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Formerly the Association of Trial Lawyers of America - New Jersey (ATLA-NJ)

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November 5, 2020

Hon. Bonnie J. Mizdol, A.J.S.C.

Chair, New Jersey Judiciary Committee on Resuming Jury Trials
Bergen County Courthouse
10 Main Street, Room 425
Hackensack, NJ 07601

Dear Judge Mizdol:

Thank you for requesting that New Jersey Association for Justice provide commentary to the New Jersey Judiciary Committee on Resuming Jury Trials. Below are our Association's positions and recommendations regarding the specific topics requested.

We believe virtual trials should be mandatory. It is respectfully submitted that if the Courts make virtual trials just an option or voluntary, intransigence and habits being what they are, very few if any trials will proceed virtually, significantly compromising the objectives of the program.

- **Whether any case type or Track should be excluded from consideration for virtual civil jury trials;**

The New Jersey Association for Justice recommends that there be no Track or type of case excluded from consideration for virtual civil jury trials. It is the Association's position that there is no particular kind of case that cannot be done via the virtual jury trial. Of course, there may be particular situations that cannot be contemplated or addressed in a general rule. Such situations should be left for pretrial motion practice to be decided by the trial court. Finally, it is the Association's position that live jury trials should always be the default and preference for our court system absent the current pandemic.

- **Whether any aspects of jury selection should be adjusted for purposes of a virtual trial (e.g., should the model voir dire questions be modified? Should attorneys be granted greater latitude in asking follow-up questions during voir dire?);**

The New Jersey Association for Justice recommends that attorneys should be granted greater latitude in asking follow-up questions during voir dire.

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In addition, the Committee should consider permitting attorney conducted voir dire within the framework of the existing model voir dire. The virtual setting makes it more difficult for the attorneys after hearing a particular question and answer from a particular juror to have separate colloquy with the trial judge about follow-up questions without the particular juror or the whole venire getting to hear said colloquy. If jury selection is to proceed virtually over Zoom, the proceedings can be recorded such that the trial judge can easily review the conduct of voir dire, if any, if trial counsel raise objection to the manner of inquiry by a particular attorney. Permitting attorney-conducted voir dire would permit trial judges to spend their time on other pressing matters during this state of emergency. Attorney-conducted voir dire in this setting would not run afoul of State v. Manley. The attorney-conducted voir dire that was the subject of the Supreme Court's decision in Manley was a free-for-all where there was no framework or parameters for attorney questions. Unlike the setting of Manley over 50 years ago, the Supreme Court has established a long-standing set of model civil and criminal voir dire questions including requiring an on-the-record conference regarding supplemental questions and the scope of voir dire. In such a setting, attorney-conducted voir dire can proceed without running afoul of the concerns of the Supreme Court in the Manley case.

- **Whether the size of the jury should be adjusted, including the number of alternates;**

It is the recommendation of the Association that the number of jurors deliberating in criminal and civil trials be maintained the same at twelve and six. However, the number of alternates may be increased. As an example, if the regular practice for a jury trial in the civil division is two alternates for a short trial, this could be doubled to four alternates. The basis for this is twofold: 1) virtual trials add the additional risk that a particular juror may not be able to continue to serve for the duration of the trial because of technical issues; and 2) the fact of the ongoing pandemic multiplies the risk that the juror will not be able to continue due to ill health. Because of the foregoing, it would be prudent to increase the number of alternate jurors across the board.

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- **Whether specific technological requirements should be established for jurors participating in a virtual trial;**

The Association's recommendation is that the Administrative Office of the Courts should provide to sitting jurors for a virtual trial all the same hardware, preferably an Apple iPad Pro with the biggest screen with Verizon cell service, so that there is uniformity and no doubt that each juror will have a minimum level of remote access to the trial proceedings and the minimum amount of bandwidth even if wireless Internet in their home is deficient. Court personnel can then collect the equipment at the end of trial. Many court reporting companies already offer a similar service for witnesses that do not have the hardware to be able to videoconference. The equipment is shipped to the witness with packaging for the equipment to be shipped back. The suggestion for use of Apple iPad Pros with the cellular service is because it is the easiest to use, and it is the hardware that is least likely to have technical glitches based upon our experience. In addition, in the event that the court cannot provide the hardware for the jurors, counsel should be afforded the opportunity to provide the hardware for the jurors via the third-party company with the proviso that the jurors are not made aware as to the fact that counsel for the parties are providing the equipment. The jurors would only know that the equipment is being provided via a third party provider as arranged by the Courts. Alternatively, the Courts should establish minimum requirements in terms of hardware and bandwidth for a juror to be able to participate in a trial.

Also, the Court should permit that trial counsel must agree upon a third party provider taken from a list of approved court reporting agencies to facilitate the Zoom video conference in the event that the Court's Zoom account is not working or otherwise unavailable. So long as the Zoom conference regardless of provider can interact with Courtsmart, this should not be an issue.

- **Whether evidence should be submitted to the Court and/or introduced and shown at trial using particular methods;**

It is the position of the Association that the trial attorneys be responsible for the mode of presentation of the evidence subject to the trial judge's rulings on said matters based on the Rules of Evidence and existing case law regarding the use of demonstrative evidence and modes of presentation, like PowerPoint. It should not be the job of the Court or its staff to facilitate the presentation of evidence. It should only be the Court's job to manage the presentation of said evidence pursuant to the Rules of Evidence and decisional law.

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For example, if a document is to be shown to the witness and the jury by way of Zoom, the Court and counsel should certainly manage to what extent the document is being seen by the jury versus the witness or both depending on the platform that is being used to present said document. In addition, if exhibits (except those to be used exclusively for cross-examination purposes) are marked before trial for identification, they can be circulated to opposing counsel and the Court to be reviewed and for rulings to be made on the issues of presentation of the evidence and the admissibility or use thereof.

- **Whether jurors participating in virtual trials should be surveyed as to their experiences for purposes of providing feedback to potentially refine the program;**

The Association wholeheartedly recommends that jurors participating in virtual trials should be surveyed as to their experience for purposes of providing feedback to refine the virtual trial program. In addition, said surveying of the jurors should be shared with the trial bar so that they can also refine their practice with this novel mode of trying cases.

- **Whether the initiative should start via pilot program in select counties or launch statewide;**

It is the Association's position that the virtual jury trial initiative should be mandated statewide rather than first attempted as a pilot program. The Association has faith in the judiciary and trial counsel that both can meet the demands and accommodate their practice to make this novel form of jury trial successful until such time as we can all resume a normal way of life and a normal manner of trial practice physically in person, in court.

Thank you again for the opportunity to offer these comments.

Respectfully yours,



Edward P. Capozzi, Esq.

President