From: Frank
Sent: Tuesday, August 4, 2020 1:09 PM
To: Christine.Burak@jud.state.ma.us
Subject: Jury trials

My impression of the public is that very few people will show up for jury duty until 2021 At earliest.

I probably would seek a medical exclusion as i am over 60 as would many on my age group.

This will leave days with a minimal jury pool only then to have The matters postponed Again.

Too soon,

From: Laurel Francoeur
Date: August 4, 2020 at 2:31:03 PM EDT
To: "christine.burak@jud.state.ma.us" <christine.burak@jud.state.ma.us>
Subject: Comment on proposed trial recommendations report

Thank you for the thoughtful process that was used in determining this thorough report of how to manage trials in the COVID era.

The one comment I have is that one of my co-counsels is deaf and will need CART services throughout all phases of our trial. Will those services be usable if everyone is wearing a mask? He will certainly lose the ability to read lips and I wonder if the testimony will be muffled with the use of masks and thus unable to be picked up by the CART system? Does the court have any ideas in this regard? Maybe doing practice runs with the technology?

Thank you,

Laurel Francoeur

From: Susan Alyn
Date: August 4, 2020 at 3:47:03 PM EDT
To: christine.burak@jud.state.ma.us
Subject: Public Comment dated August 4, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice
Via email at Christine.Burak@jud.state.ma.us

Hello -

Attached is a pdf of my 1-page public comment dated August 4, 2020.

Susan Alyn
Waltham, MA

August 4, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice
Via email at Christine.Burak@jud.state.ma.us

Re: "Notice Inviting Comment on Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials - Comments may be submitted on or before August 14, 2020."

Dear Justices of the Supreme Judicial Court (SJC):

This letter is the first of four public comments I intend to write to you prior to your deadline of August 14, 2020. (My upcoming three letters will concern proposed legislation I recently wrote, exercising my rights under Article 19, concerning the reform of jury duty laws. My MA representative, Thomas Stanley, filed these in the MA House on July 29, 2020 . The numbers for these bills are HD.5217, HD.5218, and HD.5219.)

I am an educator and member of the public. I note your report dated July 31, 2020 and released today, August 4, 2020, states on page 95:

> "(as of this writing, the OJC (Office of Juror Commissioner) has already sent out summonses for persons scheduled to appear in October)"

However, your report is incorrect, as I received what appears to be a juror summons for the date of "September 21, 2020" -- not "October." I then received a longer form summons. I have not been to the juror website, but I responded by U.S. certified mail.

I was very dismayed to read this 122-page report for a number of reasons, primarily because: I feel it lacks what I had hoped would be new thinking and innovative ideas on the issue of how to find willing jurors, if indeed MA is planning to have jury trials during this time of COVID-19. Consequently, here is my polite and heartfelt suggestion:

Stop thinking of jurors as people who must be forced to the courthouse under the current threat of criminal penalty; and instead: start thinking of soliciting jurors much the same way people in the public are now being solicited to volunteer as participants in trial vaccines for COVID-19. You or I may not be willing to be a vaccine participant, but thousands are willing to do so. Is the same true for jurors?

Thus, consider a statewide advertising campaign, and publicly ask everyone: Who is willing to serve on a jury right now? Promote the fact the court will pay $50 per day and will provide transportation vouchers. Have a survey on your juror website and hard copies available at post offices and grocery stores that asks how many days one is available, previous jury service, if preference is a criminal or civil trial, and check off which court locations are desired. See if this results in a broad and diversified pool of potential jurors. Then randomly assign them to trials at the court. I believe this could work, eliminating the focus on pre-emptive strikes and avoiding many other potential burdens for the courts – and for other prospective jurors.

Respectfully,
Susan Alyn
Waltham, MA

From: Susan Alyn
Sent: Wednesday, August 5, 2020 3:01 PM
To: Christine.Burak@jud.state.ma.us
Subject: 2nd Public Comment, dated August 5, 2020

To: Christine.Burak@jud.state.ma.us

Hello again -

Attached is a pdf of my second 1-page public comment, dated August 5, 2020.

Also attached is a 2-page pdf of a recent bill I wrote to reform jury duty disqualification law, HD.5219, which is referenced in my comment.

Susan Alyn
Waltham, MA
Encls.

August 5, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice
Via email at Christine.Burak@jud.state.ma.us

Re: "Notice Inviting Comment on Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials - Comments may be submitted on or before August 14, 2020."

Dear Justices of the Supreme Judicial Court (SJC):

This letter is the second of four public comments I'm writing to you prior to your deadline of August 14, 2020. (As you know from my initial letter yesterday, my comments now include mention of proposed legislation I recently wrote, exercising my rights under Article 19, concerning the reform of jury duty laws. My MA representative, Thomas Stanley, filed these bills in the MA House on 7/31/20 (not 7/29 as I wrote yesterday). My bills are HD.5217, HD.5218, and **HD.5219**.) As I stated yesterday I am an educator and member of the public.

Regarding your report, I see pages 19-20 of your report states:

> ***a. Revisions to Juror Summonses, Notices, and Response Forms:***
> *... prominently inform jurors of the option of* ***those age 70 or over*** *to elect not to serve;* (emphasis added)

My comment is: I disagree, as I believe both the current law and the summons should be revised to state as follows: those "**age 60**" or over – not "70."

Senior centers in MA typically set the age of membership for seniors at "**age 60.**" Grocery stores during this pandemic have set special shopping hours for those "**age 60"** or over.

Your report repeatedly mentions **age 60** – not age 70:

- *"particularly for attorneys over* ***the age of 60****."* (See: "Physical Distancing" - Page 56)
- *"health concerns or are over* ***sixty years old****."* (See: "Jury Pool Composition" - Page 57)

In addition, on your report's page 97, under *"POTENTIAL PRE-SERVICE COVID-19 QUESTIONS,"* you are considering asking: ***"Over 65 Y/N"*** Again, we are in the 60's - not age 70.

My proposed legislation, **HD.5219**, attached, changes the age a potential juror can opt out: The current law citing an age of "70" is changed to: age 60. After I showed all three of my bills to the director of a large, public senior center here in MA, she emailed back to me:

> "Hi Susan: You have some valid concerns. …"

I believe she was referring mostly to **HD.5219** -- and every MA senior center director would agree with her.

Consequently, I hope you will revise the summons to age "60." Also, I ask you help change the law, and email MA House Chair of Judiciary Rep. Claire Cronin, to let her know you support the speedy passage of **HD.5219**.

Thank you.

Respectfully,

Susan Alyn
Waltham, MA

Encl. – **HD.5219**

HOUSE DOCKET, NO. 5219 FILED ON: 7/31/2020

HOUSE . . . . . No.

The Commonwealth of Massachusetts

PRESENTED BY:

***Thomas M. Stanley*, (BY REQUEST)**

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to helping seniors age 60-69, due to COVID 19, by reforming jury duty disqualifications.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Susan Alyn	*171 Lake Street, Waltham, MA 02451*

HOUSE DOCKET, NO. 5219 FILED ON: 7/31/2020

HOUSE . . . . . No.

[Pin Slip]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act relative to helping seniors age 60-69, due to COVID 19, by reforming jury duty disqualifications.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 234A of the Massachusetts General Laws, Part III, Title II, Section 4 DISQUALIFICATION FROM JUROR SERVICE (2) is hereby amended by repealing the words "seventy years of age or older" and adding the following words: "sixty years of age or older." The new text is "Such person is sixty years of age or older and indicates on a juror summons response an election not to perform juror service."

From: Susan Alyn
Sent: Friday, August 7, 2020 10:22 AM
To: Christine.Burak@jud.state.ma.us
Subject: 3rd Public Comment, dated August 7, 2020

August 7, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice Via email at Christine.Burak@jud.state.ma.us

Hello -

Attached is a pdf of my 3rd
1-page public comment, dated today August 7, 2020.

Also attached is a bill I recently wrote, HD.5218, referenced in my comment.
The purpose of this bill is to reform current enforcement of jury duty.

Susan Alyn
Waltham, MA

Encl.

August 7, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice / Via email at Christine.Burak@jud.state.ma.us

RE: 3rd public comment of 4 public comments on JMAC Report

Dear Justices of the Supreme Judicial Court (SJC):

As a concerned member of the public, I was disappointed to find the report's recommendations do not include any proposed revisions to the criminal penalties for jurors who fail to show up at court or fail to respond to a summons. The report makes only one reference to the existing enforcement system on page 6:

> "At the same time, we acknowledge that jury service compels public participation upon pain of **criminal penalty**. That recognition dictates that we conduct the process with due regard for the health and legitimate concerns of those compelled to participate." (emphasis added)

An abbreviated description of the current "criminal penalty" is buried in a footnote on pages 19-20:

> "a knowing failure to obey the summons without justifiable excuse is a crime, which, upon conviction, may be punished by fine of not more than two thousand dollars; …" (footnote 27)

Omitted in the report is the fact that under current MA law a delinquent juror is also subject to a **Warrant of Arrest and a criminal record**. What awaits a delinquent juror is not solely a punishment by "fine."

In the context of a pandemic: how can the court legitimately hold anyone in contempt for being a no-show juror? How can the court claim to know a person's state of mind in these uncertain times? What if a potential juror discovers online the media has already published numerous reports of COVID-19 infection in the courts? How can a frightened person's decision to then ignore the jury summons or not show up at the courthouse constitute **a crime**? I believe these are valid questions and should have been addressed.

A Harvard expert cited repeatedly in this report, Dr. Allen, included this disclaimer on page 101:

> "…Adherence to any information provided will not ensure successful treatment in every situation, and… **there is no 'zero risk' scenario."** (emphasis added)

In addition, page 10 of the report gave insight into the state of mind of attorneys:

> "**Attorneys are concerned about their own health and safety**, especially if they fall into one or more of the higher risk categories because of age, health conditions, or having vulnerable members of their households." (emphasis added)

Consequently, with respect to criminal penalties, my comment is: this report should have included a recommendation similar to what Missouri plans to do about no-show jurors, as according to page 84 of the report, Missouri is:

> "**Suspending the issuance of warrants for jurors who fail to show up**."

If it is truly important to the court to maintain the trust of the public, I would like to see the court recognize that in the context of a pandemic -- which has no end in sight and may last years -- all criminal penalties should now be eliminated. Recently I wrote a bill, **HD.5218**, to reform the current enforcement system to a civil fine only. A copy of the bill is attached. I ask that you consider supporting this bill. Thank you.

Respectfully,

Susan Alyn
Waltham, MA

HOUSE DOCKET, NO. 5218 FILED ON: 7/31/2020

HOUSE . . . . . No.

The Commonwealth of Massachusetts

PRESENTED BY:

***Thomas M. Stanley*, (BY REQUEST)**

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to helping seniors age 60-69, and all, due to COVID 19, by reforming jury duty enforcement to a civil matter only, repealing current criminal enforcement.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Susan Alyn	*171 Lake Street Waltham, MA 02451*

HOUSE DOCKET, NO. 5218 FILED ON: 7/31/2020

HOUSE . . . . . No.

[Pin Slip]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act relative to helping seniors age 60-69, and all, due to COVID 19, by reforming jury duty enforcement to a civil matter only, repealing current criminal enforcement.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 234A of the Massachusetts General Laws, Part III, Title II, "Section 42: ENFORCEMENT OF CHAPTER," is hereby amended by striking all words pertaining to criminal enforcement, specifically:

(A) "may issue a warrant for the arrest of the juror or"

(B) "shall be guilty of a crime, and upon conviction thereof,"

and striking all other text except:

"Any grand or trial juror who fails to appear for juror service or who fails to perform any condition of his juror service may be punished by a fine of not more than two thousand dollars."

SECTION 2. Said Chapter 234A, Part III, Title II, is hereby amended by striking and repealing in its entirety Section 44: CRIMINAL COMPLAINT FOR DELIQUENT JUROR.

From: Susan Alyn
Sent: Wednesday, August 12, 2020 5:03 PM
To: Christine.Burak@jud.state.ma.us
Subject: PS Typo corrected / Fwd: 4th Public Comment - August 12, 2020

PS I meant to type "economic uncertainties" (not "certainties") inmy 4th paragraph, and I corrected this typo in the public comment attached.

---------- Forwarded message ----------
From: Susan Alyn
Date: Wed, 12 Aug 2020 16:00:14 -0400
Subject: 4th Public Comment - August 12, 2020
To: Christine.Burak@jud.state.ma.us

August 12, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice Via email at Christine.Burak@jud.state.ma.us

Hello -

Attached is a 1-page pdf of my 4th public comment, dated today August 12, 2020.

Also attached is a bill I recently wrote, HD.5217, referenced in my comment. The purpose of this bill is to reform the current civil fine for no-show jurors.

Finally, the black and white photo attached, from the movie "12 Angry Men," is also referenced in my comments.

Thank you.

Sincerely,
Susan Alyn
Waltham, MA
Encls.

August 12, 2020

Attn: Christine Burak, Legal Counsel to the Chief Justice / Via email at Christine.Burak@jud.state.ma.us

RE: 4th public comment on JMAC Report

Dear Justices of the Supreme Judicial Court (SJC):

As you know I wrote comments to you last week, as I read this report and found it omitted any proposed reforms to the existing jury duty system in terms of finding willing jurors and current enforcement laws.

I disagree with the omission of proposed changes, as I feel it is a highly material omission in these times of a seemingly never-ending pandemic. I note that the report's footnote number 27 on pages 19-20 states:

> "a knowing failure to obey the summons without justifiable excuse is a crime, which, upon conviction, may be punished by fine of **not more than two thousand dollars**; …"

I believe the current law should be changed to take into account the economic uncertainties people are suffering, and the civil fine for a no-show juror should be no more than $25 (twenty-five dollars). Exercising my rights as a citizen under Article 19 of the MA Constitution, I recently wrote a bill proposing this new lower fine amount; HD.5217. A copy of the bill is attached.

While the $25 fine was originally proposed to alleviate economic hardship for people, this lower amount could also serve a useful purpose for the court system -- if the court is now considering making jury duty a voluntary – not compulsory – civic duty (as I suggested in my first public comment). The $25 fine could be used to urge volunteer jurors to arrive on time, so that any *delay* in a juror's appearance is considered *no show* – and results in a $25 fine, which is strictly enforced that very same day. Thus, the late juror's payment is less. Instead of receiving the full $50 pay, the pay would be only $25 (if the juror is tardy). I believe this should be strictly enforced, to emphasize to jurors the importance of being on time to the courthouse, so that court trials can begin promptly.

