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Hon. Glenn A. Grant, J.A.D.
Acting Admin. Dir. of the Courts
Comments on Proposal for Virtual Civil Jury Trials
Hughes Justice Complex
P. O. Box 037
Trenton, NJ 08625 – 0037

RE: Comments on the Courts Proposal for Virtual Civil Jury Trials dated 11/25/20

Your Honor:

Following please find my comments as to the Court's proposal for Virtual Civil Trials. It should be noted that I have also discussed this extensively with my colleagues at the above office where I work, and occasionally with a few other colleagues (opponents) who I have had occasion to conference cases with over the last few months. I will not be able to list any separate comments by name but they are incorporated here in a general sense.

First, some background:

I am Certified by the NJ Supreme Court as a Civil Trial Attorney, since 2011. I was admitted to the NJ Bar in 2003. I have worked for *Tom McCarter, Esq.* since December 2004. We only represent people who get hurt as the result of negligence, and *Larry Madnick Esq.* only represents petitioners in Workers' Compensation cases. I was hired to this firm for the primary responsibility of trying any cases that the firm needed to be tried, or that did not settle. We work primarily in Bergen County, but also Hudson, Essex, Passaic, Middlesex, and Morris. (Technically we would work in any NJ county, and I settled a case in Ocean County just before the pandemic occurred, but mostly the counties listed, especially the first four.) I have attended trial calls in each county, and have tried cases in those first four counties (numerous trials in Bergen, Hudson & Passaic). We have a high volume practice, and so pre-pandemic I attended a trial call somewhere nearly every week, sometimes more than one per week. Most of our cases would settle, but I tried approx. 10 – 12 cases per year, full trials with live experts. That

is my passion – trying cases. It is the reason I applied to law school, it is the reason I decided to become a lawyer. Since I first learned about jury trials at a young age, their importance, and the American history behind how Jury trials came to be recognized & preserved in this country, the preservation of the right to a trial by jury, and how important that was to the early colonial settlers, even before the US Constitution was written (in New Jersey it dates back to the mid-1600's and is incorporated into the land grant document that created the "Jersey Estates".) – I have had that passion to take cases to trial and represent people on my feet in front of a jury since I was in elementary school. Clearly, when I entered law school, I figured and was told that becoming a trial lawyer was a long shot. Now that I get to do that, my passion burns even brighter and stronger. It is my honor to have that privilege, and I constantly remind myself of how esteemed it is to be where I have been able to climb to in life. With that background in mind informs my comments for virtual trials.

Comments:

First, I have come across statements to the effect of "all witnesses will be masked" at all times, all attendees of court room trials will be masked at all times, *etc.* That cannot happen, at least not as to everyone*. When witnesses are on the stand, they cannot wear a mask of any type. There is no way for anyone to assess a witness's credibility when they are testifying through a mask. Any mask, of any type, when worn correctly, will cover the person's face, all the way up to the eyes. Some people, because of the shape of their face, can correctly wear a mask where one sees more of their cheeks/cheekbones than some other people, but mostly masks cover nearly one's entire face.

We do not only judge credibility by eyes. We also evaluate credibility with: facial expressions, lip expressions, ear movements, nostril movements, cheek movements, the movement & shape of the whole face in general - as compared to the eyes - while one is speaking, color of the face, shape of the mouth as one speaks, and that is not a whole list for me. I am a very observant person. As I have aged (I am 52) I am a little amazed at all the details I see when I watch someone speak. That I can tell when someone's vein is sticking out, and/or vibrating in an abnormal way, that I notice these changes of facial color, especially if it goes back & forth (in caucasian people: white to red to white), abnormal movement or vibrations of the little muscles & skin under one's lower eye lids, subtle nose movements other than for breathing, chin changes shape, lip movements – especially while listening to someone, that list goes on for me too. All these things are the most important to assessing someone's credibility, especially when the witness is an expert, who frequently testifies in court, and is always retained by insurance companies. I cannot assess any of this if they are wearing a mask.

I expect many lay witnesses (fact witnesses) would not care if they wore a mask, as long as attorneys stay six feet away. If I wear a mask as questioning attorney, only a few people would be nervous enough where they felt they too needed a mask. But I will bet that every single defense doctor would claim covid sensitivity because they are in a risk group, or exposure, or simply a general sense of concern about it, and that would be all they have to say for the Judge to order, "Dr. Cannoli (not his real name) is permitted to wear a mask at all times on the stand." That's how it will go, I can guarantee it. And

there goes my case on behalf of the plaintiff, I am “done”. Dr. Cannoli and others like him are hard enough to assess without a mask. Permitting defense doctors to wear a mask on the stand would make it nearly impossible for anyone to tell if they are lying or not. The plaintiff will then lose her/his case because no one would be able to assess the credibility of the testifying defense doctor.

A possible way of rectifying this would be erecting a plastic shield in front of the witness, but it needs to be perfectly clear, and not put up in a way where the lights would glare off it into the jurors or anyone else’s eyes. (The lighting in most court rooms is notoriously poor, no matter how bright the fluorescent lights are).

Also, such a plastic shield would have to be erected in a way where it does not vibrate if the heating/air conditioning comes on. Further the heating and/or air conditioning has to be configured to heat/cool those on both sides of the plastic, not just one side of the other. If the shield acts as a giant wall causing the witness to sweat or freeze, it is not fair to the witness. Nor should the attorneys comfort be altered, they are the ones required to wear the most layers of clothes in court, and who work hard, causing them to sweat about 8 – 9 months a year. (Then we may smell, and that is not pleasant for the jurors.)

