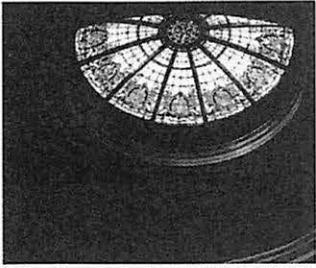


#037



Essex County Bar Association  
*"With Honor and Dignity"*

KEVIN G. WALSH  
President

December 16, 2020

EILEEN O'CONNOR  
President Elect

VIA EMAIL ([Comments.Mailbox@njcourts.gov](mailto:Comments.Mailbox@njcourts.gov))

SHOSHANA SCHIFF  
Vice President

The Honorable Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Comments on Proposal for Virtual Civil Jury Trials  
Hughes Justice Complex  
P.O. Box 037  
Trenton, New Jersey 08625-0037

G. GLENNON TROUBLEFIELD  
Treasurer

JAMES DIGIULIO  
Secretary

Re: **Comments from the Essex County Bar Association on the Judiciary's Proposal for Virtual Civil Jury Trials**

MATTHEW S. SCHULTZ  
Immediate Past President

Dear Judge Grant:

Trustees  
MATTHEW S. ADAMS  
JODI ARGENTINO  
DONNA M. CAMERON  
CARMEN DIAZ DUNCAN  
SANDRA C. FAVA  
HON. HARRIET FARBER KLEIN  
MARC D. MICELI  
ARTHUR M. OWENS  
MICHAEL J. RANKIN  
CORY J. ROTHBORT  
MARY E. TOSCANO  
MAURO G. TUCCI, Jr.

On behalf of the Essex County Bar Association ("ECBA"), we thank you for the opportunity to provide feedback on the proposal of the Administrative Office of the Courts ("AOC") to virtually resume civil jury trials currently suspended due to the ongoing COVID-19 pandemic. We trust that our comments will inform the AOC's deliberations on this critically important topic.<sup>1</sup>

Briefly, the ECBA unequivocally opposes the implementation of mandatory virtual trials at this time and concurs with the New Jersey State Bar Association ("NJSBA") that virtual trials should only occur on a voluntary, consensual basis. Our reasons are detailed below.

JESSICA C. DIAMOND  
YLS Trustee  
MARIA R. FRUCI  
YLS Chair

The ECBA has approximately 1500 members, is New Jersey's largest county bar association, and serves as the organized voice for a diverse group of lawyers and by extension their clients, many of whom are residents of our state's third most populous county. Given the diversity of our membership, the organization offers a wide range of perspectives, and stands at the ready as a valuable resource for the AOC. The ECBA welcomes this opportunity to provide input regarding the AOC's proposal to virtually resume civil jury trials. We believe it necessary to also comment generally on the important topic of virtually

LYNN FONTAINE NEWSOME  
ABA Delegate

JODI L. ROSENBERG  
G. GLENNON TROUBLEFIELD  
NJSBA Trustees

<sup>1</sup> Neither ECBA President-Elect Eileen O'Connor nor Trustee Donna M. Cameron participated in drafting or approving these comments for submission to the Administrative Office of the Courts.

WENDY E. DEER  
Executive Director

administered justice, because the pandemic has had such a dramatic impact on the operations of New Jersey's court system.

The ECBA's membership is keenly aware of the current crisis facing the courts and our clients. The pandemic has restricted movement, closed schools, and upended nearly every aspect of the lives of the citizens of our state. It has had a devastating impact upon one of the most important elements in the functioning of our society, access to the courts. It is essential to ensure that the temporary suspension of normalcy does not result in the suspension of the fair administration of justice, the effects of which will continue to be felt long after the pandemic is over.

The need for social distancing, limits on group gatherings, and other mitigation tools aimed at slowing the spread of the deadly virus have wreaked havoc on the functioning of our court system. Coupled with increasing judicial vacancies throughout our state, particularly in Essex County<sup>2</sup>, this crisis is unlike any seen before. Judicial backlogs have increased over the past several months, and the public health emergency will surely continue into some portion of 2021, thereby compounding an already daunting situation. Digging out of this backlog on the other side of the pandemic will likewise present truly "uncharted waters" for both the judiciary and the lawyers who represent their clients in the courthouses of New Jersey. Although we understand and appreciate fully that the pandemic has created enormous pressures and legitimate needs to alleviate unprecedented backlogs, expediency cannot be used as a justification for sacrificing the fundamental integrity of the jury system. Accordingly, the ECBA objects to the compulsory use of virtual civil jury trials in the absence of the consent of all parties and participants to the underlying action.

