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December 16, 2020

VIA ELECTRONIC TRANSMISSION

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposal for Virtual Civil Jury Trials
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037
Comments.Mailbox@njcourts.gov

Re: Civil-Proposal for Virtual Civil Jury Trials

Dear Judge Grant:

The Trial Attorneys of New Jersey ("TANJ") thanks the Judiciary for the opportunity to submit the within comments in response to the Judiciary's Post Pandemic Planning Committee's proposal regarding Virtual Civil Jury Trials (the "Proposal"). TANJ is a unique bar organization in that its membership consists of trial attorneys who represent plaintiffs and defendants in civil matters as well as criminal trial attorneys. Our mission is to promote and protect the jury trial system in the State of New Jersey through, *inter alia*, our continuing legal education courses, participation as *amicus curiae* in matters that affect the trial bar, and through public comment on important issues such as proposed changes to the Jury Trial.

TANJ's Jury Trial Resumption Committee has reviewed the Court's November 25, 2020 Proposal. We have also reviewed the November 11, 2020 report prepared by the New Jersey State Bar's

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Pandemic Task Force titled "A Path to Virtual Civil Jury Trials." Upon review of the aforementioned, we met and thoroughly discussed the subject with the entire Board of Trustees. After considerable discussion and debate, TANJ offers the following comments and suggestions.

Initially, TANJ notes its support for the NJSBA's November 11, 2020 report entitled "A Path to Virtual Jury Trials" and thanks the task force for its research and report. Second, TANJ notes its serious concerns as to the impact of the Proposal on the litigant's expectations and their constitutional right to a fair and impartial jury. We have additional concerns as to the access, training and reliability of the current technology. Because of these concerns, it is the general consensus of TANJ's Board that assurances should be made to the public that this proposed program is a temporary measure that is not meant to supplant the current jury trial system. TANJ recognizes that there is a difference of opinion on the issue of whether participation in the virtual jury trial program should be mandatory or voluntary. As our Board of Trustees is divided on this issue, TANJ takes no position.

JURY SELECTION ISSUES

The selection and protection of a fair and impartial jury that is representative of a cross section of the community is paramount. TANJ shares the concern expressed by others that limited access to and ability to utilize the requisite communication technology for a virtual trial may serve as a barrier to participation as jurors, thereby increasing the risk that the jury pool will not be truly representative. While the Court's willingness to provide selected jurors with tablets and internet access will help ameliorate this problem, the barriers presented by access to technology remain a concern with respect to the early stages of the jury selection process.

Ensuring the availability to jurors of the required technology is only part of the solution. Resources will likely be needed to train the jurors, not only on the use of computer hardware, but on accessing the platform ultimately selected for conducting the virtual trial. Similarly, technical support is essential

to address issues that may arise during the course of the trial. In this regard, TANJ recommends that jurors be provided a phone number to call where support is immediately available to jurors experiencing technical difficulties and that instructions to jurors be included at the beginning of the trial explaining how the Court and litigants plan to use the platform to conduct the trial, including use of break out rooms for argument, jury breaks, and objections.

Of additional concern is jury security during the course of the trial. There is no doubt a delicate balance in taking appropriate steps to maintain security while being mindful not to invade the jury's privacy. That being said, it is critical that the sanctity of virtual jury rooms be protected. The Court's task in enforcing the prohibition against cell phone use and the ban on jury access to external information related to the trial will be particularly challenging in a virtual setting. As will the Court's oversight of juror note taking, if permitted. Should jurors be permitted to take notes, TANJ suggests notebooks be issued by the Court and returned at the end of trial. Similarly, in the event exhibits are provided to the jurors, they should be instructed that the exhibits must not be altered or copied and that they must be returned at the end of the trial.

TANJ echoes the concerns raised by the State Bar with respect to peremptory challenges. The significance of an attorney's ability to exercise peremptory challenges will certainly be heightened in a virtual trial setting. TANJ does not support any reduction in the number of peremptory challenges that can be exercised.

TECHNOLOGY UNIFORMITY

TANJ feels strongly that there must be uniformity in the access to technology and training to all participants in a virtual civil jury trial. The Court's November 25, 2020 Proposal indicates that the Judiciary will be providing appropriate training and technology to jurors, including tablets, broadband access and instruction. TANJ believes that for a virtual jury trial program to succeed the needs of the litigants are just as important. Litigants must have the same equal access to technology, instruction and training. The vast

majority of New Jersey attorneys practice in solo or small law firms. It cannot be expected that all attorneys will have the technological ability or resources to provide assistance to their clients in a virtual trial setting. Simply put, TANJ recommends the training and technology available to jurors should also be made available to the litigants and their attorneys to ensure everyone is on the same equal platform.

Uniformity of implementation must also be addressed. In order to instill public confidence in a virtual jury trial program, it is imperative that the enforcement of the rules, access to technology, training, education and implementation be consistent across the state of New Jersey. Litigants must be assured that they are afforded the same due process rights in each vicinage across the state. Transparency of process is vital to the success of such a program and will help to ensure fairness across the entire State.

The members, trustees, and officers of TANJ are grateful for the opportunity to comment on the Proposal. We appreciate and understand the Judiciary's concerns with respect to offering a viable mechanism for jury trials during the pendency of the Pandemic and welcome the opportunity to assist in developing a pathway for those who desire an effective virtual resolution of their pending disputes. To that end, we respectfully seek the opportunity to participate on the Judiciary's Pandemic Planning Committee. Given the diversity of our membership, we feel that TANJ can offer a unique voice to the committee. We aim to be a part of the solution.

Thank you for your Honor's consideration of TANJ's submission.

Respectfully Submitted,

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