



**THE OFFICE OF VINCE RYAN
COUNTY ATTORNEY**

June 12, 2020

ELECTRONIC MAIL (opinion.committee@oag.texas.gov)

Attorney General Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for an opinion regarding facial covering mandates in courtrooms, courthouses and other county buildings during the COVID-19 disaster

Dear Attorney General Paxton:

Harris County Attorney Vince Ryan respectfully requests an opinion regarding these COVID-19-related questions:

1. Given a county judge's authority under her emergency powers to control the movement of persons and the occupancy of premises in her county during a declared state of disaster, may a county judge require any person entering a courthouse or other county-owned or controlled building in the county to wear a facial covering in those county buildings during the COVID-19 disaster? If so, and the person fails to wear a facial covering, may a county judge bar entry to or order removal of that person from the courthouse or other county-owned or controlled building? What other remedies, if any, are alternatively available to a county judge to protect the health and safety of county employees, customers and the public when a person declines to wear a facial covering in a courthouse and other buildings owned or controlled by a county?
2. Given a commissioners court's authority to regulate the use of and control county buildings, may a commissioners court require any person entering a courthouse or other county-owned or controlled building in the county to wear a facial covering in those county buildings during the COVID-19 disaster? If so, and a person declines to wear a facial covering, what other remedies, if any, are alternatively available to a commissioners court to protect the health and safety of county employees, customers and the public?

3. Given the Office of Court Administration’s guidance and the powers vested in a court to exercise its jurisdiction and enforce its lawful orders, may any court presiding over a courtroom in a county owned or controlled courthouse in the county require any person who enters the courthouse to wear a facial covering while in that courthouse during the COVID-19 disaster? Does a court’s authority extend beyond the courtroom to allow the entry of an order requiring facial coverings throughout the entire courthouse? If so, and a person declines to wear a facial covering, what remedies are permitted?

4. In the event of the issuance of conflicting orders during the COVID-19 pandemic, whose order regarding the use of facial coverings outside a courtroom, jury room and judge’s chambers in a county owned courthouse controls - the order of a county judge, a commissioners court or a judge presiding over a courtroom in the courthouse?

BACKGROUND

COVID-19 is a novel severe respiratory illness that spreads mainly from person to person through respiratory droplets produced when an infected person coughs, sneezes or talks.¹ These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.² Studies and evidence on infection control report that these droplets usually travel around six feet (the equivalent of about two arms lengths away).³

Since March of 2020, more than 2,034,100 people in the United States have been infected with COVID-19. At least 113,900 of those individuals have died.⁴ “At this time, there is no known cure, no effective treatment, and no vaccine.”⁵ Since people “may be infected but asymptomatic, they may unwittingly infect others.”⁶ Federal, state and local officials have searched for the least restrictive means of combatting the COVID-19 pandemic.⁷

The Texas Disaster Act, codified in Chapter 418 of the Texas Government Code, grants emergency powers to the Governor, county judges and other local officials to fulfill their

¹ See e.g., U.S. Centers for Disease Control and Prevention (CDC), *About Cloth Face Coverings*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> (last visited June 12, 2020).

² *Id.*

³ *Id.*

⁴ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, June 12, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>; Lisa Lerer & Dave Umhoefer, *On the Future, Americans Can Agree: It Doesn’t Look Good*, N.Y. Times, June 12, 2020, <https://www.nytimes.com/2020/06/12/us/politics/election-coronavirus-protests-unemployment.html>.

⁵ *S. Bay United Pentecostal Church v. Newsom*, No. 19A1044, 590 U.S. ___, 2020 WL 2813056 (U.S. May 29, 2020) (Roberts, C.J., concurring in denial of church’s application for injunctive relief seeking relief from injunction placing “numerical restrictions on public gatherings to address this extraordinary health emergency”).

⁶ *Id.*

⁷ See e.g., CDC, *Use of Face Coverings to Help Slow the Spread of COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html> (last visited June 12, 2020); CDC, *About Cloth Face Coverings*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> (last visited June 12, 2020).

responsibilities to the public during a declared disaster.⁸ Under the Act, the Governor “by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.”⁹ The Governor “may issue executive orders, proclamations and regulations,” which “have the force and effect of law.”¹⁰

An executive order or proclamation declaring a state of disaster: (1) activates the disaster recovery and rehabilitation aspects of the state emergency management plan applicable to the area subject to the declaration; and (2) authorizes the deployment and use of any forces to which the plan applies and the use or distribution of any supplies, equipment, and materials or facilities assembled, stockpiled, or arranged to be made available under this chapter or other law relating to disasters.¹¹

A county judge, who serves as the presiding officer of the governing body of a political subdivision, “may declare a local state of disaster.”¹² A declaration of local disaster likewise “activates the appropriate recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. The appropriate preparedness and response aspects of the plans are activated as provided in the plans and take effect immediately after the local state of disaster is declared.”¹³

In response to the COVID-19 pandemic, federal, state and local officials issued proclamations and declarations of disaster, and thereby invoked their respective emergency management plans to protect the public. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency “in response to COVID-19, a highly contagious virus that spreads through person-to-person contact and continues to ravage communities across the globe”.¹⁴

On March 13, 2020, the President of the United States issued Proclamation 9994, declaring a “National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” in response to COVID-19’s threatened strain on the nation’s healthcare systems, and detailing

⁸ See generally, Tex. Gov’t Code §§ 418.001-418.261 (Texas Disaster Act). See *Id.* at §§ 418.016 (“Suspension of Certain Laws and Rules”), 418.108 (“Declaration of Local Disaster”) & 418.1015 (“Emergency Management Directors”).

