand sanitizer is made available.

There is also a thorough janitorial cleaning between sessions. There are several different restrooms for the Grand Jurors. Jurors are no longer provided communal food and drinks, but they are given bottled water.

In the past, the foreperson would appoint three of the jurors to help with some of the administrative things that occur, like stamping of the docket number, recording things in the minute book, etc. However, that practice has been discontinued for now so that jurors don't have to handle any paper, pen, books, etc.

QUESTION: HAVE YOU NOTICED A DIFFERENCE IN RESPONSE TO JURY SUMMONS?

In the first jury call, many of those summoned just did not show. This was expected for some folks.

The judge that qualified the panel did an excellent job. The first few people said they were apprehensive, but the judge talked to them about what would be done for their safety and what how important this was. Those who honored the summons seemed fairly willing to participate.

The Grand Jurors did not specifically say they did not want to come because of the virus. However, there may have been a few who were caretakers for someone or who had children who did not want to risk exposure. There have been fewer and fewer people using the virus as an excuse not to serve on a Grand Jury panel. Within a few weeks, Shelby County was able to qualify its Tuesday and Wednesday panels.

QUESTION: DID YOU HAVE ANY TRAININGS WITH YOUR ADAS PRIOR TO BEGINNING VIRTUAL GRAND JURY PROCEEDINGS?

The Grand Jury section has three permanent, full-time attorneys, including Mr. Hayes. All three have served in the Grand Jury section office for a good amount of time. Before the vertical system was set up, there were up to six attorneys assigned to Grand Jury. Only Mr. Hayes is physically present in the Grand Jury area on Grand Jury day. The other attorneys are working on other cases and preparing witnesses for future sessions. When the jury is qualified, the judge, foreperson, and Mr. Hayes give a speech. Generally, Mr. Hayes does not have a lot of interaction with them once the panel is selected.

QUESTION: HOW ARE YOUR ADAS PREPARING WITNESSES PRIOR TO THEIR GRAND JURY TESTIMONY?

Mr. Hayes selects the cases the jury will hear. The indictments will be prepared and the District Attorney will sign them. The section attorneys will contact all of the witness to ensure that they know when they are to testify, which cases will be presented, and which charges will be on the indictment. If they have questions or need clarification, they help them. The ZOOM procedure will also be discussed.

Generally, the witnesses for Grand Jury are not the actual case officers, and instead, the agencies send a representative they have chosen. Once the office knows what agencies and bureaus will be involved that day, they reach out to the representative and let the witness know which cases are going to be presented. The witness looks up what information they can on their end to get up to speed and then they touch base by telephone with the office.

On Grand Jury day, the office delivers a list to the foreperson so they know what agencies will be testifying. The foreperson will send an email to the witnesses which contains a link to the ZOOM teleconference. Witnesses are required to testify, alone, from a room with a closed door. No other persons may see the grand jurors, or distract them in any way. Large departments, such as the Memphis Police Department (MPD), have all of their witnesses testify from a central location. Once an MPD witness finishes testifying, he or she leaves the room and calls for the next officer.

Normally, the attorneys would meet with witnesses on Grand Jury day, in the Grand Jury area, and they would review the cases, in person, before the testimony. The witness, attorney, and master case file would all be together at one location. Now, the file review happens via telephone, which has proved challenging.

The video aspect has worked very well, but it has been difficult and time consuming for their office to get the officers prepared in advance over the phone. First, the DA's office would need to deliver a master list to the agency with case information and what bureaus/divisions of the agency would be needed to testify. Then the DA's office would receive a list back with the necessary contact information. Finally, the attorneys would need to find a time to talk over the phone with the witnesses.

The witnesses review the information they have available, but this can be inconsistent – some agencies can look up an entire file, while others are more limited. The witness may need the prosecutor's office to send something from its copy of the report in those cases. Finding out who the witnesses will be and finding a time to talk with them on top of proofreading the indictments has been difficult.