Thank you for taking the time to read my comments. I believe this pandemic has brought about a pivotal moment in history. My suggestion to consider having a voluntary jury pool reminds me of when our nation switched from a draft to volunteer army, completely changing the way the public joins the military and serves. It seems to me possible there will be towns in MA where enough people do volunteer to serve on a jury. Maybe a pilot program to assess how many people would volunteer for jury duty would result in some locales providing enough diverse jurors – these towns could be known as "Summons-Free" towns. Other town and cities -- ***without*** enough volunteers -- would continue to receive summons. Perhaps people could serve once per year if they wish, instead of only once every three years. In addition, maybe the court's Office of Juror Commissioner could keep juror names on a waiting list, if a town has more than enough volunteers, so that instead of an annual list, that office is already preparing a list for the next year.

Prior to becoming an educator, I worked professionally in advertising. If I were creating a public service pilot program /ad campaign to see if people will volunteer as jurors, here is the info I think the court needs to tell the public, as this info was very surprising to me as a prospective juror: 1) MA pays $50 per day – and this rate is the highest of all 50 states; 2) One Day or One Trial – you can serve only one day and be done; 3) No fulltime residency required as you can be an out of state resident/MA college student and serve. I think a print campaign should include posters in places of employment, schools, colleges, and elsewhere. Popular culture could be used to connect with the public. A black and white photo from the movie "12 Angry Men" – showing all white men – might be captioned : ***"What's wrong with this picture?"*** And explain the need for juror diversity (and give instructions for how to volunteer as a juror).

Susan Alyn, Waltham, MA
Encl.

HOUSE DOCKET, NO. 5217 FILED ON: 7/31/2020

HOUSE . . . . . No.

The Commonwealth of Massachusetts

PRESENTED BY:

***Thomas M. Stanley*, (BY REQUEST)**

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to helping seniors age 60-69, and all, due to COVID 19, by reforming jury duty delinquency civil fines.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Susan Alyn	*171 Lake Street, Waltham, MA 02451*

HOUSE DOCKET, NO. 5217 FILED ON: 7/31/2020

HOUSE . . . . . No.

[Pin Slip]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-First General Court
(2019-2020)

An Act relative to helping seniors age 60-69, and all, due to COVID 19, by reforming jury duty delinquency civil fines.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 234A of the Massachusetts General Laws, Part III, Title II, "Section 42: ENFORCEMENT OF CHAPTER," is hereby amended by striking and repealing the amount of potential civil fine of "not more than two thousand dollars" and adding "not more than twenty-five dollars."


12 Angry Men

From: Gregory A Meehan
Sent: Tuesday, August 4, 2020 3:52 PM
To: Christine.Burak@jud.state.ma.us
Subject: JAMC report feedback

Good Afternoon,

After reading JAMC report, I noted that Lawrence Superior could accommodate 14 jurors in each of it's courtrooms. When factoring in social distancing the maximum number of jurors that we can accommodate in any of our courtrooms is 6. As yo know, the Trial Court implemented a thoughtful social distancing plan for each of its courts and courtroom. If we were to place 14 jurors in a courtroom, it would essentially put us at our maximum capacity number for public and staff. If we want to maintain social distancing, the courtrooms at Lawrence Superior are inadequate for this purpose and should not be considered as a possible site for jury trials

Thank you

Greg Meehan
Chief Court Officer
Lawrence Judicial Center
2 Appleton Street
Lawrence, MA 01840

From: Mark
Sent: Tuesday, August 4, 2020 6:57 PM
To: Christine.Burak@jud.state.ma.us
Subject: Jury Trail

They shouldn't conduct any trials untill they have a vaccine. Especially in Springfield Court Complex where there have been many issues with the air quality. There are many people within the State that have underlined medical problems which they would need to be medically excuse from a ready over burden medical provider. It's my strong belief that mask are not working. Thank you for the chance to give input.

From: Kathy Godfrey
Date: August 5, 2020 at 1:45:30 AM EDT
To: christine.burak@jud.state.ma.us
Subject: Comments re: Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials

As a over-60 retiree with an over-70 spouse, I am dreading the possibility of having to serve as a juror when my current COVID-19 postponement runs out. I'll be 65 by then, and the CDC at least considers that to put me in a high-risk group, even if the JMAC does not. My husband and I have been adhering to social distancing guidelines, and I would never consider going to a crowded area (public or private), or using public transportation (which I would have to do to serve in Lowell), unless the Commonwealth forced me to. Even under the proposed guidelines, serving would be a "Higher Risk" situation as described in the CDC's recommendations:

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html

It sounds as if the court would mandate jurors not just to wear a mask, but to wear one that the court would provide. What guarantee is there that the court's mask would fit, or be comfortable enough to wear all day without being distracted by it? (I know that mine fits, and I know that it's clean.) If the court mandates which mask I wear, and requires me to appear, will it also accept liability if I, or my husband, contract COVID-19?

I've also sworn off public restrooms for the duration, but I certainly couldn't expect to get through a day in court without needing to use one. Just thinking about that would distract me while sitting in the court (and, of course, thus paradoxically increase the chance I'd need to use the restroom).

As for rapid testing of jurors, I'm not impressed by the current false-negative rates reported for such tests, and I should also point out that if the actual incidence rate of COVID-19 in the population remains (hopefully) low (<5%), the false-positive rates would be pretty high as well, even for a good test.
I appreciate the need for juries, but unlike Texas Lt. Gov. Dan Patrick, I'm not willing to take a chance on my survival for them. And I'm pretty sure that would occupy my mind while sitting in a courtroom, wondering if I was committing suicide and/or potentially killing my husband.

https://www.nbcnews.com/news/us-news/texas-lt-gov-dan-patrick-suggests-he-other-seniors-willing-n1167341

Katherine Godfrey
Middlesex County

From: Marian Dunshee
Sent: Wednesday, August 5, 2020 8:11 AM
To: Christine.Burak@jud.state.ma.us
Subject: Comments on jury trial

Hello Ms. Burak,

I am 67 and have been summoned for jury duty on October 6. I responded Yes that I would serve, but I also know that I may have to back out regardless of the consequences if I fear for my health.

I have always been proud to serve, but this year — of course -- I am very uncomfortable with the idea of being indoors with numerous others for an extended period of time. I have found that in the past jury selections there is a long period while 50 or more of us sit in chairs in one room waiting.

Even if I could wait somewhere safe (say, my car) until the panel candidates are determined that would help. However, if I'm called for an actual trial the problem of being indoors, etc is still there.

I worry if older folks and/or those with medical issues get an exemption that the jury panels would be skewed and not a jury of "one's peers." Is there any possible way a trial could be held virtually for just this pandemic period? or maybe the old folks/medically compromised jurors could be Zoomed in. I wish I had a better solution.

Marian Dunshee

From: DA Michael OKeefe
Sent: Wednesday, August 5, 2020 1:20 PM
To: christine.burak@jud.state.ma.us
Subject: Jury Trials and other things

You broke it ,you fix it .

From: David.Mintz
Sent: Wednesday, August 5, 2020 12:47 PM
To: christine.burak@jud.state.ma.us
Subject: JMAC Report

Good afternoon, attorney Burak.

I am a criminal defense/civil litigator admitted to the bar in 1982, and in private practice since 1988. I wanted to pass along a couple of comments concerning resuming jury trials in Massachusetts.

Although I appreciate the obvious effort and thought that went into the Report, a couple of things struck me as problematic. The most problematic recommendation concerns the wearing of facemasks. Although I understand the rationale and public health benefits, the "masking" of attorneys, defendants (in criminal cases) and trial jurors is bound to eliminate the transmission of information critical to assuring fairness in civil and, particularly, criminal trials. Such a requirement obviously undercuts the philosophies that make physically "being there" so important to conducting jury trials. Masking makes communication more difficult, and undermines important interactions and cues between and among litigants, jurors, judges, and attorneys. One need only to reflect on their own experiences with trying to recognize and or "read" someone who is masked, let alone understand them without the aid of watching their expression and facial movements. I just think that is a bad idea which sacrifices fairness at the altar of expediency (meaning, I understand the importance of resuming jury trials sooner rather than later). At the very least, the acrylic faceguards (deemed required for testifying witnesses), so one can see the whole face, are a better alternative.

As a criminal defense attorney, I am also not a fan of any attempt to restrict peremptory challenges.

Thank you for your time and effort. We are at an historic crossroads and I am grateful for all the hard work that the judicial branch of our state government has done, is doing, and will do in order to continue to earn and inspire the confidence of its citizenry.

David

David G. Mintz, Esquire
Attorney and Counselor at Law

From: Richard J. Plouffe, Esq.
Sent: Wednesday, August 5, 2020 12:08 PM
To: Christine.Burak@jud.state.ma.us
Subject: Question/Comment on Jury Management Report

Atty. Burak~

My practice consists primarily of cases in both the small claims and regular the civil sessions of the Dedham District Court [DDC]. In fact, for more than 15 years, due to the volume of insurance subrogation claims I handle, I have my own small claim session in DDC on the third Wednesday of most months.

I have briefly reviewed the 122 page comprehensive report submitted on July 31, 2020 and do not see any specific reference to how (if at all) the small claims jury trials will be changed under Phases 0 to 3 detailed on pages 16 to 19.

My Question - How will small claims jury trials be managed under the new system?

My Comment - Given that under Phase 2, the "highest priority" cases will (rightly) be tried first, and that Phase 2 will likely last through the end of 2020, and that Phase 3 will be in effect until we get "widespread vaccination or herd immunity", from a practical standpoint, I predict that a clever defense counsel in any regular district court civil case (and especially in a very low priority small claims jury case) will request a jury trial and simply delay making any good faith settlement offers until a case gets a "firm" trial date. Under the plan presented in the July 31, 2020 report, *that may take several years!*

I truly appreciate the time and effort that has clearly been put into the July 31, 2020 report, but suggest that the small claims jury cases have been forgotten!

I'm ready, willing and able to assist in setting up a procedure to include it in the "new normal".

If you need more from me, please let me know.

Rick Plouffe

Richard J. Plouffe, Esq.

From: Thomas Robinson
Sent: Wednesday, August 5, 2020 3:54 PM
To: christine.burak@jud.state.ma.us
Subject: RE: Jury Management Advisory Committee Recommendations

August 5, 2020

Christine Burak
Legal Counsel to the Chief Justice
of the Trial Court

Dear Attorney Burak:

I object to the current proposals of the Jury Management Advisory Committee. We are in the midst of a pandemic. There is currently no vaccine and no FDA approved treatment available for COVID-19. Resuming jury trials with people sharing indoor space, would place the parties, attorneys, court personnel, judges, jurors, and their family members to heightened risk of transmission, infection, and death. We do not understand the nature of the risk.

The Committee has relied upon the advice of a learned scholar, Joseph Allen, in the area of public health and building safety in particular. It is not clear from the report whether or not Mr. Allen conducted an analysis of the risks to public health presented by jury trials. Understandably, the Committee's report focuses on strategies to mitigate the risk presented by gathering people in a building, but this approach puts the cart before the horse. While mitigation is of vital importance, the foremost concern of the Trial Court should be the nature of the risk itself. It has not been fleshed out. What is the likely rate of transmission, infection, and death, based upon placing groups of people in shared spaces, taking into account the mitigation measures suggested? There needs to be some attempt to answer this question. I suggest that at a minimum the Committee should consult with an epidemiologist and request a risk analysis on this point. The conclusions of this analysis should be shared with the legal community and the public. People participating in-person in the legal process should be apprised of the risk and enter into it knowingly.

I believe very deeply in the importance of the jury trial as a necessary safe guard of citizen rights and a check on government power. However, during this pandemic, in-person jury trials should be delayed until the Trial Court, the legal community, and the public has more concrete information about the risk.

Very Truly Yours,

Tom Robinson
Attorney at Law PC

From: Quinn, Thomas M (DAA)
Sent: Thursday, August 6, 2020 3:52 PM
To: 'Christine.Burak@jud.state.ma.us' <Christine.Burak@jud.state.ma.us>
Subject: Comment on Recommendations of the JMAC

Ms. Burak,

I am writing in my capacity as the District Attorney of Bristol County. My comments would focus on reinstituting jury trials in Superior Court, which is addressed in Phase 2 of the Recommendations. Obviously following the appropriate protocols to protect all parties involved in the jury selection process is of great importance. However, I would encourage the Committee to consider the empanelment of Superior Court cases to focus on shorter trials that prioritize cases in which the defendant is in custody. Many of these cases do not last more than one full day of evidence. This would allay jurors concerns of having to spend a long period of time engaged in coming and going to the courthouse. This would also allow defendants who are in custody, on serious cases, to have their day in court and either resolve the case or proceed with a jury trial. I think this is something that can be accomplished with appropriate protocols in place.

The most serious offenders are often in custody in Superior Court. Without jury trials we have no leverage to try and bring about a fair resolution of the case. This will continue indefinitely until jury trials are allowed to resume in Superior Court. This would be a good way to phase in Superior Court jury trials for serious cases without tying up jurors on murder cases and/or sexual abuse cases for multiple days. The focus can also be on the many cases pending in Superior Court that are not life felonies. This would drastically limit the number of jurors that can be challenged in a particular case. The selection of the jury would be much quicker and limit the jurors exposure to each other and any participants in the trial. The resumption of these shorter Superior Court jury trials could start in Phase 1 or shortly after the beginning of Phase 1.

Thank you for your consideration of this proposal.

Sincerely,

Thomas M. Quinn III
Bristol County District Attorney

From: CCJOGR
Sent: Thursday, August 6, 2020 6:09 PM
To: Christine.Burak@jud.state.ma.us; Francis.Kenneally@jud.state.ma.us
Subject: Fwd: COVID-19 Related - Jury Management Advisory Committee: Report and Recommendations

Ms. Burak,
For the Chief,

Judge as we stated, in the beginning, we did not think much of this virus; the numbers verify our conclusions, and we are on the front lines with regard to research, we know it before CDC, this was not a serious contagion, as the numbers confirm, The virus is weakening and is expected to be absorbed to the extent of common influenza by the immune system. Accordingly, we see no need for the exercise noticed. Normalcy is the order of the day.

C. Francis Tynan For CCJOGR

From: CCJOGR
Sent: Friday, August 7, 2020 11:05 AM
To: Jennifer L LaRocque <jennifer.larocque@jud.state.ma.us>
Subject: Re: COVID-19 Related - Jury Management Advisory Committee: Report and Recommendations

Thank You
WE would like to see more space for each juror, we believe this would make them more comfortable and attentive.

cft/ccjogr

From: CCJOGR
Sent: Saturday, August 8, 2020 3:35 PM
To: Jennifer L LaRocque <jennifer.larocque@jud.state.ma.us>;
Francis.Kenneally@jud.state.ma.us
Subject: Re: COVID-19 Related - Jury Management Advisory Committee: Report and Recommendations

Clarification,
This recommendation should not be taken as suggestive of altering any present order by the public authority, it simply means, the current safeguards are sufficient, spacing is an issue, related to social anxieties, that exist is everyone, and causes distraction.-cft/ccjogr

From: James J Foley
Sent: Friday, August 7, 2020 12:24 PM
To: Christine Burak <christine.burak@jud.state.ma.us>
Subject: Comments on Jury Trial Report

I believe that air quality will prove to be the most important factor in determining whether a court can conduct jury sessions. My court, Quincy District, might be able to restructure our present space for a socially-distant jury. But, when smoking was allowed here, a cloud of cigarette smoke would accumulate in the second floor lobby (which leads to most of the courtrooms and jury pool) and the cloud would get thicker as the day went on. Obviously, there was little or no ventilation and, as far as I know, the situation was never improved. With the concern over potential spread of Covid-19 through aerosols, it seems that for Quincy and similar older court buildings, a non-court location is necessary.

