



NEW JERSEY STATE BAR ASSOCIATION

A Path to Virtual Civil Jury Trials

Prepared by the New Jersey State Bar Association

Pandemic Task Force Committee on the Resumption of Jury Trials

November 9, 2020/Updated November 11, 2020

Thank you for the opportunity to provide input into the planning process as the Judiciary considers a move to fully virtual civil jury trials. We are all keenly aware of the challenges to the justice system imposed by the pandemic, and the New Jersey State Bar Association acknowledges the importance of moving forward with civil jury trials after a seven-month hiatus. Equally important and consistent with our recommendations throughout the past seven months, any accommodation made to allow jury trials to move forward in a fully virtual environment must ensure that the trial is fair, just and produces a credible result.

We commend the Judiciary and the legal community for all that has been accomplished virtually up to this point. Calendar calls, motions, detention hearings and settlement conferences have all evolved. Further, we appreciate the extent to which many of the suggestions we have offered to date have been incorporated to best benefit the public and those of us entrusted with the responsibility to advocate on the public's behalf. We have all learned many lessons since we were thrust into this new pandemic era last March.

The NJSBA believes virtual civil jury trials will need to undergo that same evolutionary process, moving forward with deliberate resolve and with flexibility to be able to make adjustments when needed. We also believe that transparency is required in developing and implementing the process to maintain the public's confidence in our courts as a fair and meaningful dispute resolution system.

Therefore, we do not believe a virtual jury trial system should be mandated until all of the participants have an informed understanding about how a virtual trial will be conducted, and until some trials have actually happened on a voluntary basis.

While lawyers and judges may participate in many jury trials in a given year, for

most litigants their jury trial represents their one and final chance to resolve their dispute. It is critical that their “day in court” be conducted under the best circumstances we can provide, with all necessary safeguards in place to ensure the rights of all parties are adequately protected and all opportunities available to present the best case possible.

Every trial has many important components that make up the overall proceeding. Each component is critically important to the whole. The goal of any virtual trial scheme should be to conduct a trial that keeps all of the same rules and procedures in place as an in-person proceeding. Attorneys and litigants need transparency as to how jurors will be chosen; how the Court will ensure that jurors attentively participate; how evidence will be presented; how witnesses will be presented – live or recorded; and perhaps most importantly, how a jury will be expected to securely and privately deliberate to ensure a credible result.

We propose a statewide, voluntary pilot program for virtual civil jury trials before a complete rollout of any more significant program. Each vicinage and county have unique logistical considerations, and we feel it is important to allow them to test the system with one or two trials to assess the capabilities and limitations of the program and the technology. The lessons learned can be used to make adjustments as needed with transparency and the full input of the judges and attorneys who practice in the civil arena. We agree that as part of that evaluative process a survey should be conducted following these virtual trials and the results used to inform the courts and the bar about the successes and the problems encountered with the system so that we can make any necessary improvements before a full roll-out.

The Judiciary must be mindful of the fact that the vast majority of attorneys, some 94%, practice in firms of five or fewer lawyers. More than 85% practice in solo or two-person law firms, according to the 2019 report on the State of the Attorney Disciplinary System. Many of these attorneys will not possess the technological ability to seamlessly move to a fully virtual civil jury system and may not possess the resources, seven months into this pandemic, to hire technology consultants to provide assistance. To be successful, it is imperative that the fully virtual civil trial program be fully vetted, clear, and comprehensive and that adequate training is provided and available to practitioners before they engage in a virtual trial. The NJSBA will assist in that educational process in any way that we can.

When the program is fully launched statewide, and to the degree that may evolve into a mandatory program, we believe there must be an “opt out” provision under criteria that are developed based upon early experiences and that include COVID-19 provisions. Before the pandemic, all cases received “mandatory” trial dates with a goal of providing trial certainty, and we understand the importance of trial dates in getting cases resolved. Nonetheless, presiding judges should be vested with the discretion to adjourn trial dates for good cause shown. Any system that is fair to litigants must, at a minimum, continue to maintain that discretion. Existing Supreme Court orders also recognize that the pandemic creates “exceptional circumstances” requiring the Judiciary to consider the unique challenges presented to all stakeholders in the justice system. Not every case can fairly and effectively be tried virtually. Therefore, we recommend a COVID-19 related basis to “opt out” in cases where a party can demonstrate that moving forward virtually will unfairly impact a litigant’s ability to obtain a fair and just resolution.

