



NEW JERSEY STATE BAR ASSOCIATION

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Honorable Stuart Rabner, Chief Justice
New Jersey Supreme Court
Hughes Justice Complex/ P.O. Box 037
Trenton, NJ 08625-0037

Re: Criminal Law Concerns

Dear Chief Justice Rabner:

As New Jersey legal professionals continue to adjust to the new reality of practicing law and administering justice virtually, I wanted to share with you some particular observations and concerns expressed by criminal law practitioners within the New Jersey State Bar Association. These comments are focused on assisting in the implementation of uniform, statewide proceedings in the criminal courts, and reflect extensive and thoughtful deliberation and debate among representatives of the defense bar, prosecutor's offices, and former members of the judiciary.

The recommendations noted below are guided by the following principles:

- (1) The county-by-county approach to criminal proceedings is inefficient and more information is needed so that lawyers know how to proceed throughout the State;
- (2) Attorney-client confidentiality is sacrosanct. Whether confidentiality can be maintained at a video/telephonic-conducted court hearing is a paramount issue. If not, going forward with the hearing is a problem that implicates a constitutional right and it would be inappropriate to proceed; and
- (3) When a defendant objects to participating in a substantive proceeding, that matter should be adjourned. If not, there is a risk of violating defendants' constitutional rights or, once the crisis ends, creating an untenable flood of cases in the Appellate Division and subsequently back to the trial courts – in effect "undoing" the effort during the crisis to proceed and eliminate a backup

With the Supreme Court's recent continuation of the transition to video and phone proceedings instead of in-person appearances and related measures through its Omnibus Order of March 27, 2020, there are particular concerns about the ability to maintain attorney-client confidentiality during a substantive/testimonial proceeding, such as a motion hearing, plea hearing, and sentencing. While there are certain proceedings that may still be accomplished virtually with mutual consent of the parties, such as first appearances, detention hearings, limited status conferences, discovery issues, and "time-served" sentencings, if confidentiality is compromised during any proceeding that implicates a constitutional right, or the defendant does not consent, the proceeding should not move forward.

Against that backdrop, the NJSBA makes the following specific recommendations:

- 1. Testimonial motions, guilty pleas, and sentencing hearings should not be scheduled where the video/telephonic setting does not protect attorney-client confidentiality. Defendants should be permitted to postpone any hearing where the confidentiality of the attorney/client communication cannot be maintained.**

Attorney-client confidentiality is sacrosanct as indicated in *State v. Sugar*, 84 N.J. 1 (1980). New Jersey Court Rule 3: 16-(a) requires the presence of the defendant at "every scheduled event unless excused by the court for good cause shown." Therefore, the question becomes whether defendants are truly present when they cannot confer with counsel as to what is taking place in court. Presently, NJSBA members are most concerned that there is no ability to "whisper" between the attorney and the client as if they are at counsel table during a proceeding. Before a proceeding, the judge should consider whether the attorney and the client are able to confidentially confer about the proceedings as if it is happening in-person. According to *State v. W.A.*, 184 N.J. 45 (2005), a defendant has a right to know what is being said at side-bar, allowing for a lawyer-shuttle system which recognizes the need for attorney-client discussions about what occurred at the side-bar conference. These communications are confidential between the lawyer and the defendant. Although *W.A.* was in a trial setting, the same application for attorney-client conferences govern testimonial and substantive proceedings. Incarcerated clients may experience particular barriers to consultations with counsel throughout the proceedings.

Specifically, section 2a(iv) of the Supreme Court's COVID-19 Omnibus Order dated March 27, 2020, states parties should make "every effort to resolve cases prior to indictment and trial, and courts will conduct proceedings by video or phone, *as appropriate ...*" (Emphasis added). Given this language, some proceedings are being conducted where testimonial motions, guilty pleas, and sentencing hearings are moving forward without prior assurance that the defendant has the ability to consult with counsel during the proceeding. To achieve state-wide consistency and application, the NJSBA requests that the Court issue a directive that testimonial motions, guilty pleas, and sentencing hearings should not be scheduled where the video/telephonic setting does not protect attorney-client confidentiality.

In addition to direct attorney/client consultation, there are concerns about attorney-client communications generally during proceedings, such as the need for defense counsel to be able to interrupt a defendant who may begin a statement during a "virtual " proceeding that could be detrimental to the defendant's case. Without some mechanism in place to allow for such communication, defendants should be permitted to object to the proceedings after being advised

by the judge that they will not have the ability to confer with their lawyer during the proceeding. If a defendant does not object to the proceedings moving forward, the judge should explain how the hearing will proceed and obtain the defendant's knowing, voluntary and intelligent agreement to move forward. Additionally, victims' rights under the Crime Victims' Bill of Rights must continue to be considered, protected, and accommodated "virtually" to the extent practicable, but without negatively affecting the constitutional rights of a defendant who seeks to proceed. The NJSBA believes it is important that neither defense counsel nor defendant feels "forced to proceed" under the circumstances currently in place. Ultimately, defendants and their counsel should have the ability to postpone *any* hearing where the confidentiality of the attorney/client communication cannot be maintained.

In the case of a plea hearing, the NJSBA requests that the Court order that, generally, a plea hearing should not be done virtually because the judge cannot make the necessary findings to accept the guilty plea on the record and determine that it is made knowingly, voluntarily and intelligently. There should be an exception, though, for cases involving a plea with a sentence of time-served. In those instances, the Court should be directed that it may take the guilty plea so long as the judge obtains the defendant's consent to enter a video/telephonic guilty plea, and determines that the consent is knowing, voluntary and intelligent.

2. If a party objects to a non-testimonial motion and/or hearing, the proceeding should be adjourned.

In the case of non-testimonial motions and/or hearings, such as motions to dismiss the indictment or other oral arguments, defense attorneys in some counties have the ability to confer with their clients through video conferencing while they are in the jail before the oral argument so that confidential discussions are not compromised on the record. In other counties, however, private defense lawyers have no ability to confer with their clients before the proceedings. For this reason, the NJSBA recommends that if a party objects to the proceedings moving forward, the judge should grant a request for an adjournment.

3. Defense counsel should be permitted to waive a defendant's appearance at an arraignment.

In an effort to promote state-wide consistency and to help alleviate the burden on the system from post-indictment arraignments, the NSBA suggests that defense counsel be permitted to waive the defendant's appearance and upload a certification that they have communicated with the client through telephone/email/or other communication and explained the charges. The certification should indicate the defendant is waiving the reading of the indictment and requesting that the court enter an original "not guilty" plea. Discovery can be handled through email or other agreed-upon procedure specified in the certification. Defense counsel can complete the arraignment form and email it to the prosecutor for review and uploading to eCourts for filing.

4. Proceedings should be scheduled for specific times.

Fourth, the NJSBA recommends that each case be given a specific time for appearance (via video and phone) to increase efficiency and predictability. This method is successfully utilized in state civil court and federal criminal proceedings, allowing lawyers to schedule accordingly and handle multiple appearances daily.

The NJSBA thanks the Court for considering the articulation of more specific guidelines for criminal proceedings as discussed above. Aside from the difficulty lawyers face in reaching court staff who are working remotely to determine the procedures in a particular county, the NJSBA does not believe a county-by-county or court-by-court response is effective. We believe that consistent, uniform, straightforward guidelines that are applied statewide will help preserve the integrity of the criminal law system during the current crisis for the benefit of all.

Respectfully,

A handwritten signature in black ink, appearing to read "Evelyn Padin". The signature is fluid and cursive, with the first name being more prominent.

Evelyn Padin
President

/sab

cc: Hon. Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts
Kimberly A. Yonta, NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

