



August 10, 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 continued leadership through these difficult times. As Maryland courts continue in Phase III of the Maryland Judiciary's phased reopening plan, it is evident this pandemic is far from over.

We, as trial lawyers, are justice system stakeholders and share the court's desire to safely and quickly resume operations. Our members practice in courts throughout the country, which is an asset that provides a wealth of beneficial experience. In an effort to be part of the solution, rather than part of the problem, we would like to offer our thoughts on a variety of issues. Our intent remains the same – to continue working as partners in developing a path forward for the safe resumption of jury trials under the current public health crisis caused by COVID-19. We remain ready, willing, and able to assist the court in this process.

We also encourage the court to use this crisis as an opportunity to improve court functions into the future. Creativity, planning, technology, and flexibility present ample opportunity to propel dispute resolution forward.

Voir Dire

We acknowledge that a primary concern of the court in resuming jury trials remains the selection of jurors. We have previously offered our suggestions on how best to conduct voir dire safely, as set forth in our previous letter of May 21, 2020, a copy of which is attached hereto. In addition to those suggestions previously provided, we also suggest the court consider remote voir dire. In the alternative, recognizing technology considerations on the court's end as well as the jury pool's accessibility to technology, a hybrid of remote/in-person voir dire may be a viable option, and is being explored by other states as well.

As more thoroughly explained in our previous letter, civil jury trials are much less onerous on the court system than criminal jury trials. With smaller jury panels and the overall jury process less cumbersome than criminal trials, civil trials would be far easier to use as "testing grounds" for the resumption of jury trials.

We offer these suggestions as an opportunity for the court to begin moving cases forward safely, but also to offer the court the chance to consider jury selection options that may improve the process into the future.

Trial Calendars

We acknowledge a significant concern to the court is the need to clear the backlog of cases. As judicial system stakeholders, we have a collective interest in moving these cases through the process toward conclusion. Dispute resolution needs to occur, whether through trial or through alternative methods. We encourage the court to use the current crisis to expand its role in dispute resolution.

Maryland circuit courts should use this opportunity to institute a more aggressive pre-trial process to maximize the number of cases that can be resolved short of trial when appropriate. Our federal courts provide a meaningful model in this regard. The federal courts have very few civil cases proceed to trial, thanks in large part to their aggressive pre-trial process, most notably strict adherence to scheduling orders and meaningful mediation, including requiring demands and offers to be made in advance of the settlement conference. In Maryland federal courts, over 80% of civil cases resolve through court-ordered mediation conducted by judges. By contrast, it is estimated less than 10% resolve through this process in the Circuit Courts, thus leaving the court's calendars filled with trials that are unlikely to go forward. Resolution of an additional 70% of cases in the pretrial process in Maryland's Circuit Courts would result in a significant relief of the backlog of pending civil trials.

In Maryland Circuit Courts, statistics demonstrate the most effective mechanism for resolving civil trials is a looming trial date. The vast majority, over 75%, of civil trials in Maryland Circuit Courts resolve less than one week before trial, with the Court generally receiving notice less than twenty-four hours before trial. Court case management systems work effectively because they understand the effectiveness of trial dates and adherence to scheduling orders in the resolution of civil matters. Thus, the best mechanism for Circuit Courts to resolve the civil trial backlog is to aggressively schedule trial dates knowing that a high percentage of these cases will resolve.

For these reasons, we urge the rapid resumption of trials for civil cases in Maryland Circuit Courts, and a more robust "federal-like" mediation system in Circuit Courts. We have a collective interest in resolving these matters, and experience teaches us that these two mechanisms are the most effective tools to obtain that goal.

Judge Trials

Judge trials provide the perfect opportunity for the court to clear portions of the docket without implicating the issue of jury selection during this pandemic. While we understand that the court cannot constitutionally force parties to waive their right to a jury trial, there are cases that, with a gentle reminder from the court, would be appropriate for Judge trials.

Remote Witness Testimony

This is an area in which the court has already adapted well but is also an area in which the court can move pro-actively into the future. The adoption of Rule 2-803 allows for remote testimony from witnesses to assist the court and the parties with the fair administration of justice. This was a tremendous change to assist in the short term but is a change that should extend indefinitely into the future. The court should take every opportunity to increase access to the courts not just for litigants, but for all witnesses who assist the trier of fact to reach fair and equitable conclusions.

Virtual Trials

For those cases in which the parties are ready for trial, and the parties agree the trial will not be complicated, we would encourage the consideration of virtual trials. There are a great many cases ready for trial that will take less than ten hours of trial time and that will require little, if any, evidentiary consideration. Certainly, these types of cases would serve as good "test" cases for virtual trials. The plaintiffs' bar and defense bar would be able to identify appropriate cases to submit for the court's consideration and selection. If the test cases prove successful, moving these cases through the system virtually will allow the court to clear some of the backlog and will further allow the court the opportunity to "experiment" on simple jury trials with no complex considerations. We have members that have been invited to conduct test case virtual trials in other jurisdictions, and we would be happy to help Maryland courts in the same way.

Thank you for your continued consideration of our suggestions. We welcome the opportunity to assist the courts with the implementation of jury trials and would welcome the opportunity to host a virtual town hall with Your Honor to further discuss these issues with our members. While we do not have all the answers, and realize there are no perfect solutions, we remain committed to being available to aid the court with this process. Thank you for your continued guidance in finding new ways to access the courts.

Respectfully,



Amy M. Orsi
President



Ellen B. Flynn
Immediate Past President

cc: Circuit Court Administrative Judges