⁹ Tex. Gov’t Code § 418.014(a). The Act defines “disaster” as “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause”, including among other things, “epidemic” and “other public calamity requiring emergency action”. *Id.* at § 418.004(1).

¹⁰ *Id.* at § 418.012.

¹¹ *Id.* at § 418.015(a). See *Id.* at § 418.015(b).

¹² *Id.* at § 418.108(a).

¹³ *Id.* at § 418.108(d).

¹⁴ See Mar. 13, 2020 *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (lasted visited June 12, 2020). On March 11, 2020, the World Health Organization announced that the COVID-19 outbreak “can be characterized as a pandemic, as the rates of infection continue to rise in many locations around the world and across the United States.” *Id.*

federal, state and local governments' preventative and proactive measures to slow the spread of the virus and to treat those affected.¹⁵

That same day, Governor Greg Abbott issued a Disaster Proclamation in Texas, certifying under Section 418.014 of the Texas Government Code that “the novel coronavirus (SAR-CoV-2, which causes the disease known as COVID-19) poses an imminent threat of disaster in the State of Texas” and declaring a state of disaster for all counties in Texas.¹⁶ This proclamation declared that COVID-19 has been recognized globally as a contagious respiratory virus; that it is critical to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans; and that declaring a state of disaster would facilitate and expedite the use and deployment of resources to enhance preparedness and response.¹⁷ Governor Abbott thereby “authorize[d] the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster” in accordance with Section 418.017 of the Texas Government Code.¹⁸ The Governor renewed this disaster proclamation as to all Texas counties on April 12, May 12, 2020, and June 11, 2020.¹⁹ This disaster proclamation is currently in effect.

On March 19, 2020, John Hellerstedt, M.D., Commissioner of Texas' Department of Health Services, issued a Declaration of a Public Health Disaster in the State of Texas, certifying that “the introduction and spread of the communicable disease known as COVID-19 in the State of Texas has created an immediate threat, poses a high risk of death to a large number of people and creates a substantial risk of public exposure because of the disease's method of transmission and evidence that there is community spread in Texas.”²⁰ Dr. Hellerstedt made these same certifications and renewed the Declaration of Public Health Disaster on April 17 and May 15, 2020.²¹ This declaration is currently in effect.

On March 11, 2020, Harris County Judge Lina Hidalgo issued a Declaration of Local Disaster for Public Health Emergency to allow Harris County to take extraordinary measures to contain COVID-19, reduce the possibility of exposure to COVID-19 and promote the health and safety of Harris County residents in accordance with Section 418.108 of the Texas Government

¹⁵ *Id.*

¹⁶ See Mar. 13, 2020 *Proclamation by the Governor of the State of Texas*, https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

¹⁷ *Id.* at p. 1.

¹⁸ *Id.*

¹⁹ See Governor of the State of Texas, Disaster Proclamation (Apr. 12, 2020), https://gov.texas.gov/uploads/files/press/DISASTER_renewing_covid19_disaster_proc_04-12-2020.pdf; Governor of the State of Texas, Disaster Proclamation (May 12, 2020), https://gov.texas.gov/uploads/files/press/DISASTER_renewing_covid19_disaster_proclamation_No_2.pdf. The Governor's June 11, 2020 Disaster Proclamation is not yet available on his website.

²⁰ See Mar. 19, 2020 *Declaration of a Public Health Disaster in the State of Texas*, https://gov.texas.gov/uploads/files/press/DECLARATION_of_public_health_disaster_Dr_Hellerstedt_03-19-2020.pdf.

²¹ See May. 15, 2020 *Declaration of a Public Health Disaster in the State of Texas*, <https://www.dshs.state.tx.us/coronavirus/docs/Declaration-PublicHealthDisaster-May15.pdf>. See also May 22, 2020 Executive Order **GA-25**, linked at <https://gov.texas.gov/coronavirus> (last visited June 12, 2020) at p. 1 (citing Dr. John Hellerstedt's March 19, April 17, and May 15, 2020 Declarations).

Code.²² The Harris County Commissioners Court extended this declaration on March 17, March 24, April 28, May 19, 2020 and June 9, 2020.²³ This declaration remains in effect.

Since issuing their disaster declarations, the Governor,²⁴ county judges²⁵ and mayors have issued executive orders aimed at protecting the health and safety of Texans and ensuring an effective State and local response to the COVID-19 disaster throughout the State of Texas.