The NJSBA presents a number of recommendations below to address all of the component parts of a virtual jury trial; however, until they are actually employed, no one knows for sure whether they will work in the anticipated manner. We will continue gathering information in the days ahead and expect to submit additional suggestions to the Judiciary, in recognition of fact that the program regarding virtual trials is being developed over an initial period of approximately two weeks.

Jury Selection for Virtual Civil Jury Trials

Virtual jury trials will only be successful if the parties are assured a panel of impartial jurors. This cannot be accomplished if traditional procedural protections are reduced or eliminated. Counsel must be present and involved during all stages of the jury selection process. There must be no change to the number of peremptory challenges or the overall number of deliberating jurors. Further, there must be a searching inquiry of all jurors for potential bias.

Any virtual trial would, by definition, include fully remote jury selection. This eliminates the need to reduce the number of potential jurors who are required to come to the courthouse. In-person COVID-19 related juror health and safety concerns are no longer present. The focus must remain solely on developing and instituting a process that assures impartial panels.

With no jurors ultimately reporting to the courthouse, we must adjust the manner in which we approach deferral requests to guarantee a representative jury. The recent attempt to restart jury trials permitted a county's jury management office to hear initial requests for deferral of jury service. Many of those requests had the potential to be related to COVID concerns with the potential for those deferrals to deprive parties of a representative jury pool in a manner that was less likely to occur pre-COVID. The plan also provided, as a next step, an appearance before a judge with no attorney involvement. The judge would then explain the precautions taken to protect jurors during the pandemic. This approach allows deferral requests to be adjudicated without any articulated standards, and outside the presence of the parties and their attorneys.

Previously, most evaluations of a "hardship" by a judge were done as part of the individual trial jury selection process with attorney involvement. Under current circumstances, to address concerns about a representative jury, that must be expanded to allow parties and their counsel to evaluate for themselves the sincerity and reasonableness of any juror's request. Without that, there is no opportunity to object to the juror's excusal from service or advocate for an excusal where the jury management office or an adjudicating judge may not have provided one. These concerns are magnified by a lack of recordkeeping regarding the dismissal of jurors, which prevents attorneys from performing any meaningful evaluation of the jury pool to determine if it is representative. In fact, a primary argument advanced in State v. Dangcil was that any arguments suggesting that the jury pool was not representative were speculation. Attorneys should not be placed at this disadvantage by the very system that has the power and the obligation to collect, evaluate, and make available information that would remove speculation. Therefore, all deferral requests should be heard by a judge with counsel participating. This will preserve New Jersey's "open court" jury selection process and provide the transparency needed to ensure public confidence in a fair and just system of jury trials.

Peremptory challenges are an important and necessary component of jury selection, and they should not be reduced or eliminated through any virtual trial plan. Peremptory challenges must be left untouched to assure the parties and counsel feel that virtual trials are a reasonable opportunity to restart civil jury trials. It would be unsound to attempt to fundamentally change "the rules" of jury selection while trials are moved to an entirely remote environment.

The right to exercise peremptory challenges is a substantial right with deep historic roots created by New Jersey statute and implemented through our Rules of Court. Peremptory challenges are necessary to protect a party from a juror who has demonstrated through their answers matters of concern to a party which do not rise to the level of “cause” as judicially constructed. Peremptory challenges also allow counsel to address a party’s intuitive or “visceral reaction” to individual jurors. See Roman v. Mitchell, 82 N.J. 336, 361 (1980).

Virtual trials in the context of a global pandemic reinforce the necessity of New Jersey’s statutorily protected peremptory challenges. Counsel must assess considerations created by the remote environment such as a juror’s willingness to engage through the virtual framework as well as their demonstrated attention to the process and its participants. When considering whether to move to an entirely virtual setting, we must preserve undisturbed this important tool that allows parties to participate meaningfully in jury selection.