It was noted that clerks expressed concerns about transporting evidence and other paperwork to a non-court location. Even if air quality was not an issue, the contortions we would need to go through to conduct a socially-distanced trial in a space never intended for such a use would far outweigh the minor inconvenience in transporting records.

The former Lowe's building in Quincy, mentioned in the report, would seem an ideal location. The proposed Quincy Judicial Center would contain space for Superior, District, Juvenile and Housing Court and it would seem the Lowe's site could accomodate some or all of these courts. It is located in the most heavily populated part of the county, has easy access to the Southeast Expressway, Route 128 and Route 3 and is across the street from a T Red Line station.

Jim Foley, Asst. Clerk-Magistrate, Quincy District Court

From: Dan Solomon
Sent: Wednesday, August 5, 2020 2:59 PM
To: Christine.Burak@jud.state.ma.us
Subject: Jury Trial Advisory Report

This report is, to put it kindly, aspirational, but more importantly bespeaks and utter lack of comprehension of the basic nature of criminal trial practice in the Commonwealth. Trial impracticalities aside, the cold truth is this seeks to adopt the same stance as major league baseball and the NFL--'we want to do business so here's a plan which we know damn well is imperfect, we know some people will get sick and some will die, but all in all the risk is worth it.

There is no way to control with whom anyone will be having contact, our client population comes in the main from dense and impoverished communities most susceptible to COVID-19, and all of the wiping and screening and disinfecting cannot obviate or even do better than somewhat minimize the risk--frankly, this is appalling. There are any number of ways I may depart this mortal plane but being collateral damage is not my favorite choice--the only sane and fair focus should shift to disincarceration--having removed all of the protection of Rule 36/speedy trial, there should be a massive a mount of give on the other end of holding people pre-trial but I suspect strongly that your bosses lack the moral courage

From: Joe Provanzano
Date: August 8, 2020 at 3:03:31 PM EDT
To: christine.burak@jud.state.ma.us
Subject: Jury trials

I am very very concerned about conducting a jury trial under the current circumstances. Being over 70 with copd i am also concerned for my own safety.

Joe Provanzano

From: Michael Anthony Sullivan
Sent: Monday, August 10, 2020 9:33 AM
To: Christine Burak <Christine.Burak@sjc.state.ma.us>
Subject: JMAC report

Good morning Chris:

Hope all is well.

As you will note many of the jury pool occupancies are in excess of 25. The Governor's current order does not allow inside gathering to exceed 25, with exceptions - judiciary being one. Although, the order does not apply to the judiciary, should the SJC consider the heath ramifications and the public perception? This would not be a bar to conducting jury trials, we would just need break the pool up into smaller groups using court rooms, as they have done in some other states.

Just Monday morning thoughts - not Monday morning quarterbacking?

The report is very well written and thought out. The one concern I have, maybe in the implementation and micro management. The big thing I hear from the leadership teams in the field, is we know our building better and how it function, let us implement a plan. There seems to be an inherent mistrust of the field, that is not always well placed. Since the most recent court reform and the change in TC leadership, many of us have developed leadership teams at each location were we work to make things work.

Thanks for listening - stay safe.

Michael

Michael A. Sullivan
Clerk Magistrate
Middlesex Superior Court

From: Kevin Powers
Sent: Monday, August 10, 2020 11:49 AM
To: christine.burak@jud.state.ma.us
Subject: RESUMPTION OF JURY TRIALS

Ms. Burak

I am responding to the SJC's request for comments regarding the resumption of jury trials.
I am a 68 year old civil litigator and my wife is a cancer survivor. Because my wife and I are in a high risk category I am particularly concerned that the Courts will begin hearing civil jury trials before it is safe for me and others in similar circumstances.

As of today (8/10/20), the Massachusetts the percentage of positive tests is approximately 2%. This means for every 100 people in a jury pool at least 2 will have the virus. I am concerned with the health of attorneys and all participants in a trial. Many of our courtrooms are ancient and do not have proper ventilation. Having attorneys and witnesses wearing masks in unworkable, they will have trouble communicating. Getting to Courtrooms in elevators with members of the public may pose an undue risk.

I am also concerned that in Suffolk County Covid may further suppress the number of minority jury members (a problem that has existed long before Covid).

If jury trials are scheduled anytime soon the SJC should direct Trail Judges to allow continuances for attorney who are in high risk categories, or who have family members in high risk categories, due to age or underlying health issues.

Trials are always stressful but are also amazing exercises in real Democracy. My greatest experiences as an attorney have been trying cases but Trails should not be a life and death experiences.

Thank you for your consideration of my perspective.

Kevin

Kevin G. Powers, Esq.
Powers, Jodoin,Margolis & Mantell*

*Successor to RODGERS, POWERS & SCHWARTZ LLP

From: David Eng
Sent: Monday, August 10, 2020 5:05 PM
To: Christine.Burak@jud.state.ma.us
Subject: public comment on JMAC recommendations

Attorney Burak,

Please accept my comments on the JMAC recommendations, in light of having recently received a jury summons for November 2nd, which would likely place my jury duty at the beginning of Phase 2. While I am uncomfortable with the thought of spending a day in a Courthouse, I also recognize the need to resume jury trials, and offer these comments as a way to make the best of a bad situation.

- Share as much information as possible about checking in and other procedures in advance of the jury duty date.
- If the Court plans to distribute surgical masks to jurors, please provide them before entering the building, after the administration of screening questions, so that unmasking and re-masking can happen outdoors.
- Have Court personnel readily available to manage the movement and physical distancing of jurors (and others) through the building.
- Prohibit food or beverage consumption inside the building to limit unmasking. Give jurors the option to go outside for lunch. If indoor food or beverage consumption is allowed, please restrict it to designated rooms where jurors can opt in to the room to remove their masks to eat or drink. I would prefer to not eat or drink for the day, rather than be in an indoor space where people are removing their masks. The recent outbreak of cases at Baystate Medical Center was traced to a shared breakroom where employees removed their masks, https://www.masslive.com/coronavirus/2020/07/baystate-health-reports-4-new-coronavirus-cases-in-outbreak-at-springfield-hospital.html. Break rooms are seen as a source of outbreaks, https://abc7news.com/coronavirus-tranmission-break-room-ucsf-doctors-warning/6356951/.

Thank you for the opportunity to offer these comments.

Regards,
David Eng
Arlington, MA

From: Bethany L. Stevens
Sent: Tuesday, August 11, 2020 4:16 PM
To: Christine Burak <christine.burak@jud.state.ma.us>
Subject: Fwd: COVID-19 Related - Jury Management Advisory Committee: Report and Recommendations

Dear Ms. Burak,

I am writing to suggest that an experimental trial be added to Phase 0 based on Models 9 & 10 ((trial participants in the courthouse with jurors participating remotely either from different area of the courthouse (Model 10) or from a separate "jury center" location (Model 9)).

I had suggested to the jury management committee that having a jury location by region to support multiple courts and therefore available to whichever court has a trial that goes would (1) have a greater impact on case backlog (rather than trying to coordinate the trial participants and jury to be in the same location which requires identifying the one trial that is really going to be a trial); (2) allow leaving the cases in their territorial courts; (3) give jurors more comfort in COVID-19 protocols where they would not have to be in the same room as the trial participants; and(4) provide control over the jurors by having the jurors all together, just separate from the trial participants (i.e., they would NOT be participating from home, but from a designated jury location under supervision of court officer and a camera for the judge and courtroom participants to observe the jury.

I know the JMAC committee's preference would be for the jurors to be in the same room as the trial participants, and that there may be concern that parties may not agree to this procedure, however, including this model in the mock trial Phase 0 could see if the concerns are ones that can be addressed or mitigated and, may provide a desirable option that parties may want to choose if ultimately more than one model is adopted (especially if having all participants in the same in-person location is considered more risky and/or provides only a limited ability to address backlog).

Sincerely,
Bethany Stevens, Esq.
Director of Legal Policy
Administrative Office of the District Court

From: Paul Dullea
Sent: Wednesday, August 12, 2020 4:15 PM
To: Christine.Burak@jud.state.ma.us
Cc: Brendan Carney <bcarney@carnlaw.com>
Subject: MATA JMAC Comments

Dear Christine:

Attached please find the MA Academy of Trial Attorneys' comments to the JMAC Report and Recommendations. Also, if I haven't already informed you, Brendan Carney is the new MATA President. His term runs from July 1, 2020 to June 30, 2021. I have cc'd him on this email.

Thank you for your kind assistance.

Very truly yours,

Paul Dullea
Executive Director
Massachusetts Academy of Trial Attorneys

August 12, 2020

Chief Justice Judith Fabricant, Chair
Jury Management Advisory Committee
Three Pemberton Square, 13th Floor
Boston, MA 02108
C/O Christine Burak, Esq., Christine.Burak@jud.state.ma.us

Re: July 31, 2020 Report

Dear Chief Justice Fabricant:

On behalf of the Massachusetts Academy of Trial Attorneys (MATA), I write to thank you for taking the initiative to create such a comprehensive plan to resume jury trials in the Commonwealth. We share the interests of the Court and other stakeholders of our justice system to resume jury trials as quickly and safely as possible for all. MATA would like to take this opportunity to offer some commentary, in the hopes of assisting your Committee in providing the highest level of safety to the judiciary, personnel, venire, litigants, witness, and counsel, while also preserving the parties' constitutional right to a fair trial.

Providing a safe environment will instill a sense of confidence in the jury pool that they can provide this valuable service to their communities without putting themselves or their families at risk. Increasing the number of pool members who are willing to serve will also provide litigants with a more diverse jury which would accurately reflects the community in which serve. Providing the highest level of safety is a necessary component of creating a diverse, fair, and impartial jury.

With the plan as proposed, we anticipate a disproportionate number of the elderly will be disqualified from service; parents and folks caring for others would not be able to serve. A potential juror who does not want to serve need merely self-report symptoms in order to be excused. Minorities are disproportionately affected by this virus and suffer from pre-existing vulnerabilities some five times that of the general population. With this plan, we are certain to see a disproportionate reduction in minority representation as well. We are concerned how the elimination of these types of people may impact the fairness that our clients can obtain.

In order to protect all jurors, including those who are most vulnerable, we recommend an emphasis on personal protection for each individual jurors, such as the use of Plexiglas or plastic, properly ventilated, inclusive of all HEPA filters or state of the art safety equipment. These might form "safe juror spaces," and could be equipped with automatic spray sanitizers for juror rotation, unobstructed visibility, and individual sound control. Similar spaces can be set up for judges, witnesses, and others and have been used or considered in other states.

In addition, COVID-19 has caused an unprecedented divisiveness in the Commonwealth and nationally. Bias and partisanship are at an all-time high while objectivity and neutral fact finding at an all-time low. If we are to assemble juries that truly resemble the community to render a fair and impartial verdict, we must ensure a thorough voir dire process. The key is not to overhaul

our developing voir dire process, required by statute, but to keep jurors, judges, attorneys, Court personnel, and the public safe. A jury box consisting of six jurors using Plexiglas dividers would allow for safe and effective panel voir dire, further allowing for a more expedient, fair and impartial jury selection. We encourage the Committee to maintain panel voir dire, which, following education, study, and an evolving practice, has become the gold standard for jury selection in the Commonwealth for both efficiency and fairness. With the use of safe juror spaces, panel voir dire is far preferable to individual voir dire on every level. The jurors are physically present in any event, so panel voir dire would not increase risk and would, in fact, decrease risk of infection as it would lower the amount of time required to select a jury (and thereby decrease the amount of time jurors spend in the courthouse) and allow them to be safety seated in the spaced-out jury box with Plexiglas dividers and face masks when not speaking. If done so correctly, panel rather than individual voir dire would be the far safer method for empaneling jurors. Segregating one juror for individual voir dire would not only require cleaning of that separate space after each individual juror is questioned there, but would require the remaining pool to be together in a separate larger room for a longer period during the tedious individual voir dire process.

And we see no need to reduce the number of peremptory challenges. The current practice strikes a fair balance. In this pandemic, they are more important than ever before. We suggest that the plan provide that a challenge for cause should not be affected by the difficulties caused by COVID-19 and that there should not be any extra rehabilitation by judges, particularly if there is a reduction in the number of peremptory challenges; if anything, there should be more such challenges. If not, MATA respectfully requests the number of challenges remain proportionate to the size of the jury. For example, if we move back to a jury of twelve, then our current peremptory norms should be reinstated.

As to the scope of voir dire, it is important that counsel be allowed to inquire about the pandemic. It affects everyone in different ways, and how prospective jurors respond to it is relevant to their ability to sit. It is important to explore how the virus has influenced jurors, especially with respect to impartiality and bias. In addition, more than beforehand counsel should be able to ask about politics and the press. Circumstances have changed dramatically, and attorneys should be allowed to probe in a broader manner than before we all went into lockdown. The world has changed and fairness considerations compel the permissible inquiry of jurors to account for that change.

We also recommend that a thorough voir dire process be augmented by the use of detailed jury questionnaires. Although these should not be considered a replacement for voir dire questioning, they could help enhance the goal of identifying a fair and objective jury pool.

We suggest that the safest means of conducting sidebar discussions over objections is through a video conference outside of the presence of the jury. There could be an area where attorneys could hold a brief video conference with the judge, with the sound controlled, so the jury does not hear. An alternative to that would be to dismiss the jury and hear the objections in open court. In any event, attorneys must be able to make a full and complete record for purposes of appeal and be heard with respect to objections.

Also, we suggest that counsel be encouraged to pre-mark all exhibits. This would reduce the handling of materials which could spread the virus. We also ask for some clarification on a few important aspects of the proposed plan:

1. What health data needs to change for Phase 1 to end before two months?
2. Can a party object to a trial by a jury of six, or is that a right?
3. Will counsel be able to apply for Phase 1, Phase 2, or Phase 3 trials?

Finally, we suggest that any new rules or orders be only temporary, and should expressly say as much. Once this public health crisis subsides, so too should any changes in the process. In addition, there should be periodic review of these rules and orders throughout the pandemic, so we can adjust or return to normal, as conditions dictate.

We are grateful for your including MATA and other bar advocacy groups in this process and we hope this is a continuing dialogue. We would gratefully appreciate the opportunity to arrange a virtual meeting with yourself, your Committee, and Chief Justice Gants to these and other concerns.

