



**REPORT OF THE COMMITTEE ON THE  
RESUMPTION OF JURY TRIALS  
OF THE NEW JERSEY STATE BAR ASSOCIATION  
PANDEMIC TASK FORCE  
Part Two**

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# NEW JERSEY STATE BAR ASSOCIATION

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Jury trials are the crown jewel of the American justice system. They provide that disputes may be resolved by a fair, impartial and representative group of one's peers from the community. Jury trials in criminal and civil matters are guaranteed by the Constitution and reflect the ultimate access to justice afforded to our citizens.

The New Jersey State Bar Association (NJSBA) recognizes the importance of resuming jury trials after months of having them suspended due to COVID-19. The desire to resume jury trials, however, cannot ignore the need to preserve the tandem benchmarks of a litigant's constitutional rights and the necessity to protect the health and safety of all participants.

For these reasons, the NJSBA urges the Judiciary to move carefully and deliberately toward resuming jury trials in a manner that elevates those two overriding considerations above all else. The NJSBA respectfully suggests that the Judiciary's current plan to first resume criminal jury trials misses the mark, as there are heightened constitutional and health and safety concerns raised by those proceedings. Instead, the NJSBA urges the Judiciary to move forward first with civil trials, as a defendant's liberty is not at stake and any lessons learned in the process can be applied to criminal trials at the appropriate time.

## **CRIMINAL TRIALS**

As the largest legal organization in the state, the NJSBA is fortunate to be able to reflect the perspectives and voices of prosecutors, defense attorneys and retired judges in its recommendations about the restarting of criminal trials in our state courts. As a result, we are uniquely able to provide recommendations meant to serve the system in its entirety. We fully understand the implications and ramifications of continued delays in criminal jury trials; nonetheless, the NJSBA expresses grave concerns about moving forward with the proposed plan under the current COVID-19 conditions.

Criminal trials present a host of heightened constitutional issues that differentiate them from civil trials and that justify continuing to put them on hold. The current plan jeopardizes the constitutional rights of defendants in several key ways, including the right to a fair trial, the right to confront witnesses, and the right to have a jury that is truly of one's peers and one that is able to meaningfully witness and engage in the trial proceedings. It also has the potential of jeopardizing a victim's right to be present in person at the trial and to have the direct support of family and friends. Even more, it presents nearly impossible-to-overcome logistical challenges in ensuring the health and safety of all who are needed for a successful criminal trial.

### **Rights of Defendants and Victims**

A critical component of a defendant's right to a fair trial is the Sixth Amendment right to counsel of choice. Under the current plan, a defendant may not have that choice if their counsel is deemed high-risk because of health or age or does not want to take the chance of going to court. The Judiciary's plan does not appear to provide any discretion to the defendant for opting out if health risks compromise this aspect of a fair trial.

If the trial moves forward, the first hurdle to address is ensuring that any assembled jury is equitable. *See State v. Gilmore*, 103 N.J. 508, 524 (1986). This is critical in a criminal case where a jury's judgment rendered on an individual's actions can mean the difference between liberty and incarceration. Under the current COVID-19 pandemic conditions, no matter what action is taken, it is doubtful that the jury pool will consist of an equitable makeup of a jury of one's peers. There is a high likelihood that members of specific communities that have been more widely impacted by COVID-19 will be left out of jury service. It has been widely researched and reported that members of the Black and Latino communities are contracting COVID-19 at higher rates than others, which means they would be disproportionately excluded from jury service. Jurors in their 50s, 60s and 70s have a higher risk for contracting COVID-19 and more serious outcomes. As a result, they may also be disproportionately excluded from jury service. Moreover, potential jurors who are not technologically savvy may be excluded based upon access to and understanding of the technology necessary to participate. With an increasing number of schools functioning on remote learning platforms, many parents across the state will not be available for jury service as their children are being schooled full-time or even part-time at home.

