



Tips and Trends: The Impact of COVID-19 on White Collar Litigation

WHITNEY Z. BERNSTEIN – BIENERT | KATZMAN PC

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Roadmap

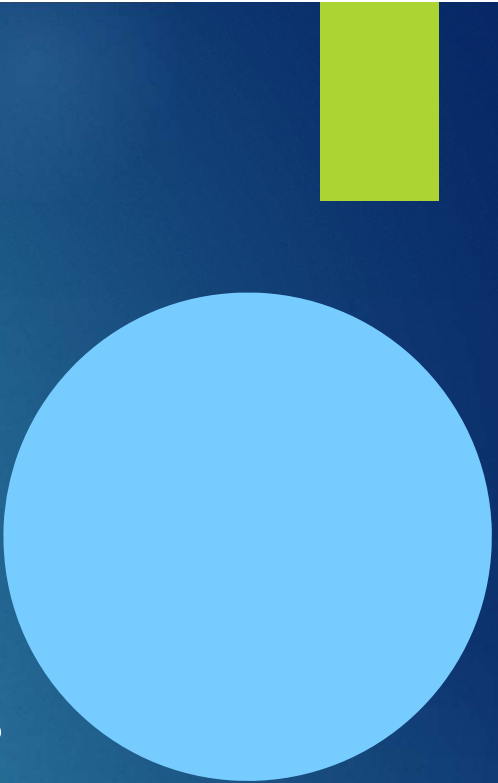
- ▶ Bail and Release
- ▶ Remote Representation
- ▶ Predictions and Trends





Bail and Release

MASS INCARCERATION DURING A GLOBAL PANDEMIC



March 21, 2020
First BOP inmate tests
positive for coronavirus

[Associated Press, "1st fed inmate tests positive for coronavirus," March 21, 2020.](#)

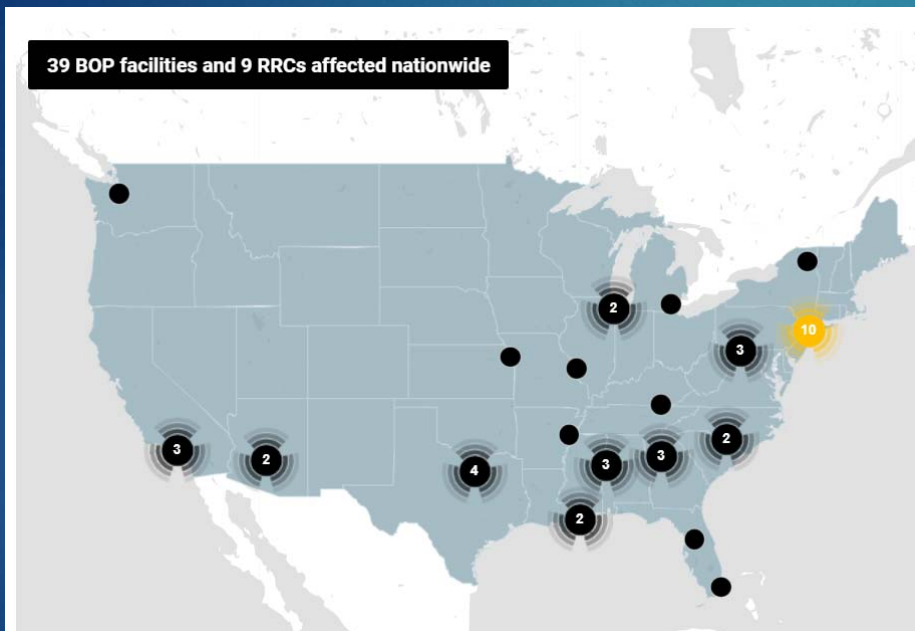


April 15, 2020

Less than a month later...

Confirmed COVID-19 Cases

FEDERAL



- ▶ 446 incarcerated people
- ▶ 248 BOP staff
- ▶ 14 deaths of incarcerated people related to COVID-19
- ▶ Underreported

As of April 14, 2020, at <https://www.bop.gov/coronavirus/>

Confirmed COVID-19 Cases

FEDERAL

- ▶ BOP Modified Policy
- ▶ Staff are still in and out
- ▶ Inmate transfers continue

BOP Implementing Modified Operations

In order to mitigate the spread of COVID-19, the BOP is operating under the following conditions for the next 30 days:

SOCIAL VISITS: Social visits are suspended. Inmate telephone system minutes will be increased to 500 minutes per calendar month Bureau-wide.