The proposed blanket compulsory virtual civil jury trial order fails to consider the nature and complications of an individual case, the type and amount of evidence, the numbers and demographics of witnesses, and issues surrounding access to sufficiently robust

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<sup>2</sup> Essex County Vicinage currently has the largest judicial shortage in New Jersey. It is imperative that our judiciary be fully staffed to ensure that, when jury trials are resumed either virtually and/or in-person, the increasing backlog of cases can be fully addressed so as to ensure the residents of Essex County have access to the full, fair, and efficient administration of justice in all matters, large and small.

technology to conduct a trial by the parties and participants in a virtual format. Additionally, virtual jury selection hinders the empaneling of juries comprised of a fair cross-section of the community. Lastly, the virtual technology itself can adversely affect the basic integrity of the evidentiary presentation thereby undermining the integrity of the proceeding from the start.

To ensure the preservation of fundamentally fair jury trials, the ECBA respectfully recommends that the AOC institute a voluntary virtual civil jury program through which a civil case may be tried before a jury virtually, if and only if, all parties and participants consent to that format.

**1. Civil Trials are Not a One-Size-Fits-All Paradigm, as the Contemplated Compulsory Virtual Jury Trial Program Suggests**

The ECBA recognizes that there are some species of civil trials that can proceed virtually, including jury trials in smaller, non-complex cases. Respectfully however, this difficult decision that is triggered by these difficult times -- foregoing the centuries old in-person jury trial -- should not be left to the sole discretion of the Court but should include the litigants who have waited years for their one and only opportunity to achieve justice. The proposed imposition of mandatory virtual civil jury trials paints with too broad a brush, implicitly lumping together all cases as essentially the same. Every civil case, like its litigants, is unique, however. There are presumably cases where the participants believe that a quicker disposition outweighs the compromises inherent in a virtual trial. Affording an opportunity to conduct civil jury trials through virtual means, but only with consent of all parties and participants, permits the appropriate cases to move forward. An opt-in program would serve the various competing purposes by aiding in reducing the judicial backlog, reducing unique appellate issues inherent in mandatory virtual trials, and facilitating resolution of certain cases.

The Supreme Court's December 8, 2020 Order suspending the requirements that healthcare professionals involved in responding to COVID-19 appear for depositions or court proceedings highlights the

unique challenges for certain civil cases. This Order, while necessary, will have a significant impact on the availability of critical witnesses, particularly in medical malpractice and personal injury actions. The AOC's proposal does not incorporate or address the restrictions imposed on cases impacted by the December 8, 2020 Order. At a bare minimum, any judicial implementation of virtual jury trials must account for the unavailability of critical witnesses due to the ongoing pandemic, by permitting any litigant to opt out of a virtual trial. Respectfully, a litigant in this untenable position should not have her hopes for a fair trial left to the discretion of the court. The guarantee in our State Constitution that "[t]he right of trial by jury shall remain inviolate," N.J. Const. art. I, ¶ 9, can only be waived by the litigants after conferring with their counsel and weighing the unique qualities of the case.

## **2. Virtual Jury Selection Does Not Produce Jury Pools That are a Fair Cross-Section of the Community**

Extensive evidence demonstrates that virtual jury selection introduces a new qualifying factor for jury service, namely, a sufficiently reliable broadband internet connection capable of sustaining the bandwidth necessary for videoconferencing software like Zoom. The so-called "digital divide" makes the ability to serve on a jury subject to a socio-economic litmus test. While the AOC has publicly stated that it will attempt to bridge this divide by supplying technology to prospective jurors, a mandatory statewide virtual civil jury trial program will, in all likelihood, tax that court-issued technology supply beyond its available limits. We also shudder to imagine the risks to certain jurors if, after seeing court personnel deliver technological equipment to a residence, neighbors jump to incorrect conclusions about why government employees are visiting that neighborhood and that residence.

Moreover, the digital divide skews juries by age as well. Many prospective jurors, who may be less familiar with the necessary software to conduct remote proceedings, struggle to navigate the technology necessary for remote jury service. This is a factor that must be considered regardless of whether there is a sufficient supply of court-issued technology. The technology is only as good as a user's ability to operate it.

We submit that a county such as Essex, with its diversity of population and dramatic socioeconomic differences, is particularly susceptible to skewed jury pools. A resident of a town that is considered “high-income” would be much more likely to have and be comfortable with the technology and virtual environment essential to the functioning of a virtual jury trial.

