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From: Ben Perkel <ben.perkel@gmail.com>
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To: Comments Mailbox
Subject: [External]Comments on Proposal for Virtual Civil Jury Trials in New Jersey
Attachments: Comments on NJ Proposal for Virtual Civil Jury Trials (final).docx

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Please see the attached document which contains my comments on the virtual civil jury trial proposal.

Thank you and I look forward to providing additional input as the process progresses.

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Comments on Proposal for Virtual Civil Jury Trials in New Jersey

Initial Thoughts

I applaud the immense efforts put forth by the Judiciary's Post-Pandemic Planning Committee on Resuming Jury Trials during these challenging times and would like to contribute my thoughts to the process. My comments below are based on my professional experience (currently as a jury consultant and formerly as both a practicing attorney and judicial law clerk in New Jersey Superior Court), combined with my ongoing study of how courts around the country (and globally) have been responding to keep the "wheels of justice" turning during the pandemic.

My comments are organized to correspond with the topic of each numbered recommendation in the Committee's proposal. I have also included an "Additional Thoughts" section to discuss issues not specifically addressed in the proposal and a "How I Can Help" section to express my interest in volunteering to help the Judiciary and the Committee as you proceed with virtual civil jury trials.

Comments on Recommendation 1

All Civil Case Types Eligible for Virtual Civil Jury Trials

I agree with an inclusive approach of having all civil case types be eligible for virtual trials, while also acknowledging the reality that some case types are less likely to be suitable for the virtual format than others. Deciding not to categorically eliminate any individual case type from eligibility for virtual civil jury trials sends an important message about the importance of getting civil trials back on track, as they have been largely stalled for the past nine months. As an additional benefit, making all case types eligible will provide an incentive for a broad cohort of attorneys to learn about virtual civil jury trials.

Criteria for Earliest Virtual Civil Jury Trials

Minimal Number of Parties:

I agree that cases involving a minimal number of parties (one plaintiff/one defendant) are likely to be the most easily managed trials, and therefore this element should be a prominent factor in selecting the earliest cases to proceed with virtual civil jury trials.

Minimal Number of Witnesses:

The Committee might also consider including guidance that the earliest virtual civil jury trials include cases with minimal witnesses. I include this for consideration in the context of minimizing the chances of something going wrong, such as a technical glitch. The more individuals there are relying on technology, the more likely an issue can arise. It is particularly important for the earliest virtual civil jury trials unfold as smoothly as possible, thereby building confidence in the process. Employing scenario planning to identify and neutralize foreseeable

risks, to the extent possible, should be considered in developing best practices for virtual civil jury trials.

Trial Length and Complexity:

I agree that the early virtual civil jury trials should focus on cases that are straightforward. While jurors generally do a good job understanding their role, the law and trial process, the more the Courts and attorneys can do to help jurors do their job, the better justice will be served. To continue learning about what makes a pending matter a good candidate to be tried virtually, each of the stakeholders involved in virtual civil jury trials (including but not limited to the judge, counsel, jurors, jury administrators, and any other relevant participants in the process), should be surveyed about their experiences, and their feedback incorporated to refine best practices.

Operational Concerns:

I agree that operational concerns are another important factor for considering whether a case is suited for a virtual civil jury trial or not. Cases involving physical evidence and those requiring interpreters are two good examples of operational concerns that may limit particular matters from consideration for the virtual trial format, particularly at this early stage. As noted above, scenario planning can be useful to identify additional operational obstacles and mitigate them if possible, as well as inform plans for the future of virtual civil jury trials in New Jersey.

Comments on Recommendation 2

Virtual Jury Selection

Public Health Concerns and Maximizing Juror Yield:

I agree that these are two primary challenges facing the Judiciary, and that implementing entirely virtual jury selection will go a long way to addressing both of these concerns. While there should be unanimous agreement regarding measures taken by courts to minimize public health risk during the pandemic, concerns have been expressed about the digital divide potentially resulting in unrepresentative jury pools. Acknowledging that it is too early to conclusively confirm or deny whether virtual civil juries are in fact representative, I believe the Judiciary has taken an important step in committing to provide standard technology to all empaneled jurors, along with technical support to all individuals summoned for virtual jury duty. What else, if anything, can be done from a technological standpoint to maximize jury yield and jury pool representativeness?