INMATE MOVEMENT (Updated): As we previously described generally, inmate internal movement is suspended with limited exceptions. This suspension, however, does not mean the BOP has ceased all inmate movements because the federal judicial system as well as state courts continue to process criminal cases.

These movement exceptions may include, but are not limited to, transfers related to forensic studies, writs, Interstate Agreements on Detainers (IAD), medical or mental health reasons (including local medical trips), and RRC placements. To be clear, the BOP may need to move inmates to better manage the detention bedspace as well as assure that administrative facilities do not become overcrowded beyond available resources.

All inmates are being authorized for movements from all facilities under the following conditions:

- Inmates must have been in BOP custody for greater than 14 days;
- Perform an exit screening for COVID-19 symptoms (fever, cough, shortness of breath and temperature).
 - If the inmate has no symptoms and a temperature less than 100.4 degrees F, the inmate will be transferred;
 - If the inmate has COVID-19 symptoms, or temperature greater than 100.4 degrees F, they will not be transferred and will instead be immediately placed in isolation.
- Regional Directors will notify the BOP Emergency Operations Center prior to movement in order to track and monitor movement.

The BOP emphasizes that all inmates regardless of where they are being housed are screened for COVID-19 prior to movement. Both the BOP and USMS are using screening protocols for both inmates and staff.

LEGAL VISITS: Legal visits will be suspended for 30 days, at which time the suspension will be re-evaluated. Case-by-case approval at the local level and confidential legal calls will be allowed in order to ensure access to counsel. If approved for an in-person visit, the attorney will need to undergo screening using the same procedures as staff.

Access to legal counsel remains a paramount requirement and will be accommodated to the maximum extent practicable. Although legal visits are generally suspended for 30-days, case-by-case accommodation will be made at the local level. If approved for an in-person visit, the attorney will need to undergo advanced health screening, to include a temperature check.

OFFICIAL STAFF TRAVEL: Official staff travel, with the exception of relocation travel, is suspended.

TRAINING: All staff training is suspended (to include conferences and meetings), with the exception of basic training for new staff.

CONTRACTORS: Contractors performing essential services or necessary maintenance on essential systems will undergo advanced health screening, to include a temperature check. All other contractor access is suspended. Contractors who require access will be screened using the same procedures as staff prior to entry.

Essential services include, for example, medical services, mental health services, religious services and critical infrastructure repairs.

As of April 12, 2020, at https://www.bop.gov/coronavirus/covid19_status.jsp

Confirmed COVID-19 Cases

FEDERAL

“ . . . inmate internal movement is suspended with **limited exceptions**. . . ”

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Confirmed COVID-19 Cases

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As of April 14, 2020, at https://www.bop.gov/coronavirus/covid19_status.jsp