A recent survey conducted by the National Center for State Courts bolsters the validity of these concerns, as 55% of respondents cited at least one obstacle to reporting for jury service if called including an inability to secure childcare (19%), someone in their household with an underlying health condition (47%) and service as a primary caregiver to an elderly family member (14%).

While the proposed plan does include efforts to reduce the potential for some of these issues to impact a defendant's right to a fair jury drawn from the community (for example, purchasing technology devices), the Judiciary cannot control many of the other factors identified. As the plan is currently structured, many of the above identified issues will be addressed by Jury Administration and through a one-on-one interaction with a judge. Under this plan, lawyers will not know whether the jury selection process in a given case is disproportionately eliminating jurors in a way that is potentially unconstitutional. Moreover, the plan does not even allow for lawyers or their clients to know or have any information about who is being excluded from service during the pre-screening process. Simply put, in an area where the Judiciary's own plan makes it clear that the potential for non-representative juries is a real concern, by design the plan forecloses lawyers from accessing critical information necessary to raise any constitutional issues in defense of their clients.

There are other issues that are serious impediments to moving forward with criminal trials. A critical factor in a criminal trial is having the jurors present in the room where the trial is being conducted. Jurors need to evaluate the proceedings in person, including witnessing body language and non-verbal reactions from defendants, attorneys and witnesses. *See State v. Cabbell*, 207 N.J. 311, 330 (2011). That cannot happen if they are positioned in another room or even in a gallery behind the defendant, as they would be unable to see the trial participants' reactions, gestures or facial cues to testimony. Part of every trial involves passing evidence among the jury, allowing them to touch and examine the evidence. If that is prohibited or the practice is substantively changed due to social distancing it will take a severe toll on the trial itself.

In addition, defendants have the right to confront witnesses – in person, in the same room. *See Mattox v. United States*, 156 U.S. 237, 242-243 (1895). Confronting a witness via video, especially those who are high-risk, does not meet constitutional muster. Having witnesses testify via video, even if it is simulcast from another room in the same building, presents serious concerns regarding credibility determinations, as people testify differently when they are in front of others or are forced to confront a defendant in person. There will also be witnesses who do not want to come to court and or who allow their fears of exposure to infect their testimony. That behavior could lead a jury to interpret the testimony differently than if the witness had appeared in court without those concerns.

There are also serious concerns about a victim's constitutional and statutory rights to be present at court events and to be treated with dignity and respect, but which may not be possible due to health concerns. *See N.J. Const.*, art. I, para. 22; N.J.S.A. 52:4B-36.

Both victims and defendants have the right to have the public attend a trial. The presence of supporting friends and family, for either party, can have an important impact on the jury. It is unclear how the public will be able to observe a criminal trial in a safe and meaningful way.

While the Judiciary's plan originally provided for criminal trials to take place with jurors in a separate room, the NJSBA recognizes and applauds the Judiciary's recognition of the significant constitutional and statutory rights that would be lost through such a process.

### **Health Concerns and Logistics**

The logistics of ensuring the safety of all participants in a criminal trial are insurmountable which puts the health of everyone involved at risk. A criminal trial requires more people to be in the courtroom at the same time, and there is a greater importance on the need for jurors to be in the same room with witnesses and litigants. The ability to confront witnesses in person, to be able to personally see the demeanor of a witness, and make critical credibility determinations are all heightened in a criminal trial. Under the current COVID-19 conditions, no matter what actions the Judiciary's plan includes, the chances are too great that people will become ill when confined in the same enclosed space for hours at a time.

Social distancing is an important public health tool, but it will disrupt the trial process. Defendants must be permitted to sit next to their counsel, not six feet away for adequate oral communications. In addition, the jury may not understand why a defendant is isolated from their attorney.

It has been widely reported that there is a significantly higher rate of infection in New Jersey's prison population. If a defendant is in jail and must be brought to the courthouse for trial, they would potentially expose all trial participants, but in particular their attorney with whom they must closely communicate, to COVID-19. Will defendants be tested prior to trial? Will defendants be required to quarantine for 14 days, which is the current protocol when exposed to the virus, before the trial begins?