COVID-19 ORDERS AND GUIDANCE

A. Governor Abbott's Executive Orders

Governor Abbott issued Executive Orders GA-16, GA-18, GA-21, and GA-23 “over the course of April and May 2020, aiming to achieve the *least restrictive means* of combatting the threat to public health by continuing certain social-distancing restrictions, while implementing a safe, strategic plan to Open Texas.”²⁶

²² See Judge Hidalgo's Mar. 11, 2020 Declaration of Local Disaster for Public Health Emergency, linked at <https://agenda.harriscountytexas.gov/> (last visited June 5, 2020).

²³ See Harris County Commissioners Court's Mar. 17, 2020, Mar. 24, 2020, April 28, 2020, May 19, 2020 & June 9, 2020 Orders extending Declaration of Local Disaster for Public Health Emergency, linked at <https://agenda.harriscountytexas.gov/> (last visited June 12, 2020).

²⁴ See Governor of the State of Texas, Executive Order **GA-08** (Mar. 19, 2020) (relating to COVID-19 preparedness and mitigation); Executive Order **GA-09** (Mar. 22, 2020) (relating to hospital capacity during COVID-19 disaster); Executive Order **GA-10** (Mar. 24, 2020) (relating to daily reporting during COVID-19 disaster); Executive Order **GA-11** (Mar. 26, 2020) (relating to airport screening and self-quarantine); Executive Order **GA-12** (Mar. 29, 2020) (relating to roadway screening and self-quarantine); Executive Order **GA-13** (Mar. 29, 2020) (relating to detention in county and municipal jails during COVID-19); Proclamation (Mar. 29, 2020) (adding states and cities to Executive Order **GA-11**); Executive Order **GA-14** (Mar. 31, 2020) (relating to continuity of essential services and activities during COVID-19); Executive Order **GA-15** (Apr. 17, 2020) (relating to hospital capacity during COVID-19); Executive Order **GA-16** (Apr. 17, 2020) (relating to the safe, strategic reopening of select services as the first step to Open Texas in response to the COVID-19 disaster); Executive Order **GA-17** (Apr. 17, 2020) (relating to the establishment of the Governor's Strike Force to Open Texas); Executive Order **GA-18** (Apr. 27, 2020) (relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas in response to the COVID-19 disaster); Executive Order **GA-19** (Apr. 27, 2020) (relating to hospital capacity during the COVID-19 disaster); Executive Order **GA-20** (Apr. 27, 2020) (relating to expanding travel without restrictions as part of the safe, strategic plan to Open Texas in response to the COVID-19 disaster); Executive Order **GA-21** (May 5, 2020) (relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas in response to the COVID-19 disaster); Executive Order **GA-22** (May 7, 2020) (relating to confinement during the COVID-19 disaster); Executive Order **GA-23** (May 18, 2020) (relating to expanded opening of Texas in response to the COVID-19 disaster); Executive Order **GA-24** (May 21, 2020) (relating to the termination of air travel restrictions as part of the safe, strategic plan to Open Texas in response to the COVID-19 disaster); Executive Order **GA-25** (May 22, 2020) (relating to in-person visitation at county and municipal jails during the COVID-19 disaster); Executive Order **GA-26** (June 3, 2020) (relating to the expanded opening of Texas in response to the COVID-19 disaster), linked at <https://gov.texas.gov/coronavirus> (last visited June 12, 2020).

²⁵ See e.g., Judge Hidalgo's Mar. 24, 2020 Stay Home Work Safe Order; Judge Hidalgo's Apr. 3, 2020 Amended Order Extending Stay Home Work Safe Order; Judge Hidalgo's Apr. 22, 2020 Face Coverings Order; Judge Hidalgo's Apr. 28, 2020 Amended Order relating to the Use of Face Coverings; Judge Hidalgo's May 1, 2020 Second Amended Stay Home, Work Safe Order; Judge Hidalgo's May 8, 2020 Third Amended Stay Home, Work Safe Order; Judge Hidalgo's May 21, 2020 Fourth Amended Stay Home, Work Safe Order, linked at <https://agenda.harriscountytexas.gov/> (last visited June 12, 2020).

²⁶ See Executive Order **GA-26** at p. 1 (emphasis added).

Governor Abbott’s Executive Order GA-26, which was issued on June 3, 2020 and expands the reopening of Texas during the COVID-19 disaster, provides no occupancy limits for “local government operations, including county and municipal governmental operations relating to licensing (including marriage licenses), permitting, recordation, and document-filing services, as determined by the local government.”²⁷

Executive Order GA-26 provides the following with regard to face coverings:

In providing or obtaining services, every person (including individuals, businesses and other legal entities) should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS. *Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services. Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.*²⁸

Executive Order GA-26 also “suspend[s] Section 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E, of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.”²⁹

Among other things, this executive order thus: (1) encourages persons to attempt to follow DSHS’ recommended minimum health standard protocols; (2) encourages individuals to wear appropriate face coverings; (3) precludes any jurisdiction from imposing civil or criminal penalty for the failure to wear a face covering;³⁰ (4) authorizes the imposition of additional hygiene measures upon customers who seek to obtain services; and (5) allows local officials to enforce Executive Order GA-26 and local restrictions that are consistent with GA-26.