Virtual trial jury selection must also provide a thorough *voir dire* that “should probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially.” State v. Erazo, 126 N.J. 112, 129 (1991). Counsel should be permitted and encouraged to initiate appropriate follow up inquiry. As noted in the New Jersey Judiciary’s Bench Manual on Jury Selection, R. 1:8-3(a) permits attorney participation, and R. 1:8-3(f) provides that the court may determine the extent of participation during the pretrial conference. See Bench Manual on Jury Selection, 4.10 Attorney Participation in Juror Questioning. Such participation could easily be incorporated into individualized *voir dire* in separate “virtual rooms” outside the presence of the entire panel. In fact, the remote setting may allow increased flexibility and efficiency for individualized juror inquiries as compared to the cumbersome nature of some sidebar questioning.

Virtual jury trials may only be considered if impartial juries can be empaneled. Any proposed jury selection process for virtual trials must retain all the procedural safeguards provided by the in-person, pre-pandemic jury trial.

Virtual Civil Jury Trials and the Presentation of Evidence

The Court asks two interrelated questions concerning the presentation of evidence. In this regard, the Court inquires: “Whether specific technological requirements should be established for jurors participating in a virtual trial” and “Whether evidence should be submitted to the Court and/or introduced and shown at trial using particular methods.”

In addressing these questions, we are guided by two primary objectives. First, as we have previously expressed, is the overarching concern to ensure a representative jury truly reflecting the community not encumbered by the availability of technology. Second, and equally important, is the standardization of platforms with adequate training to assure that litigants stand on equal footing in their ability to present evidence.

Below is a detailed outline addressing these issues that will need to be discussed and expanded upon.

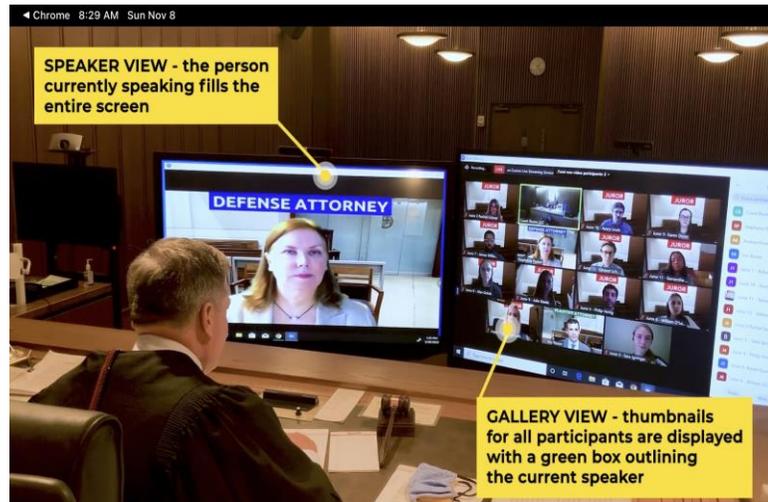
1. Sources Consulted: We have consulted numerous sources from across the country in an effort to address the issues raised by the Court concerning the presentation of evidence including:
 - a. Attorneys from New Jersey who have participated in virtual Grand Jury, virtual court proceedings & remote depositions;
 - b. Attorneys from across the country who have tried complex civil jury trials virtually, including: California, Washington State, Texas, Virginia, & Florida;
 - c. Multiple Jury Consultants;
 - d. Technical Consultants;
 - e. National Jury Project.
2. Technology & Equal Access:
 - a. Standardized Platform
 1. Platform considerations:
 - a. Courts are using a variety of conferencing platforms: GoToMeeting, Microsoft Teams, Cisco

WebEx, Zoom, and more. Not only do these platforms effectively facilitate the audio and video aspects of virtual hearings, they also offer superior file transfer mechanisms. Documents, spreadsheets, PDFs, SMS text, audio, video, image, and other digital files can be shared during a hearing either by sending the file through the Court's preferred conferencing platform or by screen sharing. Using the platform's recording features, evidence that exists on personal devices can be incorporated into the Court record without witnesses having to relinquish their devices.