Technology issues can also present unique frustrations in criminal trials. On a substantive level, if proceedings are live-streamed, the jury may not be able to see the members of the public who have come to support the defendant or victim. And, on a more nefarious level, live-streaming certain trials (child pornography cases, sexual assault cases) may present unique problems of reproduction/recording of certain evidence or testimony that might not otherwise be easily accessible to the public. These technological risks pose unique challenges in the context of a criminal trial, where there are heightened concerns about protecting the rights of defendants and victims.

The NJSBA believes that prudent action requires the Judiciary to suspend its plan for the resumption of live, in-person criminal jury trials in September. This pandemic began in March. The experts believe a vaccine may be available by the end of 2020 or early 2021. The NJSBA strongly urges the Judiciary to continue the pause on criminal jury trials for the time being and test the protocols and procedures planned with civil trials.

## **CIVIL TRIALS**

The NJSBA believes civil trials can be structured in a way that allows for the safe, fair, and rational return of jury trials to New Jersey's courthouses.

There are several factors that point to why this may be a successful way to resume jury trials. Civil trials do not present the same logistical issues as criminal trials, since there are not as many participants, nor are there the same constitutional implications necessitating that all participants be in the same room. Civil trials are a fundamentally safer endeavor as they require only six jurors with two alternates. Indeed, every stage of the trial process is safer due to the reduced number of individuals needed in the courtroom at any given time and potential for exposure.

Moreover, civil trial practitioners and jurists are in a superior position to implement the technology necessary for a test program. Expert and fact witnesses are already routinely videotaped, and many civil attorneys are well-versed in using technology in the courtroom to present evidence. As such, we believe New Jersey would be well served by starting its COVID-19 trial journey with this safer alternative. This approach will yield important lessons and present opportunities to learn during an initial pilot program of civil trials.

To do so, the NJSBA respectfully suggests that the safest and most pragmatic approach starts with civil trials in the pilot counties with a plan to follow in all other counties as soon as possible. A committee comprised of judges and lawyers should be established to facilitate discussions about lessons learned and to provide recommendations for improvement. The insight and perspective of all stakeholders in the process will be critical to ensuring an inclusive and thorough evaluation is undertaken.

## **Addressing Health and Safety Issues**

Health and safety must be the guiding principle at every stage and each decision point through the process. Clearly and transparently explaining and demonstrating the importance of health and safety will increase the likelihood that jurors will participate throughout the state. At the same

time, it is important not to compromise or diminish those principles and procedures which assure a fair and impartial trial.

Questions that are difficult to address in the context of meeting the requirements for a constitutionally sound trial, include:

- What will happen when a juror contracts the virus during the trial and is dismissed?
- Will the jurors have to be isolated for 14 days to be sure they have no symptoms before they serve on the jury?
- Will the rest of the jury have to be dismissed for safety?
- If they are allowed to remain, what will they be told and how will that information – or lack of it – distract from the task at hand?
- What happens if the entire jury gets sick?
- What happens when one person coughs during jury deliberations; will everyone rush to a verdict to get it over with and go home?

While some trial suspension and participant notification issues were addressed in the Court’s August 3, 2020 Notice to the Bar, the impact of any of these scenarios on the ability of a jury to adequately focus on the trial and effectively deliberate on the pertinent issues is a serious unknown factor that must be considered in a determination about whether a fair and unbiased trial can be conducted. Therefore, the NJSBA strongly recommends that more extensive measures be undertaken than those currently outlined to ensure the health and safety of all courthouse users. All “trial participants”<sup>1</sup> must undergo daily screenings for temperature, symptoms, and the potential for exposure. These are the recommended best practices for the reopening of businesses throughout the country. If a trial participant demonstrates elevated temperature, positive symptom(s), or exposure, in-person participation or jury service must end. We also recommend voluntary isolation (or self-quarantine) during service by all participants with contact limited to members of household who are observing Center for Disease Control (CDC) guidelines. If a juror or any trial participant demonstrates symptoms, is exposed to COVID-19 or tests positive, participation or jury service must end. In such a case, the Judiciary should notify all trial participants consistent with public health guidance and other jurors should also be immediately tested.