Very truly yours,

Brendan G. Carney
Brendan G. Carney
President

From: Tucker Merrigan
Sent: Wednesday, August 12, 2020 5:11 PM
To: Christine.Burak@jud.state.ma.us
Subject: Comments Re: JMAC recommendations

Hi Christine,

For CIVIL JURY TRIALS:

1) Please see the attached copy of a memo prepared by a colleague on the issue of jury sizes (6 vs. 12).

2) The attached table of the size of Civil Juries across the United States

Tucker

LEGAL ANALYSIS OF JURY SIZE: 6 VS. 12

I. Authority

M. G. L. A. c. 234A §68 makes reference to juries of 12 in the Superior Court and 6 in the District Court. This section states that "upon a finding of cause, the trial judge may impanel a lesser number of jurors than specified under this section." The law further states that nothing in §68 shall prevent the court from rendering a valid judgment based upon a verdict rendered by fewer jurors, so long as the parties have stipulated to this procedure.[1] §68 is unclear whether a judge, "upon a finding of cause," may impanel a lesser number of jurors in the *absence* of stipulation between the parties.

The Massachusetts Rules of Civil Procedure state that the jury may consist of any number less than twelve in the Superior Court so long as the parties agree to that procedure beforehand.[2]

That a jury of twelve is not a jurisdictional requirement in civil trials is evident in the statutory leeway given to proceeding with as few as ten jurors in the absence of agreement and with any lesser number if the parties agree.[3]

II. Constitutionality

In a civil case, a trial by jury of 12 is not constitutionally mandated.[4]

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[1] Mass. Gen. L. c. 235 §68: …Upon a finding of cause, the trial judge may impanel a lesser number of jurors than specified under this section. Nothing in this section shall prevent the court from rendering a valid judgment based upon a verdict rendered by fewer jurors than required under this section where all parties have by stipulation agreed to this procedure. Nothing in this section shall prevent the court from entering a valid judgment based upon a verdict rendered by fewer or more jurors than required under this section or based upon procedures other than that specified in this section where all parties have by stipulation agreed to such a number of jurors or to such procedures.

[2] Mass. R. Civ. P. 48: The parties may stipulate that the jury shall consist of any number less than twelve, or less than six in the District Court, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

[3] *Doyon v. Providence and Worcester R. Co.*, 31 Mass. App. Ct. 751 (1992).

[4] *Williams v. Florida,* 399 U.S. 78, 86–103, 90 S.Ct. 1893, 1898–1907, 26 L.Ed.2d 446 (1970). *Opinions of the Justices,* 360 Mass. 877, 879, 271 N.E.2d 335 (1971).

In *Doyon*, the Appeals Court of Massachusetts considered whether a judge erred in permitting a jury of more than 12 to deliberate and return a verdict in a civil matter. The Appeals court found no error, stating "Article 15 of the Massachusetts Declaration of Rights, while guaranteeing trial by jury in certain civil cases, does not prescribe the number of jurors. " '[T]he fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance....'" Opinions of the Justices, Supra at 879, 271 N.E.2d 335, quoting from and supplying emphasis to Williams v. Florida, 399 U.S. at 102, 90 S.Ct. at 1907."

The Court in *Doyon* went on to state that "As part of its inherent authority, the Superior Court 'has wide power to do justice and to adopt procedure to that end.' *Fanciullo v. B.G. & S. Theatre Corp.*, 297 Mass. 44, 51, 8 N.E.2d 174 (1937). See *Boyajian v. Hart*, 312 Mass. 264, 266, 44 N.E.2d 964 (1942). 'Short of impairment of the vital elements of the jury ..., there is no constitutional obstacle to its regulation and modification in the light of changed conditions or perceptions, or to the abandonment of older modes, or to the introduction of new ones.' Freeman v. Wood, 379 Mass. 777, 779–780, 401 N.E.2d 108 (1980). '[W]hat matters is whether [an adopted] procedure strikes at the fundamentals of the jury....' Id. at 781, 401 N.E.2d 108. Concern for the avoidance of mistrials in protracted cases frequently results in more than twelve jurors participating in civil trials in the Superior Court. Given the five-sixths rule of G.L. c. 234, § 34A,6 a jury of thirteen can participate in the decisional process without altering significantly the mathematics or substance of any party's statutory burden of persuasion. It is not unreasonable, therefore, for a judge, with the agreement of the parties, to permit all thirteen jurors who have heard a civil case to decide it. No jury fundamentals are undermined by such practice. Even were we to conclude that the agreement of the parties in a civil case was insufficient to relieve the court of the § 26B directive to reduce the jury to twelve members, we would be disinclined to apply a per se rule of reversal.7 The harmless error standard of Mass. R. Civ. P. 61, 365 Mass. 829 (1974), is sufficient to test the validity of the verdict rendered, and nothing before us indicates that the decision by thirteen jurors in this case was inconsistent with substantial justice."

The Court in *Doyon* relied heavily on a 1971 Opinion of the Justices published in response to a question propounded by the Governor to the Justices: "In criminal cases subject to trial in the (D)istrict (C)ourts, where the defendant has a constitutional right to jury trial, can this right be satisfied by trial before a jury of six rather than a jury of twelve?"[5] Briefly, the Opinion of the Justices was that a criminal defendant's constitutional right to a trial by jury is not infringed by a jury of 6 rather than 12 and the fact the juries are now compromised of 12 is simply a "historical accident…. wholly without significance." Although the 1971 Advisory Opinion issued by the Justices of the Supreme Court in their answer to this question was in the context of a criminal case, the Court clearly applied this analysis in *Doyon*, a civil action.

Further, the court in *Doyon* considers a jury of more than 12, however just as the Court determined no jury fundamentals are infringed in a jury trial of more than 12, there are similarly no jury fundamentals infringed in a jury of less than 12, as evidenced by criminal cases utilizing a 6 person jury.

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[5] *Opinions of the Justices,* 360 Mass. 877, (1971).

III. Conclusion

An argument to reduce the number of jurors in the Superior Court for civil actions is strongly supported in light of changed conditions presented by the COVID-19 pandemic. There is no constitutional obstacle to the abandonment of older modes and the introduction of new ones. Further, it may be argued that §68 allows the trial judge, upon a finding of cause, to impanel a number less than 12 in the absence of stipulation.

Changing the amount of jurors from 12 to 6 in civil actions presents no radical change, considering criminal cases – which are historically provided much stricter rules of procedure given the severity of the consequences at stake – are tried before juries of 6 in both state and federal courts. Further, "the trial by jury preserved by our Constitution is the common law trial by jury in its essential characteristics as known and understood at the time the Constitution was adopted… It did not mean to preserve the minor details or unessential formalities of the trial by jury as it then existed either in England or here"[6]; a change in the number of jurors in the Superior Court is comparable to other procedural changes made to the jury system in our Court's history, like including women and people of color. Finally, reducing the number of jurors in the midst, and also the aftermath, of today's pandemic is extremely practical and reasonable, does not violate the Commonwealth's Constitution and should be given considerable judicial discretion. If a statutory change is indeed necessary to allow for an impanelment of fewer than 12 jurors – although I believe that is unlikely – the legislature should shape the law to conform with the advisory Opinion issued by the Supreme Court in 1971. Although advisory opinions do not have the same effect as an adjudication, they are in a sense a prejudgment of the question proposed and would likely be supported by judicial officers of the Commonwealth.[7]

"…it has always been understood that the constitutional declaration of the right to trial by jury, like other constitutional declarations of right, was the enunciation of a broad, living principle capable of reasonable adaptation to a constantly changing society and not a barren congealing into rigidity of existing forms, which, with the alteration of time and circumstance, might even become clogs upon the exercise of the right itself'." [8]

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[6] *Bothwell v. Boston Elev. Ry*., 215 Mass. 467

[7] Annual Survey of Massachusetts Law: Vol. 1964, Article 13, Chp. 10: Advisory Opinions. Goodman, Reuben (1964).

[8] *Commonwealth v. Bellino*, 320 Mass. 635, 638.

State	# of Jurors	Unanimous?	Additional Info
AL	12	Yes	
AK	12	No 5/6	
AR	12 Circuit Court-seems to be primary trial court. District Courts don't seem to be involved with PI trials.	9/12	http://www.arlegalservices.org/sites/default/files/PLPM%20%E2%80%93%20Civil%20Procedure.pdf
AZ	8	No 3/4	
CA	12	Up to judge	
CO	6	Yes	
CT	6	Yes	
DC	6-12	Yes	
DE	12	Yes	
FL	6-12	Yes	
GA	12	Yes	
HI	12	No 3/4	
IA	8 district court – our superior courts but this is the starting point for all matters including small claims	7/8	https://www.iowacourts.gov/static/media/cms/Background_information_4C3E68CF3C2F1.pdf jurors; https://www.iowacourts.gov/static/media/cms/E0401_95D92DF0BB027.pdf Verdict
ID	12	No 3/4	
IL	6 unless 12 requested in small claims, 12 in circuit jury trials	Seek from MATA	https://www.isba.org/sections/bench/newsletter/2016/12/ajuryof12not6asheretoforeenjoyedthe jurors
IN	6 Circuit & Magistrate	unless the parties stipulate before the verdict is announced that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury	https://www.in.gov/judiciary/rules/jury/index.html#_Toc243295746
KS	12 but possibly less	12 jurors then 10 is sufficient	http://www.kslegislature.org/li/b2019_20/statute/060_000_0000_chapter/060_002_0000_article/060_002_0048_section/060_002_0048_k/
KY	12 Circuit Court; 6 Magistrate	9/12 Circuit, 5/6 District	https://kycourts.gov/resources/publicationsresources/Publications/P7YoutheJury.pdf
LA	12 Jurors may stipulate to 6.- may want to do extra diligence as Louisiana Court system is awkward and made up of several different systems with their own jurisdictions.	9/12 or 5/6 if 6 jurors	https://www.legis.la.gov/legis/Law.aspx?d=111297 jurors; https://www.legis.la.gov/legis/Law.aspx?d=111312
MD	6	Yes	
ME	8	No 3/4	
MI	6 Superior & Magistrate	5/6	https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/HTML/CRu/Ch%202/Court%20Rules%20Book%20Ch%202-Responsive%20HTML5/index.html#t=Court_Rules_Book_Ch_2%2FCourt_Rules_Chapter_2%2FCourt_Rules_Chapter_2.htm%23TOC_Rule_2_508_Jury_Trial_ofbc-77&rhtocid=_5_7
MN	6-12 District Court- our Superior. Court under it is Conciliation Court, like municipal no jury trials.	Unanimous, however- *Advisory Committee Comment - 1998 Amendment-The last sentence of the rule requires a verdict to be unanimous unless there is an agreement to a less-than-unanimous verdict or it is otherwise provided by law. Both the Minnesota Constitution and statutory law allow verdicts in civil cases, even without stipulation of the parties, to be returned by 5/6ths of the jurors after six hours of deliberations. See Minnesota Constitution, article I, section 4, and Minnesota Statutes 1996, section 546.17. Where jury of more than six, but fewer than twelve, jurors deliberates, a 6/7ths, 7/8ths, 8/9ths, 9/10ths or 10/11ths verdict is permitted. For a twelve-person jury, ten of the twelve jurors (the equivalent of 5/6ths) can return a verdict.*	https://www.revisor.mn.gov/court_rules/cp/id/48/
MO	12 Circuit Court but not less than 8 under stipulation- District Courts are for controversies up to 15K but it is not clear that the rule is any different.	3/4	https://law.justia.com/codes/missouri/2011/titlexxxiv/chapter494/section494490/
MS	12 Circuit Courts, 6 County	9/12; 5/6	https://courts.ms.gov/trialcourts/tc_aboutthecourts.php jurors; https://courts.ms.gov/research/rules/rulesofcivilprocedure/Revised%20Mississippi%20Rules%20of%20Civil%20Procedure%20-%208.31.16.pdf jurors and verdict rule 48.
MT	12	No 2/3	
NB	12 in District court, in lower court may be less if allowed	5/6	https://nebraskalegislature.gov/laws/articles.php?article=I-6 jurors and majority; https://nebraskalegislature.gov/laws/statutes.php?statute=25-1125 majority

	by judge but only small claims cases below district court		
NC	12	Yes	
ND	Must consist of 6 unless 9 is specifically requested – District Court – Our Superior and all Trials	Seems to be unanimous unless stipulated that it can be a majority	https://www.ndcourts.gov/legal-resources/rules/ndrcivp/38 jurors; https://www.ndcourts.gov/legal-resources/rules/ndrcivp/48 verdict
NH	12	Yes	
NJ	6	No 5/6	
NM	6-12	No 5/6	
NV	8	Up to judge	
NY	6	No 5/6	
OH	8 Superior & District	3/4ths or more	http://www.supremecourt.ohio.gov/LegalResources/Rules/civil/CivilProcedure.pdf; http://www.supremecourt.ohio.gov/LegalResources/Rules/civil/CivilProcedure.pdf
OK	12	No 3/4	
OR	12	No 3/4	
PA	12	No 5/6	
RI	6	Yes	
SC	12	Yes	
SD	12 Circuit Court same as ND main trial court. May stipulate less than 12.	10/12	https://rapidcityjournal.com/news/opinion/forum-right-to-jury-trial-different-in-criminal-civil-courts/article_942d0adb-36cd-568a-9926-776fbe657d5c.html
TN	12 Circuit & General Sessions	Yes	https://www.tncourts.gov/rules/rules-civil-procedure/48-0; https://www.tennesseeinjurylawcenter.com/how-many-jurors-do-i-need-to-win/ old and not court affiliated.
TX	12	No 5/6	
UT	8	No 3/4	
VA	5	Yes	
VT	12	Yes	
WA	12	No 5/6	
WI	6 but upon stipulation can be as high as 12 – Circuit Court – our superior, but hears all controversies	5/6	https://docs.legis.wisconsin.gov/statutes/statutes/756/06 756.06 2(b) jurors; https://docs.legis.wisconsin.gov/statutes/statutes/805 805.09 2 verdict
WV	6 Superior & Magistrate	Majority	http://www.courtswv.gov/legal-community/court-rules/civil-procedure/VI.html#rule47; http://www.courtswv.gov/legal-community/court-rules/civil-procedure/VI.html#rule48
WY	6	Yes	

From: Rich Page
Sent: Thursday, August 13, 2020 9:32 AM
To: Christine.Burak@sjc.state.ma.us
Subject: Comments on JMAC recommendations

Hi Chris -

We notified BBA members of the request for comments on the Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials.

Several members submitted suggestions, which are included in the attachment. These are not official BBA comments, and do not represent the views or policy positions of the Association as a whole; however, we are pleased to forward them to the Court in the event that they might provide useful insights from individual practitioners.

I hope you are staying cool in this hot summer!