Additionally, while recognizing that a technological divide may prohibit some citizens from participating in virtual jury service, the unfortunate reality is there were barriers that also limited people of similar demographic characteristics from participating in pre-pandemic, in-person jury service (e.g. family responsibilities, economic pressures and variables, access to transportation), so even if a virtual civil jury pool may not be perfect, it also may not be markedly different than what everyone was accustomed to with pre-pandemic in-person jury selection. Furthermore, virtual voir dire is likely to result in a more representative jury pool than in-person jury selection during the pandemic, as one study found that two-thirds (67%) of juror eligible individuals

surveyed preferred to serve as jurors from home, compared to approximately one-quarter (23%) preferring to participate as an in-person juror.¹

To confirm whether virtual civil jury pools actually reflect representative samples of the trial venue, the Committee should consider doing a statistical analysis to determine what portions of the population, if any, are being underrepresented. The data from each venue could be aggregated and analyzed to ensure that virtual civil jury pools are representative or alert the Judiciary to any issues which need to be addressed. This information could then be shared with the stakeholders to show transparency, build confidence in the virtual civil jury trial process, and promote buy in from attorneys on both sides of the civil trial aisle.

Attorney Participation During Virtual Voir Dire:

I strongly agree that judges should be more flexible in allowing attorneys to participate in virtual voir dire, particularly in permitting follow up questions from counsel. As numerous judges and attorneys who have participated in virtual jury trials reveal, and as I have also observed, virtual voir dire presents significant opportunities to learn about prospective jurors. Being able to see into someone's home provides a unique glimpse into that person's life, and the fact that jurors have generally been more open, and forthcoming, is likely influenced by being at home as opposed to being in an unfamiliar courtroom. The fact that attorneys are likely to receive additional and better information from prospective jurors during virtual voir dire also supports expanded counsel participation. It will be important to educate attorneys and judges about the benefits of virtual jury selection (e.g., the ability to learn new information about prospective jurors by seeing inside their homes, jurors being more comfortable and forthcoming answering questions) so that they can make the most of the opportunity.

Number of Alternate Jurors:

I agree about the importance of selecting additional jurors as alternates based on what is known about the various types of circumstances that could necessitate a virtual juror's excusal. For the shortest and least complex trials (i.e., taking a week or less) up to two alternates probably should be sufficient. However, if and when virtual civil jury trials expand to longer and more complex cases, the Committee might consider permitting flexibility to increase the maximum number of alternates beyond two based upon what is learned during the pilot program.

Comments on Recommendation 3

Standard Technology

Permissible Devices for Participation in Voir Dire:

I agree with permitting smartphones for jury selection to make it accessible to more people and enhance the likelihood that the jury pool will be a representative sample of the trial venue.

¹ Empirical Jury. (2020). *Analysis of the Impact of Covid-19 on Jury Attitudes, Behavior, and Willingness to Serve*.

Samsung Galaxy Pro Tablets for All Empaneled Jurors:

I agree about the importance of all jurors utilizing standardized technology for receiving virtual trial presentations. I believe there should also be standard protocols focused on logistical concerns (e.g., hardware testing, software security and privacy features, ensuring safe and efficient delivery and receipt of equipment, sanitization procedures, etc.).

Instructions and Training for Empaneled Jurors:

I agree about the importance of clear instructions, training, and technical support for empaneled jurors. I believe technical assistance and support will also be important for all jurors summoned to participate in virtual jury selection. The more accessible, supportive, and helpful the courts can be for jurors, the more comfortable jurors will be and the more likely they will remain engaged in the virtual trial process. It is a challenging time for everyone, and it is important for jurors to know the court cares about them and values their service in a virtual format. Showing jurors that the civil justice system is trying to help them complete their jobs as smoothly as possible can tap into the social psychology principle of reciprocity, which can help motivate their sustained commitment and cooperation throughout the virtual civil jury trial process.

Comments on Recommendation 4

Comprehensive Pretrial Conference

Where Counsel and Parties will Appear from:

Logistics and planning, like who will be appearing from where, will be critical to the success of virtual civil jury trials. I believe it would be safest to “err on the side of caution” by seeking to limit the number of people present in the courtroom to as few bodies as possible to minimize public health risks and to ensure seamless compliance with fluid and disparate local rules on gatherings due to COVID. Consequently, I believe judges should be given broad discretion to permit remote appearances when feasible, especially by witnesses. To further mitigate COVID related concerns, while also minimizing chances for technological problems, the Committee might consider limiting trial length to only 2 or 3 days, particularly for the initial round of virtual civil jury trials in pilot counties.

Method of Presenting Evidence:

Due to the variety of options for presenting different types of evidence, involving a variety of different transmission methods, the Committee might consider studying the successes and failures of each method, along with the circumstances in which they were utilized. The Bar as a whole could benefit from the development and maintenance of a centralized and accessible repository of best practices and ideas for presenting and sharing evidence in virtual civil jury trials.