Confirmed COVID-19 Cases

FEDERAL

Today's Calendar, 04/14/2020

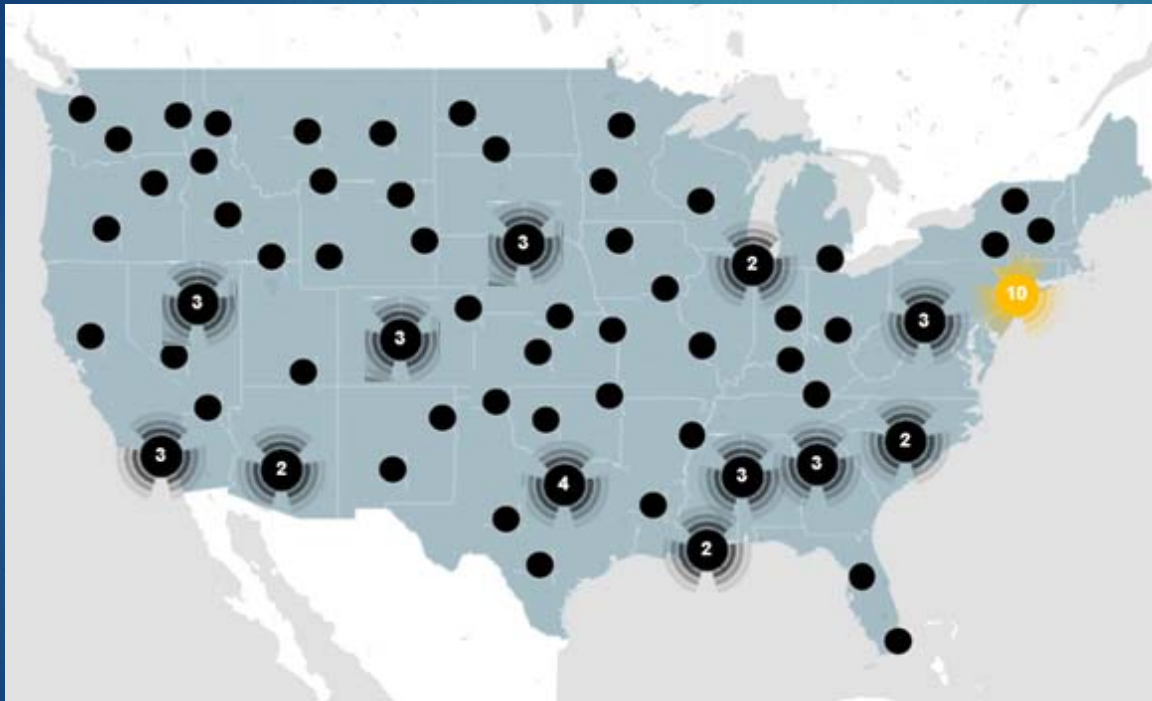
<< Previous | >> Next | - Collapse | + Expand |

Search

Division	Time	Courtroom	Case Number	Defendant
▼ Western				
▼ Initial Appearance				
	2:00 PM	341	2:20-MJ-01647-DUTY-1	Ryan Rhee Custody Out of District Affidavit
	2:00 PM	341	2:20-MJ-01648-DUTY-1	Edgar Joseph Gonzales Urieta Custody Out of District Affidavit
	2:00 PM	341	2:20-MJ-01649-DUTY-1	Michael Adam Valverde Custody Out of District Affidavit
	2:00 PM	341	2:20-MJ-01653-DUTY-1	Allan Roberto Guevara-Lopez Custody Out of District Affidavit
▼ Bond Posting				
	4:00 PM	341	2:19-CR-00043-GW-1	Diego Diaz Urbano Custody Indictment

