

NJSBA

PANDEMIC TASK FORCE

Report of the Committee on the Resumption of Jury Trials



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NEW JERSEY STATE BAR ASSOCIATION

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Introduction

The New Jersey State Bar Association provides these recommendations in response to the systemic disruption of trials within the New Jersey court system caused by the COVID-19 pandemic. They are proposed to restart jury trials while accommodating and preserving essential constitutional protections. They result from extensive discussions with civil trial attorneys, criminal defense attorneys, county prosecutors, and former members of the Judiciary from across the state. In addition, this report and the recommendations herein have been reviewed and are endorsed by the New Jersey Association for Justice and the Trial Attorneys of New Jersey.

These recommendations are intended to serve as guidance for the COVID-19 pandemic and are both a starting point and a work in progress. As such, they are designed to be flexible to accommodate the specific circumstances of each vicinage and practice area while preserving what is constitutionally required. It is our expectation that this will serve as an emergency template that can be re-examined for applicability and revised accordingly for future unforeseen disruptive events.

When considering any recommendations to resume jury trials, the two paramount considerations must be the health and safety of all participants and the protection of the right to a trial with a representative, fair and impartial jury. At this time of social justice protest and reform, we are particularly cognizant of the need for a plan that produces a jury pool reflective of the diversity in the community. As such, we believe that to the extent that evolving communication technology is part of this plan and future plans, sufficient safeguards must be built in to ensure that any required technology is available to all potential jurors. To do otherwise would be to create a system that discriminates based upon the ability to afford the technology necessary to meaningfully participate in the jury process.

While preliminary screening of potential jurors may be conducted remotely, ultimately there is no substitute for in-person observation during the final phases of jury selection. We recognize that we are working to solve problems concerning access to justice in individual cases which cannot be sacrificed by well-intentioned shortcuts designed to overcome the obstacles presented by COVID-19.

Finally, we recognize that some may seek to reduce peremptory challenges during this disruption to reduce the number of jurors utilized by the selection process. We are opposed to any change to peremptory challenges during this delicate time. We must not yield the very real protections against juror bias provided by the statutorily afforded peremptory challenges, especially when we explore mechanisms to integrate technology and other remote screening criteria. In a time when systemic racism and implicit bias are at the forefront of American social issues, the peremptory challenge is an important right afforded to litigants which makes them feel as though they have “a say” in the jury that is being selected.

Plan Overview

A live, in-person jury is the cornerstone of our civil and criminal justice system. As such, we do not believe that virtual jury trials will satisfy constitutional mandates. That being said, we believe communication technology can be used to make the jury selection process safer, while conserving the judicial resources.

We understand that in this pandemic, in order to protect the health of all involved with the justice system, we must formulate a safe way for a jury to be selected, bearing in mind limitations on resources and the physical boundaries of our courtrooms. Our plan envisions a multi-staged process beginning with screening potential jurors outside of the courthouse using questionnaires and available technology, while requiring that the final selection take place in the courthouse in the presence of counsel and the Court. In this regard, we propose:

- (1) Jury duty notification/video introduction to court system;
- (2) Available screening of jurors by jury management;
- (3) Preliminary *voir dire* via remote questionnaire; and
- (4) Final *voir dire* of jurors in-person at the courthouse.

For civil actions, this plan contemplates two different tracks of cases that is dependent upon the complexity of the case, recognizing that jury selection for simple, two-party Track 2 cases will be easier to implement and will come before more involved trials.

The Plan

A. Jury Duty Notification/Video Introduction

We recommend that potential jurors are provided a password-protected link to an initial online introduction, informational video and screening process that will explain the trial process and address any of COVID-19 related concerns. The introductory video should include information that the courts currently provide when the jurors are welcomed to the courthouse and explain all steps the courts are taking to make the jury selection process and trial safe, including photos or video of the courtroom set up and safety measures that are being put in place.

In order to acclimate and orient jurors, we suggest that the video demonstration show the actual environment that they will experience, such as people wearing masks (if such is to be the case) and the actual courtrooms that they will sit in. These videos should be county specific as each courthouse is different. Additionally, to the extent that evidence will be presented through technology, the video should explain such.