Witness Testimony Live via Video:

I agree that live testimony over a videoconference platform serves as a reasonable alternative to live in-person testimony. Keeping as many rules and procedures consistent as possible is also

likely to help judges and attorneys feel more comfortable about venturing into the virtual civil jury trial experience. It has been said that ambiguity causes anxiety, so I believe it will be valuable to take advantage of opportunities to rely on what is known, increase familiarity through continuing legal education, and make every effort to normalize the unique benefits of virtual civil jury trial practices.

Requirements for Witnesses who Testify Remotely:

I agree with administering an oath requiring witnesses testifying remotely to swear that they are alone and that they will not have any communication with anyone, including their attorneys, during their testimony. I also agree that requiring witnesses to turn off any other electronic devices seems like a sensible policy to mitigate concerns about the potential for external communications during their testimony.

The Committee might also consider adapting an idea proposed by the NJSBA in the context of jury monitoring, which would permit the court to require jurors to perform a 360 scan of the room from time to time. Translating this principle to remote witness testimony, I suggest the Committee consider a process requiring remotely testifying witnesses to perform a 360 scan at the beginning and conclusion of their testimony and when returning from any breaks. The committee might also consider permitting a judge to require a remote witness to perform a 360 scan during the witness' testimony, either at random or in situations where a judge reasonably believes that a remote witness might be getting impermissible help during virtual testimony. I believe that the 360-scan concept can be a tool to help alleviate these types of concerns people have about witnesses testifying remotely.

Additionally, I respectfully disagree with a related recommendation proposed by the NJSBA requiring jurors to have a second camera set up to confirm that nobody else is there in the room with them. In the juror context, I believe some people may already be skeptical of having to use a "government issued" device due to privacy concerns, so introducing a second camera specifically for the purpose of monitoring them is likely only to increase resistance to participating. A second camera also implies a level of mistrust that may be counterproductive, particularly since jury deliberations rely on jurors feeling comfortable to openly express their views about the case. However, I believe it is worth noting that use of a second camera to monitor a room where a witness is testifying remotely might be more feasible and therefore might be something the Committee wishes to consider.

Trial Schedule Designed to Minimize Zoom Fatigue for Jurors:

I strongly agree about the importance of exploring modifications to virtual trial schedules to minimize zoom fatigue. Based on what I have heard from judges in other states, half-day schedules seem like they have been the most successful in combatting zoom fatigue. I also believe that the cumulative fatigue effect of receiving content through zoom for a full day, even if the schedule includes more frequent breaks, may be considered as an additional factor in favor of shorter days. This may be particularly significant when combined with the fact that jurors are already being bombarded with novel and often complex information, which represents an additional factor related to accelerated cognitive fatigue. Furthermore, a shorter trial day may provide more jurors with greater flexibility to participate (e.g., finding childcare might be easier for half a day than a full day) which is highly desirable to ensure representative jury pools. For

these reasons, I believe the Committee should strongly consider starting with a half day schedule for virtual civil jury trials and adapting the process from there. Alternatively, the Committee might consider studying the impact of different virtual trial day lengths and schedule configurations in the pilot counties and getting feedback from participants to enhance guidance on recommended schedules for virtual civil jury trials.

Pretrial Order for Virtual Civil Jury Trials:

I strongly agree with requiring a pretrial order memorializing all relevant aspects of the processes and procedures for a virtual civil jury trial. It would be prudent for these pretrial orders to be as specific, detailed, and thorough as possible to enhance transparency and minimize the risk of encountering unexpected issues that may cause unnecessary delay. I believe this is a critical topic to educate attorneys about to help promote the importance of early preparation for virtual civil jury trials.

Comments on Recommendation 5

Noticing, Conferencing, and Scheduling Civil Cases for Virtual Jury Trials

Consent Not Required:

In general, I agree that consent should not be required for civil cases to proceed with virtual jury trials because requiring consent would vastly reduce the number of cases eligible for virtual civil jury trials, while also eliminating the type of pressure that promotes cases to get resolved. However, I also agree that it would make sense to prioritize cases in which there is consent amongst counsel and the parties, particularly for the initial virtual civil jury trials that take place in the pilot counties. As noted throughout my comments, I believe it is important to minimize the risk of foreseeable problems that could arise during a virtual civil jury trial and having consent could help to promote an orderly and cooperative process for cases selected to be resolved through the pilot program.

Feedback for Refinement of Future Protocols:

I strongly agree about the importance of getting feedback from the participants in virtual civil jury trials. To that end, I am volunteering to help out with designing ways to obtain, record, analyze and catalogue participant feedback, as well as helping communicate what is learned to inform and educate members of the legal community about the virtues of virtual civil jury trials as a practical solution to the obstacles of conducting in-person trials during a pandemic.

