



# COVID-19: Offense & Defense – Lessons Learned from Being on Both Sides of the Courtroom Aisle

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## Overview

Lessons Learned After Time Spent as Both the  
Offense and the Defense:

- Drafting facially neutral local public health orders.
- Coordinating with your local Court on the process for filing of ex parte applications.
- Applying, and enforcing, orders universally.
  - What to ask of the Court, and how to limit your requests.
  - Working with other local municipalities to have a united message on enforcement when possible.
- Coordinating with co-defendants – EARLY!
- Preparing for Public Records Act Requests.
- Staying on top of State and Federal trends.

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# Drafting Public Health Orders

## Starting Out with Facially Neutral Local Public Health Orders: The Best Defense is a Good Offense!

- **Make Orders “User Friendly”**
- **Always Include the Basis for the Orders:**
  - State Codes like Health & Safety Code or Code of Regulations:
  - State Constitution
  - Local Ordinances & Municipal Codes
- **Put the “User” on Notice of What Happens if an Order is Violated:**
  - State Health and Safety Code:
  - Penal Code
  - Local Ordinances
  - Law Enforcement Assistance
- **Don’t Target Specific Businesses (Most of the Time)**

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# Enforcing Public Health Orders

## Know Your Role & Stick to It:

### Are You Looking for Violations or Responding to Them?

- **Learning About Violations:**
  - Anonymous Tip Lines
  - Emails
  - Alerts from Other Public Agencies
  - Social Media
- **Once the alleged violation is discovered, two questions arise:**
  - (1) Is this a violation of a Public Health Order?
  - (2) If yes, who will enforce the Public Health Order?
    - If law enforcement declines to enforce the order, then what?
    - Role and impact of civil investigators
- **CONSISTENCY IS KEY!!!**

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# Enforcing Public Health Orders

## **Enforcement & The First Amendment: Knowing When To Swing & When Not To**

- **Does the Violation Have a Tie to the First Amendment?**
- **Is the Violation of a Local or State Order?**
  - If Local – Are You Being More Restrictive than the State and Making Yourself a Target for a Lawsuit? Is There a Less Restrictive Alternative?
  - If State – Do You Enforce or Refer to the State for Enforcement?
- **Is Enforcement Consistent Across the Board?**
  - Ex: Is a Prohibition on Live Music Enforced Equally at a Church Service and at a Winery?

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# Enforcing Public Health Orders

## **Cease & Desist Letters**

### **Otherwise Known as Exhibit “A”:**

- **Detail the Violation – But Make it Understandable!**
- **Cite to the Law. Provide a Link and/or a Copy.**
- **Explain What Corrective Action is Needed.**
- **Put the Business on Notice of the Consequences for Continued Violation**
- **Give Notice of an Ex Parte Hearing**
- **Remember – The Court Will Read This!**

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# Enforcing Public Health Orders

## Seeking Court Intervention:

### Know What to Ask for and When to Ask

- **How to File in a Pandemic – Working With Your Courts to Establish a Process.**
- **Going in Ex Parte – Make Sure There is an Emergency.**
  - The Rise in COVID Cases May Be Your Emergency.
  - An Upcoming Event May Also Be a Good Basis.
- **When Filing your Ex Parte Application, Also File Your Complaint for the Violation of the Public Health Order (and Any Local Ordinances or Municipal Codes).**
  - Work with your Local Municipalities to capture all concerns and laws. Also, try to stay on the same page when enforcing!

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# Enforcing Public Health Orders

## Seeking Court Intervention:

### Know What to Ask for and When to Ask

- **DON'T Overreach in Your Ask!**
  - Limit Your Request to What the Law Says – So if the Law Says “No Spectators”, Don’t Ask to Shut Down the Event. If the Law Allows Outdoor Operations, Explain You’re Not Trying to Shut Down the Business.
- **DO Extend the Reach of the Risk!**
  - Remember that the Risk to the Public is Greater than the Risk to just those in Attendance.
- **DO Let the Court be Your Ally in Fighting Claims of Selective Enforcement.**
  - When You’re Seeing the Same Judge 3x a Week for TRO’s Against a Variety of Different Businesses, Get that on the Record!
- **DO Encourage Stipulated Injunctions Whenever Possible – The Court Will be Grateful.**

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## Defending Public Health Orders

### How to Play Defense – While Still Playing Offense

- **DON'T Make Your Job Harder:**
  - If you are arguing in a Federal Case that you have taken no action against a particular business, **DON'T** seek a TRO in State Court on that same issue. In fact, maybe consider not sending anymore cease & desist letters too. Your Opposing Counsel is Always Watching!
- **Coordinate with Your Co-Defendants – ASAP!**
  - Come Up with a United Strategy if Possible.
  - Coordinate Filing Dates, Hearing Dates, and Meet & Confer Conversations.
  - Join in Motions when Possible.

