

IMPLEMENTATION OF THE CARES ACT IN FEDERAL CRIMINAL PROCEEDINGS

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On March 27, Congress passed the Corona Aid, Relief, and Economic Security Act (CARES Act), and the President signed the Act into law hours later. This \$2 trillion relief package is aimed at helping people, states and businesses nationwide that are negatively affected by the COVID-19 outbreak. The full text of the CARES Act can be found [here](#).

The massive package contains various provisions aimed at addressing the devastating impact of COVID-19 in the United States. One provision in particular, which can be found [here](#), resulted in unprecedented procedures in federal criminal court systems all over the country, including Texas. The CARES Act authorizes the Judicial Conference of the United States to give chief district judges authority to permit certain criminal proceedings to be conducted by video or telephone conference.[1] The CARES Act also provides that the authorization of video and telephone conferencing will end on whichever of the following two events comes first: (1) 30 days after the national emergency ends; or (2) when the Judicial Conference finds the federal courts are no longer materially affected.

On March 29, the Judicial Conference used its new authority to find that "emergency conditions due to the national emergency declared by the President with respect to COVID-19 will materially affect the functioning of federal courts generally." As a result, chief district judges are now authorized to temporarily use video or telephone conferences in certain criminal proceedings *if* a defendant consents after he or she has consulted with counsel. Recognizing that this practice may conflict with the presumption that all criminal proceedings are to be open to the public, the Conference also approved a temporary exception to the broadcast policy.[2] This exception now allows judges to provide the public and media audio access to court proceedings when public access to the federal courthouse is restricted due to COVID-19 health and safety concerns.

Since the Judicial Conference's action, more than a dozen federal courts have issued orders permitting teleconferencing and videoconferencing in some criminal proceedings, and it is expected that this number will increase as the COVID-19 crisis unfolds. In Texas, the [Northern](#), [Southern](#), [Eastern](#) and [Western](#) Districts all issued orders authorizing video and audio conferencing in certain criminal proceedings, including, but not limited to, detention hearings, arraignments, initial appearances, revocation proceedings, misdemeanor pleas and sentencing, and felony plea or sentencing hearings if the presiding judge finds that a delay will cause serious harm to the interests of justice. The list does not include trials by judge or jury. Each order provides that the authorization for remote conferencing will remain in effect for 90 days, unless terminated earlier. If the emergency surpasses 90 days, each court will review the situation for possible extension.

Per the Judicial Conference's decision, before video or audio conferencing can take place, a defendant must consent after consulting with counsel. Which in this time of crisis begs an important question — what happens if a defendant does not consent, and yet one or more of these proceedings are required under the Federal Rules of Criminal Procedure? As all seasoned practitioners know, the federal procedural rules are generally inflexible (at best) when it comes to criminal proceedings, and they commonly impose strict time limits for when certain procedural events are required to take place.

In Texas, the Northern and Western Districts specified that their decisions are not intended to prevent individual judges from using discretion to conduct in-person proceedings in individual cases. As such, if a defendant does not consent to video or audio conferencing, and a delay could harm the interests of justice or violate a defendant's constitutional rights, it is likely that courts in the Northern and Western Districts of Texas would hold the necessary proceeding in-person while implementing very strict guidelines to protect the health and safety of those involved. It is very possible that other districts in Texas and elsewhere would follow the same or similar practices.

The above is just one of the many questions that district courts will have to address in the coming months. Additional questions that the courts and parties will soon be confronted with include how will the process of admitting exhibits work in certain hearings; how will a defendant or the government call witnesses; what happens if a defendant is incarcerated and wants to proceed via video conference; and other important procedural, and sometimes constitutional, questions that are sure to be presented. As a practitioner, the *ad hoc*, and likely district or even court-specific, manner in which these issues will be addressed by the courts is concerning for the rights of the accused in what are likely to be the most important proceedings of their lives.

Never before in our country's history has the criminal justice system faced such a novel scenario, compromising the progression of criminal proceedings and forcing certain matters to take place outside of the courtroom. It is hard to imagine how difficult it is for defendants to be physically distanced from their counsel and the judge when making life-altering decisions. In fact, many criminal defense attorneys are moving for release of their incarcerated clients in preparation for in-court hearings and trial, as even legal visits at the jails have stopped amid the pandemic, isolating defendants even more.

For now, we can only speculate as to what additional problems the system will face in the coming months, and how those problems will be addressed. But the changes being made during the COVID-19 pandemic for the health and safety of society does not mean that criminal defense attorneys will stop advocating for their clients' rights and pushing the government and courts to move forward in the best interests of the defendants. Now, more than ever, is the time to do so.

[1] The Judicial Conference of the United States is a 26-member national policy-making body for the federal courts comprised of the chief judges of the 13 courts of appeal, a district judge from each geographic circuit, and the chief judge of the Court of International Trade.

[2] The Judicial Conference does not allow, with some exceptions, for civil and criminal courtroom proceedings to be broadcast, televised, recorded, or photographed for the purpose of public dissemination. The policy can be found [here](#).

If you have questions or would like to discuss further, please contact Jeff Ansley, Arianna Goodman or Katherine Devlin.