Virtual jury selection, in the few cases that proceeded to trial this autumn utilizing a hybrid jury selection model before the second wave of the pandemic forced another pause of in-person court proceedings, has been very problematic. Significant legal challenges to the jury selection process utilized in those trials have been mounted, see, e.g., *State v. Dangcil*, drawing *amici* support from nearly all of New Jersey’s major stakeholders.

To ensure truly representative juries, the consent-based system of virtual civil jury trials for which the ECBA advocates must be protected by safeguards that did not exist in the hybrid jury trials that have been conducted thus far. If a virtual jury trial is requested on consent of all parties and participants, the ECBA concurs with the NJSBA’s assessment that counsel must be present and involved during all stages of the jury selection process. There must be no change to the number of peremptory challenges or the overall number of deliberating jurors. Further, there must be a searching inquiry of all jurors for potential bias. To be clear, the ECBA in no way advocates that a juror with genuine health concerns serve on a jury during a global pandemic. Instead, the ECBA recommends that stringent requirements be instituted to ensure that any potential jurors seeking to be excused during the juror screening process due to COVID-19 have legitimate medical excuses, and that litigants are not forced into a situation where they are required to try a case before a jury that is not representative of the community at large.

Stated succinctly, litigants cannot and should not be forced to have their day in court before a jury compromised by a skewed pool of candidates.

### **3. Virtual Technology Affects the Presentation of Evidence**

It is axiomatic that trials broadcast by video cannot completely replicate in-person proceedings. There is no substitute for a litigant’s

right to communicate about strategy with an attorney physically seated next to her during the course of a trial. Documentary evidence presented via a “shared screen” is not the same as showing it to a witness on the stand, especially where such issues as the genuineness of a signature may be present. No matter how good the video platform, from time to time the screen may freeze or otherwise impede the video and/or audio transmission.

A concrete example can be found in the requirement to conduct bench trials virtually in the Domestic Violence Restraining Order forum. Anecdotal reports of significant problems during those proceedings by our members reaffirm the conclusions of many academic studies suggesting that the technology itself is to blame. For example, a report funded by the Department of Justice to study video arraignment hearings found, “The audio feature on some video-conferencing technology uses a middle bandwidth filter that cuts off low and high voice frequencies, which are typically used to transmit emotion. ... This feature removes critical emotional cues that can be used by judicial officers to determine a defendant’s remorse and character.”<sup>3</sup>

Video quality is equally important, and poor video quality for a host of reasons outside of the control of litigants and their counsel can translate into negative impressions from jurors. Credibility is left to the sound discretion of the trier of fact, the jury. The credibility of witnesses, litigants, and counsel cannot be effectively evaluated virtually to the same extent as in-person proceedings. Human beings, including judges, grossly overestimate their ability to determine witness credibility.<sup>4</sup> To make a credibility determination, people need not only to hear witnesses’ words, but also to observe their demeanors, tones, gestures, eye contact and body language— all of which are greatly diminished by video. Courts have long recognized, as the venerable Judge Learned Hand once remarked, “[D]emeanor

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<sup>3</sup> Davis, Robin, PhD., Research on Videoconferencing at Post Arraignment Release Hearings: Phase I Final Report, ICF International, May 29, 2015.

<sup>4</sup> A series of studies conducted by Chris Guthrie at Vanderbilt University showed judges have no greater capacity to assess credibility than the average person. A comprehensive list of those studies can be found here: [https://www.nawj.org/uploads/pdf/conferences/CLE/Bibliography\\_How%20Intuition%20Misleads%20Judges.pdf](https://www.nawj.org/uploads/pdf/conferences/CLE/Bibliography_How%20Intuition%20Misleads%20Judges.pdf)

is part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs.” *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952).

Video also negatively impacts credibility assessments by suppressing witness emotion, limiting the lens through which the juror sees the witness, and diminishing the quality of what the naked eye can see. Video also limits a juror’s “assessments of demeanor and nonverbal cues (e.g., eye contact, body language) in ways that lessen the speaker’s ability to connect emotionally with listeners and reduce the speaker’s perceived credibility.”<sup>5</sup> Emotion is a powerful indicator of credibility and it is substantially diminished by a video feed being transmitted over an often unstable, frequently buffering internet connection.

