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NEW JERSEY STATE BAR ASSOCIATION

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on the Future of Court Operations
Hughes Justice Complex, P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on the Future of Court Operations

Dear Judge Grant:

As the New Jersey State Bar Association continues its efforts to help the legal community successfully transition to a post-pandemic world, we welcome the opportunity to provide comments on those court events that should be continued in a remote format and where it is necessary to return to in-person proceedings to advance the cause of justice for all. As discussed during the recent listening sessions, we are mindful that the courts serve the litigants who appear on their doorstep, and understand the need to focus on what is best for them to ensure they are provided with a fair, impartial and adequate opportunity to have their grievances resolved.

Earlier this year, on May 3, 2021, the NJSBA shared its Practice of Law Subcommittee Report with the Judiciary. Among other issues, the Report examined those pandemic-related measures that had positive effects on the practice of law, and contained a number of recommendations in connection with continued virtual hearings in certain circumstances. These recommendations, which are attached, touch on proceedings in several practice areas, including civil, criminal, family, landlord tenant, municipal court, taxation, real estate/trust and estate, immigration and workers' compensation. In addition, the NJSBA has additional specific comments on the proposal outlined in the Judiciary's July 16 Notice.

For civil matters, the NJSBA agrees that routine motion arguments and case management conferences can generally proceed remotely. However, we believe that more complex and, in particular, dispositive motions should be heard in person unless the parties consent otherwise, as they are more akin to an appellate argument and will potentially decide the outcome of a case.

There should also be a presumption that settlement conferences in civil matters will be held in person (with virtual accommodations for specific individuals, as needed), unless the parties consent to an all virtual conference, as in person discussions and negotiations are likely to be more effective and lead to swifter resolution of a matter.

For municipal court matters, the NJSBA believes that more concise guidelines are needed to ensure consistency throughout the state. Judges should not have to make a pretrial determination about the “reasonable likelihood” of a jail sentence or loss or suspension of license before determining the format of a proceeding; rather, all trials that involve charges where the objective potential sentencing options point to a likelihood of jail or a loss of license should be heard in person. In addition, all testimonial hearings, not just evidentiary hearings, should be in person, unless the parties consent to proceed virtually. And, litigants should not be considered absent and unreachable, and therefore unable to consent to the format of a hearing, if their attorney is present and provides a response on their behalf. If a proceeding is determined to move forward in person, all individuals expected to testify should be required to appear in person to ensure a defendant’s rights to confront their accuser are met.

For all other municipal court matters, judges should be required to consult with counsel before making a determination about whether a hearing will proceed in person or virtually to ensure that any specific concerns or unique facets of a particular case are taken into consideration.

Finally, all municipal court proceedings should endeavor to be made public, even those handled virtually, by providing a public link for members of the public to view, just as if they were sitting in person in the courtroom watching live proceedings.

Again, on behalf of the NJSBA thank you for the opportunity to participate in this process and for the Judiciary’s consideration of the comments provided. The NJSBA stands ready to assist the Judiciary in whatever way it can as we adapt to a post-pandemic world and attempt to retain those practices that benefit litigants and enhance their access to justice, without sacrificing their rights to a fair resolution of their grievance.

Respectfully yours.



Domenick Carmagnola, Esq.
President

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cc: Jeralyn Lawrence, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

EXCERPTS FROM NJSBA PRACTICE OF LAW SUBCOMMITTEE FINAL REPORT

LOOKING AHEAD—POST-PANDEMIC RECOMMENDATIONS FOR VIRTUAL PROCEEDINGS

Many practitioners feel that the ability to conduct case management conferences, hearings and proceedings on virtual conference platforms has been a positive outcome and anticipate that these methods may continue as permanent alternatives.

Many practitioners have indicated that they are conducting consultations and meetings with clients via Zoom or other virtual platforms and this has been efficient and successful. Interestingly, the pandemic has encouraged many to become more technologically savvy in order to stay connected with the courts, colleagues and clients.

At the beginning of the pandemic, many law firms began operating fully remote or relied upon skeleton crews and modified schedules to accommodate the circumstances. As the pandemic extended, some have begun making attempts to resume ordinary business hours with a full staff, taking all precautions for the health and safety of employees.

Notably, practitioners and personnel with children have faced difficult challenges with children at home, as day care services are widely unavailable, and many schools have instituted virtual learning. Apprehension from stay-at-home orders and being out of routines for many months has been difficult for so many.

