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Judge Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

Via electronic mail

Comments on the Report of the Committee on Diversity, Inclusion, and Community Engagement

Dear Judge Grant:

On behalf of Partners for Women and Justice (“Partners”), please accept these comments in support of the report and recommendations of the Committee on Diversity, Inclusion, and Community Engagement (“DICE”). Partners provides free legal services to low-income victims and survivors of domestic violence and sexual assault in family court matters in New Jersey.

1. RECOMMENDATION 21-1 VIRTUAL COURT OPERATIONS POST-COVID

The DICE Report acknowledges the problems of the digital divide as well as the opportunities to expand access to justice post-COVID through the continuation of virtual court appearances, including domestic violence cases. (Report at 17.) Current rules do not permit the routine use of remote court proceedings, and we recognize that the rules for post-pandemic court operations will involve many other court constituencies beyond the DICE Committee.¹ We nevertheless offer Partners’ perspective on the experience to date with remote operations on the FV (“Family Violence”) docket to identify issues for future consideration.

A. Challenges for Survivors Navigating Virtual Courtrooms During COVID

Domestic violence litigants appearing on the FV docket are disproportionately low-income and more likely to fall on the wrong side of the digital divide in a world that has gone completely remote. For many victims, the issue with remote court stems from both a lack of access, compounded by a limited comfort with technology. For those with limited English proficiency (“LEP”), these barriers to remote court are even higher, as many of the resources for pro se litigants on the New Jersey Courts website are available only in English, with some in Spanish. Many domestic violence victims do not have computers, and some lack smart phones. In addition, during

¹ Partners suggests, as a first step in that process, eliciting feedback from each county’s domestic violence working group on the potential uses of remote technology.

the pandemic, Partners has observed more cases where the defendant has cut off the phone for internet service to the victim in an attempt to interfere with the victim's access to the courts.

The judiciary has gone to extraordinary lengths to support litigants that face technology barriers. The Office of the Ombudsman has assumed the new responsibility for providing tech support to litigants and has expanded hours for service. Providers of domestic violence services, including Partners, have also offered their offices and staff to support victims' access to the courts. Courthouses are designating kiosks for those in need of a computer or safe place to participate in court remotely, but survivors need to demonstrate a good deal of persistence to learn about these opportunities.

We cannot quantify the number of victims with temporary restraining orders ("TRO") who have found the barriers to trial over Zoom unduly burdensome or who otherwise have been stymied in their efforts to secure a restraining order.² The Judiciary Electronic Document Submission (JEDS) system provides a way for self-represented litigants to submit documents and evidence electronically to the court. However, the JEDS interface is far more accessible to attorneys than *pro se* litigants. The list of document types is expansive and requires the court user to correctly categorize the pleading. Many domestic violence advocates themselves have expressed confusion about guiding clients through JEDS. The JEDS functionality further depends on users having access to computers and other hardware, as it requires downloading, printing, physical signing, scanning, and uploading documents, creating significant barriers to access to the courts for those with only a smart phone. The judiciary's requirement to upload evidence in advance of trial to facilitate Zoom trials compounds the technology challenges; litigants must upload and compress video, text message screenshots, and voice messages, and other evidence onto the JEDS system. For LEP litigants who lack counsel or the support of a domestic violence agency, the system is all but impenetrable.³

Some judges hearing domestic violence cases have voiced their preference for virtual trials, believing that the computer screen actually enhances their ability to make credibility findings. Although at first glance this may seem intuitive, social science research suggests that the focus on the face amplifies humans' cognitive prejudices and stereotypes.⁴ This bias is especially concerning

² Interviews conducted with domestic violence agencies in New Jersey provide support for the concern that a significant percentage of victims felt discouraged in their efforts to navigate the court system during the pandemic. Patricia Perlmutter & Jessica Miles, *The Impact of Covid-19 Intensifies the Shadow Pandemic of Domestic Violence in New Jersey* (Dec. 2020), available at <https://pfwj.org/media/Partners-for-Women-and-Justice-Report-on-Pandemic-Impact.pdf>. National surveys echo our anecdotal evidence. See, *Survey of the Center for Survivor Agency and Justice* at 40 ("Why Survivors Had Trouble Accessing Court") (Dec. 2020), available at bit.ly/covid-19-ppt.