The Judiciary’s current plan does not include automatic mandatory notification to all other trial participants if someone participating in the trial tests positive, exhibits symptoms, or is exposed to someone who has COVID-19. Moreover, it is unclear how and when prospective jurors will be informed of the Judiciary’s intended handling of this process. While it is understandable that the Judiciary has attempted to develop a protocol that complies with both CDC and New Jersey Department of Health (NJDOH) guidelines in effect, those guidelines and science are evolving on a daily basis. The six-foot guideline commonly employed is widely believed to be most effective for short duration exposures. Research has shown that the longer the exposure, the

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<sup>1</sup> A trial participant is any Judge, juror, attorney, witness, court personnel or any other any person who will be in a courtroom at any time during a trial.

greater the viral load, and the risks associated with long exposure indoors without adequate air filtration systems increases the potential for contagion exponentially. Many of our courthouses are older buildings, and it is unknown whether the ventilation systems are adequate to address the issues associated with a group of people being in the same room for an extended period of time.

While reasonable minds can differ on whether it is safe to have jurors six feet apart for an entire day or whether that is an activity that presents an unacceptable risk, failing to recognize the potential risks and leaving notification decisions about potential exposures to the discretion of a non-medical professional (a judge) unnecessarily puts lives at risk. The judge will not be with all participants at all times, will need to rely on self-reports, hearsay reports, etc. in a manner that increases the risk to all participants. The only safe option in the case of an exposure is to suspend the proceeding immediately, notify all participants, and resume after testing and a mandatory quarantine period. Further, it is imperative that there be a uniform protocol throughout the state. Any other procedure signals to the public that the Judiciary is more concerned about disruption of a trial than it is about the health of those who are taking the risk to participate in the trial.

Other aspects of the Judiciary's plan demonstrate that, even with the best of intentions, non-medical personnel are not well positioned to make life and death decisions related to conducting a jury trial during the pandemic. As currently structured, the plan allows jurors to bring their own masks with the Judiciary supplying them for jurors who need a mask. It is common knowledge at this point that not all masks are effective in preventing the spread of COVID-19 and that some actually do nothing at all. If the Judiciary moves forward with jury trials, it is incumbent that it seek expert advice on the best mask to protect people, provide that information to all trial participants, and supply the masks that are recommended. To do otherwise risks having people come in with inadequate protection for themselves and those around them.

Additionally, the Judiciary's proposal currently allows judges to remove their masks at their own discretion. It also allows judges to direct others to do so. No explanation or reasoning is offered for this exception to the mask requirement. No medical basis is provided for why judges should have the discretion to create a health risk to themselves or other participants. To the extent the public is being advised that the Judiciary's plan strictly follows CDC and NJDOH guidelines, such an exception without a compelling reason and transparent medical vetting has the potential to undermine the public's confidence in the entire process.

We would ask that the Judiciary seriously consider testing all trial participants as trial participation is a congregate setting contemplated by the NJDOH. Systematic testing will provide confidence to all involved in the trial process that everything is being done to protect their health and well-being.

Consistent with current CDC and NJDOH guidelines, all civil trials must take place in a courtroom set up to allow appropriate physical distance between all trial participants. This will require most trials to commence with jurors seated in the gallery. If appropriate distance cannot be accommodated, plastic/plexiglass shields between trial participants must be provided.

## **Ensuring a Representative Jury**

The same concerns about a representative jury that exist for criminal cases are present in civil cases. The parties must be assured that a representative panel of prospective jurors is part of the *voir dire* process. As noted earlier, COVID-19 has had disparate effects among various population groups. For example, it is commonly viewed that “older” individuals are at a higher risk to adverse outcomes while it is viewed that “younger” individuals are viewed as less susceptible to experience more severe outcomes. There has also been significant media attention to the effect of COVID-19 in minority communities. The ability of “essential workers” and parents of remote learners to participate as jurors is also a concern.

