

#026



NEW JERSEY STATE BAR ASSOCIATION

KIMBERLY A. YONTA, PRESIDENT
Yonta Law, LLC
111 Livingston Ave.
New Brunswick, NJ 08901
732-421-1680 • FAX: 732-543-7502
kim@yontalawnj.com

December 16, 2020

Hon. 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

Re: Comments on Proposal for Virtual Civil Jury Trials

Dear Judge Grant:

Thank you for including the New Jersey State Bar Association in ongoing discussions about COVID-19 operations of the courts, and for providing an opportunity to comment on this proposal for civil virtual trials. These comments supplement the NJSBA's previous submissions to the Working Group on COVID-19 Jury Operations titled, "A Path to Virtual Civil Jury Trials" dated Nov. 9, 2020 and updated Nov. 11, 2020.

The NJSBA recognizes the challenges to the justice system imposed by the pandemic and appreciates the Judiciary's efforts to keep the judicial system operational to ensure continued access to justice by New Jersey's residents. In particular, the NJSBA appreciates the efforts to move forward with civil jury trials after a seven-month hiatus. Transparency, clear communication, and flexibility will be key components of any plan to pivot toward virtual civil trials, with the overarching aim of ensuring that any trial is fair, just and produces a credible result. These comments, and our previous recommendations, are made with that singular goal in mind and in the spirit of working with the Judiciary to maintain the utmost confidence in our esteemed judicial system.

The NJSBA supports the Judiciary's efforts to allow virtual civil jury trials to move forward on an emergency basis with the express understanding that as soon as in-person jury trials can safely resume, these emergency measures will be discontinued. Moreover, we emphasize, consistent with our prior communications to the Court, that virtual trial proceedings are not appropriate in criminal cases.

Against that background, the NJSBA provides the following comments in connection with each recommendation in the current proposal:

Judiciary Proposal:

1. All civil case types (all dockets and all tracks) should be eligible for virtual civil jury trials, with the Civil Presiding Judge, trial judges, and attorneys working together to select or exclude cases based on individual factors.
 - a. To the extent possible, virtual civil jury trials should begin with cases involving a single plaintiff, a single defendant, and a modest number of live witnesses.
 - b. Cases that are especially complex or anticipated to require more than a few weeks to complete should be considered only after more straightforward trials have been conducted.
 - c. Operational concerns should be considered in determining if a case is not suited for a virtual civil jury trial. Among other factors, cases involving evidence that will be difficult to present in a virtual format (e.g., physical objects) or will require multiple interpreters for parties and witnesses may be difficult to conduct.

NJSBA Comment: The NJSBA generally agrees with these recommendations. We believe that in order to reassure the public, litigants, and lawyers that virtual trials will not place litigants at a disadvantage because of a health crisis, there needs to be a clear public communication that the Judiciary will not move forward with any trial wherein a credible COVID-19-based disadvantage will be created by trying the case remotely. Examples include, but are not limited to, COVID-19-related unavailability of lay or expert witnesses, demonstrated inability of a non-party witness to utilize technology sufficiently, such that it will greatly compromise the effectiveness of the witness, and other similar considerations that are beyond the litigant or lawyer's ability to reasonably control.

Judiciary Proposal:

2. Jury selection should be conducted in an entirely virtual format.

NJSBA Comment: The NJSBA agrees with this proposition, and adds that the jury selection process for virtual trials must retain all of the pre-pandemic procedural safeguards to ensure that impartial and representative juries are empaneled.

We draw particular attention to one issue. Previously, most evaluations of a "hardship" by a judge were done as part of the individual trial jury selection process with attorney involvement. In recent in-person trials with a hybrid jury selection system, the jury management office was empowered to hear initial requests for deferment without any other input, with many of those requests presumably related to COVID-19 issues. This left no opportunity for an attorney to perform a meaningful evaluation of the jury array to determine if it is representative. It also prevented a litigant, or counsel on behalf of a litigant, from being able to object to a juror's excusal from service or to advocate for an excusal where one was not provided.