Relevant Factors for Selecting and Scheduling Virtual Civil Jury Trial Dates:

I agree that logistical concerns should be considered in selecting which cases are most suitable for virtual civil jury trials. However, I believe that cases in which counsel will appear remotely should also be considered if surrounding factors (e.g., consent or agreement of the participants, short trial length) are satisfied. Further, the Committee might consider the potential for unintended consequences of including any recommendations that could limit the pool of cases potentially suited for virtual civil jury trials. Finally, I would like to suggest the possibility that the attorneys who would be most interested in participating in a virtual civil jury trial might also

be those attorneys most capable and comfortable presenting remotely from their office or home. Accordingly, because not all attorneys will be located in counties that participate in the pilot program, I do not think it would be prudent to categorically exclude cases in which one or both attorneys are unable to travel to the courthouse, particularly if all counsel in a suitable civil case are agreeable to a virtual trial with one or more attorneys appearing remotely.

Comments on Recommendation 6

Enhanced Jury Charge

I strongly agree about the importance of an enhanced jury charge and agree that it makes sense to use the supplemental charge for virtual grand juries as a foundation. I believe the enhanced jury charge for virtual civil jury trials should be as thorough and formal as possible to properly prepare virtual jurors for the unique aspects of performing their tasks virtually. I also agree about the importance of including additional jury instructions emphasizing attentional and confidentiality concerns.

Comments on Recommendation 7

Starting Virtual Civil Trials in Select Pilot Counties

I agree that beginning with pilot counties to study the virtual civil jury process and utilizing what is learned to refine virtual civil jury trial procedures follows a sound methodology. What criteria is being (or was) used to select the pilot counties? Additionally, as noted above, could the fact that only certain counties will be participating in the initial round of virtual civil jury trials support expanding consideration for allowing attorneys to appear remotely in order to expand the pool of cases potentially best suited for a virtual civil jury trial to help ensure the most willing attorneys are able to participate early in the program?

Additional Thoughts

Importance of Communication and Messaging

I believe the threshold issues to overcome with all stakeholders can be addressed through strategic communication and messaging. Responsiveness to expressed concerns and consistency of communications from the Judiciary will be important to promote an accurate and realistic understanding about the capabilities and limitations of virtual civil jury trials. Receiving candid feedback from participants in the initial round of virtual civil jury trials will be helpful for refining best practices and providing stakeholders with valuable and timely guidance as the process evolves.

Concern About Reduced Opportunities for Virtual Civil Jury Bonding

While I think this concern is more likely to impact longer and more complex virtual civil jury trials than the types of shorter, simpler cases being considered for the pilot program, I suggest that the Committee consider adopting a policy of studying ways to promote bonding amongst virtual jurors. Given the possibility that longer and more complex civil jury trials may be conducted virtually in the future, whether out of necessity or practicality, I believe it makes sense to begin preparing for that situation, if and when it should arise. The Committee might consider exploring this topic as part of the pilot program.

Attorney Concerns About Ability to Communicate with Their Client

I believe the most obvious way to alleviate these concerns would be for counsel and client to be in the same room during the trial. However, circumstances may arise that prevent an attorney and client from being in the same room, especially during the pandemic. I think this is an issue that the Committee might consider studying as part of the pilot program because attorneys must feel comfortable that they will be able to adequately communicate with their client during trial.

How I Can Help

I believe I can provide unique insights and suggestions to the Judiciary as the virtual civil jury trial planning process concludes and the implementation phase begins. As virtual civil jury trials approach in New Jersey, I am volunteering my services to help the Judiciary and the Committee design standardized questions to ask participants, implement surveys and report on the responses. I believe that educating members of the bar, and citizens of the New Jersey who may be called upon to participate in virtual jury service, about the experiences of colleagues and peers will be an important component for the overall success of virtual civil jury trials. Consequently, I am passionate about assisting the Judiciary with educational and communication efforts and helping the Committee however I can be of service going forward.

I am also currently drafting an article recapping the experiences of judges, attorneys, and court administrators from around the country who have participated in the planning and implementation of fully virtual and hybrid civil jury trials. The piece is scheduled for publication in the January 2021 Civil Jury Project Newsletter. Some of the ideas included in that article are incorporated into my comments above, and I look forward to sharing the completed version once it is published.

Additionally, I am including a link to an article I wrote about best practices for remote persuasive communication: <https://civiljuryproject.law.nyu.edu/advocacys-new-frontier-smart-tm-persuasion-strategies-for-remote-communication/>.

Thank you for taking my comments into consideration.

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