B. Texas Supreme Court’s Seventeenth Emergency Order

On May 26, 2020, the Texas Supreme Court issued its Seventeenth Emergency Order regarding the COVID-19 State of Disaster. The Court ordered, in part, that “[s]ubject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant’s consent: ...

- Conduct proceedings away from the court’s usual location with reasonable notice and access to the participants and the public; ... [and]

²⁷ *Id.* at p. 2.

²⁸ *Id.* at p. 3.

²⁹ *Id.* at p. 4.

³⁰ *Compare* Tex. Gov’t Code § 418.173 (providing, among other things, that a local jurisdiction’s emergency management plan may provide that the failure to comply with the plan or with an order adopted under the plan is an offense punishable by fine not to exceed \$1,000 or confinement in jail for a term not to exceed 180 days).

- Take any other reasonable action to avoid exposing court proceedings to the threat of COVID-19 ...”³¹

The Court directed all courts in Texas to comply with the Office of Court Administration’s (“OCA”) guidance with regard to in-person proceedings, stating:

Courts must not conduct in-person proceedings contrary to guidance issued by the Office of Court Administration regarding social distancing, maximum group size, and other restrictions and precautions. Prior to holding any in-person proceedings on or after June 1, 2020, a court must submit an operating plan that is consistent with the requirements set forth by the Office of Court Administration’s Guidance for All Court Proceedings During COVID-19 Pandemic issued on May 4, 2020. Courts must continue to use all reasonable efforts to conduct proceedings remotely.³²

This order applies to both civil and criminal proceedings.³³ The Texas Judicial Branch has also provided Court Operation Guidance, stating that “[e]ffective June 1, courts may begin holding non-essential in-person hearings consistent with OCA’s Guidance to Courts Regarding All Court Proceedings.”³⁴

C. Office of Court Administration’s Guidance

On May 4, 2020, the Office of Court Administration issued guidance encouraging courts to use all reasonable efforts to conduct proceedings remotely and imposing social distancing, maximum group size and other restrictions and precautions applicable to in-person proceedings conducted on and after June 1, 2020 during the COVID-19 pandemic.³⁵ The OCA provided this guidance regarding face coverings:

Face coverings – how the courts will ensure face coverings over the nose and mouth are worn. Cloth face coverings, at a minimum, should be *required* of individuals *while in the courthouse*. Should an individual be in the courthouse for lengthy periods of time, non-medical grade face masks should be considered if they are available.³⁶

³¹ See Texas Supreme Court, *Seventeenth Emergency Order Regarding the COVID-19 State of Disaster*, <https://www.txcourts.gov/media/1446702/209071.pdf>, pp. 1-2 at No. 3(d) & (f).

³² See *Id.*, p. 2 at No. 4.

³³ *Id.* at p. 1. See also Texas Judicial Branch, *COVID-19 Emergency Orders*, <https://www.txcourts.net/emergency-orders> (last visited June 12, 2020).

³⁴ See Texas Judicial Branch, *Court Operation Guidance, Guidance for Proceedings on or after June 1, 2020*, Texas Judicial Branch, <https://www.txcourts.net/court-guidance> (last visited June 12, 2020).

³⁵ See Office of Court Administration, *Guidance for All Court Proceedings during COVID-19 Pandemic (for Proceedings on or after June 1, 2020)*, <https://www.txcourts.gov/media/1447076/guidance-for-all-court-proceedings-during-covid-19-pandemic.pdf> (May 4, 2020).

³⁶ See *Id.* at p. 4 & n. 19 (citing Tex. Dep’t of State Health Services (DSHS), *Checklist for all Employers*) & n. 22 (citing CDC, *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19*) (emphasis added).

Prior to any court holding in-person proceedings, other than essential hearings that cannot be conducted remotely because doing so is not possible or practicable,³⁷ the local administrative district judge for a county or the presiding judge of a municipal court, as applicable, must submit an operating plan for all courts in the county or municipality to the Regional Presiding Judge.³⁸ The OCA has provided a templated Operating Plan for the Judiciary which includes these, among other, protective measures:

General. All judges will comply with the Emergency Orders issued by the Supreme Court of Texas and Court of Criminal Appeals, including conducting in-person proceedings according to the guidance issued by the Office of Court Administration regarding social distancing, maximum group size, and other restrictions and precautions.

Judge and Court Staff Health. ... *Judges and court staff will be required to wear face coverings, practice social distancing, and practice appropriate hygiene recommendations at all time[s].*

Face Coverings. *All individuals entering the court building will be required to wear face coverings at all times.*

Individuals will be encouraged to bring cloth face coverings with them, but if the individual does not have a cloth face covering, a disposable face mask will be provided.

