NOTICE TO THE BAR

CIVIL – PROPOSAL FOR VIRTUAL CIVIL JURY TRIALS – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the attached proposal for virtual civil jury trials during the ongoing COVID-19 pandemic.

The Judiciary's Post-Pandemic Planning Committee on Resuming Jury Trials developed the proposal with discussion and detailed written input from members of the Working Group on COVID-19 Jury Operations, including the New Jersey State Bar Association, the New Jersey Association for Justice, the New Jersey Defense Association, and the Division of Law in the Department of Law and Public Safety. While those stakeholders universally supported some variety of virtual civil jury trials, each made individual suggestions that are to varying extents consistent with and different than the final recommendations as attached. The Court is considering the option of virtual civil jury trials as one way of supporting comprehensive court services while in-person events remain curtailed because of the COVID-19 virus.

Please send any comments on the proposal for virtual civil jury trials in writing by Wednesday, December 16, 2020 to:

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 may also be submitted via email to: Comments.Mailbox@njcourts.gov.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by email should include their name and email address). Comments are subject to public disclosure upon receipt.

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: November 25, 2020

COVID-19 – VIRTUAL CIVIL JURY TRIALS: RECOMMENDATIONS OF THE POST-PANDEMIC PLANNING COMMITTEE ON RESUMING JURY TRIALS

New criminal and civil jury trials resumed in New Jersey in late September 2020, beginning (to the greatest extent possible) with criminal jury trials involving detained defendants, followed by civil trials. Juries returned verdicts in a number of criminal and some civil trials. While the total number of completed in-person jury trials was modest, the effect of resuming jury trials was substantial:

- More than 115 criminal cases were resolved by plea or downgrade, involving more than 60 detained defendants.

- More than 225 civil cases settled after being scheduled and conferenced for trial dates.

- Many more cases were adjourned after conferencing, often due to COVID-19 related concerns (e.g., inability of attorneys or witnesses to come in person for a trial based on health factors or travel to states on the evolving travel advisory).

Consistent with pre-pandemic experiences, the real possibility that a case will proceed to trial prompted resolutions in both criminal and civil matters. The Supreme Court's action in resuming jury trials restarted parts of the justice system that had stalled for more than six months. Based on current COVID-19 trends, the Court by Order dated November 16, 2020 suspended new in-person jury trials pending further order.

Recommendations

The Judiciary Post-Pandemic Planning Committee on Resuming Jury Trials recommends that the Court authorize virtual civil jury trials as follows:

1. All civil case types (all dockets and all tracks) should be eligible for virtual civil jury trials, with the Civil Presiding Judge, trial judge, 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.

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

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).

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

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.)

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.

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.

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.

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.

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.

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