Confirmed COVID-19 Cases

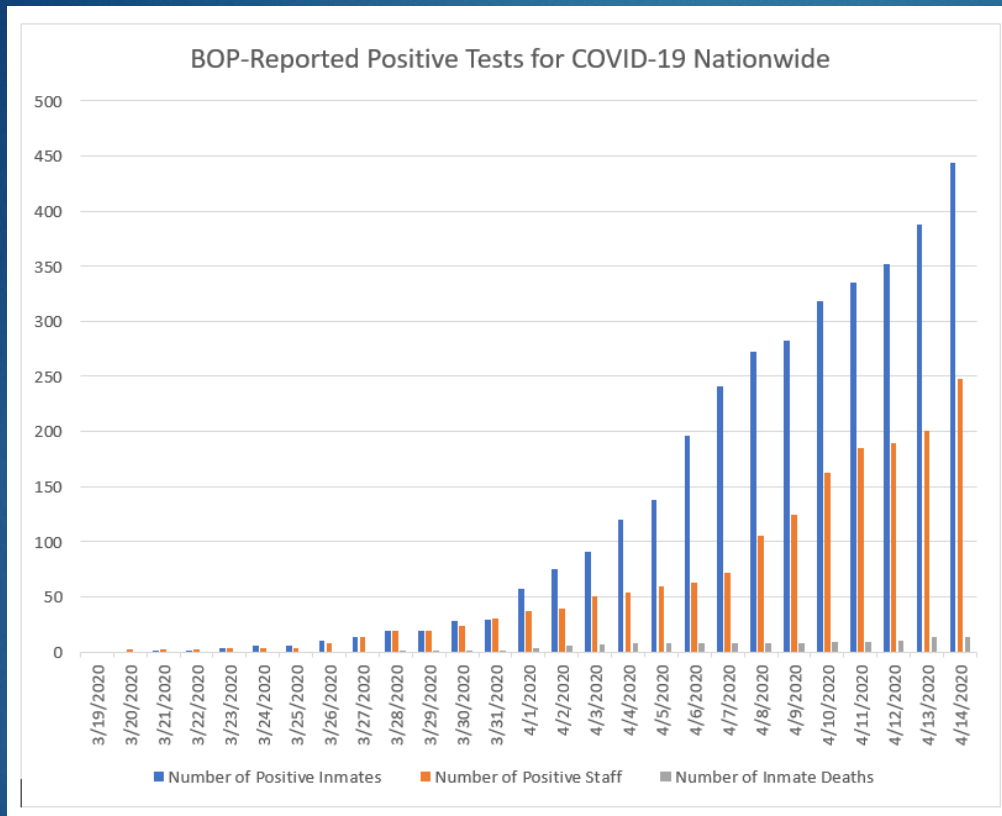
FEDERAL



(image is demonstrative)



Myth: "Prison is Safer"



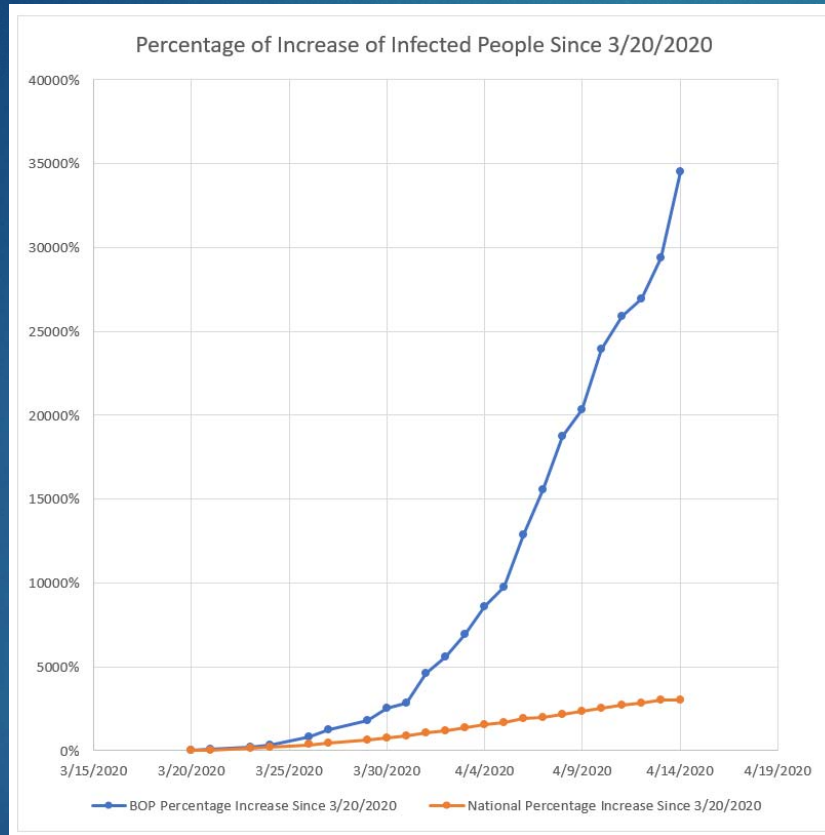
Daily confirmed BOP cases as of April 14, 2020, as compiled by Rachel Bass of the Federal Defenders of New York

Myth: "Prison is Safer"