*Individuals who will be required to be in the court building over 1 hour will be provided surgical masks and required to wear them while in the court building if the supply is available.*³⁹

The local administrative judge(s) “must attempt to confer with judges of all courts with courtrooms in county building(s)” with regard to the Operating Plan and must “ensure that the judges of courts with courtrooms in the court building covered by th[e] Operating Plan conduct proceedings consistent with the plan.”⁴⁰

The OCA’s face covering mandates are not limited to courtrooms, but more expansively cover the entire “courthouse,” including, for example, offices of other elected officials such as the

³⁷ “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.” *Id.* at p. 1 n. 4.

³⁸ *Id.* at p. 1.

³⁹ Texas Judicial Branch, *Operating Plan Template*, <https://www.txcourts.gov/court-coronavirus-information/court-guidance/> (last visited June 12, 2020) at pp. 1 & 3 (emphasis added).

⁴⁰ Office of Court Administration, *Guidance for All Court Proceedings during COVID-19 Pandemic (for Proceedings on or after June 1, 2020)*, at p. 1; Texas Judicial Branch, *Operating Plan Template*, at p. 3.

District Clerk's offices, the County Clerk's offices and tax offices), courtrooms, jury rooms, conference rooms, break rooms, judges' chambers, public and private offices, public cafeteria, rooms set aside for lawyers to confer with one another, restrooms, elevators, staircases and other common areas within the courthouse.

The OCA's face covering mandates likewise appear to apply to all who enter a courthouse - whether that person is a judge, attorney, litigant, venire person, juror, witness, courtroom visitor, "customer" of any service provided in the courthouse or other courthouse visitor.

D. Federal Courts

Federal courts have also issued mandatory facial coverings in response to the COVID-19 pandemic. On May 18, 2020, for example, the Fort Worth Division of the United States District Court for the Northern District of Texas issued a Special Order requiring facial coverings in the Eldon B. Mahon United States Courthouse "until further order of the Court."⁴¹ This order provides, in pertinent part:

Owing to the public health emergency declared by the president of the United States in response to the COVID-19 pandemic, beginning May 18, 2020, each person over two years of age who enters the Eldon B. Mahon United States Courthouse must have nose and mouth covered with a close-fitting fabric or cloth mask while in the building, including especially while in the courtrooms, main lobby, district and bankruptcy clerk's office lobbies, elevators, and stairs. The precaution is being required to reduce airborne spread of the disease. ...

The requirements are intended to protect everyone in the courthouse, including persons held in federal custody. ... Participation is voluntary. However, anyone who refuses to wear a face-covering while in the courthouse [or refuses to adhere to other protective measures] will not be permitted to enter the courthouse. Such persons may, however, contact the court for special accommodations by calling 817-850-6601, or by sending an email message through the "Email Us" tab in the upper left-hand corner of the court's website at www.txnd.uscourts.gov.

A person scheduled to participate in a court proceeding as an attorney, litigant, or juror who is not permitted to enter the building under this order should immediately contact the presiding judge's chambers as follows: ...⁴²

Orders denying courthouse entry to individuals who refuse to wear a facial covering have thus been crafted to give these individuals an opportunity to contact the court to explain their absence and seek any appropriate relief.

⁴¹ E.g., Special Order 13-14 re Requirements for Courthouse Entry During National Pandemic Emergency (N.D. Tex. May 18, 2020), <http://www.txnd.uscourts.gov/sites/default/files/documents/SO13-14.pdf>.

⁴² *Id.*

E. Recent Harris County Guidance

On June 11, 2020, Harris County announced a new color-coded threat level system to inform residents regarding the current level of risk from COVID-19. County health officials determined the County was at Threat Level Orange, the second-highest of four public threat levels, finding there is “a significant and uncontrolled level of COVID-19 in Harris County.” Residents have been encouraged to “minimize contact with others, avoiding any medium or large gatherings and only visiting permissible businesses that follow public health guidance.”⁴³

QUESTION ONE

Under the Texas Disaster Act, each person in Texas “shall conduct himself and keep and manage his affairs and property in ways that will reasonably assist and will not unreasonably detract from the ability of the state and the public successfully to manage emergencies.”⁴⁴ What actions may a county judge take when a Texan fails to act reasonably to protect others from harm?

As noted above, Executive Order GA-26 encourages individuals to wear appropriate face coverings. GA-26 also allows the imposition of additional hygiene measures applicable to “customers” who wish to obtain services. While GA-26 prohibits a “jurisdiction” from imposing a civil or criminal penalty for the failure to wear a face covering, it does not preclude a jurisdiction from barring entry to or ejecting individuals who decline to wear face coverings.⁴⁵

Executive Order GA-23, predecessor to GA-26, provided that “[i]n coping with the COVID-19 disaster and especially as services are being reopened in Texas, government officials should look for the least restrictive means of combatting the threat to public health.”⁴⁶ Once a local state of disaster has been declared, the “county judge ... may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge ... and control the movement of persons and the occupancy of premises in that area” in accordance with Section 418.108 of the Texas Government Code.⁴⁷ A county judge’s order requiring the use of facial coverings in courthouses and other county buildings is clearly far less restrictive than closing a building in order to protect the health and safety of those who might otherwise seek to enter the building during the COVID-19 disaster.⁴⁸

⁴³ *Harris County COVID-19 Threat Level System*, <https://www.readyharris.org/Stay-Safe> (last visited June 12, 2020).