Rich

Comments from BBA members on Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials

- The ideas in this document are very well thought out and represent considerable effort.
- I applaud the work of the JMAC, but have some concerns about the impact of these plans on jurors, litigants, and witnesses, including:
    - What is the ability of the jurors, litigants, and witnesses to safely get to these locations if they do not have car or there is no parking; is it safe to take a T or cab right now?
    - The lack of childcare or school for the children of jurors, litigants, and witnesses may make it difficult for them to appear for trials.
    - Jurors may be distracted by fears of catching the virus and the strict distancing procedures put in place and may rush deliberations to get out of the building as soon as possible.
- There is a need to track the impact on juror demographics because there are concerns that, assuming the courts can even get enough jurors who are willing and able to serve right now, this might skew the mix of people on juries.
- In Phase 2, how will the court determine what is a "civil case of particular significance." What does this mean? Significant to whom? There should be a ranking system for the cases that are overdue for a trial date, factoring in the length of time on the docket.
- The recommendation limiting public access diminishes the public trial right by requiring spectators to be media or have some connection to the trial. Who will decide which members of the public will be in the courtroom and who will be excluded?
- There are concerns that these precautions and protocols will make jury trials cumbersome and lengthy, leading to the completion of very few trials.
- There are concerns about the ability of some court buildings to effectively accommodate the physical distancing requirements and ensure proper ventilation.
- The recommendation to reduce the number of peremptory challenges diminishes both parties' abilities to ensure a fair and impartial jury, which is one of the most important cornerstones of due process.
- Requiring counsel to remain at table or podium may inhibit attorneys who use the courtroom space in their advocacy, effective cross examination, and effective presentation to the jury.
- There are concerns that the attorney-client communication protocol may delay attorneys' communications with their clients. Delays and slowdowns in the pace of trials may prejudice criminal defendants.
- The elimination of sidebars may impair communication between parties and limit the parties' abilities to make specific objections to preserve issues on the record.
- For criminal proceedings, I would like additional information on how the court will facilitate the digital exchange of exhibits between parties and how the court will navigate the sharing or removal of exhibits during trial given the restriction on passing and handling exhibits.
- If jurors in criminal cases are escorted out to avoid overlap with the "trial participants," this may undermine now-permitted juror contact by attorneys, an important tool for post-conviction relief.

From: Steve Gingras
Sent: Thursday, August 13, 2020 7:33 AM
To: Christine Burak <christine.burak@jud.state.ma.us>
Subject: Pittsfield Jury

The numbers in the report for Jury capacity for Pittsfield Superior Court needs to be looked at again. The building capacity at this point is only 35 including staff and the Jury Room capacity with social distancing is around 16. Any questions you can contact Clerk Deborah Capeless. Thank you.

--
Steve R. Gingras
Court Officer II
Pittsfield Superior Court

From: Peter Agnes
Date: Tue, Aug 11, 2020 at 8:23 AM
Subject: Re: New Duke University Mask Study

Colleagues:

On August 7, 2020, a group of Duke University researchers released a study measuring the effectiveness of certain types of facial masks and coverings to reduce the distribution and size of droplets. It has received widespread coverage in the media. I have attached a copy.

This study affects my assessment of the JMAC report. The JMAC report states that if a juror reports for duty without a mask, he or she will be given a "surgical mask." It also notes one of the expert's preference for three-ply masks. See JMAC Report, pp. 25-31. However, it does not appear to me that the JMAC report includes any recommendation concerning the type of mask or facial covering that will be deemed acceptable by court security staff at the courthouse entrance. Also, apart from the quality of the mask initially, how do various masks perform over time i.e., are some masks as good after 1, 2, 5, 6 hours of use as they are initially, or do some degrade over time? What if jurors come to court on Day 2 or Day 4 with the same mask they wore on Day 1?

In light of the significant differences in the efficacy of certain types of masks and facial coverings (see figure 3A in the Duke University study), I think this the JMAC study did not give sufficient attention to the quality of the masks or facial coverings worn by jurors, and that this is an issue that requires further consideration. The Duke University study is only one study; there may be other research that should be considered. However, if grand jurors are to be in a building and a particular room day in and day out for months at a time, the quality of the masks they wear seems to me to be a matter that we should examine carefully.

From: Mici, Carol (DOC)
Sent: Thursday, August 13, 2020 12:10 PM
To: christine.burak@jud.state.ma.us
Subject: FW: Solicitation of Comments on the Resumption of Jury Trials

Hi Christine,
Attached are DOC comments.
Thanks

Comments about the Jury Management Advisory Committee (JMAC) Report

With respect to the G.L. c. 123A, § 9 petitions, the Department[1] requests that the Court consider the following:

First, the Department requests that the Court not adopt the recommendation that § 9 petitions be heard by six-person juries. JMAC Report, p. 28. Sexually dangerous person (SDP) cases sit at the crossroads of individual liberty and public safety. Each SDP has already been found, beyond a reasonable doubt, to have engaged in sexual misconduct and to have a condition that makes him likely to reoffend sexually if released to the community. The determination of whether an individual remains or does not remain sexually dangerous warrants consideration by the same number of jurors empanelled in criminal cases tried in the Superior Court. *See* JMAC Report, p. 28 (addressing concerns raised by decreased jury sizes).

Second, the Department requests that consideration be given to moving the jury trials of § 9 petitions from Suffolk Superior Court to another location, such as Bay State Correctional Center, if it becomes available, or the Superior Court in Plymouth.[2] *See* G.L. c. 123A, § 9 (providing that the trials of § 9 petitions "may be held in any court or any place designated for such purpose by the administrative justice of the superior court department"). Such a move would likely reduce the contact that the petitioners will have with other persons in lock-up as well as reduce transportation time from the Massachusetts Treatment Center. The availability of outdoor parking would also limit the contact that attorneys, witnesses, and spectators have with other members of the public without the significant expense of parking in the garages near the Suffolk Superior Court where § 9 petitions have been tried for the past several years.

Third, as new trial dates are set for § 9 petitions postponed as a result of the pandemic-related court closures to jury trials, expert reports, including the reports of the qualified examiners, the Community Access Board and the petitioner's retained experts, will likely need to be updated. The Department requests that the lead time for updating the expert reports be taken into consideration as jury trials are re-scheduled.

Fourth, while fully mindful of the need for contact tracing in the case of infection, the Department urges the Court to consider how contact information of victims and other persons identified on the Victim Notification Registry, if collected, will be maintained confidentially. *See* JMAC Report, p. 31 n. 54.

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[1] The Commissioner of Correction appoints qualified examiners and members of the Community Access Board (CAB). *See* G.L. c. 123A, §§ 1, 6A. The qualified examiners and the two consulting CAB members are assigned and paid through the Department's clinical service contract with its vendor, Wellpath. Department attorneys based at the Massachusetts Treatment Center represent the Commonwealth in all G.L. c. 123A, § 9 petitions.

[2] By statute, either the petitioner or the Commonwealth may request that the petition be tried before a jury. *See* G.L. c. 123A, § 9. For more than thirteen years, it has been the Commonwealth's practice to elect a jury trial.

From: Bell, Karen J (DAA)
Sent: Thursday, August 13, 2020 2:44 PM
To: christine.burak@jud.state.ma.us
Subject: comments re jury trials

Christine,

Thank you for the opportunity to comment on the very comprehensive report regarding resumption of jury trials in Massachusetts.

One of the concerns that I have in Berkshire County is that the Courthouse in Pittsfield has only one location – the Superior Court courtroom on the second floor that has been deemed appropriate for ANY jury trial. It is important to note that this courtroom is also the only space in the courthouse that has been deemed appropriate to convene and present cases to the Grand Jury. Having only this one space will make it difficult to have the number of cases addressed that have been sitting idle since March.

Secondly, I am concerned about the jump from Phase 1 to Phase 2. It appears that we jump from the least complex jury of 6 trials in District Court where defendants are not being held to the most serious Superior Court jury of 12 cases (with likely 4 additional alternate jurors) where defendants are being held. I would expect there should be a more gradual pproach. Considering the fact that cases are not being resolved and are unlikely to be resolved until a jury trial is imminently upon a defendant, would it make sense to ease into Superior Court trials by addressing those cases that would be shorter trials with less complex issues and in which defendants are most likely to enter a plea of guilty? This would allow the Superior Court to get their feet wet so to speak and also hopefully significantly reduce the backlogged docket.

Please let me know if you have any questions or I can help you in any way.

Thank you,

Karen J. Bell | First Assistant District Attorney
Office of the Berkshire District Attorney Andrea Harrington

From: Stacey McCullough
Sent: Thursday, August 13, 2020 6:53 PM
To: Christine.Burak@jud.state.ma.us
Subject: Public comment on JMAC report

Dear Christine Burak:

Thank you for the opportunity to submit comments on the JMAC Report and Recommendations to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic (hereafter, "the Report"). I've read it though with care, and I'm commenting as a prospective juror -- one who has received a summons for October.

I appreciate the thought and effort that's gone into making proceedings safer, but I'm scared to participate as a juror during this pandemic. I feel strongly that the Report's recommendations do not sufficiently support my ability to make decisions that prioritize safety.

In my daily life, I've been lucky to be able to avoid anything remotely approaching the level of exposure that would be involved in jury service. I've chosen strict limits, even when it's meant giving up things that I'd very much like to do. I haven't gotten an ice cream from my favorite shop, or gone to buy annuals for the garden, or assented to an in-person, outdoor, distanced meeting of my book club. I haven't gotten take-out or a haircut or had my long-overdue check-ups. I know that MA will let me do all those things now, but each individual's need and willingness to take on risk varies. While my decisions are on the more cautious end, they're still within reason, as stakeholders consulted by JMAC agree: "Several participants in our meetings... openly question whether jury trials can recommence at an acceptable risk level prior to widespread availability of a vaccine or rapid, reliable testing" (p. 10).

I value my right to make reasonable decisions about my safety. If MA were to require my first foray outside my comfort zone to be for jury duty, I would be very upset, and I don't think I could serve well under what I consider unsafe conditions. Every day, I'm giving up things I want to do because I am prioritizing safety. Others are giving up even more -- canceling or missing major life events, keeping kids home from school, risking their livelihoods -- because we are exercising our rights to prioritize our own safety and that of our families. I hate to think that MA would breach those rights to compel jurors to spend extended times among other people inside public buildings, using public bathrooms, and traveling via public transport. I'm alarmed that I don't see sufficient assurance otherwise in the Report.

So that's the emotion behind my response. Now for the particulars about the process and product of the Report.

JMAC's Process
On pages 7-8, I see a long list of stakeholders consulted:

"...the OJC... the Trial Court Department of Research and Planning... the Trial Court Facilities Department... judges and clerks... the National Center for State Courts and the Federal District Court for the District of Massachusetts... judges and experts from other jurisdictions, and reports from jurisdictions and organizations across the country ... the Trial Court Human Resources Department... Trial Court consulting infectious disease specialist... officials of the Massachusetts Department of Public Health... Associate Professor and Director of the Healthy Buildings Program at Harvard T.H. Chan School of Public Health... attorneys, Trial Court officials... criminal attorneys... civil attorneys... leaders of statewide, local, and affinity bar associations; representatives of District Attorneys' Offices, the Attorney General's Office, the Committee for Public Counsel Services (CPCS), the Massachusetts Association of Criminal Defense Lawyers (MACDL), and the Massachusetts Office of Victim Assistance (MOVA); civil attorneys who represent plaintiffs and defendants in personal injury (MATA and MDLA) and business cases; certified conciliators; representatives of Sheriffs' Departments, the Department of Correction (DOC), the Trial Court Security Department, the Trial Court Facilities Department, and the Judicial Information Services Department; and Clerks of the Boston Municipal Court, District Court, Juvenile Court, and Superior Court..."

Do you notice who's excluded from this very extensive list? The very people for whom this entire apparatus exists: victims and defendants, without whom almost all of the above stakeholders would be out of a job. And, prospective jurors. So it should be no surprise -- though it's assuredly distressing -- that the safety concerns of those who were excluded are not sufficiently prioritized. While it's a common error in business & industry research to consult experts while neglecting to consult end-users, it almost invariably results in conclusions that fail to address end-user needs. In the case of planning for jury trials, it's an egregious omission. I do see on page 18 that a juror survey is planned during Phase 1. That's too late, it doesn't sound likely to be deeply probing, and there's barely any allowance for processing the resulting feedback. I don't see it being harnessed for substantial iteration of the jury trial process. (And of course, there's this public comment phase, but I doubt very much that many prospective jurors even know the report exists and that they can comment -- which is also a problem in itself.)

If juror input were incorporated into the process, I believe the plan would better respect jurors' safety concerns in many ways. What follows are four examples, with the caveat that these are coming from just one prospective juror, so they are of course incomplete and flawed compared to those that would result from an appropriately robust key stakeholder consultation.

1. Remote option
I understand why bar members advocated for in-person jury trials (p.9), and that other options are less feasible (p. 10-11) for now (p. 73). I'm less convinced by the arguments against remote stages of the process including: juror check-in, orientation, voir dire, impanelment, recesses, and deliberation.

First, I see that there are concerns about "juror access to technology" (p. 57), however:
A. That is empirical, not a matter to leave to conjecture. Several years ago, I was working on a project intended to support a very disadvantaged demographic segment. The particular group in question was almost all poor and Black, and many were homeless, addicted, and/or with a range of diagnoses in addition to the one our project had as its focus. At that time, one aspect of the

support system we envisioned required mobile phones with web access. We were somewhat surprised to learn that web-enabled phone access was not a barrier for the majority in our intended user group. Even those who don't own smartphones with web access often have the requisite tech literacy, and surely loaner devices with web access could be sourced for them for the term of the trial. Technology access and technology literacy data is available by demographic (though no longer to me), and should be known before deciding whether technology-based solutions are too exclusionary.
B. Even if some do lack access, I don't see that as a reason to eliminate tech-enabled remote solutions as one option for others. For prospective jurors with no other choice, an in-person process could be available, without it being the only option for everyone.

Second, the fact that federal and/or some state courts are already pursuing remote practices for some or all of these stages of the process (p. 75-6) certainly suggests that in addition to the technological obstacles, the constitutional and other hurdles noted in Models 5 and 6 (p. 67-8) are surmountable, as well. Across domains, when current participants in a system are asked how that system should run, inevitably they insist it has to be much as it has been. System users are not system designers, and it's a mistake to ask them to be, rather than to inform actual system designers' work. It takes vision to adapt to unprecedented times, and the JMAC recommendations lag their documentation of what other entities are managing to achieve, and they do so in ways that unnecessarily compromise juror safety.