Date	Number of BOP Cases ³	BOP Percentage Increase Since 3/20/2020	National Percentage Increase Since 3/20/2020	Number of National Cases
3/20/2020	2	0%	0%	18,747
3/21/2020	3	50%	31%	24,583
3/23/2020	6	200%	135%	44,183
3/24/2020	9	350%	190%	54,453
3/26/2020	18	800%	355%	85,356
3/27/2020	27	1250%	451%	103,321
3/29/2020	38	1800%	651%	140,904
3/30/2020	52	2500%	772%	163,539
3/31/2020	59	2850%	892%	186,101
4/1/2020	94	4600%	1036%	213,144
4/2/2020	114	5600%	1176%	239,279
4/3/2020	141	6950%	1379%	277,205
4/4/2020	174	8600%	1526%	304,826
4/5/2020	197	9750%	1665%	330,891
4/6/2020	259	12850%	1897%	374,329
4/7/2020	313	15550%	1963%	386,800
4/8/2020	377	18750%	2140%	419,975
4/9/2020	408	20300%	2349%	459,165
4/10/2020	481	23950%	2527%	492,416
4/11/2020	520	25900%	2704%	525,704
4/12/2020	541	26950%	2860%	554,849
4/13/2020	589	29350%	2989%	579,005
4/14/2020	692	34500%	3042%	489,048

Daily confirmed BOP cases, as compiled by Rachel Bass of the Federal Defenders of New York

Myth: "Prison is Safer"



Daily confirmed BOP cases, as compiled by Rachel Bass of the Federal Defenders of New York

Pretrial Release

FEDERAL



Pretrial Release

FEDERAL

- ▶ Bail Reform Act
- ▶ Global Pandemic =
Less Flight Risk, Less Danger
- ▶ 18 U.S.C § 3142(i)



Pretrial Release

FEDERAL

18 U.S.C. § 3142(i): "The judicial officer may, by subsequent order, permit the **temporary release of the person**, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for **another compelling reason.**"

Pretrial Release

FEDERAL

U.S. v. Mahan

1:19-CR-00233-DCN (D. Idaho), April 10, 2020

- ▶ 36-years-old
- ▶ Danger and a flight risk
- ▶ Asthma
- ▶ "...release is justified . . . because of the compelling reasons created by his chronic, moderate asthma condition in a detention facility during the COVID-19 pandemic."

Pretrial Release

FEDERAL

U.S. v. Avenatti

8:19-cr-61-JVS (C.D. Cal. Mar. 27, 2020)

- ▶ 48-years-old, no serious health conditions
- ▶ Committed crimes while on release
- ▶ "Avenatti has demonstrated that the Covid-19 virus and its effects in greater New York City constitute 'another compelling reason'" under Section 3142(i).

Pretrial Release

FEDERAL

In re Manrique

3:19-mj-71055-MAG (N.D. Cal. Mar. 19, 2020)

- ▶ 74-years-old
- ▶ Flight Risk - Former President of Peru
- ▶ “The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”



Post-Conviction Relief

FEDERAL



Compassionate Release

FEDERAL

- ▶ First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i)
 - ▶ Exhaustion of administrative remedies
 - ▶ “Extraordinary and compelling reasons”
 - ▶ 18 U.S.C. 3553(a) factors

Compassionate Release

FEDERAL

Exhaustion of Administrative Remedies

Defendant must fully exhaust: "all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, **whichever is earlier.**" 18 U.S.C. § 3582(c) (emphasis added)

Compassionate Release

FEDERAL

- ▶ Can courts waive the exhaustion requirement?
 - ▶ Courts split on whether undue prejudice/futility exception is applicable.
 - ▶ U.S. v. Burrill, 3:17-cr-00491 RS (Dkt. 308, p. 4, fn.3) (N.D.Cal. April 10, 2020) (string cite describes split)
 - ▶ United States v. Raia, 2020 WL 1647922 (3rd Cir. 2020) (exhaustion mandatory, but did not consider any arguments)
 - ▶ **Petition for Rehearing filed April 14, 2020**



Compassionate Release

FEDERAL

U.S. v. Neman

2:14-CR-00521-JAK (C.D. Cal. April 10, 2020)

- ▶ Over 60 years old, with lung conditions
- ▶ Housed at Lompoc (69 inmates have tested positive)
- ▶ Court finds exhaustion is mandatory
- ▶ Hearing set for “extraordinary and compelling” factors, even after defendants sent to halfway house

Compassionate Release

FEDERAL

U.S. v. Resnick

1:12-CR-00152-CM (E.D.N.Y. April 2, 2020)

- ▶ 65 years old
- ▶ Diabetes, end-stage liver disease
- ▶ Broader view of exhaustion
- ▶ Served 3 years and 9 months of a 6-year sentence

Compassionate Release

FEDERAL

U.S. v. Haney

1:19-CR-541-JSR (S.D.N.Y. Apr. 13, 2020)

- ▶ Judge Rakoff analyzes the exhaustion requirement in § 3582(c)(1)(A)
- ▶ Holds that it “is a claim-processing rule that does not deprive [a court] of jurisdiction.”