⁴⁴ *See Id.* at § 418.151(b) (“This chapter neither increases nor decreases these obligations but recognizes their existence under the constitution and statutes of this state and the common law.”).

⁴⁵ *See* Executive Order **GA-26** at pp. 3 & 4. The term “jurisdiction” is not defined in Executive Order GA-23. We liberally construed this term to include a county (a local government unit) and a county judge (the presiding officer of the county’s governing body).

⁴⁶ *See* Executive Order **GA-23** at p. 2.

⁴⁷ Tex. Gov’t Code § 418.108(g).

⁴⁸ *See e.g.*, CDC, *Coronavirus Disease 2019 (COVID-19) – About Face Coverings*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> (last visited June 12, 2020) (recommending use of face coverings in public settings since COVID-19 spreads mainly from person to person through respiratory droplets produced when an infected person coughs, sneezes, or talks); Tex. Dep’t of State Health Services (DSHS), *Minimum Recommended Health Protocols*, <https://www.dshs.texas.gov/coronavirus/opentexas.aspx> (May 2020) (recommending facial coverings for all individuals in connection with all DSHS checklists & protocols).

Given a county judge’s authority under her emergency powers to control the movement of persons and the occupancy of premises in her county during a declared state of disaster, may a county judge require any person entering a courthouse or other county-owned or controlled building in the county to wear a facial covering in those county buildings during the COVID-19 disaster? If so, and the person declines to wear a facial covering, may a county judge bar entry to or order removal of that person from the courthouse or other county-owned or controlled building? If a person declines to wear a facial covering and is then either barred entry or directed to leave the courthouse, and refuses to do so, may that person be arrested, jailed or fined for criminal trespass or other crime? What other remedies, if any, are alternatively available to a county judge to protect the health and safety of county employees, customers and the public when a person declines to wear a facial covering in a courthouse and other buildings owned or controlled by a county?

QUESTION TWO

The commissioners court of a county has the duty and authority to provide a courthouse and offices for county officers, as well as other necessary public buildings, and must maintain the operations of the courthouse, offices, and other public buildings.⁴⁹ Other county officials and employees, including the county judge, sheriff, clerks of the district and county courts, county treasurer, tax assessor-collector, county surveyor, and county attorney are required to keep their offices at the county seat.⁵⁰ The commissioners court “regulates the use of” and “directs and controls the employees needed to repair, maintain and operate” the county’s courthouses, criminal court buildings and county offices.⁵¹ The commissioners court may also lease or rent to any person any part of the building or rooms that are not necessary for county purposes.⁵²

In Harris County, the courts and courthouse services are housed in more than twenty county buildings.⁵³ The County’s courthouses and annexes housing these courthouses also house offices and provide public services that do not involve the judicial branch of government.⁵⁴ These buildings include, for example, courtrooms, judges’ chambers, jury rooms, private offices, public

⁴⁹ See e.g., Tex. Loc. Gov’t Code §§ 291.001, 292.002 & 292.004; *Dodson v. Marshall*, 118 S.W.2d 621, 623 (Tex. Civ. App.—Waco 1938, writ dism’d) (noting that a commissioners court has “at least implied authority to regulate the use [of county offices] within reasonable bounds”). See also Tex. CONST. art. V, § 18(b) (providing that the county commissioners court “shall exercise such powers and jurisdiction over all county business” as conferred by law).

⁵⁰ Tex. Loc. Gov’t Code § 291.002.

⁵¹ Tex. Loc. Gov’t Code § 291.003 (providing that county sheriff “shall have charge and control of the county courthouse, *subject to the regulations of the commissioners court*”) (emphasis added); Tex. Loc. Gov’t Code § 291.005 (providing that commissioners court of a county with a population of more than 500,000 shall direct and control the employees needed to repair, maintain, and operate the county’s courthouses and criminal court buildings); *Dodson v. Marshall*, 118 S.W.2d 621, 623 (Tex. Civ. App.—Waco 1938, writ dism’d) (noting that a commissioners court has “at least implied authority to regulate the use [of county offices] within reasonable bounds”).

⁵² Tex. Loc. Gov’t Code § 292.001(c). See also Tex. Loc. Gov’t Code § 291.006 (imposing conditions on the operation of private businesses on public property).

⁵³ See **Attachment** (including “Harris County Courthouses, Annexes & Other County Buildings Housing Courts & Court Services”).

⁵⁴ *Id.*

offices, breakrooms, public cafeterias, restrooms, hallways, elevators, stairs and other common areas. Judges, court employees, attorneys, paralegals, litigants, witnesses, jurors, law enforcement officers, observers, visitors, clerks, employees of other independently elected officials and/or department heads, customers and others frequent these buildings on a daily basis.