Going forward, we would hope to take what we have learned from the global health crisis and create new routines and practices that are lasting, useful and efficient. Video and audio conferencing of routine and administrative functions should continue, to the extent permitted and constitutionally appropriate. It is a benefit to the court, practitioners and, most importantly, the litigants in reducing counsel fees and expenses, and has proved to be a streamlined process. Scheduling virtual events has become a more routine practice, the ability to use rooms in a virtual setting has facilitated mediations and other out-of-court dispute resolution methods, and both time, costs and stress are mitigated without the need to wait in courtroom hallways or commute from one event to the next.

Based on information received from NJSBA substantive practice sections, we make the following recommendations as to which matters should proceed on virtual platforms indefinitely. Those recommendations have been allocated by practice area:

Civil: Consideration should be given to continuing many of the pretrial proceedings virtually and with the consent of the parties, such as:

- motions;
- case management conferences;
- depositions of experts;
- litigant depositions for litigants who are medically compromised, have travel issues or otherwise have extenuating circumstances that prevent an in-person appearance; and
- inspection of medical records or other documents.

While settlement conferences would likely benefit from in-person meetings, a hybrid proceeding to accommodate insurance adjusters unable to attend in person should be considered.

Criminal: Certain pretrial proceedings can continue to be conducted virtually with the consent of the parties, such as initial appearances and arraignments, as well as pretrial detention hearings.

It is critical, however, that proceedings which implicate constitutionally guaranteed rights, such as testimonial motions and jury trials, only proceed in person, so that defendants are provided an opportunity to confront the state's evidence against them and the jury's fact-finding function is not infringed.

Family:

FM—Matrimonial Practice:

- Case Management Conferences and other conferences with the court have been very successful and should remain remote. This allows clients to avoid missing time from work and mitigates counsel fees and costs in travelling to and appearing in court.
- Early Settlement Panels are successfully conducted via video conferencing and should remain as such. They are efficient, work well and save clients time and money. Panelists are able to stagger the panels scheduled for the day, receive submissions electronically and coordinate several virtual rooms for clients and attorneys.

- Oral argument of motions using video conferencing platforms has been implemented with ease and should remain remote. The lack of travel has reduced time spent between appearances, which has rendered less adjournments, scheduling conflicts and postponements trying to accommodate several appearances, in several counties, in one day.
- Electronic filing and the court's acceptance of electronic signatures has proved convenient. It is recommended that all security precautions be taken by the administrators of electronic filing systems, such as the Judiciary Electronic Document System (JEDS), as there are continued concerns for the breach of confidential information through such a system.
- Divorce "on the papers" through the use of statewide forms should be the norm and not the exception.

It is also important to highlight certain adjustments in the practice of family law that have not been as successful, as follows:

- It has been difficult to conduct trials remotely. While remote trials have been a welcome resource under the current safety restrictions, it certainly is easier to try a case in person, particularly in complex cases with extensive exhibits and numerous witnesses. Once it is safe to do, a return to in-person trials in the family courts is recommended for more complex matters, but on less complex matters, and with consent of the parties, virtual hearings should be permitted.
- Domestic violence matters are handled differently under the present circumstances, whereby some courts are requiring that evidence be provided prior to the trial. This hampers the effectiveness of cross-examination.
- Intensive or lengthy settlement conferences requiring the judge to remain present during the entire conference have been less successful when conducted remotely, as sometimes settlement becomes more of a reality when a judge is nearby or readily available to encourage the parties to settle. If the judge steps in and out of the process infrequently, it is difficult to build momentum and settle.
- Timing of appearances can be managed more successfully. There are instances where parties are either waiting for others on video platforms, or there have been miscommunications regarding access links for appearances that have caused disruption or delays. Understandably, video technology is new for many of us, and implementing a flawless system to accommodate the state of this crisis will be subject to a learning curve. In addition, all appearances should be staggered.