Alternative Options

FEDERAL

SO NOW WHAT?



Furlough

FEDERAL

18 U.S.C. § 3622(a)

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period . . . to—

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(3) obtaining medical treatment not otherwise available;

(6) engaging in any other significant activity consistent with the public interest

Furlough

FEDERAL

18 U.S.C. § 3622(a)

- ▶ Temporary release
- ▶ 30-day period
- ▶ Sole discretion of the BOP



Furlough

FEDERAL

U.S. v. Schaefer

07-cr-498 (LJL) (S.D.N.Y.), Dkt. 73 at 4

- ▶ “[N]othing in the law prevents [a] Court from recommending release from [BOP] and to home detention in the strongest possible language.”

Practitioner tip: Seek court recommendation to BOP

CARES Act – Home Confinement FEDERAL

Section 12003(b)(2) of the CARES Act

- ▶ **"HOME CONFINEMENT AUTHORITY.**—During the covered emergency period...the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate."

CARES Act – Home Confinement

FEDERAL

18 U.S.C. § 3624(c)

BOP's sole discretion to place into home confinement usually limited to the shorter of

- ▶ 10 percent of the term of imprisonment, or
- ▶ 6 months

Practitioner tip: Seek court recommendation to BOP

CARES Act – Home Confinement FEDERAL

Attorney General Barr encouraging
BOP to broadly permit home
confinement:

- ▶ [Barr Memo to BOP, March 26, 2020](#)
- ▶ [Barr Memo to BOP, April 3, 2020](#)

Delay Self-Surrender

FEDERAL

- ▶ United States v Garlock, No. 18-CR-00418-VC-1, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020)
 - ▶ “By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”

Delay Self-Surrender

FEDERAL

- ▶ United States v. Powell, 2020 WL 1540485 (N.D. Cal. Mar. 27, 2020)
 - ▶ Sua sponte granting extension of self-surrender in light of dangers of COVID-19

Confirmed COVID-19 Cases

CALIFORNIA



- ▶ CDCR: 42 inmates and 77 staff confirmed
- ▶ County jail information not centralized
 - ▶ LA County: 29 inmates confirmed
 - ▶ SD County: 1 inmate, 4 staff confirmed, as of April 3, 2020 (*San Diego Union-Tribune*)
 - ▶ SF County: inmate population fell from 1,238 on January 21, 2020 to 735 on April 14, 2020
 - ▶ Orange County: 3 inmates as of March 27, 2020

California COVID-19 Rules

California Judicial Counsel

Emergency Rules, effective April 6, 2020

- ▶ Rule 4: Bail reduced to zero dollars for many offenses.
- ▶ Rule 5: Courts must allow defendants to appear 977 or remotely.



Remote Representation

PROS AND CONS

Why Proffer (Attorney or client) remotely?

- ▶ Timing of case.
- ▶ Video > phone.
- ▶ Arms-length/controlled.
- ▶ Tech advantage.



Considerations Going In:

- ▶ Control/master the platform (e.g. Zoom).
- ▶ Become a producer/director.
- ▶ Seize the beginning to adjust.