Many county offices housed in these buildings do not directly serve the courts, and are headed by independently elected officials or county department heads. For example, the County Clerk's offices are in the courthouse. County employees, for example, issue marriage licenses and assumed name certificates for new businesses and record deeds and other documents for persons buying and selling their property. In many counties, the tax office may be located in the primary courthouse or, as in Harris County, in annex courthouses housing justice of the peace courts. A facial mask requirement furthers the County's goal of protecting county employees, customers and the public. However, barring entry to the courthouse to those who refuse to wear a mask would deprive those individuals of access to important governmental non-judicial services. We note that Section 2.002(1) of the Texas Family Code requires a person wishing to obtain a marriage license to appear in person before the County Clerk and may not send a representative except in certain limited circumstances.⁵⁵

Given a commissioners court's authority to regulate the use of and control county buildings, may a commissioners court require any person entering a courthouse or other county-owned or controlled building in the county to wear a facial covering in those county buildings during the COVID-19 disaster? If a person declines to wear a facial covering and is then either barred entry or directed to leave the courthouse, and refuses to do so, may that person be arrested, jailed or fined for criminal trespass or other crime? If a person declines to wear a facial covering, what other remedies, if any, are alternatively available to a commissioners court to protect the health and safety of county employees, customers and the public?

QUESTION THREE

The Texas Supreme Court has directed all courts to comply with the Office of Court Administration's guidance with regard to in-person proceedings, which includes guidance requiring individuals to wear cloth face coverings or non-medical grade face masks while in the courthouse. Excluding an exception applicable to "customers,"⁵⁶ the Governor's executive order – which encourages, rather than mandates the wearing of facial coverings – appears to be inconsistent with the Judicial Branch's orders and directives on the face covering issue.

A court is authorized by law to control its courtroom. A court "has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction."⁵⁷ A court "shall require

⁵⁵ Tex. Fam. Code § 2.002(1).

⁵⁶ According to Executive Order GA-23: "Nothing in this executive order or the DSHS minimum standards precludes requiring a customer wishing to obtain services to follow additional hygiene measures." See Executive Order **GA-23** at p. 6.

⁵⁷ Tex. Gov't Code § 21.001(a).

that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done.”⁵⁸

A court can prohibit entry into a courtroom or eject anyone from a courtroom who poses a threat or fails to comply with reasonable rules set by the court.⁵⁹ A court may also punish for contempt of court.⁶⁰ Contempt may be either direct or constructive. Acts that impede, embarrass or obstruct a court in the discharge of its duties constitute constructive contempt.⁶¹ The essence of “contempt” requires conduct that obstructs or tends to obstruct the proper administration of justice.⁶² Threats to participants’ health and safety clearly obstruct the proper administration of justice. As Texas Supreme Court Chief Justice Nathan Hecht recently stated: “The preeminent issue [in a proceeding before the court] is always the safety of the participants—and principally the jurors, who are not volunteers. They are forced to be there.”⁶³

Given the Office of Court Administration’s guidance and the powers vested in a court to exercise its jurisdiction and enforce its lawful orders, may any court presiding over a courtroom in a county owned or controlled courthouse require any person who enters the *courthouse* to wear a facial covering while in the courthouse during the COVID-19 disaster? Does a court’s authority extend beyond the *courtroom* to allow the entry of an order requiring facial coverings throughout the entire courthouse? If so, and a person declines to wear a facial covering, what remedies are permitted?

QUESTION FOUR

A county official “may not frustrate the commissioners court in the performance of its responsibilities.”⁶⁴ Consequently, one county official may exercise its authority in a county building only to the extent the official “does not usurp or interfere with the county commissioners’ authority with respect to county buildings.”⁶⁵ In the event of the issuance of conflicting orders during the COVID-19 pandemic, whose order regarding the use of facial coverings outside a courtroom, jury room and judge’s chambers in a county owned courthouse controls - the order of a county judge, a commissioners court or a judge presiding over a courtroom in the courthouse?

⁵⁸ Tex. Gov’t Code § 21.001(b).

⁵⁹ See e.g., Tex. Att’y Gen. LO-88-125 (1988) at *4 (“A district judge in Texas possesses the power to eject persons from the proceedings he conducts as provided by Government Code Section 21.001 ...”).

⁶⁰ Tex. Gov’t Code § 21.002.

⁶¹ *In re Reece*, 341 S.W.3d 360, 366 (Tex. 2011) (citations omitted).

⁶² *Id.*

⁶³ Texas District & County Attorney’s Ass’n, *Quotes of the Week* (May 28, 2020), <https://www.tdcaa.com/covid-19-update-no-13/> (last visited June 1, 2020) (quoting Chief Justice Nathan Hecht’s critique of a recent criminal jury trial in Ohio that was scrubbed after the defendant exhibited COVID-19 symptoms during voir dire).

⁶⁴ See Tex. Att’y Gen. Op. KP-0111 (2016) at 4.

⁶⁵ *Id.*

CONCLUSION

As explained above, we seek guidance relating to the required use of facial coverings, which along with social distancing, provides a “least restrictive measure” available to county judges, commissioners courts and the courts to protect the health and safety of county employees, customers and the public in county courthouses, annexes and other buildings owned or controlled by a county.