B. Availability Screening Performed by Jury Management

The goal is to summon to the courthouse the number of jurors necessary to meaningfully select a jury while protecting the health and safety of judges and court personnel, litigants, counsel, and the jurors. We propose using a questionnaire as the first step of the juror screening process. The questionnaire should have two parts: the first, will consist of questions addressing the potential jurors' availability to serve and COVID-19 related information (PART 1 of Exhibit 1), while the second part will be the first opportunity for the jurors to provide information to the Court and the parties, which will be part of the basis used to determine if the individuals can fairly decide the case.

We suggest that, when possible, potential jurors answer the questions referenced in the proposed questionnaire online. This will reduce the time that counsel, the Court and the potential juror must be in the courthouse or on Zoom. We believe this will streamline the jury selection process. As set forth below, however, arrangements must be made for online access for those who require it or, in the alternative, allow answers to the questionnaires to be mailed to the jury manager.

During the initial questionnaire screening, the jury manager will address determinations concerning future availability of the potential juror. This will allow the court to adapt to changes in circumstances as more information concerning COVID-19, including a possible vaccine, becomes available.

It is intended that the jury management staff will use the first portion of this questionnaire to determine if the potential jurors are to be excused or if they are to proceed to the second part of jury selection. Based upon the information in the initial screening portion of the questionnaire (availability and the COVID-19 related questions), the jury management staff can excuse those jurors that will not be available or are too concerned about possible exposure to the virus that they would not be able to focus on the trial.

It is critically important to litigants in selecting a fair and balanced jury to understand why jurors are unable to perform this important service. Therefore, counsel and the parties should be provided with the questionnaires and names of those people that were excluded from the panel in this phase of selection.

C. Preliminary *Voir Dire* by Questionnaire

The second portion of the questionnaire seeks to elicit information sought in all cases, including some biographical questions, as well as the questions set forth in the Directives.

The questions will be different for civil and criminal cases. Suggested questions for civil cases are contained in the second portion of in Part Two of Exhibit 1.

It is the consensus of the criminal practitioners that consent of the parties is required before questionnaire screening can be used in criminal cases. Questionnaires in criminal cases must be case specific and safeguard against outside influences when answering the questions. For example, in a domestic violence case there may be questions related to the potential jurors' prior interaction personally or through family/friends with domestic violence. Similarly, in drug cases there might be questions about potential jurors' experiences with drug abuse and views on how strict drug laws are. In more serious cases, questions might include the ability to view crime scene photographs and thoughts on the necessity of scientific evidence. Other questions might include topics such as their ability to rely on circumstantial evidence or concerns with hearing that a witness has a prior record.

After the questionnaires are completed, the court will meet with counsel via Zoom video conference to review the jurors' qualifications and discuss unresolved hardship issues and which jurors the parties agree should be removed for cause. The goal of this process is to obtain a sufficient number of "*pre-qualified*" jurors to successfully complete the final phase of in-person jury selection. The number of potential jurors to be selected through this prescreening process should be left to the discretion of the trial judge, in consultation with the attorneys and the jury manager, and will depend *inter alia* upon the number of parties, anticipated length of trial and the complexity of the case.

D. Final Voir Dire

Final *voir dire* will be conducted in-person in the courthouse. The final *voir dire* must include the individual jurors addressing the biographical information and open-ended questions. The Court and the parties would not be foreclosed from following up on information provided by the juror in his or her questionnaire. We suggest using the largest courtrooms for this process and using all space available to promote social distancing, as well as the employment of plexiglass barriers where appropriate or necessary. Jurors can be interviewed individually with precautions consistent with CDC guidelines and approval by the New Jersey Department of Health. The logistics concerning how to safely move people in and out of the courtrooms is being studied elsewhere and is beyond the purview of our proposal.

In order to minimize the number of potential jurors that need to appear at the courthouse we suggest that a set number of pre-qualified jurors appear daily, for instance no more than 30 people at a time, until a final panel is arrived at. If the juror is pre-qualified and is determined to be eligible for jury service after *voir dire*, he or she will be permitted to go

home and be notified to return when final selection is scheduled to take place. Peremptory challenges will be exercised from that final group.

E. Timing of Jury Selection and Pretrial Motions

Initiation of jury selection in advance of the final in-person screening process and trial date will permit jurors to plan to be available and will reduce “cause” challenges based upon juror availability. Building in extra time will alleviate some of the hazards associated with people coming to the courthouse, thereby reducing the risk of COVID-19 exposure.