³ The Ombudsman and Family Division staff can offer workarounds to these issues, but most court users are not aware of these resources. Since last March, most victims have not been able to access the support, information, and referrals for services from domestic violence advocates previously available at the courthouse.

⁴ Vincent Denault & Miles L. Patterson, *Justice and Nonverbal Communication in a Post-pandemic World: An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges*, *Journal of Nonverbal Behavior* (2020).

in domestic violence cases with victims of trauma, whose credibility is systemically discounted.⁵ In relying on trials through Zoom or Teams on an ongoing basis, the judiciary should consider how the technology itself and the hyper-focus on the victim's face could potentially influence perceptions of witnesses. The fact finder in a remote trial cannot assess behavior relevant to a credibility determination exhibited by body parts other than the face, such as shivering, muscle flexing, or impatient tapping/ stomping of feet.

B. Reservations about the Routine Utilization of Virtual Trials Post-COVID

Partners would oppose making virtual trials the norm once courthouses can safely reopen. Post-pandemic decision making about the docket should consider the following issues, all of which suggest a cautious approach to continued restraining order trials over Zoom or Microsoft Teams:

- The centrality of credibility assessments in final restraining order (“FRO”) cases, and diminished opportunities via Zoom to assess body language and whether witnesses are sequestered or reviewing material while testifying;
- The impact of required evidence exchange for FRO trials that are summary in nature and do not generally permit discovery, *Depos v. Depos*, 307 N.J. Super. 296 (Ch. Div. 1997);
- Access to court advocates and court staff, who traditionally have provided support, referrals, and information to survivors;
- Whether courtroom management is diminished in virtual courtrooms; and
- Whether virtual court affects the parties’ confidence in the judiciary, the extent to which parties feel heard, and their understanding of the final restraining order and the gravity of the consequences of contempt.

C. Virtual Court Opportunities for Litigants on the FV Docket Post-COVID

FRO trials should resume in-person, once it is safe to reopen, unless both parties consent to a remote trial. In person proceedings ensure all litigants are afforded full due process of law, regardless of lack of access to technology due to geographic location or income disparity. In addition, in order to expand access to the courts, and consistent with the proposed rule amendment creating R. 1:2-1(b), a party should be able to apply to the court for leave to appear remotely for good cause shown, such as disability, substantial fear of confronting the defendant in-person,⁶ or lack of physical access to the courthouse. Supplemental Report of the 2029-2021 Family Practice Committee at 2, <https://njcourts.gov/courts/assets/supreme/reports/2021/suppfcreport19-21.pdf>.

⁵ See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 422 (2019) (“Because PTSD symptoms can make abused women appear hysterical, angry, paranoid, or flat and numb, they contribute to credibility discounts that may be imposed by . . . judges”).

⁶ Past recommendations by the Supreme Court Ad Hoc Committee on Domestic Violence included the potential for virtual appearance by the plaintiff in instances where the plaintiff is afraid of being in the presence of the defendant. Report of the Supreme Court Ad Hoc Committee on Domestic Violence, Recommendation 3 at 16 (June 2016), https://www.state.nj.us/dcf/providers/boards/acdv/Report.of.the.Supreme.Court.Ad.Hoc.Committee.on.DV-June_20.16.pdf.

Many court appearances on the FV docket do not entail taking of testimony and could proceed by virtual means with video appearances.⁷ Partners supports continued virtual applications for TROs (as well as retaining the option to amend TROs electronically), virtual first appearances, and virtual appearances for motions. A hybrid model for the FV docket can expand access to the court, limit the number of times the victim must confront the defendant in-person, save legal time, thus enabling legal service providers to serve more clients, reduce travel time and expense, a significant barrier in the south of the State, and reduce lost income associated with multiple court appearances.