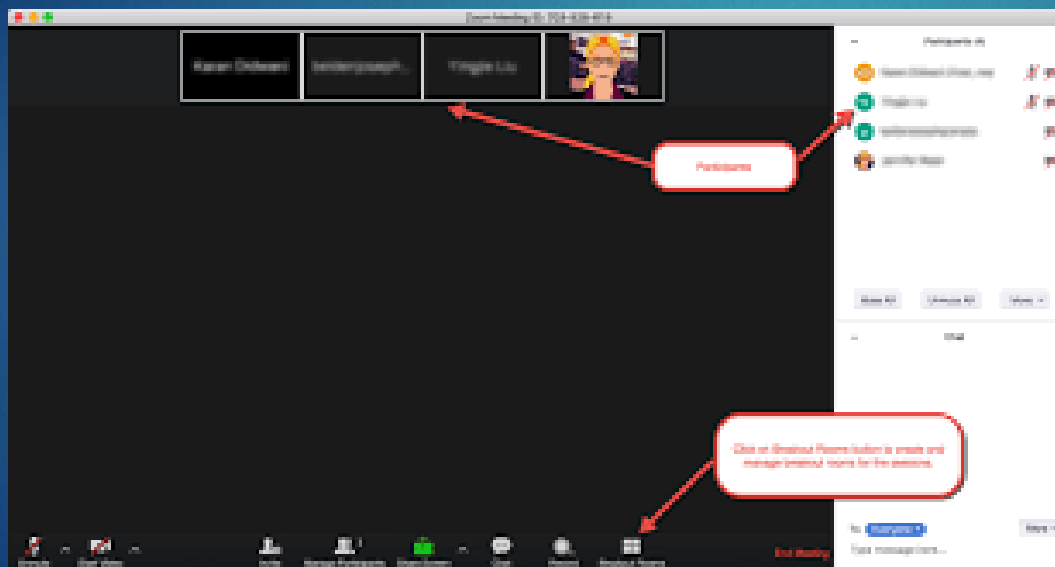


Take Advantage of Technology:

- ▶ Prep client re: use of private channel.
 - ▶ Text message.
 - ▶ Zoom break out room.
 - ▶ Take a break and make a call.

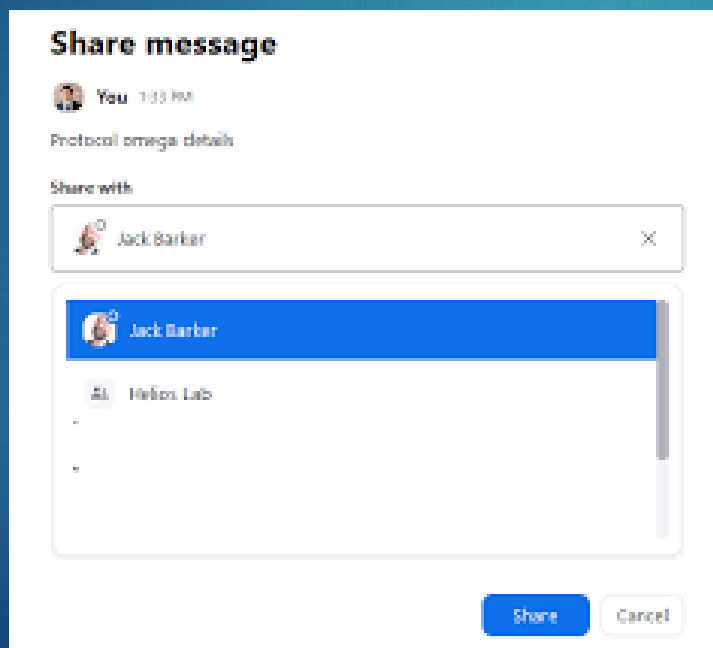
Zoom Break-out room:

- ▶ Host/co-host controlled
- ▶ Can be set up in advance (IT)



Zoom Private Chat:

- ▶ Host controls save settings.
- ▶ Use to communicate with government.





Predictions and Trends

FRAUD PROSECUTIONS, ANTITRUST AND SEC ACTIONS, BANKRUPTCY

COVID-19 Policies: DOJ/USAOs

- ▶ USAG Memos to USAOs regarding pretrial detention and home confinement
- ▶ Scam and Fraud Alerts, Hotlines
- ▶ Coronavirus Fraud Coordinators
- ▶ COVID-19 Hoarding and Price Gouging Task Force

COVID-19 Policies: SEC/CFTC



- ▶ SEC on heightened risk of insider trading (3/24) :
 - ▶ “corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances”
 - ▶ need to “protect against the improper dissemination and use of material nonpublic information”
- ▶ Temporary suspension of trading (4/13) :
 - ▶ Sunnyvale-based Arrayit Corporation due to concerns about its financial information and claims that it developed an approved COVID-19 blood test.
 - ▶ LA-based Applied BioSciences due to questions about accuracy of publicly-available information re: home use coronavirus test kits.
- ▶ CFTC Customer Advisory: Be on Alert for Frauds Seeking to Profit from Market Volatility Related to COVID-19