In civil actions for simple Track 2 cases, we believe that initiation of jury selection should begin 14 days before the scheduled trial date. We anticipate that the lessons learned during the early trials of Track 2 cases will be invaluable and can help plan for trials involving more complex cases.

We further believe a plan must be developed for picking a jury in more complex cases and criminal cases.

For civil cases, there is significant support among members of the Bar for a plan that would include more time between jury selection and the trial date than currently exists for Track 2 cases. This can only be successful if there is a firm trial date set that will be enforced absent exigent circumstances. The exact amount of lead time between jury selection and the firm trial date should be left to the discretion of the presiding civil judge in each county. Thus, for example, depending on the circumstances, jury selection for cases set for trial in January 2021 could take place as early as November or December of 2020 at which time *in limine* motions would also be decided. Adjustments to the plan can be made as more information becomes known about flattening of the curve, hazard reduction and the possible availability of a vaccine.

In limine motions and pretrial matters, which should take place remotely, will be addressed shortly before jury selection starts. This serves two functions: first, it may promote settlement, and second, it will streamline the trial process. The initiation of jury selection tied to resolution of all *in limine* motions will send a clear message to litigants that there is no turning back and that the case is proceeding towards trial. That will encourage the parties to meaningfully explore resolution long before the actual firm trial date. A Pretrial Information Exchange should be required in advance of the jury selection date.

Because criminal cases require more jurors than civil cases, the logistics of planning how to move people safely within the courthouse requires additional consideration. We believe that jury selection in criminal cases is more complex and would benefit from the lessons learned trying the simple Track 2 civil cases. In this regard, it would make sense to place the

initiation of selecting juries in criminal cases on a timeline similar to that of more complex civil cases.

F. Access to Technology Required to Implement Remote Screening is Essential

Using communication technology to aide in the jury selection process raises the serious concern that potential jurors who do not have access to resources or adequate technology will be systemically excluded from the jury pool. As defined herein, at this point the only need for technology for potential jurors is to complete online questionnaires. If jurors are also provided the option of mailing in or dropping off questionnaires at designated locations, these concerns can be reduced significantly.

In order to assure that all potential jurors are able to participate in completing questionnaires online if they so choose, the court should provide Wi-Fi access location where jurors can safely go to have a strong signal and participate and perhaps use a computer if available. There should be some planning as well to assist older citizens who may not be as savvy with technology.

For those potential jurors that do not have access to a computer, arrangements should be made to have computers available at local libraries, the courthouse or municipal offices. To the extent that video technology may be further integrated into the jury selection process in the future, significant planning will be required to insure that there is no systemic exclusion of citizens who cannot otherwise afford access to that technology.

G. Alternative: Conducting Intermediate *Voir Dire* by Video Conference

There was considerable debate whether *voir dire* should be conducted using video conferencing such as Zoom. Ultimately it was determined that there is not enough time to plan and implement sufficient institutional safeguards to guarantee that the technology required to conduct *voir dire* using Zoom is available to all potential jurors to make this a viable option in the near future. Therefore, we do not recommend any video conference format for conducting *voir dire*.

However, in the event the Court is inclined to move in the direction of juror *voir dire* by video conference, our plan would be amended as follows:

- (1) Jury duty notification/video introduction to court system;
- (2) Available screening of jurors by jury management;
- (3) Preliminary *voir dire* via remote questionnaire;
- (4) **Intermediate *voir dire* using Zoom**
- (5) Final *voir dire* of jurors in-person at the courthouse.

It should be noted, however, that prosecutors and defense counsel are unanimous that, absent consent, *voir dire* using Zoom or any other video conference format presents constitutional obstacles that are too difficult to overcome in criminal cases.

If implemented in civil cases, “Intermediate *Voir Dire*” using Zoom would be preceded by Jury Notification, Questionnaire Screening and Preliminary *Voir Dire*, as set forth in Sections A through C above. The objective of Preliminary *Voir Dire* using questionnaire screening (Section C above) would be to arrive at a panel of jurors to interview live, one at a time using Zoom during Intermediate *Voir Dire*.