We must assure that all panels derive from a representative cross-section of the county jury pool. To provide transparency and allow for any issues to be addressed, data concerning who was administratively excused prior to the proposed virtual *voir dire* process should be made available to the parties.

## **Pretrial/Trial Procedures**

A comprehensive pretrial and trial procedure must be designed to assure a safe and efficient civil jury trial during the COVID-19 disruption. This procedure can be driven by three key dates: pretrial conference, remote jury selection date and trial.

A pretrial conference date should be scheduled at least 28 days before the date chosen to begin virtual jury selection. The parties must meet and confer before the pretrial conference date to exchange and address the following:

1. *In Limine* Motions: subject, timing and potential for testimony;
2. Exhibit exchange, review and agreement, where possible;
3. Video testimony objections and redactions;
4. Witness list and any objections;
5. Deposition/Interrogatory Readings: page/line or number and objections;
6. *Voir dire*;
  1. Supplemental and open-ended questions
  2. Supplemental questionnaire
7. Proposed statement of the case; and
8. Jury instructions.

The trial judge and the attorneys will meet virtually to review the exchanged information and resolve any issues that cannot be addressed through agreement. The remote jury selection date should be scheduled at least one week before the anticipated trial date. In complex matters, it is recommended that virtual jury selection begin 28 days before the initial trial dates of the pilot program as this may help facilitate early resolution of cases.

Opening and closing statements should be performed from an appropriate distance from the jury and all other trial participants. If CDC and NJDOH guidelines require attorneys to wear masks, they should be permitted to use approved clear masks. Digital presentations using permissible

visual aids should be encouraged with use of multiple screens to allow all trial participants a clear view.

Wherever possible, all witnesses should be videotaped with exception of parties. The parties should be encouraged to meet and confer to agree on stipulated facts for live witnesses to minimize time in the courtroom. Any live witness examination or cross-examination should be performed by attorneys from counsel table only with the witness appropriately distanced from all trial participants.

All exhibits must be marked pre-trial and addressed through the pretrial exchange and conference. All exhibits should be made available in an electronic form except where physical evidence is necessary. Admitted exhibits can be available during deliberations electronically when feasible.

### **Courtroom Logistics**

Courtrooms should be set up to ensure that all participants are not only safe but feel confident in the safety of their environment. During the Judiciary's presentation to stakeholders, the possibility of jurors observing the trial from another room was raised. While in-person proceedings are clearly preferable where possible, below are three separate scenarios that can be utilized based upon the availability of space and resources.

#### **A. Courtroom Setup A (In Person)**

Jurors would be set up in the area usually reserved for the public using social distancing consistent with CDC and NJDOH guidelines. We recommend that plexiglass be installed sectioning off the area of each juror to provide the juror with maximum confidence. Jurors should be provided clear masks and sanitizers.

A concern raised by a number of attorneys is the inability to actually see the reaction of the jurors to the presentation of evidence given the significant distance between each of the jurors and the awkward configuration required to accomplish safety objectives. We recommend that this be remedied by supplying each juror with an iPad, or similar tablet, which comes with a built-in camera. With a camera focused on each individual juror the attorneys will be able to view a monitor that contains the live portraits of all jurors in one place thus simulating what would be seen in an actual jury box.

In civil cases clients are often not present in the courtroom for the entire trial. This is particularly the case with corporate defendants and severely injured plaintiffs. The judge can easily explain their absence to the jury.

White noise currently used to block jury sound in the jury box will need to be redirected to insure adequate coverage. This could possibly be accomplished with a broadcast through the iPad.

If jurors are provided with paper notebooks, special precautions must be taken. Notebooks should either be left in the juror area at the end of the day or sanitized before being redistributed.

The trial should be publicly broadcasted on the Judiciary's website to allow not only public and client observation but to minimize the number of support staff needed in the courtroom for each party.