COVID-19 Policies: DOJ Antitrust/FTC

- ▶ DOJ/FTC Joint Statement announcing expedited antitrust procedure and guidance for Coronavirus public health efforts:
 - ▶ Will opine on legality of COVID-related collaboration w/in 7 days
 - ▶ Acceptable joint conduct: R&D collaboration, sharing of technical know how, joint purchasing for hospitals, temporary combinations to facilitate production and distribution of supplies
- ▶ DOJ seeking 6-month extension of statute of limitations for criminal antitrust offenses as part of next legislation
- ▶ DOJ/FTC on alert for collusion in labor markets (e.g., wage-fixing, no-poach agreements)
- ▶ DOJ warns it will prosecute price fixing and bid rigging for face masks, respirators, and other related health equipment
- ▶ State AGs / FTC focus on price gouging

Enforcement

The San Diego Union-Tribune

FBI warns of COVID-19-related scams, asks victims to report fraud



Los Angeles Times

Amid coronavirus outbreak, testing and treatment scams spike

abc NEWS

Man faces 20 years for attempted \$750 million COVID-19 PPE scam



ABC7 News

FDA warns about at-home COVID-19 test kit scams

Enforcement



- ▶ First COVID-related enforcement action on 3/21 (WDTX, DOJ Civil):
 - ▶ coronavirusmedicalkit.com claimed to offer access to WHO vaccine kits in exchange for a shipping charge
 - ▶ Issued TRO to take down website; potential criminal enforcement
- ▶ U.K. national charged by complaint with smuggling into the US mislabeled drugs purporting to be a treatment for COVID-19 (CDCA)
- ▶ Investment fraud scheme involving claimed “patent-pending cure” and prevention pill for COVID-19 (CDCA)
- ▶ FTC reports \$12 million in COVID-related fraud losses across US

Predictions



Predictions



- ▶ Increase in white collar criminal and regulatory cases
 - ▶ Routine frauds revealed by economic downturn
 - ▶ COVID-related frauds:
 - ▶ Selling fake cures and tests
 - ▶ Phishing emails (posing as WHO or CDC)
 - ▶ Fraudulent requests for charitable donations
 - ▶ Insider trading
 - ▶ Whistleblower cases
 - ▶ Antitrust enforcement
 - ▶ Congressional inquiries by COVID-19 Oversight Commission
 - ▶ Bankruptcy fraud

Bankruptcy

OVERVIEW

- ▶ Expected to surge
- ▶ CARES Act makes filings easier
- ▶ Most recent analogy – 2008 recession
 - ▶ 2008: 65,000 bankruptcy filings in C.D. Cal.
 - ▶ 2010-2012: 142,000+ bankruptcy filings in C.D. Cal.

Bankruptcy

INTERSECTION WITH CRIMINAL LAW

- ▶ Principal(s) indicted for fraud when company in bankruptcy
- ▶ Payment of criminal counsel when payor files for bankruptcy
- ▶ Client information seized through bankruptcy proceedings
- ▶ Race to assets between bankruptcy estate and UASO forfeiture



Bankruptcy

CONSIDERATIONS

- ▶ Bankruptcy trustees have duty to investigate and refer criminal conduct
- ▶ 18 U.S.C. § 3057
- ▶ Bankruptcy judges, receivers, trustees are mandated to report to USAO
- ▶ Documents provided in bankruptcy can be used against criminal defendants

Bankruptcy

PRACTITIONER TIPS

- ▶ Bankruptcy usually precedes criminal case
- ▶ Object to providing documents to bankruptcy court
- ▶ Rule 41 to prevent USAO access to bankruptcy documents
- ▶ Consider Fifth Amendment implications of documents

Special thanks to:

- ▶ Justine A. Harris, Sher Tremonte LLP
- ▶ Women's White Collar Google Group
- ▶ Federal Defenders of New York
- ▶ fd.org
- ▶ WWCDA, Los Angeles and San Francisco Chapters
- ▶ FBA, Northern District of California and Los Angeles Chapters





Q&A?

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