During Intermediate *Voir Dire*, the court and counsel will evaluate the jurors for excusal based upon cause. Judges will pose agreed upon questions including open-ended questions. Judges should also be encouraged to allow lawyers to ask focused follow-up questions to determine the need for excusal. The goal of the Intermediate *Voir Dire* is to obtain a minimum of 30 jurors who can appear in-person at the courthouse for Final *Voir Dire*.

Given that a civil jury is generally comprised of 8 jurors and the first cases contemplated being tried will be two-party trials, there will be a total of 12 preemptory challenges between counsel. Accordingly, without any challenges for cause or changes in jurors’ circumstances that make it a hardship for them to serve, it would be necessary to have 20 jurors to arrive at a jury, assuming all preemptory challenges are exercised. A minimum of 30 jurors, provides a “cushion” of 10 jurors in the event that the court is required to use “for cause” excusals or jurors’ personal situations have changed.

We strongly urge that a prerequisite to conducting *voir dire* using video conferencing must be that sufficient protections are in place to guarantee that availability of and access to technology does not systemically discriminate or prevent selecting a jury that is not representative of a true cross-section of the community. (See section F above.)

EXHIBIT 1

PROPOSED NJ MODEL JURY SELECTION QUESTIONNAIRE
FOR COVID-19
Standard Jury *Voir Dire* - Civil

INTRODUCTION

Please complete this questionnaire. It will assist the lawyers and the Court in fairly selecting a jury for this civil case.

You are sworn to give true and complete answers to all questions on this questionnaire. Please answer all the questions to the best of your ability. There are no “right” or “wrong” answers. The questions that are asked are not designed to intrude on your privacy or to offend or embarrass you. If they do so, you have my apologies. However, the parties, the lawyers, and this Court have a right and an obligation to ask certain questions in order to ensure a fair trial for the parties to this case.

We, as citizens, have a responsibility and duty to support our unique system of jury trials in this country. Thank you in advance for your careful attention to the questions below, and for doing your part to support our system of justice.

DIRECTIONS

- 1. Provide complete and honest answers to all the questions below. There are no right or wrong answers, simply answer to the best of your ability.**
- 2. Do not show your questionnaire to anyone else other than Court staff.**
- 3. Do not discuss this questionnaire or your responses with anyone else, including other prospective jurors or Court staff. Do not communicate in any way with anyone about the questions on this form, your answers, or anything you hear in Court until the Judge tells you that you may.**
- 4. Do NOT do any research or look up anything on the internet to answer these questions.**
- 5. Do NOT have any communication with anyone, or read anything about this case, or about the questions in this questionnaire, until the Judge tells you that you may. Do NOT email, text, or use social media or any other means of communication to read or communicate about this case with anyone else. This includes any in-person communication, as well as posting, commenting, or entering into any discussion on any social media, blogs, or any other internet forum (including any access to Facebook, Facebook Live, YouTube, Twitter, Snapchat, Periscope, Vine, LinkedIn, Instagram, Google+ or any other method of messaging or communication) regarding anything to do with this questionnaire or this case.**
- 6. It is important that you follow these directions. If you violate any portion of these directions you may be held in contempt of Court. If the Court must summon**

additional jurors or extend the trial proceedings as a result of any violation of these directions, you may be personally required to pay the costs for such additional proceedings.

- 7. Your completed questionnaire will only be read by the Court, the parties, their attorneys and those working with them for use in jury selection. The parties and lawyers have a right to review your answers to these questions in order to ensure a fair trial. Any copies of this questionnaire that are made part of the public record in the future will be anonymous, with your name removed.**
- 8. If you feel you cannot answer any question in the space provided, please indicate the reason here. Write the number of the relevant question before anything additional that you write.**

*Initial here to indicate that you have read the directions above: _____

PART ONE – General Qualifications to Be a Juror

1. In order to be qualified under New Jersey law to serve on a jury, a person must have certain qualifying characteristics. A juror must be:
 - age 18 or older
 - a citizen of the United States
 - able to read and understand the English language.
 - a resident of _____ county (the summoning county)

Also a juror must not:

- have been convicted of any indictable offense in any state or federal court, and
 - must not have any physical or mental disability which would prevent the person from properly serving as a juror. Please consider that the Judiciary will provide reasonable accommodations consistent with the Americans with Disabilities Act. Do you meet ALL of the above requirements?
2. This trial is expected to last for _____. Is there anything about the length or scheduling of the trial that would interfere with your ability to serve?
 3. Do you have any medical, personal or financial problem that would prevent you from serving on this jury? (including problems with language, hearing, your vision, or your health that could make it difficult for you to see, hear, and understand the testimony and evidence in this case)

4. Do you have a special need or require a reasonable accommodation to help you in listening, paying attention, reading printed materials, deliberating, or otherwise participating as a fair juror?
5. **COVID-19 EXPOSURE QUESTIONS**
 - a. Hardship questions related to COVID 19:
 - i. Are you age 65 or older?
 - ii. Do you reside in a nursing home or other long-term care facility?
 - iii. Do you believe you should not serve because you have a medical condition that you understand leaves you at a higher risk regarding COVID-19? Some of these conditions may include the following : asthma, liver disease, chronic lung disease, diabetes, hemoglobin disorders, immunocompromised, serious heart conditions, chronic kidney disease requiring treatment with dialysis, or severe obesity.
 - b. The questionnaire will also ask that the individual specify those months over the next 6 months that the individual would not be available to serve on jury duty and the reason.
 - c. For those potential jurors that do not have access to a computer, arrangements can be made at local libraries, the courthouse or possibly municipal offices.

PART TWO – Case Specific General Questions

1. Do any of you know [Plaintiff’s counsel]?
 - a. Has [Plaintiff’s counsel] ever represented you or brought any action against you?
 - a. Do you know Mr./Ms. [Plaintiff]?
2. Do any of you know [Defendant’s counsel]? (repeat for each)
 - a. Has [Defendant’s counsel] ever represented you? (repeat for each)
 - b. Do you know Mr./Ms. [Defendant]? (repeat for each)
3. Do you know any of the following potential witnesses? [Note: List witnesses’ names immediately below.]
4. [Enter brief description of matter 3-5 sentences maximum including the following particulars: accident time, location, and neutral description].
 - a. Do you know anything about this case from any source other than the above paragraph?
 - b. If YES, please explain how.

5. Are you familiar with the area or address of the incident?
6. Have you or any family member or close personal friend ever filed a claim or a lawsuit of any kind?
7. Has anyone ever filed a claim or a lawsuit against you or a member of your family or a close friend?
8. Have you or a family member or close personal friend either currently or in the past been involved as a party...as either a plaintiff or a defendant...in a lawsuit involving damages for personal injury?
9. A plaintiff is a person or corporation [or other entity] who has initiated a lawsuit. Do you have an opinion for or against a plaintiff simply because he or she has brought a lawsuit?
10. A defendant is a person or corporation [or other entity] against whom a lawsuit has been brought. Do you have an opinion for or against a defendant simply because a lawsuit has been brought against him or her?
11. The defendant is a corporation. Under the law, a corporation is entitled to be treated the same as anyone else and is entitled to be treated the same as a private individual. Would you have any difficulty in accepting that principle?
12. The court is aware that there has been a great deal of public discussion about something called Tort Reform (laws that restrict the right to sue or limit the amount recovered). Do you have an opinion, one way or the other, on this subject?
13. If the law and evidence warranted, would you be able to render a verdict in favor of the plaintiff or defendant regardless of any sympathy you may have for either party?
14. Based on what you have been told, is there anything about this case, or the nature of the claim itself, that would interfere with your ability to be fair and impartial and to apply the law as instructed by the court?
15. Can you accept the law as explained by the court and apply it to the facts regardless of your personal beliefs about what the law is or should be?
16. Have you ever served on a trial jury before today, here in New Jersey or in any state court or federal court?
17. Would your verdict in this case be influenced in any way by any factors other than the evidence in the courtroom, such as friendships or family relationships or the type of work you do?
18. Have you ever been a witness in a civil matter, regardless of whether it went to trial?
19. Have you ever testified in any court proceeding?

20. New Jersey law requires that a plaintiff has to prove his or her case against a defendant before he or she is entitled to recover money damages from that defendant. Do you have any difficulty accepting that concept?

