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New Jersey Defense Association

New Jersey's Defense Voice

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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
Comments.Mailbox@njcourts.gov.

Re: Virtual Civil Jury Trials

Dear Judge Grant:

The New Jersey Defense Association appreciates the opportunity afforded by the Judiciary's Post Pandemic Planning Committee to submit comments regarding the proposal for Virtual Civil Jury Trials.

Initially, we wish to thank the Judiciary for all its efforts and accommodations made throughout the pandemic to keep the justice system operational. We genuinely support the Judiciary's desire to find a tool to resolve cases through trial while in-person court proceedings are limited. In addition, the NJDA supports the NJSBA's November 11, 2020 report on these topics, with minor exceptions noted herein, and provides additional considerations and recommendations.

The NJDA membership is largely comprised of trial attorneys who represent defendants in civil litigation and their insurers. The membership litigates matters ranging from Special Civil Part disputes over property damage with few witnesses to complex, multi-party professional malpractice, employment and products liability matters, the trials of which routinely take weeks or months in the courtroom. While there are cases where risks to the integrity of the trial process are minimal enough to justify proceeding in a fully virtual fashion, we do not see this concept as a viable alternative for all civil cases. We have genuine concerns as to whether virtual trials can produce fair and credible results. For this reason, and those that follow, we strongly believe that virtual trials should proceed on a temporary and voluntary basis only.

It is our hope that the concerns we express are not construed as a blanket condemnation of virtual proceedings. As practitioners, we have altered

our practices significantly during the pandemic so as to continue zealously representing our clients in litigated matters while also moving cases towards resolution as expeditiously as possible. These efforts have necessarily included an adaptation to discovery and court proceedings conducted on a purely virtual basis.

Depositions, for example, have been conducted in a virtual setting since March. While this has proven to be effective much of the time, there have been countless instances where technology failures did not allow a successful proceeding. And while virtual depositions do permit counsel to obtain testimony from the witness, the ability to assess the witness based on body language and other intangibles is simply not comparable to a live format. We draw on these experiences in expressing our concern that a virtual jury will be similarly limited where the jurors are called to adjudicate a case based upon "heads in boxes" on a computer screen. It is indisputable that the human interaction which takes place in person, in a courtroom, cannot be replicated over a computer. In bodily injury cases, physical movement cannot be observed; in discrimination cases, non-verbal cues or exchanges between a witness and a party are lost; in every case, the opportunity to look anyone – a witness, the jurors, the judge – in the eye is unavailable. Thus, a fully remote process will have the very real likelihood of producing results quite different, and less just, than in-person trials.

Another important consideration is the effort and burden that will be placed upon members of the bar to prepare for virtual trials. Many law offices do not have the resources to purchase upgraded equipment and hire technology consultants, especially after months of decreased revenues. Both time and money would need to be spent to learn and test the system before counsel would be comfortable trying a fully virtual case. Considering that the virtual system would likely be short-lived, with the expected vaccine availability, forcing all trial counsel to significantly revamp their practices does not seem practical.

The above concerns are not without respite. For instance, some are mollified, to a degree, in a proceeding where only the jury is remote, whereas counsel, witnesses, and the judge are safely present in the courtroom. We believe that proceeding accordingly provides the opportunity for a more equitable proceeding than a trial where the court, counsel, parties and witnesses are all remote.

Furthermore, we are confident that the members of the Bar can identify cases that would be appropriate to try in a fully, or partially, virtual setting. For example, for many years counsel have selected cases for trial on an

expedited basis. These expedited cases may be appealing to try because counsel typically agree on the parameters of the trial in advance and the actual trial is much shorter than a typical full trial.

What is clear to our membership is that the selection of cases for fully, or partially, virtual trials requires a careful weighing of various factors that are unique to the circumstances of each case. For this reason, we reiterate our firm belief that any virtual trial should be voluntarily conducted with the consent of all parties.

Building upon the aforementioned fundamental considerations regarding virtual trials, two aspects of virtual trials are of such pressing concern to the NJDA that we feel specific is comment appropriate.

I. Jury Selection

The right to a trial by a jury of one's peers is guaranteed by our Constitution. A jury of one's peers, has been interpreted by courts to mean that the available jurors include a broad spectrum of the population, particularly of race, national origin and gender. Ensuring that this constitutional right remains uncompromised, is crucial to the success of any virtual program.

In order to ensure this, counsel and their clients should be granted access to all aspects of the juror selection process. This would include all pretrial deferral and hardship requests, including those that are typically handled by jury management and the court. Many of the juror selection issues raised by *State v. Dangcil* can be avoided by simply allowing counsel more access to the selection process. More access would also allow for more transparency. More transparency would garner more trust from the public and litigants.