- b. Any platform or evidence presentation program must be compatible with recording by Court Smart, which is the official court record.
 - c. The platform must also accommodate the use of interpreters, if needed.
 - d. All systems and approved platforms must be approved and compliant with the cyber security requirements of the AOC.
2. Virtual Public Rooms & Breakout Rooms Required:
- a. Virtual courtroom controlled by the court;
 - b. Two (2) lawyer client breakout rooms;
 - c. Jury breakout room;
 - d. Witness breakout room;
 - e. Public viewing room.
3. Every participant in the trial should have the same virtual background or otherwise neutral background.
4. Parties should be informed about the Court's evidence submission platform and provided with step-by-step instructions for use.

b. Hardware Set Up

- i. For the Court: The Internet connection should be hard wired if possible, or, as an alternative WiFi with adequate bandwidth for the Court.
- ii. The Judge should have (2) two monitors:
 1. One monitor should be a touch screen to be operated by Court personnel with technical skills;



- iii. Attorneys should also be encouraged, but not required, to use (2) two monitors;
- iv. Lawyers on screen should be limited to those participating in the trial;
- v. Jurors & Witnesses:
 1. Jurors should have standardized hardware supplied by the Court that includes a SIM card with independent access to the internet to ensure internet access is not dependent on a strong WiFi connection.
 2. We understand that the Court has purchased Samsung Galaxy notebooks. We have verified with our consultants that the Galaxy notebooks will support all of the recommendations included in this report.

3. Witnesses' hardware must be approved by the Court if not supplied by the Court or counsel.
4. The Sheriff's Officer/Court Personnel should be provided a computer to monitor the virtual jury room.

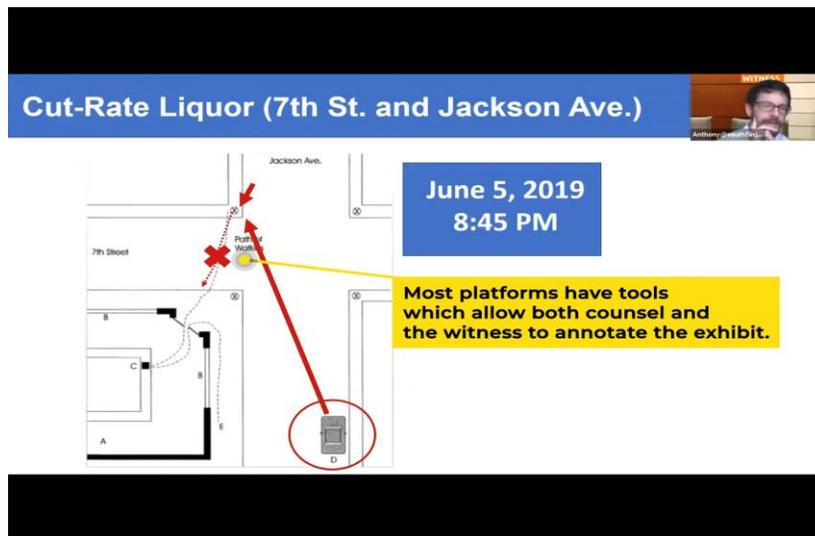
c. Juror Assistance

- i. The Court's technical assistant should virtually check in jurors while the judge handles pre-trial issues.
- ii. The technical assistant should hold an individual or group pre-session with each Jury to ensure that each juror understands and is capable of employing the technology.
- iii. The Jury should be told there is technical assistance available if issues should arise.
- iv. Jurors should be provided cell phone access to a help line to each Vicinage's Court IT Department in the event problems are encountered.
- v. The Jury should be told daily about start and end times as well as timing and length of anticipated breaks.
- vi. The Jury should be told what is and is not permitted during breaks.
- vii. Everyone involved should be instructed that no pop-up notifications are permitted on the computer (i.e., from emails, social media, etc.) and cell phones must be turned off.
- viii. Any Juror that appears to be distracted should be spoken to privately by the Court in a private virtual breakout room.