We thank you for your assistance in providing guidance as to these questions. Please contact Assistant County Attorney Lisa Hulseley at 713.274.5139 if you need more information or have any questions regarding this matter.

Sincerely,



Vince Ryan
Harris County Attorney

ATTACHMENT

HARRIS COUNTY COURTHOUSES, ANNEXES & OTHER COUNTY BUILDINGS HOUSING COURTS & COURT SERVICES

Downtown Courthouse Complexes

Civil Courthouse:

- 201 Caroline
- 17 Story Building
- Civil and Family District Courts
- Probate Courts
- County Civil Courts at Law
- District Clerk's Office
- County Clerk's Office
- District Court Administration
- Pretrial Services – Justice Navigators (front desk lobby)
- Houston Volunteer Lawyers Program (Office/Information Booth on the 17th Floor)

Juvenile Justice Center:

- 1200 Congress
- 9 Story Building
- Juvenile District Courts
- Juvenile Detention Center
- Juvenile Probation Department
- District Attorney's Office – several divisions
- District Clerk's Office
- District Court Administration

Family Law Center:

- 1115 Congress St.
- 7 Story Building
- Commissioners Court Analyst Office
- Justice Administration Department
- IVD Courts
- Probable Cause Court *temporary location due to COVID-19 pandemic, District Clerk staff and Magistrates Only. VIA Video to the Joint Processing Center. (Defendants are at JPC for the hearing, Assistant Public Defenders and Assistant District Attorney participate by video as well.)

Harris County Joint Processing Center

- 700 N. San Jacinto Street
- 3 Story Building
- PC Court located on 2nd floor (defendant and HCSO only, held by video with Magistrate, Assistant Public Defender, and Assistant District Attorney)
- Separate public viewing room on 2nd floor

Criminal Justice Center:

- 1201 Franklin
- 20 Story Building
- County Criminal Courts at Law
- Criminal District Courts

- District Clerk's Office, 1st Floor Criminal Collections
- Pretrial Services – Justice Navigators (front desk in lobby) & Administration (not public interfacing)
- CSCD – Court Supervisors (not public interfacing)
- Facilities and Property Management
- Constable Precinct One – (Offices for staff and supervisors that provide security to the building)
- Public Defender's Office

*When the courthouse fully reopens – District Clerk's Office, District Attorney's Office, District Court Administration, Office of Court Administration, and Grand Jury Operations will return to the CJC.

Court of Appeals:

- 301 Fannin
- 6 Story Building
- 1st & 14th Court of Appeals, including staff for Clerk of each court
- District Court Administration
- Office of Court Management
- Administrative Office of the Eleventh Administrative Judicial Region

Jury Assembly: Building closed due to Harvey, currently under construction, expected to open in mid-February 2021.

Harris County Administration Building

Jury Assembly relocated to Harris County Administration Building after Harvey. Please note, because of COVID-19 pandemic, jury operations suspended through the end of June. Currently looking for alternate location that can accommodate social distancing.

- 1001 Preston
- 9 Story Building
- Auditor's Office
- Budget Management Department
- Commissioners Court Offices
- Commissioners Courtroom
- County Clerk's Office
- County Engineering
- County Judge's Office
- Purchasing
- Tax Assessors Office

49 San Jacinto

- 6 Story Building
- Community Supervision & Corrections Department
- 1st Floor Cite and Release Court (Held every Wednesday at 1:00 pm)

ANNEX	BUILDING NAME	ADDRESS	# OF FLOORS	JP	CONSTABLE	HCSO	COUNTY CLERK	TAX OFFICE	COMMISSIONER	DISTRICT ATTORNEY	POLLUTION CONTROL	PUBLIC SAFETY	PATROL
2	Old Fire Station	1302 Preston	5	X									
3	Humble Courthouse	7900 Will Clayton	1	X	X	X		X		X			
4	John Phelps Courthouse	101 S. Richey	2	X	X		X	X			X		
8	Clinton F. Greenwood Courthouse	701 West Baker	1	X	X		X	X	X				
9	Raul Martinez Courthouse	1001 Macario Garcia Dr.	2	X			X						
10	Clear Lake Annex	16603 Buccaneer Lane	2	X				X					
11	Westside Annex	16715 Clay Rd.	1	X		X		X				X	X
14	Southeast Annex	5737 Cullen BLVD	1	X	X								
17	Marine Division	117 East Avenue	1	X	X	X							
19	Southwest Annex	6000 Chimney Rock	1	X	X		X	X					
25	Kyle Chapman Courthouse	7330 Spencer Highway	1	X	X			X	X				
26	Jim Fonteno Courthouse	14350 Wallisville	1	X				X					
31	Mickey Leland	7300 North Shepherd	1	X	X			X					
67	Annex 67	10851 Scarsdale Blvd	1	X	X		X	X	X				
E	Palm Center	5290 Griggs Rd	1	X	X		X	X					X