The NJSBA strongly recommends that all deferral requests be heard by a judge with counsel participating. This will provide attorneys with adequate opportunity to evaluate the jury array, will preserve New Jersey's "open court" jury selection process, and will provide the transparency needed to ensure public confidence in a fair and just system of jury trials.

Judiciary Proposal:

a. To minimize public health risks and maximize juror yield, jurors should not come into the courthouse for an in-person phase of selection. Rather, jury selection should be conducted virtually (without requiring attorney consent for that virtual selection process).

NJSBA Comment: The NJSBA agrees, subject to the above comments that all previous procedural safeguards are retained. Without the need to reduce the number of potential jurors who are required to come to the courthouse, the focus of juror selection should remain solely on developing and instituting a process that assures impartial and representative panels.

Judiciary Proposal:

b. Given the modified process, judges should be more permissive in allowing attorneys to participate during virtual voir dire.

NJSBA Comment: The NJSBA believes this is a critical component of ensuring impartial and representative panels, particularly in virtual trials and under pandemic conditions. We note that a thorough voir dire “should probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially.” *State v. Erazo*, 126 N.J. 112, 129 (1991). To fully accomplish this, counsel should be permitted and encouraged to initiate any necessary appropriate follow-up inquiry. Increased attorney participation could easily be incorporated into individualized voir dire in separate “virtual breakout rooms” outside the presence of the entire panel.

In addition, while no changes are suggested here to the number of peremptory challenges available to each litigant, the NJSBA firmly believes that peremptory challenges are an important and necessary component of jury selection. They should not be reduced or eliminated through any virtual trial plan. Because New Jersey’s current *voir dire* process does not permit a robust examination of juror attitudes, beliefs and experiences, the use of peremptory challenges allows counsel to address matters of concern to a party which do not rise to the level of “cause” as judicially constructed, such as implicit biases that may affect a juror’s consideration of the issues in a particular case. Peremptory challenges also allow counsel to address a party’s intuitive or “visceral reaction” to individual jurors. See *Roman v. Mitchell*, 82 N.J. 336, 361 (1980). Moreover, under present circumstances, peremptory challenges will provide an avenue for counsel to assess and address considerations created by the remote environment, such as a juror’s willingness to engage through the virtual framework and their demonstrated attention to the process and its participants.

For these reasons, the NJSBA strongly encourages the preservation of the very real and important protections provided by the statutorily afforded peremptory challenges, especially as mechanisms to integrate technology and remote screening criteria are being explored. In a time when systemic racism and implicit bias are at the forefront of American social issues, the peremptory challenge is an important right and tool afforded to litigants which makes them feel as though they have a say in the jury that is being selected, thus bolstering the public’s willingness to trust the judicial system to resolve disputes.

Judiciary Proposal:

c. The model voir dire questions should not be modified but may be expanded to address adjustments to the voir dire and trial format (both as to the optics of social distancing between attorneys and clients and as to the use of virtual presentation of evidence, etc.).

NJSBA Comment: The NJSBA recommends the addition of voir dire questions concerning juror availability, potential hardships in connection with COVID-19, and biographic/demographic information. It is critically important to litigants in selecting a fair, balanced and representative jury to understand any and all concerns jurors may have in serving, and to have information about a juror's background since they will not be able to "see" a full potential jury in person. This consideration is of particular important if any jurors will be excluded or deferred in a manner that does not include attorney participation.

Judiciary Proposal:

- d. Additional jurors should be selected as alternates.
- i. Up to two additional alternates should be selected to account for the possibility that a juror may experience technical difficulties that prevent them from continuing with the trial or that a juror could develop a COVID-19 related issue that necessitates excusal (e.g., an empaneled juror might be excused midtrial if their child's daycare or school closed during the trial and they were unable to arrange for childcare).
 - ii. The selection of additional alternates should not affect any substantive aspect of jury deliberations. The same process should be used to select deliberating jurors and alternates before starting deliberations. The same number of jurors should be required to return a verdict.

NJSBA Comment: Because of the unpredictability of COVID-19-related complications that could develop during a trial resulting in a juror's inability to finish their service, the NJSBA suggests consideration be given to increasing the number of alternate jurors. Alternatively, discretion should be left to the trial judge, in consultation with the attorneys, to increase the number of alternate jurors based on the number of parties, the anticipated length of a trial and the complexity of a case.

