

## NOTICE TO THE BAR

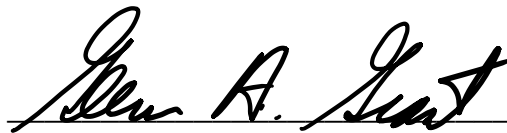
### **COVID-19 – VIRTUAL CIVIL JURY TRIALS**

The Supreme Court has authorized a two-phase approach to implementing virtual civil jury trials during the ongoing COVID-19 pandemic. The Court's January 7, 2021 Order provides for virtual civil jury trials to begin in five vicinages on or after February 1, 2021, with consent required during the initial implementation. As of April 5, 2021, virtual civil jury trials will expand to all counties with no requirement of consent.

The Court's approved plan for virtual civil jury trials incorporates suggestions from various stakeholder organizations, including the New Jersey State Bar Association, New Jersey Association for Justice, New Jersey Defense Association, Trial Attorneys of New Jersey, County Bar Associations, and many individual attorneys.

The Court's January 7, 2021 Order is attached, followed by Directive #02-21 ("COVID-19 – Electronic Evidence in Virtual Civil Jury Trials – Supreme Court's January 7, 2021 Order").

Questions regarding this notice may be directed to the Office of the Administrative Director of the Courts.

A handwritten signature in black ink, appearing to read "Glenn A. Grant", is written over a horizontal line.

Hon. Glenn A. Grant

Acting Administrative Director of the Courts

Dated: January 7, 2021

## **SUPREME COURT OF NEW JERSEY**

Throughout the COVID-19 pandemic, the Judiciary has been committed to provide a forum for the fair adjudication of disputes and to safeguard public health. The pandemic required the court system to consider new ways to respond to the needs of the public and administer justice. The Supreme Court's response has included temporarily authorizing virtual formats for various court events that cannot safely be conducted in person at this time.

Since March 16, 2020, judges at all levels of the New Jersey courts have conducted more than 120,000 remote court events involving more than 1,450,000 participants. During the same period, attorneys have developed expertise in participating in virtual proceedings. In addition, with training and support from the Judiciary, more than 500 New Jersey residents have served as jurors in hybrid trials and virtual grand jury panels, using their own technology or technology provided by the courts.

Despite those efforts, countless civil litigants whose trials have been indefinitely delayed during the pandemic have not been able to resolve important disputes. As a result, the Court on November 25, 2020 authorized publication for comment of a proposal for virtual civil jury trials. The proposal was developed by the Post-Pandemic Planning Committee on Resuming Jury Trials, which sought advance input from stakeholders including the New Jersey State Bar Association,

New Jersey Association for Justice, New Jersey Defense Association, and Division of Law in the Department of Law and Public Safety.

The Court received and considered 45 public comments in response to the Committee's proposal. Having considered and incorporated certain suggestions, the Court now directs the implementation of a two-phase approach to virtual civil jury trials during the pandemic.

Accordingly, it is ORDERED that for the duration of the COVID-19 pandemic and until further Order:

1. Civil jury trials will be conducted in a virtual (video) format as follows:
  - a. Virtual civil jury trials are authorized during the ongoing COVID-19 pandemic as set forth in this Order. The Court may modify the protocols for conducting virtual civil jury trials based on updated public health recommendations, including recommended changes in occupancy limits for indoor gatherings.
  - b. Consent to proceed remotely will be required during Phase 1 (starting in a limited number of vicinages on or after February 1, 2021). Consent to proceed remotely will not be required during Phase 2 (starting statewide on or after April 5, 2021) because of the expected length of the continued dire public health threat posed by COVID-19.