QUESTION: HOW IS YOUR OFFICE ENSURING THE SECRECY OF THE GRAND JURY PROCEEDINGS AND THAT THE JURORS ARE NOT BEING INFLUENCED BY OUTSIDE PARTIES?

The IT department recommended that they use Zoom. Although it recognizes that anything on the computer can be attacked or hacked, it is happy with the Zoom's security. The office requires a witness to be alone in a room where the door can be closed and nobody can hear the witness or view his or her screen (showing the jurors and foreperson). The office has tried to maintain the same level of privacy and security remotely.

The office has gotten some feedback from the foreperson and from the officers. For example, some problems have included:

- A witness forgot to put the Grand Jurors on mute.
- Officers have said that the Grand Jurors forgot to mute while they were voting, causing the officer to mute their own computers and leave the room.
- Telling individuals that they cannot testify from their car to avoid noise.

Thus, so far, the office has not had any issues with witness access to technology. Because some smaller departments are without a designated workstation or computer, some witnesses have testified using their phone (in an interview room or a similar private area).

QUESTION: HOW IS PHYSICAL EVIDENCE PRESENTED TO THE GRAND JURORS? FOR EXAMPLE, IF THERE IS A PHOTOGRAPH THAT THE GRAND JURORS NEED TO SEE, HOW ARE THEY ABLE TO EXAMINE IT?

Typically, no physical evidence is shown to the Grand Jury and the Grand Jurors don't ask to see physical evidence. Before transitioning to video Grand Juries, if the Grand Jurors wanted to see something that was a part of a paper file, the testifying officer would comply with this request.

If the Grand Jurors were to ask for something in the file, the foreperson would ask Mr. Hayes to bring it.

QUESTION: HAVE YOU HAD ANY DEFENDANTS TESTIFY IN FRONT OF THE GRAND JURY? IF SO, HOW WERE THE DEFENDANT AND HIS/HER ATTORNEY ABLE TO COMMUNICATE PRIVATELY ON THE VIRTUAL PLATFORM?

This is not a common practice in Shelby County. However, if a defendant were to want to testify, the application process would give the office enough lead time to ensure that the technology was prepared.

To testify before the Grand Jury, the defendant has to make a written request and the attorney has to meet with the foreperson. Although the office has not prepared for this specifically, if this were to occur, the foreperson, Mr. Hayes, and the defense attorney would meet before a judge to establish fair rules

QUESTION: DO YOU PROVIDE THE GRAND JURORS WITH ANY SPECIAL INSTRUCTIONS RELATING TO THEIR BEING IN A VIRTUAL ENVIRONMENT? IF SO, HOW WERE THESE DEVELOPED?

When the Grand Jury is being empaneled, the judge, foreperson, and Mr. Hayes all give speeches. Mr. Hayes ensures that the following topics are discussed:

- How the system is set up.
- That there will be no live witnesses.
- This is something that the judges, prosecutor's office, and Supreme Court of Tennessee have approved.
- The jurors' health and safety is a priority.

The main concern is ensuring that the Grand Jurors know that these changes are a necessity due to the pandemic. The Shelby County DA's office wants to limit the Grand Jurors' exposure to others, particularly law enforcement officers, many of whom have been working throughout the pandemic.

Some jurors love the new system, but some hate it, and they continue to question why the real person isn't present.

The Shelby County DA's office stresses that, if the Grand Jurors can't see or hear a witness, it may be due to the technology, and the juror should make sure that the foreperson is aware. At first, the office was concerned that the impact of witness testimony wouldn't be as powerful, that jurors wouldn't feel as much a part of the process, or that they may be reluctant to ask questions. So far, this has not been the case.

QUESTION: WHAT ARE THE MECHANICS OF THE GRAND JURORS VOTING?

The foreperson mutes and obscures the camera. Different forepersons handle this differently. For example, one points the camera to the ceiling while another turns off the camera feature within Zoom.