Additionally, paragraph 2(d)(ii) references a verdict by the same "number" of jurors. To avoid any confusion the plan should provide that any verdict must be reached in accordance with the requirements set forth in Rule 1:8-2.

Judiciary Proposal:

3. The Judiciary should provide standard technology to all empaneled jurors.
 - a. The requirements for virtual jury selection should continue consistent with applicable court orders, including the Court's July 22, 2020 Order that permits the use of various appropriate technology, including smartphones with cameras, for purposes of selection.

- b. Samsung Galaxy Pro tablets should be provided to all empaneled jurors with Broadband activated if necessary.
- c. Consistent with the protocols for virtual jury selection and virtual grand jury proceedings, empaneled jurors should receive instructions and training on use of Judiciary-issued technology and on the protocol for informing the judge if they experience a technical problem during the trial.

NJSBA Comment: The NJSBA agrees that standard technology and training should be provided to all empaneled jurors. The ability of jurors to maintain a clear and uninterrupted connection to the trial proceedings, as well as to view the proceedings in the same format as all of the other jurors, will be critical to the success of a virtual trial. Consideration should be given, though, to permitting jurors to use their own computers if they are more comfortable with the supplied Samsung tablet available as a backup.

The NJSBA recommends that additional steps be taken as well. Jurors should be provided with a SIM card that provides independent access to the internet to ensure internet access is not dependent on a strong WiFi connection. A technical assistant should be designated to ensure that each juror understands and is capable of employing the technology. The technical assistant should also virtually check in jurors while the judge handles pre-trial issues.

While the trial is ongoing, jurors should be provided mobile phone access to a help line in the event problems are encountered. They should be instructed that no pop-up notifications are permitted on the computer (i.e., from emails, social media, etc.) and mobile phones must be turned off. Any juror who appears to be distracted should be addressed privately by the Court in a virtual breakout room.

Finally, a Sheriff's Officer/court personnel should be provided a computer to monitor the virtual jury room while proceedings are paused.

There could be a case where it may be difficult for jurors to fully see or appreciate the exhibits presented by the parties utilizing the standard equipment provided. In those situations, the parties should have the right to request that the Judiciary supply additional equipment to the empaneled jurors. Alternatively, if the parties agree, additional equipment may be supplied to the jurors at the expense of one or more parties, conditioned upon any equipment provided being available for use by all parties equally.

Judiciary Proposal:

- 4. The trial judge should conduct a comprehensive pretrial conference that covers all aspects of the virtual trial process.
 - a. The pretrial conference should address whether the judge, attorneys, and parties will be present in a courtroom or whether any or all of them will participate remotely.
 - i. At this time, the Judiciary would permit "hybrid" or "modified" virtual civil jury trials with the judge, attorneys, and even witnesses participating from the courtroom. However, given the possibility of an executive order that further limits

or suspends indoor gatherings, the judge and attorneys also should plan for how they could continue the trial in a fully virtual format if necessary.

- b. The pretrial conference also should address the method(s) of presenting evidence.
 - i. Pre-marked exhibits could be made available to the jurors in a hard copy binder or an electronic file folder or other agreed upon method.
 - ii. Evidence introduced at trial could be shared virtually, by video or screen sharing, or via other methods. Protocols for impeachment evidence should be determined in advance, to the extent possible.
 - iii. Witness testimony that generally would be presented live should be presented live via video (e.g., there is no expectation of pre-recording testimony except as would have been done pre-pandemic).
 - iv. Witnesses who testify remotely may be required to swear or affirm that they will not communicate with or receive messages from attorneys or others during testimony. They also may be required to turn off or render inoperable any electronic devices other than those used to participate in the virtual trial.
- c. The judge and attorneys should agree on a trial schedule designed to minimize Zoom fatigue for jurors (e.g., limiting the morning and afternoon sessions to three hours and scheduling lunch and other breaks).
- d. A pretrial order should be entered memorializing relevant aspects of the virtual civil jury trial process.