Jurors would have to be excluded by the Court if one or some is uncomfortable with the witness not wearing a mask. A problem could ensue though if the trial Judge is either uncomfortable with the witness next to him/her being unmasked, or if the Judge becomes either exposed or symptomatic, [and does not feel the need to interrupt the trial until his/her symptoms go away, or receives a negative test] and feels the need to wear a mask in court during trial.

Another problem with masking, is that it covers the voice. As I age, I notice my hearing is less than it was – not hugely, I am not ready for hearing aids yet, but the fact that most “senior” trial attorneys active in court wear them is not encouraging. But from meetings in the office, dep prep, and other experiences, I know I hear quite a bit less of the voice, both in terms of quality, and also in terms of quality (force or volume), when the person speaking is wearing a mask. This judgment is based on people sitting less than 6 feet from me, sometimes only 4 feet from me. So if it is already harder to hear someone 4 feet away with a mask on, when we are made to stand 6 feet apart from each other, and 6 feet from the Jury box, and we add in a clear, sturdy, plastic shield as well, how is my hearing going to be then? That is in a general, “everyday talking” sense.

Further with witnesses wearing a mask, I know I already pick up on subtle variations in voice – the subtle rising & lowering of the voice of a witness – that often occurs as a person testifies, especially based on the strength of one’s belief of what they are saying. In other words, it is a rare occasion when a person is telling the whole truth and their voice lowers to a point that they cannot be heard (unless they are extremely embarrassed about what they are describing). So, as alluded to already, when we have a witness in the box testifying, and an attorney is standing 6 feet away, the witness cannot wear a mask, or I will not be able to hear the voice subtleties that I need to hear.

A lot of this seems to say that if the trial was 100% virtual, my concerns would be lessened; however, I do not believe a trial by video Zoom over computers will be acceptable for me either.

First, one often cannot see as well over Zoom as we can in real life. Other platforms, like Microsoft, and there is another one that the Magna dep people like to use, are worse than zoom.

Second, when a witness testifies, we will be at the mercy of the technology of his/her equipment. There is no guarantee all involved (2 attorneys, Judge, witness, all the jurors) will have adequate technology, even if the Court provides it. Not all computers are the same: my two kids have the same brand, model & age lap top from Lenovo that we bought at the same time from Costco. They are not the same computers, & they are not equal. (Just the way they were made, & no one could have known – yet not a fault making one returnable or defective, it is just different internally than the other one in ways we will never know).

Then there is WiFi quality. No one has the same, it is always wonky, and never great, especially when you have 2 kids attending school remotely at the same time.

Who or what guarantees a juror will give his full attention, meaning the same or more than live court? According to what I am told, it is easy to put up an online newspaper on ½ your screen and “watch” a Zoom conference on the other ½ of your screen, and unless I walk into the room and look at the person’s screen with them, most people would rarely know the person is reading while “watching” his Zoom screen. I feel that Jurors would pay less attention than they usually do, and be able to get away with it, no matter how strongly we write a new oath.

There is a difficulty with documents, as published, or publishable evidence. For example, if I want a defense doctor to refer to the 3rd line of the 2nd para. of his report, I need to be able to see it, and he, and counsel, and the Judge, at the same time. I would want to point to it as he reads along. This is a very complex technology that I am sure can be done via Zoom, but hard to do, and could be very prone to difficulty a lot. As soon as one person does not see it, it fails. Also, if hypothet. that line or page becomes evidence, then the Jury needs to see it. They may need to see it at that moment. What if all jurors cannot see the document?

There will be extra alternates, probably many. What if they do not all get to see the document?

I do not want alternates to deliberate. It is mathematically unfair.

Although a Zoom trial could attempt to solve some of my initial concerns, it would not alleviate them all. The technology required could actually cause more problems than less. If technology is not equal for all concerned – each attorney, the judge, all the jurors – the outcome will not be fair & will be objected to.

Training potential jurors before trial needs to be a different day, such as 30 days before trial. Then selected jurors would get additional refresher & more advanced training also before trial. Trying to compact their training into 1-2 days will never work.

I have concerns that a 70 year old lay person, or certain others who could be any age, who has never been very technologically advanced will be able to do any of this. That reduces the jury pool, and is unfair.

Diversity is already lacking in Bergen County's jury pool. Having Zoom trials will not help that.

There has been no testing. Instead of "Pilot counties", we need mock trials, perhaps of older cases that were already tried before. Put the mock trials through the different experiments you are considering & see what works. But no one should have to be made to live with a verdict as final in such a virtual system that has not been tested here before. It is just not fair.

These trials will take more time, and due to Zoom fatigue, we will only be able to do 3-4 hours a day. No Judge will be happy with that, the AOC, and/or the Judge supervisors will not allow it. They will take longer, and yet the time will not be allowed.

I am not an anti-masker. In fact I am a pretty good at ensuring I follow all the guidelines. I have a wife & 2 children at home, a boss in his 60's, friends with asthma, and relatives in their mid-70's, so my concern is that I do not want to bring the virus home to anyone, as I continue to work & earn income for the family.

Justice cannot be about completing cases, cutting down the numbers of waiting cases, and clearing the log jam. It is not about finishing trials without regard to who wins or loses. The goal is to finish trials in a way that is fair & equitable, over a time frame that is fair & equitable – whatever time that might require – to achieve a just result. The one that is right, which we know because the process leading up to it, but especially the trial itself, was conducted in a way that was completely fair & equitable.

If you have any questions or concerns, do not hesitate to call.

Very truly yours,

STEPHEN G. MAYHEW

Via mail & email:
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