2. RECOMMENDATION 21-10 TO ESTABLISH THE FD (“NON-DISSOLUTION”) WORKING GROUP

Partners has experience on the FD docket through our Children of Domestic Violence Project⁸ and through our representation of victims who choose to enter into civil restraints thereby dismissing their Temporary Restraining Order and establishing a FD order. Although many survivors of intimate partner violence appear on the FD docket, court processes use an overly narrow screening method by focusing on past TRO applications as a proxy for domestic violence history and thereby neglecting to identify other high-risk cases. The family history of domestic violence is important for courts making parenting time decisions and is relevant to child support matters as well.

Partners supports the creation of a FD working group. Many litigants in this docket are *pro se* and include litigants who are seeking assistance with critical family issues such as establishing custody, child, and parenting time. These matters are summary proceedings often resulting in a court order containing consequences of great magnitude, and errors generally go uncorrected because litigants are largely unable to navigate the appellate process *pro se* and generally, cannot afford appellate counsel. This working group can suggest ways to improve the processes and procedures to address systemic concerns on the docket.

The judiciary’s technology advances during this last year create opportunities for reconsidering best practices on the FD Docket and make this an opportune time for formation of a working group. With the advent of JEDS, it should be possible to correct a lack of due process on this docket—the failure to serve parties with the underlying motion papers on this docket.⁹ Likewise, virtual court processes open up opportunities for hearing child support cases without the need for the parties to appear at the courthouse and miss additional hours of work. Other topics for consideration by the working group could include reconsidering the time frames for case processing on this docket to allow judges adequate time to manage the docket, examining access to and utilization of “complex”

⁷ During the pandemic, some child custody and visitation disputes have proceeded by audio only. Audio only hearings are not a good substitute for in-person or video hearings because demeanor and credibility contribute to sound decision-making about the best interests of children.

⁸ Through this project, supervised pro bono attorneys provide representation to survivors on both the FV and FD dockets with disputes regarding child custody, visitation, and support.

⁹ When a litigant files a motion, the court sends a hearing notice to the other party without including a copy of the motion papers. Without this information, a self-represented litigant must participate in a summary hearing unprepared and uninformed of the basis of the adversary’s claims. Likewise, although Rule 5:5(3) requires an exchange of income information in advance of a child support hearing, when parents are alienated from each other, the first opportunity to learn of the other parent’s assertion about their income is often at the hearing when support is set, sometimes on the basis of only oral testimony.

designation of cases, including plenary hearings for custody determinations, and standards for designation of guardian ad litem for minor children. The working group can help insure that the best interests of children on the FD docket receive the same consideration as those on the marital docket.

3. PARTNERS' SUPPORT FOR THE OTHER DICE RECOMMENDATIONS

Partners endorses the remaining recommendations of the DICE report. Collecting accurate demographic data from the bar will contribute to strengthening efforts to expand diversity of both the bench and law clerks. Diversity of life experiences and perspectives will continue to enhance the judiciary's commitment to equal access to justice. Partners also agrees with Recommendation 2021:04 of the Committee to reimagine communications to pro se litigants by video and infographic and other means; many self-represented litigants do not understand the materials on the judiciary's Self-Help Center page. Finally, Partners supports the proposed rule change, Recommendation 2021:11 for Rule 4:72, to allow name changes to proceed without publication to protect the privacy and safety of children and adults, of special importance to LBTQ+ individuals.

CONCLUSION

We commend the DICE report and recommendations and support their adoption by the Supreme Court. Thank you for Your Honor's consideration of Partners' comments and for the judiciary's deep commitment to eliminating barriers to equal justice.

Respectfully Submitted,

/s/

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Policy Counsel