NJSBA Comment: The NJSBA generally agrees with this recommendation and suggests that guidelines be provided to assist judges and attorneys in developing a virtual trial procedure. The NJSBA offers the following for consideration:

1. Document Considerations:

- a. All documents should be pre-marked. Pre-marked exhibits should not be supplied to jurors prior to deliberations unless there has been an agreement or ruling that an exhibit is admitted in evidence and there is agreement by the parties or a ruling by the court that the exhibit should be provided before deliberations. To do otherwise risks undue emphasis on those pieces of evidence over other evidence, including testamentary evidence.
- b. A standard format should be used for all evidence compatible with viewing by all participants. Universal accepted formats include:
 - i. Documents – pdf;
 - ii. Images, pictures – .jpg, gif, png, pdf;
 - iii. Audio recordings - .avi, .mpg, .mp3, .mp4;
 - iv. Video recordings - .avi, .mpg, .mp3, .mp4.

- c. To prevent modification, documents should be “flattened” or “locked” in PDF/A format, with an archival and preservation format that ensures documents will look the same regardless of the software used to view them.
- d. Similarly, the Court should specify PDF or PDF/A, image orientation, whether documents should be submitted in color or black and white, and if multi-page documents are acceptable or if each document should be submitted in a separate file.
- e. File Size Limitations: Litigants may have smaller file size limitations than each other and the Court. This should be addressed in advance to avoid any unanticipated issues.
- f. Security: Consideration should be given to access points for evidence shared and stored digitally, and electronic audit logging should be enabled to document when files are accessed and by whom. Presumably this process would continue through jury deliberation.
- g. Admitted Exhibits: As the exhibits are admitted into evidence they should be placed by the Court in a secure cloud-based folder that is accessible to counsel and the Court. Optimally there should be a folder for both admitted plaintiff and defense exhibits.

Judiciary Proposal:

- 5. Trial-ready civil cases should be noticed, conferenced, and scheduled for virtual jury trials.
 - a. Consent to proceed remotely should not be required. However, to the extent practicable, the first virtual civil jury trials should involve judges and attorneys who are amenable to the process and willing to provide feedback for refinement of future protocols.
 - b. While consent should not be required, relevant factors (including health- or travel-related barriers to attorneys convening in the courtroom) should be considered in selecting and scheduling cases for trial dates.

NJSBA Comment: The NJSBA believes that participation in a virtual civil jury trial should not be mandated at first, and agrees that the first such trials should involve judges and attorneys who are amenable to the process and willing to provide feedback for refinement of future protocols. We do not believe a virtual jury trial system should be mandated until all of the participants have an informed understanding about how a virtual trial will be conducted, and until some trials have happened on a voluntary basis. This should be accomplished through the pilot program proposed by the court after which a decision to move to a mandatory program can be made on an informed basis with a well-developed and well-communicated proven process.

While lawyers and judges may participate in many jury trials in a given year, for most litigants their jury trial represents their one and final chance to resolve their dispute. It is critical that their “day in court” be conducted with a full understanding of the proceeding and with all necessary safeguards in place to ensure the rights of all parties are adequately protected and all opportunities are available to present the best case possible. The NJSBA agrees there should be a post-evaluative process to inform the courts and the bar about the successes and the problems encountered with the system so that any necessary improvements can be made moving forward.

Ideally, there should be uniform rules related to the technology that may be used to present a case at trial. Trying a case virtually should not result in an advantage being created for those attorneys and litigants who are more technologically sophisticated or those who have the resources to develop or purchase sophisticated technology. Fundamental fairness in the administration of justice dictates that the outcome of a case should not be determined by which litigant has the resources to invest in technology or the sophistication to produce the presentation of evidence. Moreover, a uniform baseline platform for the presentation of evidence will facilitate training of lawyers, judges, and court personnel most of whom will be utilizing technology to try a case for the first time. In the event the Court is not inclined to adopt a uniform approach, opting to leave such decisions up to individual trial judges in consultation with counsel, trial judges should be instructed to rule on the use of technology with a primary focus of insuring that no litigant is disadvantaged by the technology used for the reasons expressed above.