### **B. Courtroom Setup B (Jury Observation from Separate Room)**

If space limitations require that the jury observe the trial from a separate room, we recommend the setup be the same as set forth in scenario A above with plexiglass between each juror to provide maximum confidence that every step is being taken to ensure juror safety.

Each juror should be supplied with an iPad which comes with a built-in camera. With a camera focused on each individual juror the attorneys will be able to view a monitor that contains the live portraits of all jurors in one place thus simulating what would be seen in an actual jury box.

Side bar conferences should be conducted from the attorneys' tables with sound turned off for the jurors.

### **C. Courtroom Setup C (Remote Broadcast)**

If remote broadcasting to a jury in another room is required, an alternative to scenario B above is to place jurors in other rooms in the courthouse with six to eight contiguous offices supervised by a sheriff's officer. This method has the advantage of providing maximum protection and confidence for everyone involved. There would be no need for jurors to wear masks in their individual offices. Cameras would remain on and always operate, except during breaks, to ensure the jurors are paying attention and engaged.

Jurors should be permitted to interact virtually during all breaks and sidebars through a Zoom/Teams format. This will minimize the feeling of isolation and encourage bonding.

This scenario has the added advantage of allowing multiple trials to take place simultaneously in the courthouse with the only limitation the availability of office space. As many county offices are currently rotating staff and are not at full capacity, consideration of space availability should be considered.

## **CONCLUSION**

The NJSBA agrees with the Judiciary's plan, in principle, to resume jury trials. The preservation of litigants' constitutional rights, including the right to an impartial, representative jury of one's peers, and the health and safety of all trial participants must be the paramount driving considerations in structuring the resumption.

The NJSBA has been monitoring the experiences of other states in moving forward with both in-person and virtual jury trials, and these recommendations are meant to incorporate the lessons learned from those experiences, while ensuring New Jersey can adequately test the waters and build on its own experiences as well. News reports show that in Georgia, for example, courts had to be closed after judges and staff became ill, despite what they thought were adequate health

and safety protocols, while in California, it was difficult to keep the attention of jurors in virtual proceedings where jurors were surrounded by circumstances in their everyday lives.

For all of the reasons cited above, the NJSBA urges the Judiciary to move forward with in-person jury trials, but to start with civil trials first, using the above potential scenarios to guide the process. We strongly encourage the continued pause on criminal trials until the procedures and protocols can be tested in the civil context.

We recognize that this may require some defendants to be incarcerated longer than they otherwise would be under the Speedy Trial Act, and, admittedly, that is a major reservation with the pause. Those defendants should be able to appear before a judge to determine whether release is appropriate under these circumstances.

Just because criminal jury trials are paused, however, does not mean that cases should completely stall. During this pause, the criminal legal community can begin conducting in-person substantive proceedings that are necessary to accomplish prior to trials. There is much less risk involved with these types of hearings because of the smaller number of participants. This will also help to identify and address potential difficulties that may arise in more complicated proceedings and allow for the difficulties be worked out ahead of time. At the same time, the results of these proceedings, such as motions to suppress evidence or determinations of admissible testimony, should narrow the pool of cases that otherwise seem destined for trial.

In the meantime, civil trials can occur and be used as a test for whether jury trials can successfully proceed at all. Issues identified in civil cases can be improved upon and addressed in any subsequent move toward criminal cases. Civil trials pose less risk because they require fewer jurors, which would make jury selection easier. A defendant's liberty is not at risk and fewer constitutional rights are at stake. The consequences are less severe if something goes wrong, and a mistrial is far less likely.

In conclusion, the NJSBA strongly supports resuming jury trials with civil cases to allow the Judiciary to work through issues related to courtroom setup and public health and safety prior to dealing with criminal jury trials. If it is ultimately necessary to resume criminal jury trials, the Judiciary and all parties involved will be better prepared from the experiences learned with civil trials and will be better able to address the unique constitutional challenges presented in criminal trials.