- c. The following vicinages will conduct virtual civil jury trials during Phase 1: Atlantic/Cape May; Cumberland/Gloucester/Salem; Monmouth; Passaic; and Union. During Phase 1, civil cases will be noticed and scheduled for virtual jury trials to start on or after February 1, 2021. Consent to proceed in a virtual format may be withdrawn no later than the tenth day before jury selection in a given matter.
  - d. Virtual civil jury trials will expand to all counties in Phase 2, and civil cases will be noticed and scheduled for virtual jury trials to start on or after April 5, 2021. In Phase 2, consent will not be required for a civil jury trial to proceed in a virtual format.
  - e. Phase 2 will continue until further order but only as long as necessary based on the COVID-19 pandemic.
  - f. During Phase 1 and Phase 2, relevant factors (including health-related or unavoidable travel-related barriers to attorneys convening in the courtroom) will be considered in scheduling cases for trial dates.
2. All civil case types (all dockets and all tracks) will be eligible for virtual civil jury trials.
- a. To the extent possible, virtual civil jury trials in each county will begin with cases involving a single plaintiff, a single defendant, a

limited number of issues in dispute, and a modest number of live witnesses.

- b. Cases that are especially complex (including but not limited to professional malpractice cases), or anticipated to require more than a few weeks to complete, should be scheduled only after one or more straightforward trials have been conducted in the county.

Regardless of complexity, cases involving healthcare professionals involved in responding to the COVID-19 pandemic will not proceed if contrary to the Court's December 8, 2020 Order.

- c. Operational concerns will be considered in determining if a case is not suited for a virtual civil jury trial. Among other factors, cases involving evidence that will be difficult to present in a virtual format (e.g., physical objects that cannot be shown to jurors using an Elmo visual presenter or other technical solution), or matters that will require multiple interpreters for parties and witnesses, may be difficult to conduct in a virtual format.

3. Jury selection will be conducted in an entirely virtual format.

- a. Non-case specific (i) disqualifications; (ii) deferrals; and (iii) pre-reporting excusal requests, will continue to be handled by the

Assignment Judge or designee as prescribed by N.J.S.A. 2B:20-9. For example, a juror who supplies a doctor's note substantiating that they are unable to serve based on a medical condition unlikely to change within one year should be excused before reporting for selection, without any new requirement to disclose their medical condition to the trial judge or attorneys. That approach is no different from the practice in place before the pandemic. In contrast, consistent with applicable law and the Supreme Court's Plan for Resuming Jury Trials (July 22, 2020, updated August 14, 2020), a juror who does not supply documentation required for a pre-reporting excuse and instead requests an excuse during *voir dire* should be addressed at virtual sidebar in the presence of the attorneys.

- b. To minimize public health risks, jurors will not be brought into the courthouse for the in-person phase of selection.
- c. Given the modified virtual selection process, judges will be encouraged to be more permissive in allowing attorneys to participate during virtual *voir dire*.
- d. The model *voir dire* questions will be expanded to address adjustments to the *voir dire* and trial format. In addition to the practice before the pandemic, the trial judge and attorneys will agree

on at least two open-ended questions that probe (i) juror understanding of public health precautions that will be followed during trial and (ii) juror capacity and commitment to participate in a virtual trial. In all virtual civil jury trials, the judge will advise jurors to avoid distractions and to comply with the Policy Regulating Jurors' Use of Electronic Devices During Juror Service. The judge may adjust application of that policy based on the virtual trial format (e.g., to permit a juror participating from home to have a cellular phone on vibrate mode within view in case of an emergency call).

e. Additional jurors should be selected as alternates for a virtual civil jury trial -- that is, more alternates than would ordinarily be selected for an in-person jury trial.

i. Up to two additional alternates should be selected to account for the possibility that jurors might experience technical difficulties, which could prevent them from continuing with the trial, or might develop a COVID-19 related issue that require them to be excused.

ii. The selection of additional alternates will not affect any substantive aspect of jury deliberations. The same process will be used to select deliberating jurors and alternates before

starting deliberations. The same number of jurors will be required to return a verdict (meaning that a verdict must be reached in accordance with Rule 1:8-2).