Although attorneys do not directly engage with jurors in the course of a trial, they do observe juror responses as jurors consume the evidence. Attorneys watch for signs of comprehension, interest, and even boredom to determine how to progress with their presentations. Jury reactions can be the harbinger of an ultimate outcome in a civil case that motivates an attorney to pursue a settlement in the midst of trial. The virtual environment is an inadequate substitute for what the in-person civil jury trial experience can provide. No box on a Zoom screen can ever allow attorneys to make adjustments to their case in the way that first hand observations of the jury in a courtroom can.

For these reasons and others cited in the significant body of academic literature on the subject, a consent-based system of virtual jury trials is the only feasible option to the resumption of civil jury trials. The unique frailties and limitations of the technology demand that virtual civil jury trials only be conducted under circumstances where litigants have been afforded the opportunity to balance the

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<sup>5</sup> Gourdet, Camille, Amanda R. Witwer, Lynn Langton, Duren Banks, Michael G. Planty, Dulani Woods, and Brian A. Jackson, *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*. Santa Monica, CA: RAND Corporation, 2020. [https://www.rand.org/pubs/research\\_reports/RR3222.html](https://www.rand.org/pubs/research_reports/RR3222.html) (citing Landström and Granhag, 2010; Landström, 2008; Landström, Ask, and Sommar, 2015; Walsh and Walsh, 2008).

imperfections of the proposed virtual format against the circumstances of their unique case. Virtual jury trials should never be considered for criminal proceedings.

#### **4. Other Mandatory Experiments with Virtual Justice in New Jersey Have Been Fraught with Problems and Negative Stakeholder Feedback**

Throughout the current public health crisis, the AOC has rolled out various types of virtual court proceedings, with and without the type of input from stakeholders now being sought by the AOC regarding virtual civil jury trials. The reactions to virtual proceedings have been highly critical.

For example, the County Prosecutors Association of New Jersey (“CPANJ”), after engaging in remote grand jury pilot programs with “mixed results,” recognized the importance of in-person juries and renewed its position that moving grand juries to larger venues, where virus mitigation efforts like social distancing would be possible, is a better alternative than conducting grand juries in a virtual format. Uncharacteristically siding with similar published commentary from leaders of the criminal defense bar, CPANJ called for the elimination of virtual grand juries and wrote the following in a published statement: “Given our sworn obligation to seek justice, we cannot stand by and fail to advocate for the protection of Constitutional rights, privacy rights, and the safety of all participants in our criminal justice system, including defendants and victims.” See County Prosecutors Association of New Jersey public statement on remote grand juries, <https://www.almcms.com/contrib/content/uploads/documents/399/46336/CPANJ-Final.doc>.

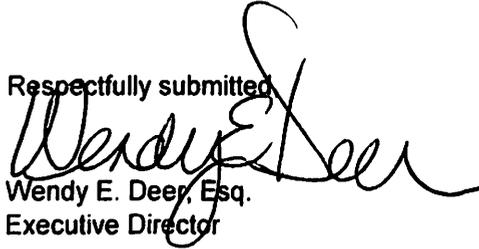
Criticism of the experience with virtual grand juries from both sides of the criminal bar this past summer underscores how important it is for the AOC to listen to diverse groups of practitioners such as the ECBA and the NJSBA. It further illustrates the type of needless controversy that would likely envelop a mandatory virtual civil jury trial program implemented without the support of organizations such as the ECBA and NJSBA. The ECBA shares the grave Constitutional concerns raised by prosecutors and the defense bar alike with respect

to virtual grand juries, and seeks to avoid compounding the already contentious debate surrounding virtual justice by endorsing a pragmatic consent-driven solution to the current moratorium on civil jury trials as set forth herein.

#### **5. Conclusion**

Although well intentioned, the AOC's proposal for mandatory virtual trials threatens the fair administration of justice. Expediency is only one component of the equation and cannot serve as a justification for resorting to inherently flawed legal proceedings. The inequities that would result from a mandatory virtual civil jury trial system would run counter to the fair administration of justice, flood our appellate courts with legal challenges, and exacerbate already palpable social justice issues. The legitimate need to eliminate backlogs and move the civil calendar can and should be achieved through a virtual jury trial program built upon the consent of the parties and participants. We therefore strongly urge the AOC to reconsider its proposal and adopt a plan better equipped to remedy the issues the current proposal seeks to address.

Respectfully submitted,



Wendy E. Deer, Esq.  
Executive Director

CC: The Honorable Sallyanne Floria, A.J.S.C.  
CC: Members of the Essex County Bar Association  
CC: Kimberly A. Yonta, Esq., President, New Jersey State Bar Association