Judiciary Proposal:

6. The trial judge should provide an enhanced jury charge (modeled after the supplement to the grand jury charge used for virtual grand juries) that emphasizes that jurors must give their full attention to the trial and must maintain secrecy of jury proceedings.

NJSBA Comment: The NJSBA agrees that an enhanced jury charge is necessary, and suggests that special consideration be given to visually monitoring the jury environment during deliberations. Two potential alternatives for consideration are: periodic requests for each juror to perform a 360-degree scan of the room they are in or a second tablet or other device with a panoramic view be supplied and placed behind the juror for purposes of monitoring the juror environment. Although the second suggested method is more reliable, steps would need to be taken to insure lack of interference from competing devices.

In addition, the following steps should be taken to ensure jury security:

- a. The judge and court administration personnel, including the Court's IT department, should have access to mute the audio and turn the video cameras on and off for all participants, including jurors.
- b. The Court should establish protocols for the jurors to communicate to the Court during the proceedings:
 - i. If a juror needs to interrupt the proceedings for any emergent reason, including technical/internet issues, they should call the Court's IT Department and/or the Sheriff's Officer/court administrator via their provided cell phone numbers.
 - ii. In the event issues are presented related to audio, the jurors should be provided with a standardized card to raise on the video alerting the Court and Sheriff's Officer/court personnel there is a problem.
 - iii. If a juror needs to request a break for a bathroom or other reason, they should use the "raised hand" feature and call the Sheriff's Officer/court administrator's provided cell phone number.

- c. All chat functions on juror tablets should be disabled as well as in the Zoom platform.
- d. The Sheriff's Officer/court personnel should be off screen and monitoring the jury at all times even if a second observation camera is not used.

During jury deliberations, additional steps should be taken to secure the jury verdict:

- a. The jury monitor should not be permitted to hear anything that goes on during deliberations and should not be visible to the jury.
- b. The jury foreperson should be provided a number to call if an issue arises during deliberations that requires the court's attention.
- c. There should be no recording of jury deliberations, and deliberations should be conducted in a secure locked down virtual room.

Judiciary Proposal:

- 7. Virtual civil jury trials should start in select pilot counties and then expand statewide as promptly as practicable.

NJSBA Comment: The NJSBA agrees that virtual civil jury trials should start as a voluntary pilot program before a complete or mandatory rollout of any more significant program. Each vicinage and county has unique logistical considerations and it is important to allow them to test the system with one or two trials to assess the capabilities and limitations of the program and the technology. The NJSBA recommends that a transparent, evaluative process aimed at obtaining the full input of the judges and attorneys involved should be used to inform the courts and the bar about the successes and the problems encountered with the system so that any necessary improvements can be made before a full roll-out.

Additional Considerations

While not addressed in the Judiciary's proposal, the NJSBA requests that consideration be given to how the public will be able to view any of the proceedings. Pre-COVID-19, members of the public were free to attend any proceeding by simply walking into the courtroom to observe. Over the past several months, virtual court proceedings were available for viewing through the Court's website. Virtual civil jury trials should have that same accessibility.

To the extent that the Judiciary is mandating a completely new and unfamiliar manner of conducting the single most important event in litigation, there is an obligation to ensure training is available to lawyers who will be required to try cases in an unprecedented manner. The Judiciary owes it to litigants, as well as the lawyers who have professional responsibility for trying these cases, to make sure these cases can be tried in a manner that satisfies the lawyer's obligation to the client. The NJSBA stands ready to work with the Judiciary to develop and present these programs, for the benefit of all trial participants.

Conclusion

Once again, the NJSBA thanks the Judiciary for its tireless work to keep the courts operating during these continuing unprecedented times. We appreciate the opportunity to provide these comments in the spirit of assisting the Judiciary to move toward instituting virtual civil jury trials. We remain available to provide additional input and any assistance necessary to facilitate the success of a virtual civil jury trial program until in-person proceedings can resume.

Respectfully,

A handwritten signature in black ink, appearing to read "Kimberly A. Yonta". The signature is fluid and cursive, with a large initial "K" and a long, sweeping tail.

Kimberly A. Yonta, Esq.
President

cc: Domenick Carmagnola, NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director