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## Public Records Requests

### Keep Records Like You Know They'll Be Requested – Because They Will!

- **Cease & Desist Letters, Emails, Text Messages, Phone Records – Remember that These May All be Requested**
- **Is Publishing Your Cease& Desist Letters Online the Way to Go for Your Agency?**
  - San Diego:
    - [https://www.sandiegocounty.gov/content/sdc/hhsa/programs/p hs/community\\_epidemiology/dc/2019-nCoV/closure-orders.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/p hs/community_epidemiology/dc/2019-nCoV/closure-orders.html)
- **Keep Records of Your Referrals to State Agencies**
- **Use Your Variety of Letters to Defend Against Selective Enforcement Claims.**

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# Stay on Top of State and Federal Trends

## Civil Action Across the Country

- *Abiding Place Ministries v. Wooten et al*  
3:20-cv-00683-BAS-AHG
  - Abiding Place Ministries filed a temporary restraining order to prohibit San Diego County from enforcing its public health directives against the congregation's planned Easter Sunday gathering. The church argued that the County's order is an unconstitutional violation of the right to freely exercise one's religion.
  - On April 10, 2020, the U.S. District Court Southern District of California denied the church's request for a TRO, saying that though it was unfortunate the peak of the virus coincided with religious holidays, the County was within its authority to "reasonably restrict" constitutional rights in the face of a public health emergency. "The right to practice religion freely does not include the right to expose the community ... to communicable disease ..." *Prince v. Massachusetts* (1944) 321 U.S. 158, 166.
  - Second Amended Complaint dismissed by Joint Stipulation on September 3, 2020.
- *First Baptist Church et al v. Kelly et al*  
6:20-cv-01102-JWB-GEB
  - On April 18, 2020, U.S. District Court District of Kansas granted a TRO, preventing enforcement of the governor's public health order against two churches. The Court later extended the TRO until May 16 but it was voluntarily dismissed by plaintiffs when the original governor's order expired and was replaced with a new order allowing for church gatherings.
  - "Given the circumstances, Plaintiffs have made a substantial showing that development of the current restriction on religious activities shows religious activities were specifically targeted for more onerous restrictions than comparable secular activities. The Governor previously designated the attendance of religious services as an "essential function" that was exempt from the general prohibition on mass gatherings. That designation has not been rescinded or modified, yet in EO 20-18 and EO 20-25 churches and religious activities appear to have been singled out among essential functions for stricter treatment. It appears to be the only essential function whose core purpose – association for the purpose of worship – had been basically eliminated."
  - On May 5, 2020, Plaintiffs ' voluntarily dismissed the case.

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## Civil Action Across the Country

- *Legacy Church, Inc. v. Kunkel et al*  
1:20-cv-00327-JB-SCY
  - On April 17, 2020, the U.S. District Court District of New Mexico denied the church's request for TRO and permanent injunction preventing enforcement of state emergency orders against church gatherings.
  - The Court concluded that: (i) the Order did not violate Legacy Church's First Amendment religious freedom rights, because the Order is neutral and generally applicable; and (ii) the Order is a reasonable time, place, and manner restriction, and thus did not violate Legacy Church's First Amendment rights to assemble.
  - Motion to Dismiss filed by the State and granted on July 13, 2020
- *Maryville Baptist Church, Inc. v. Andy Beshear*  
6<sup>th</sup> Circuit Case No: 20-5427 (DC: 20-00278)
  - On May 2, 2020, the 6<sup>th</sup> Circuit Court of Appeal granted in part plaintiff's motion for injunction, enjoining the governor from enforcing public health orders preventing church from holding drive-in services. A prohibition on in-person services was allowed to continue.

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## Civil Action Across the Country

- *Beloved Church et al v. Pritzker et al*  
3:20-cv-50153
  - On May 3, 2020, the U.S. District Court Northern District of Illinois denied church's request for TRO and preliminary injunction and ruled that governor's April 30<sup>th</sup> order satisfies minimal constitutional muster.
  - "But even the foundational rights secured by the First Amendment are not without limits; they are subject to restriction if necessary to further compelling government interests—and, certainly, the prevention of mass infections and deaths qualifies. After all, without life, there can be no liberty or pursuit of happiness."
  - Appeal filed and pending before 7th Circuit.
- *Friends of Danny Devito et al v. Wolf, Gov. of PA, et al*  
68 MM 2020
  - Though this case does not involve religious institutions, it does involve constitutional claims. Filed on behalf of several local businesses, the case sought an emergency application for extraordinary relief seeking to invalidate Gov. Tom Wolf's executive order that shut down the physical operations of all "non-life-sustaining" business in response to the COVID-19 epidemic
  - On April 13, 2020, the Pennsylvania Supreme Court Middle District denied the request from Petitioners, a group of business and other entities, to vacate or strike the governor's executive order. On May 6, 2020, the application to the U.S. Supreme Court for stay was denied.
  - Petition pending before the U.S. Supreme Court

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## Civil Action Across the Country