2. Minimizing time indoors
From my brief prior experience as a prospective juror. I remember a lot of waiting around. If all the stages are to be in-person rather than remote, the Report should at least address how to make that waiting time as safe as possible. The current report only minimally does so (noting that jurors should be called in by number and that paperwork should be pre-completed, p. 25). As a prospective juror, I'd want arrangements to be made to allow us to spend all waiting time outdoors or in our cars, where it's safer. We could be called back in on our phones for the briefest possible periods indoors. For those without phones, (disinfected) pagers could be issued (such as those used by crowded restaurants). While this might introduce some degree of inconvenience for those stakeholders whose input JMAC did incorporate, it's an example of how the resulting report prioritizes those stakeholders' convenience over excluded stakeholders' safety. The impression lingers that the value of juror-friendly options were discounted because jurors' needs were not directly represented in the process.

3. Deferral and penalties
Deferral methods and reasons need further adjusting to Covid-realities. People may be anxious because they have risk factors, or simply because they're cautious personalities. Both are valid reasons not to serve while there are such high stakes (and either could make it impossible to serve effectively). Unlike the publicized questionnaires of many other states (p. 98-9), only the former is explicitly acknowledged in the Report's plans (p. 20 and 57), except for a Y/N question (p. 96) with unspecified consequentiality. I believe that prospective jurors should be given the opportunity to affirm -- from home, without ever having to come to a public building -- whether we're avoiding Covid exposure in our daily life to a greater degree than jury service would allow. If so, that should be sufficient reason for deferring service, even if one is not in an atypically high-risk demographic. Such deferral would continue until the individual prospective juror

begins re-engaging in public life or until the danger of the pandemic is past, and would not use up the one-year grace deferral period, which may legitimately still be needed for all the usual, non-pandemic-related reasons.

Currently, a cautious prospective juror can only try to guess far in advance when within their deferral year might be safest, which obviously isn't knowable. Other options should be generated and made available.

I'd also expect that penalties related to failure to serve would be reconceived in consideration of those who very understandably choose not to participate in public life during an active global pandemic.

4. Iteration and transparency
As the system proceeds through the experimental phases outlined in the Report, I see that Phase 1 is expected to be about 2 months, and Phase 2 2-4 months. No one should be required to be a guinea pig. So the clock on the one-year deferrals shouldn't start for, at the very least, 4-6 months, with full transparency to prospective jurors about what's been tried, what's resulted, what feedback was collected, and what will be iterated accordingly.

IN SUMMARY
I find the JMAC report neglects the juror perspective, and clings to business-as-usual more than other states and more than advisable. I call on those who are planning jury trial resumption to:
- Refuse to consider planning sufficient until input is gathered and synthesized from key neglected stakeholders: victims, defendants, and prospective jurors.
- Acquire the actual data about smartphone ownership and tech literacy, rather than allowing conjecture to eliminate remote options for prospective jurors.
- Provide a remote option for all steps of the process outside the core trial itself, drawing on safety-oriented practices of other states' courts.
- Provide alternatives to unnecessarily spending waiting time inside public buildings.
- Accept deferrals from jurors who are not resuming public life during the pandemic, without using up their usual deferral year, and reconceive failure-to-serve penalties in consideration of fearful jurors.
- Refrain from requiring anyone to unwillingly participate in experimental phases, and support prospective jurors' ability to inform their decisions about their service with transparent communication about what's learned and iterated during those phases.

The Report notes, "more people may be willing to participate if they felt assured that the court prioritized keeping people safe" (p. 57). I do not feel that assurance with regard to the current plan, and I sincerely hope that revisions to the plan's process and conclusions will more convincingly reflect this priority. Thank you very much for your time and consideration.

Sincerely,
Stacey McCullough
Pelham, MA

From: Robert N. Meltzer
Sent: Thursday, August 13, 2020 7:37 PM
To: christine.burak@jud.state.ma.us
Subject: Comments on JMAC Report and Recommendations Kindly Confirm Receipt

Please see the enclosed. Kindly confirm receipt. Thank you. Rob

Robert N. Meltzer

Robert N. Meltzer
Attorney At Law

August 14, 2020

Supreme Judicial Court of the Commonwealth of Massachusetts
Office of the Chief Justice
Attn: Christine Burak, Legal Counsel

Re: Jury Management Advisory Committee-Report and Recommendation-July 31, 2020

Dear Ms. Burak:

This letter shall serve as a comment on the Report and Recommendation to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials, dated July 31, 2020.

This office has noted five major deficiencies in the Report and Recommendation which I believe render the entire Report and Recommendation flawed beyond repair, and I suggest that the entire Report and Recommendation be rejected, and that the process be reopened and expanded to address the deficiencies in the document through a broader array of community and scientific input.

With particularity, the Report and Recommendation has these serious flaws:

1. The Report and Recommendation gives insufficient deference to 42 U.S. C. 1281-12189, also known as the Americans with Disabilities Act, in conjunction with §36 of Title 28., as well as Health Insurance Portability and Accountability Act of 1996 (HIPAA), as well as the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution in that the federal statutory protections and constitutional protections reserved to American citizens appear to have been totally disregarded.

2. The Report and Recommendation gives insufficient deference to the preemption power of federal law, in that the United States Congress has passed two acts relating to the COVID-19 Pandemic, both signed by President of the United States, neither of which deferred to the states or their subdivisions the statutory right to supersede the federal statutory provisions of the ADA or HIPAA.

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3. The Report and Recommendation gives insufficient deference to the limitations of the Court's superintendency power, which permits a Court to direct its day to day operations, but not to legislate with regards to the privacy rights of persons and the right to secure from unwarranted search; the Report and Recommendation presumes that the Supreme Judicial Court, in the exercise of its power to direct its operation, equally has the power to override the expressed will of Congress in terms of dictating personal conduct of American citizens in violation of their protected rights. More specifically, the Report and Recommendation legislates a concept of "disability by law" as opposed to "disability by fact," effectively barring citizens from judicial process simply because of the inability of citizens to comply with the recommendations of the Report. This is an unwarranted act of amendment of the ADA which is not within the Court's superintendency power.

4. The Report and Recommendation appears to grant unwarranted deference and excessive reliance on an expert witness who should be subject to a Daubert/Frye standard of examination. Instead, the considerations commencing on page 12 are drawn "primarily from our consultation with Dr. Joseph Gardner Allen…" and which are based, seemingly, on conclusions that are not generally accepted. Considering that these recommendations appear to be the basis of an effort to constrict the statutory and constitutional rights of citizens, the report is deficient in failing to consider a wide range of disparate experts. I am sure that I am not alone in doubting the wisdom of relying on Dr. Allen's recommendations as a primary basis of restructuring established trial court proceedings.

5. Finally, the Report and Recommendation gives insufficient deference to the trial judge to determine rules and procedures that apply in unique circumstances, and provide insufficient latitude for the session judge to direct the trial in a manner that ensures due process of law, sufficient and appropriate examination and the zealous advocacy which is the bedrock of our system. In short, the recommendations are so rigid and inflexible that they are unworkable, and deny trial lawyers the capacity to plan, prepare, structure and conduct trials in a manner which is typical, suitable and acceptable as a matter of practice.

Leaving aside the issue of science, which has not been adequately addressed in the process, I wish to make four points supporting the prior objections to the Report and Recommendation.

1. The recommendations made by the Center for Disease Control in its federal capacity **does not mandate masks and shields for all persons**. In fact, the CDC was careful in its recommendations to exempt citizens with "breathing problems," which is a subjective and personal determination that does not mandate that the citizen **prove** to government authority or private businesses the existence of a "breathing problem." Mandating that a citizen wear a mask or face shield to participate in judicial process ignores the CDC

recommendation, and seemingly mandates that a citizen surrender privacy rights under HIPAA, the right to speak or remain silent under the First and Fifth Amendments to government officials regarding private medical information as a condition precedent to participate in state court process. The recommendation of mandatory masks or face shields also constitute an unlawful search of the citizen under the Fourth Amendment as a condition precedent to participation in the court process, and, finally, threatens the right of fair trial under the Sixth and Fourteenth Amendments of the United States Constitution, by excluding jurors, witnesses, counsel and parties who refuse to waive federal rights in order to participate in state court process based on "breathing problems" which they may elect not to disclose. These violations are occurring even as evidence mounts that masks and face shields do not provide the "protection" attributed to them. Thus, balancing federal rights against dubious science should not result in a victory for dubious science, which is what the Report does.

2. The Report and Recommendation equally errs in failing to address the growing lack of concern about the danger of hand sanitizer, in both contaminated and uncontaminated form, as a deadly neuro toxin. Mandates to create "safety" in this Report, in fact, are exposing citizens to potential danger based on dubious science, an issue not sufficiently addressed. Equally, there is a substantial population in the Commonwealth who cannot and will not submit to "screening" or vaccination for medical reasons, which they have a right not to disclose. Screening, as the phrase is used, indicates some sort of encapsulated process, ignoring that any form of "screening" is likely or possible to reveal immaterial medical information which is not relevant to the stated goals of the Report. The assumptions in the Report and Recommendation simply refuse to recognize that people are not robots stamped out at factories with interchangeable parts, but that they have distinct and private medical discrepancies that do not comport with "one size fits all" policies, and that the ADA protects these citizens from discrimination, whether stated or implied.

3. The Report and Recommendation is more likely to instill fear that the Court is not a safe place, as opposed to a place of justice and law. In a time in which "justice" in courts is being questioned in the streets, the Report and Recommendation not only slams the doors shut on public access, but welds them shut as well. The Report and Recommendation fails to address the need for "normalcy" of our court system as a way to ensure justice, and instead instills paranoia, fear and unwarranted health mania as the norm of our Courts. The Report and Recommendation promises to transform our Courts into a hostile environment for litigants and court officials, and the Report failed to consider these elements in a proper and considered manner.

4. The Report and Recommendation promises to lead to trial chaos. It is well-accepted doctrine that experienced trial lawyers are effective because of their knowledge of the rules of court, and the certainties of court process. Adding an entire gloss of new and

cumbersome rules on top of the Massachusetts Rules of Civil Procedure will render nearly all procedural trial precedent useless in the service of a remedy to a threat which may be more imagined than real. What this Report and Recommendation promises is that every trial under these rules will feel weird and uncertain, and that every trial will be subject to appellate review, in a manner that is going to clog the Courts for years after these panic-trials have ceased. The current situation does not warrant the imposition of legal uncertainty that these rules will create.

The Report and Recommendation needs to consider some basic principles.

First, there will be lawyers, witnesses, jurors, court officers, judges, reporters and other court personnel who need to walk around the courts without face coverings, and who will not be using hand sanitizer, and who will not submit to screening or vaccines, and that they will be doing so under the protection of federal and constitutional law. The Committee must give greater deference to federal statutory and constitutional rights in balancing solutions to demonstrated, but not speculative, problems.

Second, decisions about trial procedures should be left exclusively to the discretion of trial judges.

Third, rules that apply based upon health cannot become the tail that wags the dog in terms of court process.

Fourth, the process that applies must consider the needs of the general public, as well as litigants, to a courthouse that appears open, fair, honest and comprehensible.

Fifth, the Committee cannot start with the assumption that drastic revision of court rules and invasion of protected rights warrants trial process, but must weigh whether a problem even exists, or whether the new rules are, instead, a solution in search of a problem. Based upon the Report, it's not clear that as of this date there is even a problem to be solved.

Sixth, even if a problem does exist, then the appropriate remedy for this Committee is to devise recommendations that allows those that do not wish to participate in an open court system to "opt out" of the process without prejudice, rather than imposing draconian measures that force people to "opt in" by waiving their protected rights.

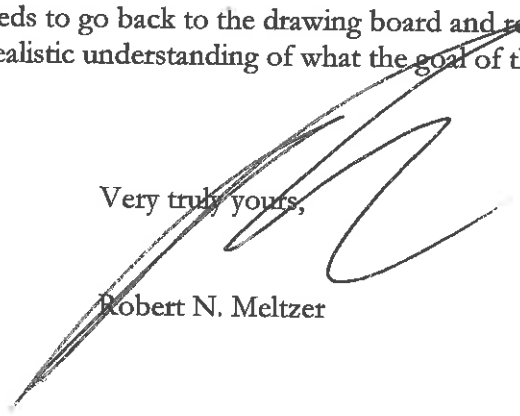
Seventh, it is likely that the Report and Recommendation, if implemented, is so drastic and flawed that federal court review is nearly certain; the scope of violation of federal rights in the Report and Recommendation is so broad and deep and dangerous that impacted citizens, (including lawyers who are being denied their right to practice by being unwilling to waive their rights, and whose businesses are being damaged contrary to government restraint required by the Fifth Amendment,) have a right to protection of those rights enforced by the federal judiciary. It is evident that no one considered the breadth of constitutional violation of protected federal rights, and the impact of forcing the citizen to surrender these rights in order to receive access to justice.

Eighth, the breadth and complexity of the Recommendations are not only cumbersome and unworkable, but they are likely to unnecessarily elongate trials, and drive up legal costs for litigants, who are often barely capable of financing litigation in the best of times. In a system in which an open court is a fundamental right for access to justice, these Recommendations threaten to bar the courthouse door to all but governmental and corporate litigants, and will shift power toward those who can afford this process. Equally, the medical requirements in the Recommendation will preclude many otherwise able people from coming to court, thereby denying litigants of the right to the counsel of their choice, of juries comprised of their peers and of key witnesses to material facts. Simply put, the new rules run contrary to the stated goals of a flexible, effective, cost-efficient and useful trial court. The Recommendations promise to fix something which is not broken, while breaking it in the process.

Lastly, in the event that this Report is accepted, the Report should have an implementation date which provides sufficient time for federal court review of the Report consistent with the principles stated herein.

Frankly, the Committee simply needs to go back to the drawing board and reconsider its whole approach, commencing with a more realistic understanding of what the goal of these new rules is supposed to be.

Very truly yours,



Robert N. Meltzer

From: Janice Robertson
Sent: Thursday, August 13, 2020 9:48 PM
To: Christine.Burak@jud.state.ma.us
Subject: Jury duty

Because people 65 and older have been required to stay home except for medical treatment and grocery shopping they should be exempt from jury duty until a vaccine is proven to be safe and effective.

From: Peter B. Krupp
Sent: Friday, August 14, 2020 9:47 AM
To: christine.burak@jud.state.ma.us
Cc: judith.fabricant@jud.state.ma.us
Subject: Comment on JMAC Report

Good morning, Christine,

Please see attached. Thank you.

Peter

Peter B. Krupp
Associate Justice
Superior Court

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
650 High Street
Dedham, Massachusetts 02026

PETER B. KRUPP
Associate Justice

August 14, 2020

By email to christine.burak@jud.state.ma.us

Christine Burak
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse, Suite 2500
One Pemberton Square
Boston, MA 02108

Re: Jury Management Advisory Committee ("JMAC")
Report and Recommendations

Dear Ms. Burak:

I write to offer a single comment on the thoughtful and thorough recommendations in the JMAC Report.