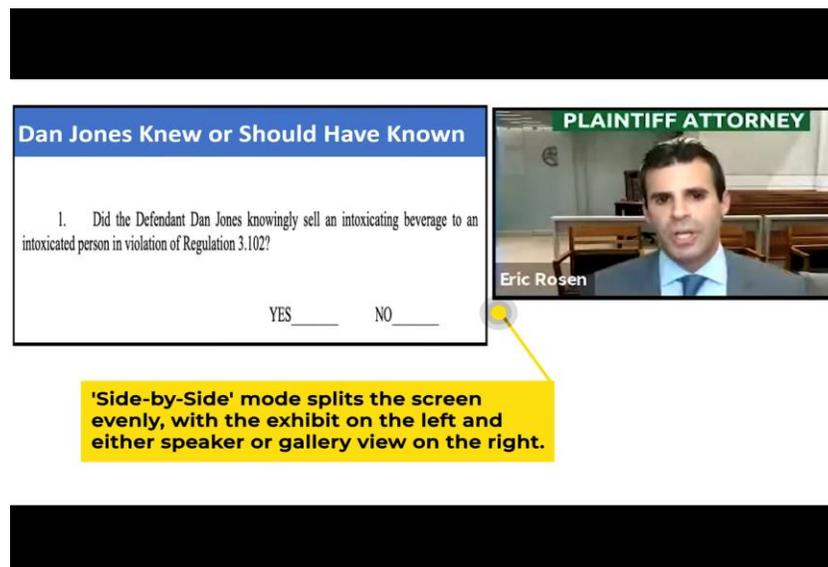
3. Presentation of Evidence & Argument

- a. If requested, Counsel should be allowed to agree on evidence presentation administered by a third-party vendor as is done now in non-virtual jury trial so long as the presentation software is compatible with the Court's base platform.

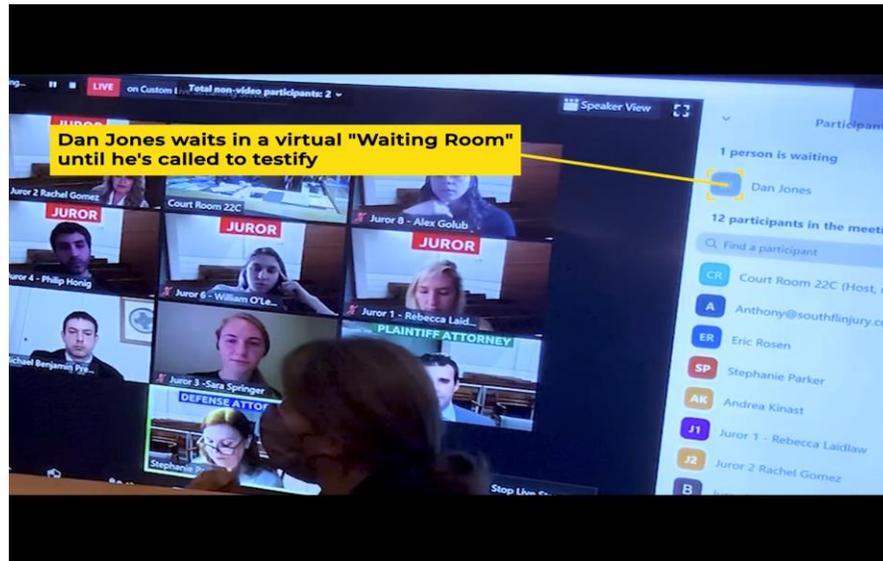
- b. Shared Screen Control should be permitted with the Court having control over whose screen can be shared at any point in time.



- c. Lawyers should not be inhibited in their creativity so long as evidence presentation is done within the Court’s imposed parameters.
- d. Elmos and trial presentation programs are permitted with Shared Screen function.
- e. Whiteboards are part of Zoom and other platforms and can take the place of the typical easel used in the courtroom. The court can give the witness access to the whiteboard to draw, annotate and save as an exhibit when complete.
- f. Side-by-Side” views with exhibits are encouraged.



