



May 21, 2020

Mary Ellen Barbera, Chief Judge  
Robert C. Murphy Courts of Appeal Building  
361 Rowe Blvd.  
Annapolis, MD 21401

Chief Judge Barbera:

Thank you for your leadership in these challenging times. On behalf of the Maryland Association for Justice and civil trial lawyers across the State of Maryland we understand the difficulties you have faced in confronting the present and future of court operations in Maryland.

Please indulge us to express our thoughts on steps that might help us return to civil jury trials in Maryland. While we understand such actions will be challenging, the constitutional rights of civil litigants are no less important than any other constitutional rights. If the courts are closed to civil litigants until 2021, the constitutional rights of thousands of Marylanders will have been significantly impacted. We would ask the court to use this opportunity to adapt now, and into the future, with modern ways to accommodate one of our oldest constitutional rights.

Civil jury trials are much less onerous on the system, in terms of logistics, than criminal jury trials. While we understand the rights of the accused and have heard the court's sentiment that criminal jury trials should return first, civil jury trials are much easier to accommodate in these challenging times. We have smaller jury pools, smaller juries, limited voir dire and fewer challenges for confrontation and cross examination. Civil jury trials are the more natural, and easy, jury trials to begin in our State and can help forge the path to full court operations.

We recognize, through your updates as well as updates of courts across the country, the concept of jury trials is of great concern for court administration. We would like to address what we perceive to be the most challenging issues and make suggestions for potential solutions so we can continue civil and criminal jury trials.

### **Issue One – Jury Selection**

The concept of having hundreds of potential jurors gather in a room for orientation and potential selection is no longer reasonable and may not be for some time. But this does not mean we can no longer select juries, it simply means we must adapt the way in which we select juries to our current limitations. Here are several suggestions we have based on our

review of what courts are doing elsewhere and through our collective experience of practicing in various states.

**Suggestion 1:** Jury Selection on a day other than the first day of trial. This is performed in many courts around the country even before the pandemic. Incorporating this into our system would allow the court greater control of the influx of jurors into the courthouse.

**Suggestion 2:** Ask jurors to report for jury selection at staggered times throughout the day. This works well in conjunction with Suggestion 1 as jurors could report into the afternoon if they were potentially being seated for a trial the next week.

**Suggestion 3:** Conduct voir dire of jurors individually. This is already done in many jurisdictions and does not take significantly different time. Jurors are provided with preliminary voir dire questions in advance, indicate to the court which questions they have affirmative answers to, and then the juror is called into a separate room for follow up questioning. This could be done in a room large enough to allow for social distancing or could easily be accommodated through video conferencing.

**Suggestion 4:** Attorney conducted voir dire. The court could allow attorney conducted voir dire which would provide an opportunity for the court to “test” the efficacy of this process. One model could be that each potential juror is invited into the courtroom undergo questioning by attorneys in the presence of courtroom clerk on the record. The juror takes the witness stand and is sworn by the clerk. Plaintiffs’ attorneys are limited to 5 or 10 minutes of questions for each potential juror; Defense attorneys limited to 5 or 10 minutes of questions for each potential juror. After the questioning, if an attorney has a motion to strike for cause, the clerk is told to contact the judge. The judge comes to the courtroom to hear the motion to strike and either the juror is retained or excused. If the juror is retained he/she is instructed that they may be selected to be on the jury, and that they should return on the first day of trial for final selection. This continues until enough jurors are selected to permit the jurors + alternates + voluntary strikes.

**Suggestion 5:** Preliminary voir dire questionnaire completed with jury commissioner’s office, followed by remote voir dire with judge and attorneys over conference call/zoom meeting.

Juror summons includes required call to jury commissioner. Preliminary voir dire questionnaire is completed over the phone with jury commissioner or other staff. Jurors that are not eliminated by the initial voir dire questions are requested to call into a conference call for further questioning by a judge and attorneys.

**Suggestion 6:** Hybrid - Initial questioning remotely, and then smaller panel invited for final selection and to serve on the jury.

## Issue Two - Trial

The actual trial is, seemingly, the least complicated issue to accommodate into Covid-19 challenges. Our suggestions regarding trial changes are as follows:

**Suggestion 1:** Civil juries can easily be accommodated into courtrooms with social distancing guidelines. Civil juries are limited to six persons and even with several alternates our jury boxes can accommodate civil juries with many leftover seats. To the extent jurors can not fit in the box courtrooms and counsel can accommodate civil juries in the well or other areas in the courtroom.

**Suggestion 2:** Allow more witnesses to testify via video. This is already done in certain counties (Montgomery County for instance). The technology required is minimal and even if the courts do not have the capacity, most counsel are ready and willing to bring their own equipment to allow remote witness testimony. This would benefit the courts and witnesses not just during the pandemic but into the future. In the short term, it would lessen the number of individuals who need to enter the courthouse and loiter in/near the courtroom.

## Issue Three - Jury Deliberations

**Suggestion 1:** Give the jury the courtroom for deliberations. Jury deliberations could occur in the courtroom while maintaining social distancing. While typically the jury leaves the courtroom while the lawyers and judge remain in the courtroom there is nothing to prohibit the opposite from occurring – the lawyers and judge leave the jury in the courtroom. They can be monitored by the bailiff.

Thank you for considering these suggestions. We would welcome the opportunity to assist the courts with investigating the application of these suggestions. There is no doubt there will be many challenges ahead, and we are thankful for your wise guidance and ability to find new solutions.

Respectfully,



Ellen B. Flynn  
President



Amy Orsi  
President-Elect