I urge the SJC to build COVID-19 testing into the protocol for resuming jury trials. To be effective, testing would have to include each person in the court system with exposure to jurors – custodial staff, court officers, courtroom clerks, judges, lawyers, parties, and the jurors themselves. The testing would have to be mandatory; repeated at regular intervals; free to employees, jurors, indigent litigants, and court-appointed counsel; available on site; and performed under a special arrangement with a testing lab to assure a quick return of test results. Such regular testing protocols have reportedly been employed successfully in various contexts, including at UMass Medical School, nursing homes, and other institutions.

A rigorous testing protocol would not eliminate all risk, but to resume jury trials successfully, we must be able to assure jurors that serving as a juror is as safe as we can make it and safer than other activities they may choose to do. We must be able to assure court staff, litigants, and jurors that spending eight hours a day inside a closed room for multiple days in a row with 14-22 strangers or in most cases many more (at a minimum, 6-14 jurors, 2 court officers, a judge, a clerk, and an attorney and one party for each side) is as safe as it can be.

Testing of court staff could occur at regular intervals. Testing of jurors could occur at the time of jury selection and the court could withhold swearing the jury until juror test results are received within 48 hours. Jurors could receive periodic testing at medically advisable intervals, particularly for longer trials.

There will be a price associated with such testing, which may come down over time. I would urge the courts to seek emergency funding if necessary to permit us to resume jury trials under such a testing protocol. There may be some push-back from some quarters about being required to submit to testing. I would hope that in this time of pandemic, given the crucial need to resume jury trials safely and efficiently for all attendees, and with the SJC's leadership, all parties will agree and see the collective value of mandatory testing.

Thank you.

Very truly yours,

/ s / Peter B. Krupp

Peter B. Krupp

cc: Chief Justice Judith Fabricant (by email)
Chair, Jury Management Advisory Committee

From: Cathryn Spaulding
Sent: Friday, August 14, 2020 9:54 AM
To: christine.burak@jud.state.ma.us
Subject: MassDLA's Comments re: Jury Management Advisory Committee Report
Importance: High

Dear Attorney Burak, Attached is the MassDLA’s comments relative to the Jury Management Advisory Committee Report. Thank you.

Cathryn Spaulding, Esq.
Lamontagne, Spaulding & Hayes, LLP

MASS DLA
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

August 14, 2020

By E-mail (christine.burak@jud.state.ma.us)

Christine P. Burak, Esq.
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: Jury Management Advisory Committee Report

Dear Attorney Burak:

I write on behalf of the Massachusetts Defense Lawyers Association ("MassDLA") to provide comments relative to the Jury Management Advisory Committee's ("JMAC") report dated July 31, 2020. MassDLA appreciates the amount of time that was put into this detailed report by the JMAC and recognizes the urgency that exists to resume jury trials in the District and Superior Courts. Our concerns are primarily focused on the recommendation to reduce the jury size from twelve to six persons in the Superior Court. Because we feel that this recommendation would, in part, fundamentally change the jury trial process in the Superior Courts by empaneling juries that may not be representative of the community due to COVID-19 issues, we ask the Court to reject the Committee's proposal.

Under the current rules of civil procedure[1], the parties would still have the option of stipulating to a jury of less than twelve persons in the Superior Court thus satisfying the Committee's proposal. In addition, in the event one or more jurors had to be excused for good cause (a highly likely scenario during this pandemic) the trial could still proceed with ten jurors and with a lesser number if the parties were in agreement.[2] The case law and research on this issue are clear – that twelve-person juries are preferable to smaller juries. After careful consideration, it is the MassDLA's position that the current rules and law provide the best options for the parties and best safeguards against potentially unfair jury verdicts.

[1] See Mass. R. Civ. P. 48
[2] See M.G.L. c. 234, §34B

A second area of concern is that Under Phase 1, civil jury trials of six would be ". . . selected by court leaders in each location." It is unclear who will be tasked with making these decisions and what types of cases would be selected. It is also unclear if this case selection process will be mandatory. As written, the JMAC proposal does not lay out the criteria to be applied in the decision-making process. The facts and issues vary greatly on a case by case basis and the litigants are truly in the best position to advocate their respective positions. Ceding that ability to court leaders, no matter how well-intentioned they might be, is bound to raise issues of fundamental fairness.

Lastly, according to the JMAC report, "Phase 1 will last approximately two months, unless health data changes." It is entirely reasonable to expect that there will be a second surge this fall or winter based on scientific data and opinions of reputable epidemiologists. In light of this possibility or, in a worst case, eventuality, we are concerned that what has been proposed as a temporary solution will become a permanent one. Also, it is not clear that once the Courts have moved to Phase 2 whether or not six-person juries will be eliminated in the Superior Court and all jury trials going forward will be twelve-person juries.

For the foregoing reasons, the MassDLA opposes any mandatory change from twelve-person juries to six-person juries in the Superior Court.

Thank you for taking the time to consider the MassDLA's position on this issue. If you wish to discuss this matter further, please do not hesitate to contact me by email at cspaulding@lshattorneys.com or by telephone at (617) 733-3625.

Respectfully,

Cathryn Spaulding
President, MassDLA

CS/cs

From: Alford, Pamela (DAA)
Sent: Friday, August 14, 2020 12:41 PM
To: 'christine.burak@jud.state.ma.us' <christine.burak@jud.state.ma.us>
Subject: Comment on JMAC recommendations

Dear Attorney Burak:

Please see attached for Norfolk District Attorney Michael W. Morrissey's comment on the Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials.

Thank you,

Pamela Alford
Chief, Appeals Unit
Norfolk District Attorney's Office

The Commonwealth of Massachusetts
OFFICE OF THE DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT
45 SHAWMUT ROAD, CANTON, MA 02021 | PH: 781.830.4800 | FAX: 781.830.4801

MICHAEL W. MORRISSEY
NORFOLK DISTRICT ATTORNEY

August 14, 2020

BY EMAIL: Christine.Burak@jud.state.ma.us
Christine Burak
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 2500
Boston, MA 02108-1750

Re: Comment on Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials

Dear Attorney Burak:

Thank you for the opportunity to comment on the JMAC report on courthouse access. The obvious effort and work into the report is noticeable. I write to highlight the following issues that must not be overlooked and particularly impact Norfolk County due to the age of the courthouses.

It is important that the administrative department of trial court continue to provide assistance to all the counties. Not all counties are created equal. Many counties, including Norfolk, do not have the current ability to hold a jury trial simply based on the lack of size and configuration of its facilities and inability to meet CDC or public health restrictions. It should be plainly evident that without independent outside locations or some significant reconstruction of the first session in Norfolk Superior Court that a jury trial for a murder or other complex criminal case requiring twelve to sixteen jurors will not be feasible.

The report suggests that the old probate courtroom used as the jury room for prospective jurors could be put into service as a potential jury site for Dedham District Court or possibly Superior Court. However, that space is currently being used and occupied by the grand jury as there is no other space large enough in the county to accommodate the grand jury within one of the existing facilities. It is implausible to move ahead with this plan and eliminate the grand jury session.

At least three of the District Courts and the Superior Court have no plexiglass in any courtroom. The county does not have sufficient financial resources and is forced to front the cost of any improvements for safety additions required to accomplish the goals necessary to open a courtroom. The county only has one skilled carpenter who performs the work. As of today, the Commonwealth has provided no reimbursement to date and no plexiglass or supplies to the county. We must consider supplementing the county workforce with a subcontractor to do the work so it can be done in a timely manner, otherwise we are concerned we will not see the plexiglass shields completed for an extended period of time. Again, every county has different and unique problems and we should consider decentralizing the ability to create solutions based on the general outline from the central administration. Presiding judges should be given more power and flexibility to work with the various stakeholders to solve the problem on a county by county basis.

Finally, the need for outside venues is not unique to Norfolk alone. Given the emergency created by the pandemic we should take appropriate action to be able to seek alternatives outside of the normal DCAMM process to hold jury trials in facilities that meet the specifications necessary to protect the public and all of the participants. Failure to move in an expedited manner will have a dramatic and adverse impact for all stakeholders who rely on our system of justice.

Sincerely,

/s/ *Michael W. Morrissey*

Michael W. Morrissey
District Attorney

Cc: Chief Justice of the Juvenile Court Amy L. Nechtem
Chief Justice of the District Court Paul C. Dawley
Chief Justice of the Superior Court Judith Fabricant

From: Gavriela Bogin-Farber
Sent: Friday, August 14, 2020 12:34 PM
To: Christine P. Burak, Esq. <christine.burak@jud.state.ma.us>
Subject: JMAC Comments - Mass. Employment Lawyers Association and other civil rights groups

Dear Ms. Burak:

Attached please find the Massachusetts Employment Lawyers Association and other civil rights groups' comments on the Jury Management Advisory Committee's recommendations regarding
resumption of jury trials. Please do not hesitate to contact me with any questions or concerns. Thank you.

Very truly yours,
Gavi

Gavriela M. Bogin-Farber

MELA Massachusetts Employment Lawyers Association, Inc.

August 14, 2020

VIA ELECTRONIC MAIL (Christine.Burak@jud.state.ma.us)
Christine P. Burak
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 2500
Boston, MA 02108

Ms. Burak:

The Massachusetts Employment Lawyers Association (MELA) is an organization of approximately 160 attorneys who represent plaintiffs and employees in employment litigation, with a special emphasis on representation of clients who have experienced discrimination on the basis of race, gender, disability, age, sexual orientation, or national origin. As active participants in the Massachusetts court system, we very much appreciate the assiduous and thoughtful efforts to resume jury trials reflected in the comprehensive report of the Jury Management Advisory Committee (JMAC). We also appreciate all the efforts that JMAC has taken to consider the views of the many stakeholders in the jury trial process. Further, we are grateful for the thought and care, evident in the report, that have gone into safeguarding the health and well-being of jurors, judges, witnesses, parties, lawyers, and the public as jury trials resume. However, we are deeply concerned about several proposed recommendations in the report.

EXCUSING JURORS FROM SERVICE AND THE EFFECT ON REPRESENTATIVE JURIES. First, it is important to ensure that in our zeal to ensure that jurors' health is protected, we not distort the composition of juries by easing too readily the process of excusing jurors from service. If jurors with stated health concerns, or who are over 70, or who share a household with an ailing family member are automatically or readily excused, how will that skew the jury pool? And how will that affect the ability of the parties to (for example) a disability discrimination case to choose a legitimately representative jury? If jurors are excused because they are the (disproportionately female) primary caretakers of children kept home by the pandemic, how will that affect the gender composition of juries in sexual harassment cases?

Further, given that COVID-19 (and other chronic health conditions) disproportionately affect people of color and those of non-U.S. national origin, will the jury pool become racially and ethnically unrepresentative if juries are empaneled containing no members who have had any contact with or connection to the virus? If so, can fair trials really be achieved, especially in cases where race, or racial discrimination, are central issues in the trial? Are there steps we can take to address that very serious problem? This undertaking should resonate with the spirit of the

June 3, 2020 letter from the SJC justices calling on the bar and the judiciary to (among other things) "look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal."[1]

As an alternative to transforming our juries into younger, whiter, more abled institutions, we urge that the emphasis be refocused into protecting the safety of all jurors, including those who are more vulnerable. We urge personal protection for each individual juror, including plexiglass or plastic barriers, increased ventilation, HEPA filters, and any other available state-of-the-art safety equipment. The measures can be reasonable in cost and portable from one location to the next. Similar spaces can be set up for judges, witnesses, and others, and have been utilized or considered in other states.

MODIFICATIONS TO VOIR DIRE AND THE EFFECT ON IMPARTIAL JURY SELECTION. Second, we should not overhaul our well-evolved voir dire process, now mandated by our legislature. Many segments of the judiciary and the bar worked long and hard for years to create G.L. c. 234A, §67D, Superior Court R. 6, and District Court Standing Order 1-18. Panel voir dire is the fairest, most transparent form of attorney voir dire, and the one most conducive to jurors volunteering information important to the exercise of challenges for cause and peremptory challenges.

Panel voir dire also promotes safety. Without question, it takes less time than individual voir dire, limiting juror time in courthouses. Compared to individual voir dire, the panel voir dire model—a lawyer addressing a group of potential jurors who are physically distanced from one another—is relatively safe, similar to an opening or a closing argument. In contrast, individual voir dire forces far more sidebar occasions (or even at table) in which a private encounter among counsel, the court, and a prospective juror will be required.

If we forsake panel voir dire, judges will have to spend far more time during empanelment to seek an impartial jury than is currently the case. Jurors would have to be secluded and questioned one at a time, often in a repetitive manner, in order to provide any chance of selecting an impartial jury. If the potential jurors come in "one at a time" to be questioned at a long conference table, then the "juror" chair would have to sanitized after every single juror sits there. The impracticality of that sanitization process alone is a significant drain on the efficiency of the empanelment process.

The investment in a high-quality protective environment for each individual juror would far outweigh its cost and save the courts tremendous time and resources. It would also project confidence to jurors and the public that juror service is safe. If it is determined, regrettably, to temporarily place a hold on panel voir dire, we ask that the courts acknowledge that time

[1]Although the tracking proposed on page 23 of the JMAC report may be useful if robust and connected to an immediate feedback loop, it is inadequate in and of itself to ensure representative juries.

restrictions must be relaxed for individual voir dire and recognize that the case backlog will increase. In addition, lawyers must be permitted to inquire more deeply of potential jurors.

Under any voir dire methodology, it is crucial that we be allowed to ask questions about how COVID-19 has influenced jurors, especially with respect to impartiality and bias. Circumstances have changed dramatically, and attorneys should be allowed to probe in a broader manner than even a few months ago. This is a different world, dominated by hand sanitizer, masks (or lack thereof), and worry and anxiety. These factors may have a direct impact on the way that jurors receive and perceive facts, the objects of their focus, and their ability to assess damages.

We also recommend the increased use of juror questionnaires. As they are used in many states, robust questionnaires help to achieve a fair jury and will also help to obtain information regarding jurors' opinions and feelings about COVID-19, masks, jury service, and any concerns they have. This will enable voir dire to run more smoothly because the judge and lawyers will already have some substantive answers from potential jurors, thus making the voir dire questioning more targeted and efficient.

PEREMPTORY CHALLENGES. Third, we disagree with reducing peremptory challenges. Current flexible trial practice regarding peremptory challenges is based on achieving an appropriate balance based on the facts and circumstances of each case, not solely on fidelity to the statutory mandate. It is unclear what harm is intended to be avoided, or what good is to be gained, by vetoing the discretion of trial judges to authorize additional peremptory challenges in appropriate cases. If there is anything that we have learned in the upheaval of the past few months, it is that human biases are deep-rooted and extensive. Frequently they are not accessible to challenges for cause. If anything, fairness would dictate an *increase* in peremptory challenges. If JMAC declines to reconsider its proposed reduction, the reduction should at least remain proportionate to the size of the jury: if a jury of eight, 10, or 12 is seated, for example, permitted peremptory challenges should be proportionately higher.