- g. Witnesses should be placed in virtual waiting rooms in anticipation of testimony and during side bar. The Court should be assured by the witness under oath that no one else is present or listening while in virtual waiting rooms other than Court administrator personnel.



4. Document Considerations:

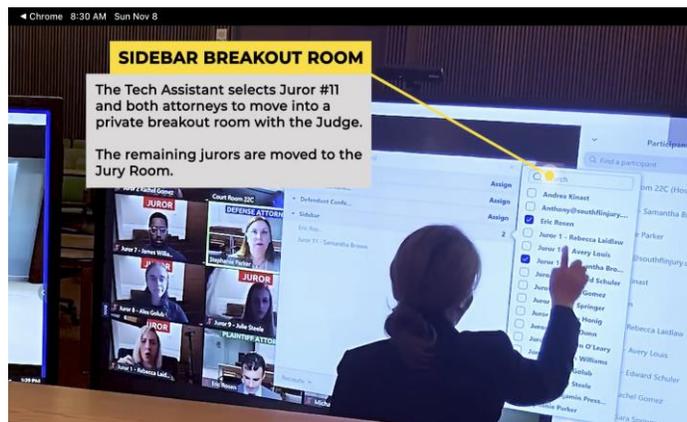
- a. All documents should be pre-marked.
- b. A standard format should be used for all evidence compatible with viewing by all participants. Universal accepted formats include:
 - i. Documents – pdf;
 - ii. Images, pictures – .jpg, gif, png, pdf;
 - iii. Audio recordings - .avi, .mpg, .mp3, .mp4;
 - iv. Video recordings - .avi, .mpg, .mp3, .mp4.
- c. To prevent modification, documents should be “flattened” or “locked” in PDF/A format, with an archival and preservation format that ensures documents will look the same regardless of the software used to view them.

- d. Similarly, the Court should probably specify PDF or PDF/A, image orientation, whether documents should be submitted in color or black and white, and if multi-page documents are acceptable or if each document should be submitted in a separate file.
 - e. File Size Limitations:
 - i. Litigants may have smaller file size limitations than each other and the Court. This should be addressed in advance to avoid any unanticipated issues.
 - f. Security:
 - i. Consideration should be given to access points for evidence shared and stored digitally, and that electronic audit logging should be enabled to document when files are accessed and by whom. Presumably this process would continue through jury deliberation.
 - g. Admitted Exhibits:
 - i. As the exhibits are admitted into evidence they should be placed by the court in a secure cloud based folder that is accessible to counsel and the court. Optimally there should be a folder for both admitted plaintiff and defense exhibits.
5. Expert Witnesses:
- a. Parties should be encouraged but not required to pre-record testimony where availability may be in issue.
 - b. The normal rules for trial presentation of evidence concerning experts should apply.
6. Handling Impeachment Evidence:
- a. Opposing counsel should be emailed a link to all impeachment material when the cross-examination begins. Counsel will download material and should have access to a separate screen so they can read documents and stay on Zoom or other Virtual Court approved platform, if the impeachment is necessary.

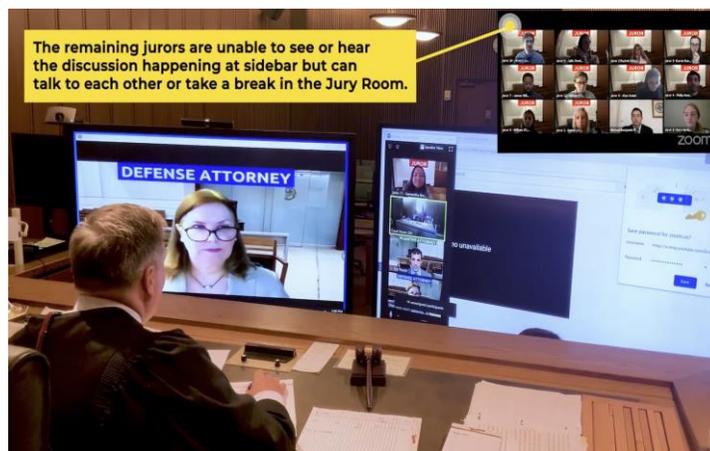
- b. Alternate techniques used elsewhere include having exhibits mailed in hard copy in a binder to counsel and the witness in a sealed envelope that cannot be opened until cross-examination begins.
- c. The Court should be provided with a binder with all potential impeachment material via hard copy.