PART THREE – Biographical Questions

You have answered a series of questions about civil trials and civil cases. Now we would like to learn a little bit about each of you. Please tell us the following:

1. What type of work do you do?
 - a. Who is your employer?
 - b. What are your duties?
2. Have you done any type of work which is substantially different from what you do now? (Please explain)
3. Have you or someone close to you (relative or close friend) ever been employed by the following:
 - a. Law Office
 - b. Medical Profession
 - c. Law Enforcement or Criminal Justice Agency
 - d. Insurance Industry
 - e. Local Municipality (City or County Worker)
4. What is your marital status?
 - a. If married, by whom is your current spouse or partner employed?
 - b. What are his or her job duties?
 - c. Have you been separated, divorced, or widowed for less than five years?

Circle One: Yes No Not Applicable
 - d. If “Yes,” by whom was your former spouse(s) or partner(s) employed?
 - e. What are/were his or her job duties?
5. Have you served in the military?
6. What is your highest level of education (including vocational training after elementary school)?

7. Where do you currently live?
 - a. How long have you lived there?
 - b. If you have lived anywhere else in the past five years, where?
8. What is your gender?
9. What is your current age?
10. Please identify any of the following which you use to describe your race and/or ethnicity.
 - ___ African American
 - ___ Asian
 - ___ Native American /Alaska Native
 - ___ Hispanic/Latino
 - ___ White
 - ___ Other (please specify) _____
11. Who else lives in your household?
12. What type of work do the members of your household do?
13. Do you have any children living elsewhere?
14. What type of work does that child do (repeat for every child)
15. What television shows you watch regularly, if any?
16. What periodicals do you read/subscribe, if any?
17. What books have you read recently, if any?
18. What websites or blogs have you read recently, if any?
19. If you have a bumper sticker that does not pertain to a political candidate, what does it say?
20. What you do in your spare time (hobbies, interests, etc.)
21. Are you involved in any civic, social, union, professional, or other organizations (including church or religious organizations, school groups, as well as social, fraternal, service, professional, business, entertainment, media, sports, union, political, or community groups)?
 - a. Please include your position there, if any and the

- b. Length of membership.?
22. Is there anything, whether or not covered in the previous questions, which would affect your ability to be a fair and impartial juror or in any way be a problem for you in serving on this jury?
 23. Is there anything else that you feel is important for the parties in this case to know about you?

PART FOUR – Open-Ended Questions

General

1. What do you think about large corporations that are named as defendants in lawsuits?
 - a. Would you consider the legal rights and responsibilities of a corporation differently than those of an actual person?
 - b. Why do you feel this way?
2. There may be expert witnesses in this case. You should consider their opinions with an open mind. The expected field of expertise of these witnesses is _____. How do you feel about experts in that field?
3. Will you be able to evaluate their opinions fairly and with an open mind?
4. Why do you feel the way you do about this?
5. How do you feel about the jury system?
 - a. Do you think lawsuits would be better decided by some sort of professional hearing officers, arbitration panels, or judges?
 - b. In our country, under our Constitution, in cases such as this one, people have the right to a jury trial. If it were up to you, should that right continue to exist or be eliminated?
6. Do you believe that you will make a good juror for this case? Please explain.
7. What are your thoughts or feelings about lawsuits in general; damages awarded by juries; our justice system; the jury system; the "McDonald's" hot coffee spill verdict?
8. Some people believe that people who have sued for injuries typically exaggerate their injuries. Others believe that does not typically occur. What do you believe and why?

PART FIVE - Case Type - Specific

Auto

1. Please indicate if you are a licensed driver.
2. Have you or any family member or close personal friend ever been involved in a motor vehicle accident in which an injury resulted?
3. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?
4. Have you or a family member or close personal friend utilized the services of a chiropractor?
5. The court is aware that there has been a great deal of public discussion in print and in the media about automobile accident lawsuits and automobile accident claims. Do you have an opinion, one way or the other on this subject?

Slip and Fall

1. Are you a tenant?
2. Are you a landlord?
3. Are you a homeowner?
4. Have you or a family member or close personal friend ever been involved ...as either a plaintiff or a defendant...in a slip and fall accident in which an injury resulted?
5. Have you or a family member or close personal friend ever been involved in litigation or filed a claim of any sort?
6. Have you or a family member or close personal friend sustained an injury to the _____ or have chronic problems with _____?