- *Antietam Battlefield KOA et al v. Hogan et al*  
1:20-cv-1130
  - On May 2, 2020, a complaint for TRO was filed in US District Court District of Maryland by a group of state lawmakers, businesses, veterans, and pastors alleging governor's orders violate the U.S. and Maryland Constitutions.
  - On May 20, 2020, U.S. District Judge Catherine C. Blake rejected the constitutional challenge, saying the governor's directives are narrowly tailored to achieve Maryland's compelling interest of protecting the public from the deadly COVID-19 virus.
  - "Public officials cannot reasonably exercise their broad authority to protect the health of the entire community without considering the data, the science and the advice of experienced public health officials. Gov. Hogan, exercising the powers given to him by the legislature in the face of the COVID-19 crisis, has made reasonable choices informed, if not dictated by, such data, science and advice."
  - Motion to Dismiss pending before the District Court.
- *Lighthouse Fellowship Church v. Ralph Northam*  
2:20-cv-00204-AWA-RJK
  - The pastor of Lighthouse Fellowship Church in Chincoteague was charged April 5 with violating Gov. Ralph Northam's order that limits gatherings across the state — including at churches — to 10 people to contain the coronavirus spread.
  - On May 1, 2020, the U.S. District Court Eastern District of Virginia denied an emergency restraining order sought by a religious liberties group that contends Northam's 10-person limit infringes on the Lighthouse Fellowship's constitutional rights. The US DOJ had filed a statement of interest in support of the church's claims.
  - Motion to Dismiss pending before the District Court.

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## Civil Action Across the Country

### *Peterson v. Kunkel*

- District Court No. 1:20-cv-00898-WJ-CG
- Case filed on 9/1/20 and dismissed on 10/22/20
  
- Plaintiff Peterson's daughter K.P. attended Albuquerque Academy, a private school.
  
- New Mexico's COVID-19 measures allowed public schools to open at 50% of capacity, but private schools, including religious institutions, were limited to 25%.
  
- Honorable William P. Johnson denied the TRO by applying rational basis standard. Key issue on Equal Protection though was denied without prejudice.

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## Civil Action Across the Country

### • **Riverside County Actions:**

#### • **Civil Enforcement:**

- *County of Riverside v. Church Unlimited, et al.*  
PSC 2002064
- *County of Riverside v. Grace Baptist Church, et al.*  
RIC 2001286

#### • **Defending Litigation:**

- *Gish v. Newsom, et al.*  
5:20-cv-00755-JGB-KK
- *Gondola Adventures, Inc., et al. v. Newsom, et al.*  
2:20-cv-03789-CBM-MAA

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## Civil Action Across the Country

### *Gish v. Newsom, et al.*

- Plaintiffs, including faith leaders, filed a federal lawsuit alleging violation of the U.S. and California Constitutions.
  - Eleven total causes of action, but relying heavily on the First Amendment.
- Plaintiffs requested a TRO, and a permanent injunction, against enforcement of the State's stay-at-home order as well as the stay-at-home orders issued by San Bernardino County and Riverside County
  - Court denied the TRO and did not schedule a hearing on a permanent injunction.
  - The State and County Orders satisfied a "deferential standard" and a rational basis standard. No application of strict scrutiny
- County's Motion to Dismiss granted on mootness grounds
  - Motion for Reconsideration filed by Plaintiffs.

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## Civil Action Across the Country

### *Gallagher v. Newsom*

- Two Assemblymen filed a lawsuit against Gov. Newsom alleging violation of the California Constitution stemmed from an executive order that resulted in a vote-by-mail election for November 2020.
- Court ruled that COVID-19 measures that amend, alter or change any existing statutory law or make a new statutory law.
  - Court ruled that the Governor has certain authority to make
- Court of Appeal has stayed that Order pending further review

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## Civil Action Across the Country

### ***County of Butler v. Wolf***

- Local counties and businesses brought a lawsuit against Gov. Wolf arguing violation of various constitutional rights including the First Amendment and Fourteenth Amendment
- Trial conducted in June and July 2020
- 66 page ruling issued by Hon. Judge William Stickman in favor of the Plaintiffs.
  - Congregate gathering limitation violated right to assembly
  - Stay-at-home and business closure violated Due Process Clause of the Fourteenth Amendment
  - Business closure requirement violated Equal Protection Clause
- Gov. Wolf plans to file an appeal.

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## Civil Action Across the Country

### ***Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York***

- On November 25, 2020, the U.S. Supreme Court ordered a preliminary injunction holding that NY may not enforce a 10 or 25 person congregation limit on certain Catholic and Orthodox synagogues pending further review.
- Key factual issue: person-based limit versus percentage-based limit that resulted in strict scrutiny being applied. As such, regulations were not narrowly tailored.
- Post-litigation change did not warrant withholding injunctive relief due to constant threat of litigation.

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## Civil Action Across the Country

### *Harvest Rock Church v. Newsom*

- Following the NY case, the Supreme Court vacated the District Court's denial of Plaintiff's Request for a Preliminary Injunction and remanded the matter to the District Court
- District Court Judge – Honorable Judge Bernal has consistently ruled in favor of COVID-19 based restrictions and is handling the Gish case.

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# QUESTIONS?



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