Adoptions:

- Adult adoptions should continue via virtual platforms. For individuals or adoptees who no longer reside in New Jersey scheduling in-person appearances can be difficult and expenses.
- Agency adoptions where the child has been in placement for more than six months and both birth parents' rights have been terminated by surrender or subsequent to a preliminary hearing, are more streamlined adoptions. However, it is understandable that many families may wish to experience the adoption in person. As such, we recommend that litigants be given the option to appear in court on the date of adoption, or conduct such an appearance via video conference.
- Case management in contested adoptions can be conducted via video conference to reduce the cost and expense in travel, as adoptions tend to bear a heavy cost even without the prospect of legal fees. Moreover, for contesting birth parents who reside out of state, it would be most efficient to allow these individuals to appear via video conference, as the prospect of travel may be impractical and cumbersome as we navigate the pandemic and subsequent impact on travel.

FD:

- Custody/Special Immigrant Juvenile Status (SIJS) appearances should be done virtually so they can be scheduled promptly and handled expeditiously in the interest of all parties involved. Some of these cases are languishing in a few counties and require the courts to get these on track toward resolution. Also, the availability of interpreters by telephone has been easier than obtaining an interpreter in court, and allows access to a greater breadth of languages.
- Emergent Temporary Custody Applications should continue to be heard via video conferencing. The courts have been diligent and quick in processing emergent applications, and attorneys have had an easier time remaining on standby for an appearance while working remotely.

Landlord Tenant (LT): Once the current eviction moratorium is lifted and cases are able to be heard and tried, it will be important to evaluate the effectiveness of the virtual settlement hearings that are currently being conducted as a potential future means of resolving some disputes without the need for a court appearance. In a recent series of listening sessions held by Acting Administrative Director of the Courts Judge Glenn Grant indicated that assistance from attorneys is and will continue to support improvements in these matters.

The Judiciary has implemented a number of measures to encourage attorney assistance in resolving landlord/tenant matters. Attorneys can earn Continuing Legal Education (CLE) by training to serve as LT settlors. Training and resources also will be provided to members of the bar who take on pro bono representation of eligible parties in LT matters. Attorneys who provide 25 hours of legal representation to those clients will be entitled to an exemption from their *Madden* requirements for the following year. The NJSBA has pledged its ongoing support of these measures and is committed to sharing with its members these and other opportunities to provide critical legal assistance. We encourage our members to assist in this vital program if they can.

Municipal Court: A special *ad hoc* Municipal Court Reopening Committee was formed by the NJSBA to make specific recommendations about future municipal court operations. That Committee's report was adopted by the Board of Trustees and is attached. The recommendations include:

- Appearances by video or audio should be encouraged for all procedural matters such as arraignment, trial scheduling conferences, pre-trial conferences or dispositions on all matters that are *not* matters of consequence. For all matters of consequence, consent to proceed virtually should be obtained by the defendant and the state; otherwise, they should be permitted to be heard in person. Priority for in-person court hearings should be given to motions to suppress and DWI trials.
- Options for virtual appearances by defendants should be encouraged going forward under appropriate circumstances. We agree with the AOC proposal of remote first as the best option to resolve uncontested proceedings.
- Plea by mail and online dispute resolution programs should be utilized when appropriate, but prosecutors and/or court staff should be required to refrain from communicating with defendants unless and until they have been arraigned and waived their rights to counsel. Until there is a waiver of counsel, communication should be limited to advising defendants of court dates.
- A centralized repository of municipal court information should be established by the Attorney General or the AOC to facilitate appropriate contact absent in-person appearances that would include:
 - Contact information for court (address, phone, fax, e-mail),
 - Name of judge,
 - Name of court administrator and preferred method for communication,

- Name of prosecutor and preferred method for communication,
- Preferred manner to enter appearance by defense counsel, and
- Preferred method by prosecutor to request discovery.

Taxation: Remote/virtual courtrooms should proceed for status conferences.

Real Estate, Trust and Estate: Remote notarization should be permitted on a permanent basis going forward. The NJSBA is working with legislators on appropriate statutory changes that will allow for this under appropriate circumstances.

Immigration: The Immigration Courts should implement the ability to conduct hearings via video conference on a large scale. In addition, pleadings and other preliminary documents should be permitted to be filed remotely in advance, eliminating the need for many calendar call hearings and saving attorneys and litigants time, effort and money.

Workers Compensation: Workers' Compensation practitioners and judges should work together as part of the Chief Judge's Task Force to determine how to best utilize technology to ensure uniform and efficient handling of matters in the most convenient way for litigants in the future. Consideration should also be given to whether the current number of Workers' Compensation judges is sufficient to efficiently handle the case load in the Division, even with the implementation of technological improvements.