7. Objections & Side Bars:

- a. Side Bars should be handled in a virtual breakout room separate from and outside the presence of the jury.



- b. During side bars, the Jury should be placed in a separate virtual breakout room where they can converse consistent with the rules already in place.



- c. The Jury should be told in advance if the side bar is likely to be extended.

8. Jury Security:

- a. The Judge and Court administration personnel, including Court's IT Department, should have access to mute the audio and turn the video cameras on and off for all participants, including Jurors.
- b. The Court should establish protocols for the Jurors to communicate to the Court during the proceedings:
 - i. If a Juror needs to interrupt the proceedings for any emergent reason, including technical/internet issues, they should call the Court's IT Department and/or Court's Sheriff's Officer/Court administrator via their provided cell phone numbers.
 - ii. In the event issues are presented related to audio, the jurors should be provided with a standardized card to raise on the video alerting the Court and Sheriff's Officer/Court Personnel there is a problem.
 - iii. If a Juror needs to request a break for a bathroom or other reason, they should use the "Raised Hand" feature and call the Court's Sheriff's Officer's/Court administrator's provided cell phone number.
- c. All chat functions on juror notebooks should be disabled as well as in the Zoom platform.
- d. Jury Monitoring:
 - i. Serious consideration should be given to monitoring the jury environment. Two different suggestions were discussed as viable alternatives.
 1. At the outset of the trial the jury will be instructed that from time to time the court may ask that the jury perform a 360 scan of the room.
 2. Also suggested is that a second tablet be supplied and placed behind the juror for purposes of monitoring the juror environment. Although this method is more reliable, steps would need to be taken to insure lack of interference from competing devices.

- ii. The Sheriff's Officer/Court Personnel should be off screen and monitoring the Jury at all times even if a second observation camera is not used.
- e. Jury Deliberations:
- i. The jury monitor should not be permitted to hear anything that goes on during deliberations and should not be visible to the jury.
 - ii. The jury foreperson should be provided a number to call if an issue arising during deliberations requiring the court's attention.
 - iii. There should be no recording of jury deliberations which will be conducted in a secure locked down virtual room.
 - iv. Evidence & Exhibits:
 - 1. The tablet will come pre-programmed with a folder on the Home Screen that will be populated with all evidence admitted at trial at the beginning of jury selection. This will be done through a secure cloud-based platform.
 - 2. Alternatively, each juror can be provided with a hard copy binder of exhibits admitted at trial at the beginning of deliberations. This will allow for greater participation by prospective jurors (with the goal of a representative jury) by not excluding people who will be less capable of using technology to review and access evidence. This will likely require deliberations to begin at the start of a day so that the exhibit binders can be overnighted to the jurors. Precautions will also need to be taken to make sure that all evidence is returned after deliberations are completed.

Surveying the Results

The NJSBA believes that a robust survey will be critical in developing a process that allows the Judiciary to consistently and efficiently administer a fair trial. The survey should target methods of presenting information so that attorneys and the Court can gain valuable feedback on the manner in which jurors prefer to receive

information in a virtual trial setting. Many of these questions can be used in all cases and additional questions should be permitted when unusual issues arise. Great care should be taken to craft questions that will not inadvertently disclose the thought process of the jurors during deliberations or otherwise undermine the sanctity of the jury's ultimate verdict in an individual case. We believe strongly that both the Court and counsel should have contemporaneous access to the survey information in aggregate form so that each stakeholder's role in the process can be adjusted to provide a fair outcome.

Conclusion

The NJSBA appreciates the opportunity to provide meaningful input as the pandemic requires us all to pivot in ways unimagined before to ensure that our judicial system can continue to move forward. We hope that the information and recommendations contained herein prove useful to the Judiciary as it considers how best to address civil jury trials, and we remain available to provide additional input and any assistance necessary to facilitate the success of a virtual civil jury trial program.