As the Memphis PD may have multiple officers testifying throughout the day, it typically leaves the link open.

The Grand Jurors vote on all the indictments that the witness has presented at one time, so they're not pausing between each case.

QUESTION: WHEN VOTING TO INDICT A DEFENDANT, ARE YOUR GRAND JURORS REQUIRED TO SIGN ANY PAPERWORK? IF SO, HOW IS THIS BEING DONE?

Generally, the jurors do not sign any paperwork. If the Grand Jury were to return a presentment, instead of an indictment, it would need to be signed by all the Grand Jurors. So far, this has not happened.

The Shelby County DA's office does not provide pens or note paper, but the jurors can bring their own. There is a unopened box of pens and gloves available. The foreperson could put gloves on and distribute the unused pens for signatures, if needed.

QUESTION: SOME JURISDICTIONS HAVE QUESTIONED THE CONSTITUTIONALITY OF VIRTUAL GRAND JURIES AND VIRTUAL PROCEEDINGS, GENERALLY. HAVE YOU RECEIVED ANY MOTIONS RELATED TO THE CONSTITUTIONALITY OF YOUR VIRTUAL GRAND JURY PROCEEDINGS?

The Supreme Court of Tennessee declared a judicial state of emergency that suspended certain rules and put in place the ability and authority to handle any matter virtually that could be handled virtually. The courts in each District submitted a written plan to handle matters virtually, and the State Supreme Court approved these plans.

The State Supreme Court's order also tolled certain statutes of limitations for a limited amount of time.

In declaring a state of emergency as it did, the State Supreme Court was able to be proactive. The office was aided greatly by its guidance.

QUESTION: MOVING FORWARD, DO YOU EXPECT THESE PRACTICES TO STAY THE SAME OR ARE YOU PLANNING TO MOVE TO IN-PERSON GRAND JURIES SOON?

This is not clear. For these virtual practices to continue, additional discussions will be necessary – but this may be investigated. Any time you do something new and it works, it's worth considering whether practices should be changed.

Things are working well and the office is seeing no more or fewer true bills than normal. One foreperson loves the video, one hates it and wants to go back, and one would like a hybrid.

QUESTION: WHAT HAS BEEN THE MOST CHALLENGING PART OF CONDUCTING VIRTUAL GRAND JURY PROCEEDINGS? WHAT HAS THE OFFICE LEARNED DURING THIS EXPERIENCE?

Getting the equipment set up properly was a challenge. The office had approximately 2 weeks' notice that Grand Juries would be returning – and it determined that the proceedings would be remote only about a week in advance.

The Shelby County DA's office worked diligently to ensure that the equipment was set up and that the relevant departments knew the protocols. This was a huge undertaking. The foreperson's reliance on Mr. Hayes and his staff for technology troubleshooting has also been challenging.

The most difficult part has been ensuring that the witnesses are properly prepared, as this requires more preparation be done in advance of the testimony. The office was much more flexible with witnesses prior to instituting virtual Grand Jury proceedings.

QUESTION: DO YOU HAVE ANY ADVICE OR TIPS FOR JURISDICTIONS THAT ARE LOOKING TO RESUME GRAND JURY PROCEEDINGS IN A VIRTUAL ENVIRONMENT?

It's essential that all stakeholders are on board with the plan. Having the administrative judges, the District Attorney, the Grand Jury forepersons, the IT department, and the law enforcement agencies on board with the plan helped with the quick introduction of the new system.

Another important point is to pick one platform and make that platform work for all parties involved. The Shelby County DA's office chose Zoom to avoid juggling multiple platforms.

If you have any legal questions, check your local rules and regulations. For example, in Tennessee, the DA can ask for an Attorney General's Opinion to provide an answer to a legal question. Offices should work to ensure that they will not have legal challenges to the plans they put in place for years to come.