Likewise, there should be no loss or reduction of peremptory challenges simply because we are in a virtual environment. Peremptory challenges occupy an important position in our trial process. *See Batson v. Kentucky, 476 U.S. 79 (1986).* Challenges help to protect a litigant's right to a fair and impartial jury. All peremptory challenges should remain intact.

The loss of "in person" jury selection certainly creates a number of challenges. Indeed, many studies conclude that 93% of communication is non-verbal. Knowing this, we must re-examine our "voir dire" process. Fashioned effectively, jury selection in a virtual environment presents the opportunity for a more thorough "voir dire." This will also help ensure the litigants have more opportunities to remedy the loss of *in person* evaluation.

II. Witness Examinations and Evidence Presentation

Preliminarily, now more than ever, during each step of the process the Court and counsel must work together to adequately preserve the record. There should be leniency for addressing technical problems, such as counsel's inability to object to a question due to a connection issue. Additionally, for example, if the Court uses a "raised hand" to alert court personnel to a juror's technical issues, the record must be adequately preserved along with an understanding of anything the juror missed due to the problem.

As for witness examinations, during direct and cross examination, each juror should have an uninterrupted clear view of the witness to assess credibility. While it is preferable for the jury to simultaneously view counsel conducting the examination, this should not be at the expense of the jury viewing the witness. A drawback of "speaker view" is that any noise made by a speaker removes the video from the non-speaker. Whether intentional or not, there is a concern about removing the jury's focus from the witness. In cases requiring an interpreter, it is preferable for the jury to see both the witness and interpreter.

Similarly, the jury should still have a clear view of the witness when shown or confronted with an exhibit, or when asked to draw on an exhibit or create a document, such as drawing on a whiteboard. When simultaneously using a document by Shared Screen, a witness view may be minimized; at times substantially. Effort should be made to avoid minimizing the jury's view of the witness while also viewing an exhibit. Providing each juror with a separate monitor for viewing exhibits while viewing the witness on a laptop is preferable.

There should be no restriction on any counsel's use of a third-party vendor for evidence presentation. For any attorney who may not be technologically comfortable and is not hiring a third-party vendor, but rather expects to use court personnel for evidence presentation, the Court should provide instructions in advance. Additionally, counsel should be permitted to practice with court personnel in advance so that the Court's instructions, and counsel's expectations, are fully understood.

For expert witnesses testifying remotely using demonstrative evidence which will not be moved into evidence, counsel calling the expert should be required to notify opposing counsel in advance of the demonstrative evidence expected to be used. For example, cross-examining counsel should know before an orthopedic surgeon testifies that the expert intends to use a model of the spine on direct.

As for impeachment evidence, we respectfully disagree with the NJSBA's recommendation of emailing a link of all impeachment evidence to opposing counsel when cross-examination begins. Cross-examining counsel may not have sufficient time to add impeachment documents arising as a result of direct examination or which arise unexpectedly during cross-examination. The NJSBA's recommendation also does not consider circumstances where cross-examining counsel may have considered using a document but changed his or her mind. As an alternative, cross-examining counsel's office could email opposing counsel each impeachment exhibit when used. We also strongly disagree with the alternative technique of mailing impeachment exhibits to the witness in advance in a sealed envelope.

Finally, we are concerned about applying virtual jury trials to complex civil cases with numerous witnesses, multiple attorneys and voluminous documents, both from the standpoint of jury fatigue and jury confusion. Potential problems in simple trials are magnified when expanded into more complex cases. For example, more document intensive cases will require more redactions and potential HIPAA concerns.[1] A case involving a few pages of medical records, which will need to be redacted not only for HIPAA reasons but also to exclude hearsay statements, will become more difficult and time consuming in cases involving hundreds or thousands of pages of medical records. Producing extensive redacted records to the Court and counsel on a shared drive or link will also prove challenging for counsel who are less technologically proficient and will increase costs. Additionally, screen sharing of documents will prove more difficult and tedious, particularly if there are voluminous documents which are not yet published to the jury, but rather are initially shown to the witness to establish foundation and admissibility. Moreover, a greater number of trial witnesses increases the potential for technology problems with each additional witness's: device, internet access, and ability to review and analyze exhibits, resulting in additional trial delays.

In conclusion, we appreciate the opportunity that the judiciary has afforded all practitioners, including our organization, to comment upon the viability of virtual trials. Our members are eager to work with the judiciary to establish a voluntary virtual trial program that may be temporarily implemented to relieve the backlog in trial-ready cases. We believe that a program which is fully vetted and tested prior to implementation will address many of the above concerns, as well as those that will likely surface in the practical application of virtual trials. Once such a program has been established, and an adequate opportunity for training provided to all

[1] There is also a concern about the security of private information in a virtual environment which is reduced or eliminated by the confines of a courtroom.

practitioners, we believe virtual trials will be a useful instrument for moving certain cases to final disposition.

Very truly yours,

JOHN V. MALLON
President, New Jersey Defense Association