4. As needed, the Judiciary will provide standard technology to summoned jurors during the selection process and to all empaneled jurors.
  - a. The requirements for virtual jury selection will continue consistent with applicable court orders, including the Court's July 22, 2020 Order that permits the use of different devices, including smartphones with cameras, for purposes of selection.
  - b. Samsung Galaxy Pro tablets generally will be provided to all empaneled jurors, with Broadband activated if necessary. The Judiciary will deliver the technology to jurors at their homes or an agreed upon location, or will coordinate for pickup if preferred. The court may permit jurors who prefer to use their own technology and who demonstrate the capacity and reliability of that technology to use an appropriate personal device instead of the Samsung Galaxy Pro tablet.
  - c. Empaneled jurors will receive instructions and training on the use of Judiciary-issued technology and the protocol for informing the judge if they experience technical problems during the trial. As



with other virtual court events, designated staff will be available and responsible to monitor and address technical issues. All jurors will have a way to contact designated court staff (including by phone) to convey any technical problems or other issues during trial.

5. The trial judge will conduct a comprehensive pretrial conference that covers all aspects of the virtual trial process.
  - a. The pretrial conference will address whether the judge, attorneys, and parties will be present in a courtroom or whether any or all of them will participate remotely.
    - i. At this time, the judge and attorneys may agree to conduct trials in a “hybrid” or “modified” format with the judge, attorneys, and even witnesses participating from the courtroom. Given the possibility of further limitations on indoor gatherings, the judge and attorneys also should plan for how to continue the trial in a fully virtual format if necessary.
  - b. The pretrial conference also will address the method(s) of presenting evidence, including when and how to show evidence to the jury.
  - c. Witness testimony that would be presented live in an in-person format should be presented via live video. That said, jurors can still

hear pre-recorded testimony as they would have before the pandemic. Videotaped depositions may still be introduced at trial consistent with Rule 4:14-9 (“Audiovisual Recording of Depositions”) and applicable discovery rules.

- d. Witnesses who testify remotely should be required to swear or affirm that they will not communicate with or receive messages from attorneys or others while testifying. Witnesses who testify remotely also may be required to turn off or render inoperable or silent any electronic devices, other than those used to participate in the virtual trial.
- e. The Director of the Administrative Office of the Courts will provide additional guidance to judges about the format for documents, images, pictures, audio recordings, and video recordings, and how to preserve and retain those items.
- f. The judge and attorneys will agree on a trial schedule designed to minimize the fatigue associated with online participation (e.g., limiting morning and afternoon sessions to three hours and scheduling lunch and other breaks).
- g. A pretrial order will be entered to memorialize the above issues and any other relevant aspects of the virtual civil jury trial process.

6. The trial judge will provide an enhanced jury charge that emphasizes jurors must give their full attention to the trial and must maintain the secrecy of jury proceedings. Among other precautions, jurors may be required to scan the room (360°) to show that they are in a private location, and affirm their compliance with the Policy Regulating Jurors' Use of Electronic Devices During Juror Service (subject to any modifications appropriate to the virtual setting).
7. Public access to the first virtual civil jury trials will be provided by live broadcast without showing images of or otherwise identifying the jurors. After a few virtual civil jury trials are shown live, public access will be accommodated by individual Zoom invitation to the court proceeding or by other means.
8. Recordings of the first virtual civil jury trials may be used for purposes of attorney and juror training for future virtual jury trials. The recordings will be edited to remove images and personally identifiable information about jurors.
9. In recognition of the pervasive and severe effects of the COVID-19 public health crisis, the court in any individual matter consistent with Rule 1:1-2(a) may suspend proceedings, extend discovery or other deadlines, or otherwise accommodate the legitimate needs of parties, attorneys, and

others in the interests of justice.

10. Depending on the duration of the COVID-19 pandemic, the Court may reconsider and revise the provisions of this order.

For the Court,



Chief Justice

Dated: January 7, 2021