SIDEBARS. Fourth, as to objections and sidebar discussion, texting is an awkward and inefficient means of communication. As an alternative, we recommend brief Zoom conferences between the judge and counsel in which counsel can be adequately heard and make a complete record for purposes of appeal.

TEMPORARY NATURE OF ANY MODIFICATIONS. Fifth, any new rules/orders should be expressly deemed temporary. Once this health emergency subsides, so too should any changes to our process. In addition, there should be active, ongoing review of these rules/orders to determine their effect on jury representativeness, jury impartiality, and the fairness of the process.

Finally, we hope that discrimination and retaliation trials will resume as quickly as possible, in light of the right to a speedy trial granted by G.L. c. 151B, §9, and the importance of eradicating discrimination in the Commonwealth.

We appreciate the opportunity to submit our views and hope they will be given serious consideration.

Very truly yours,

Massachusetts Employment Lawyers Association
Gavriela M. Bogin-Farber, President

MELA COVID Committee
David Belfort, Bennett & Belfort

Matthew Fogelman, Fogelman Law

Sophia Hall, Lawyers for Civil Rights

Robert Mantell, Powers, Jodoin, Margolis & Mantell

Ellen J. Messing, Messing, Rudavsky & Weliky

Elizabeth Rodgers, Gordon Law Group

Monica Shah, Zalkind Duncan & Bernstein

Union of Minority Neighborhoods
Horace Small, Founder & Executive Director

Charles Hamilton Houston Institute For Race & Justice
David J. Harris, Managing Director

Amicus Group Coordinators
Anne Josephson, Kotin, Crabtree & Strong

Emma Quinn-Judge, Zalkind Duncan & Bernstein

Nancy Shilepsky, Sherin and Lodgen

From: Law Office of Edward J. Brennan, Jr
Sent: Friday, August 14, 2020 12:55 PM
To: Christine.Burak@jud.state.ma.us
Subject: Comments on JMAC Report and Recommendations on Resumption of Jury Trials

Dear Attorney Burak,

I am the Executive Director of the Professional Liability Foundation, Ltd. (PLF). I am submitting comments on behalf of the PLF pursuant to the Notice inviting comments on the recommendations of the Jury Management Advisory Committee relative to their "Report and Recommendation to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic".

Thank you,
Ed Brennan

Law Office of Edward J. Brennan, Jr

PLF

PROFESSIONAL LIABILITY FOUNDATION, LTD.

August 14, 2020

By Electronic Mail

Christine P. Burak
Legal Counsel to the Chief Justice
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Christine.Burak@jud.state.ma.us

Re: Comments of the Professional Liability Foundation, Ltd., to Jury Management Advisory Committee "Report and Recommendation to the Justices of the Supreme Judicial Court on the Resumption of Jury Trials in the Context of the COVID-19 Pandemic.

Dear Attorney Burak,

We write on behalf of the Professional Liability Foundation, Ltd., ("PLF") to provide comments on the Jury Management Advisory Committee Report and Recommendations ("the Report") pursuant to the Notice Inviting Comments dated August 4, 2020. The PLF recognizes the difficulties presented in adjudicating cases in the context of the COVID-19 pandemic, and the importance of formulating a plan to allow certain matters to proceed in the trial courts in the short term, but has concerns about the possibility of reducing the jury size from twelve to six. The PLF also has concerns about any plans that may require cases to proceed to trial with alternative counsel, alternative witnesses, or either videotape or remote video testimony, and any process that may interfere with the ability of the jurors to focus on the pending cases and to evaluate live testimony.

The PLF is a non-profit Massachusetts corporation established in 1995. The PLF's purposes include improving the quality and affordability of patient health care, promoting reform of the medical tort and professional liability insurance system, supporting legislation and administrative regulation consistent with its goals, and participating in litigation where appropriate to improve operations and conditions for member medical service providers. In furtherance of these objectives, the PLF has filed amicus briefs in the appellate courts of the Commonwealth on a number of occasions and has submitted comments on proposed legislation and rules changes. The members of PLF include the Massachusetts Health and Hospital Association and the Massachusetts Medical Society, membership organizations of Massachusetts

hospitals and physicians, respectively. Our full membership and Board of Directors are listed on this stationery.

I. Phased Resumption of Jury Trials[1]

(a) Phase 0: The Report recommends a "Phase 0" that would serve as a "mock run-through" of a jury trial process "for the purpose of identifying issues and making adjustments." The PLF supports such a process designed to identify problems that may arise when trials do begin.

(b) Phase 1: The Report suggests that in Phase 1 "court leaders in each location" would identify cases that "would be civil, or, if criminal or delinquency, would involve relatively minor charges against one person not in custody." This language suggests that *any* "civil" case may be scheduled for a trial, but that in criminal or delinquency matters, only cases with "relatively minor" charges "against one person" would be scheduled for a trial. The PLF recommends that there be a more rigorous set of requirements to guide the court leaders in making trial assignments to assure that the goals of this phase are best achieved. During Phase 1 the Report recommends that courts proceed with a very limited number of cases to gain experience with the process. The Report indicates that one of the "themes that emerged" from their meetings and fact finding was "Civil lawyers on both sides who practice in the Superior Court expressed willingness to accept trials before juries of six, if reduction in jury size would achieve earlier trial dates for their cases." Report at 8-9. If Phase 1 is limited to parties who are ready, willing, and able to proceed to trial in light of the recommended COVID-19 restrictions and precautions, then such parties could execute appropriate waivers and there would be no actual or perceived infringement of rights of the litigants.

(c) Phase 2: The Report recommends that this phase include conducting trials of cases "that have the highest priority, including serious criminal cases with defendants in custody, youthful offender cases and civil cases of particular significance." Report at 18-18. The Report recommends a jump from "relatively minor" matters in Phase 1 to those of "highest priority," with the most "serious criminal charges" and "civil cases of particular significance" on Phase 2. The court administrators may be tempted to select the oldest civil cases on the civil dockets as those with the "highest priority," or to select cases where one party to the litigation may be pressing vigorously for a short trial date. The PLF recommends that the term "highest priority" and the term "civil cases of particular significance" be modified to focus on cases that may be put on the trial list while recognizing the realities presented by the COVID-19 pandemic. For example, experience shows that professional liability cases are often complex matters with multiple parties requiring many fact witnesses, and using multiple expert witnesses who are often brought in from locations outside the Commonwealth. In such cases it is also common that the parties and witnesses may either be of advanced age or health-compromised. Health care providers who must be present for such trials

[1] The Report outlines the "Phases" at pp. 16-19.

would not be available to provide medical services that may be needed during the health care crisis. All parties to professional liability cases have an interest in prompt resolution of the dispute, but if the matters do proceed to trial all parties should have the benefit of a full jury of twelve, and the opportunity to employ counsel of choice, to call the most knowledgeable fact witnesses, and to have live testimony from both fact and expert witnesses whenever possible. While certain medical malpractice cases may be characterized as "high priority" or cases of "particular significance" they may also be the least-well-suited to be placed on trial lists at this time. The PLF recommends that at Phase 2 cases should be placed on the trial list only when there is assent of all parties. If productive work can be accomplished in the courts while at the same time satisfying a mutual request on the part of the parties to proceed, that would be the most preferable.

(d) Phase 3: The Report describes this phase as "conducting as many trials as possible in all locations that meet the criteria" that allow for appropriate facilities and spacing. The same concerns expressed above in connection with Phase 1 and Phase 2 exist in Phase 3. All of these phases acknowledge that there will be a reduced number of trials, and there is at least a six month back-log for all the trials that have been postponed from March through September. The PLF recommends that the Courts give priority on the necessarily-reduced trial schedule to parties who report that they are ready, willing, and able to proceed to trial, and that the courts honor the preferences that may be expressed by parties who do not wish to proceed to trial under the COVID-19 conditions and precautions.

II. Objection to Reducing Jury Size in Superior Court Civil Cases

The Report recommends "that the SJC reduce to six the number of jurors in Superior Court civil cases. . ." Report at p. 28. This recommendation has both constitutional and statutory implications. The Report recognizes the importance of trial by jury and the constitutional underpinnings of that right. Report at 5-6. However, the recommendation that "a temporary change to juries of six in civil cases seems well warranted in the context of the pandemic" (Report at 29), does not take full account of the constitution and laws of the Commonwealth bearing upon the right to a jury of twelve.

The right to a jury trial is guaranteed by the Constitution of the Commonwealth and the provisions of the Declaration of Rights. The right to a jury trial is guaranteed by Articles 12[2] and 15 of the

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[2] Article 12 provides as follows:

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. *And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election*. And *no subject shall be arrested, imprisoned, despoiled, or deprived of his property*, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his

Declaration of Rights to the Constitution of the Commonwealth.[3] Article 12 is typically invoked as the source of the right to a jury trial in criminal cases but it has also been applied in other matters where there is a punitive aspect to the proceedings. See *Commonwealth v. One 1972 Chevrolet Van*, 385 Mass. 198, 201-202 (1982); *Commonwealth v. United Food Corp*., 374 Mass. 765, 778-781 (1978). In addition, Article 12 and Article 10[4], guarantee the right to due process of law. See, *Commonwealth v. O'Neal*, 369 Mass. 242, 244-245 (1975) (Tauro, concurring) (due process concepts are derived under arts. 1, 10, and 12 of the Declaration of Rights). Article 15, which applies specifically to civil cases, "preserves the 'common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted' in 1790." *Stonehill College v. Massachusetts Commission Against Discrimination*, 441 Mass. 549, 559, (2004), citing *Department of Revenue v. Jarvenpaa*, 404 Mass. 177, 185-186 (1989), quoting *Opinion of the Justices*, 237 Mass. 591, 596 (1921).[5]

The Supreme Judicial Court has long held that the right to a trial by jury in an action in tort, and in an "ordinary action at law" is secured by the Constitution. *Higgins v. Boston Elevated RY. Co.*, 214 Mass. 335 (1913); *Shields v. LeBrecht*, 345 Mass. 354 (1963). The right to a jury trial must be honored where the claims "are essentially legal in nature, with roots both in torts and contracts." *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 226-227 (1994). See also *Curcuru v. Rose's Oil Service, Inc.*, 441 Mass. 12, 16-17 (2004).

The appellate courts have recognized the significance of the right to a jury trial, and specifically the right of a defendant in a civil case to assert that right, even if a plaintiff seeks to proceed in a forum that would not typically provide an opportunity for a jury trial. See *New Bedford Housing Authority v. Olan*, 435 Mass. 364 (2001) (tenant in eviction case may assert right to jury trial); *Bischof v. Kern*, 33 Mass. App. Ct. 45, 46-47 (1992) (a small claims plaintiff as a defendant in counterclaim could claim a right to a jury trial until the legislature provided otherwise).

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life, liberty, or estate, *but by the judgment of his peers*, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, *without trial by jury*. (emphasis added)

[3] Article 15 provides as follows:
In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, *the parties have a right to a trial by jury*; and *this method of procedure shall be held sacred*, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it. (emphasis added)

[4] Article 10 of the Declaration of Rights provides, in part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to the standing laws . . ."

[5] The right to a jury trial in civil cases is also guaranteed by the Seventh Amendment to the United States Constitution which provides that "[i]n suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." While the Seventh Amendment recognizes this important right, it has no direct application in the state courts. *Galvin v. Welsh Mfg. Co.*, 382 Mass. 340 (1981), citing *Curtis v. Loether*, 415 U.S. 189, 192 n. 6 (1974).

The Report states that "[a]lthough the Massachusetts Constitution guarantees the right to a trial by jury, it makes no express reference to the number of persons serving on a petit jury." Report at 28. The Report recognizes "there is a long-standing common law tradition of 12-person juries for both civil and criminal cases in the Superior Court." Report at 28-29, citing Opinion of the Justices, 360 Mass. 877, 886-887 (1971)(Quirico, J. dissenting)(discussing common-law history of 12-person jury). Both the Supreme Judicial Court and the Legislature have recognized the foundational nature of the right to a 12 person jury, and that any reduction in the number of jurors from 12 to 6 may only be accomplished through legislation or the assent of the parties. In *Opinion of the Justices* the SJC was asked whether a bill to modify the trial de novo system in the District Courts would be constitutional if it were to provide for a right to a jury-waived trial where a defendant could either accept the result of the bench trial, or have a trial before a jury of six, still retaining the right to appeal to the appellate courts. The SJC found that such legislation would be constitutional, however the Court made it clear that it was not rendering an opinion on offenses tried in the Superior Court: "We recognize, of course, that the present bill has no effect either upon trials for more serious crimes or in any case where the defendant may be exposed to a State prison sentence. This circumstance probably means (see art. 12, last sentence) that no offense involving 'infamous punishment' is dealt with by the bill." 360 Mass. at 885. In subsequent years the trial de novo system was eliminated altogether and through legislation a six person jury is now permitted in the District Courts and the Boston Municipal Court in civil matters within the jurisdiction of those courts, where the amount in controversy is alleged to be under $25,000. G.L. c. 218, § 19 (setting $25,000 amount in controversy); G.L.218, § 19A (providing that if the amount in controversy may reasonably exceed $25,000 the case shall be dismissed and refiled in the Superior Court). See *Sperounes v. Farese*, 449 Mass. 800 (2007) (describing the creation and evolution of the jury of six system in the District and Boston Municipal Courts for civil cases); *Rockland Trust Company v. Langone*, 477 Mass. 230 (2017)(describing the one trial jury of six system in the District and Boston Municipal Courts as enacted in 2004. St. 2004, c. 252).

If the legislature has not expressly reduced the number of jurors from 12 to 6, then the required number of jurors remains at 12. As the SJC noted in *In Re Sheridan*, 422 Mass. 776, 781 & n. 5 (1996), "While statutes provide for a jury of six persons in civil trials in certain lower courts,. . .[citations omitted]. . . no statute or rule provides for six-person juries in Superior court civil actions." The SJC concluded in *Sheridan* that since SDP proceedings are conducted in the Superior Court, they are subject to the practices and rules governing Superior Court actions, specifically including the requirement of a jury of 12. The Report suggests that in the absence of an express constitutional requirement for a jury of 12 the Court is free to reduce the number of jurors. But in the absence of legislation authorizing the reduction of the number of jurors in specific circumstances, the base-line law has always been that there shall be a jury of twelve in all Superior Court trials. The Rules of Civil Procedure recognize this. See, Rule 48 Mass. R. Civ. P., ("The parties may stipulate that the jury may consist of any number less than twelve, or less than six in the District Court, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.") ; Rule 47 (b) and (c) Mass. R. Civ. P., (In Courts "other than District Courts" the court "may order impanelled a jury of not more than sixteen members and the court shall have jurisdiction to try the case with such jury as provided by law." In the District Court the "court may order impanelled a jury of not more than eight members . . .") Notably, the statute that once permitted Superior Court civil cases to proceed with as few as 10 jurors when members of the full panel were unable to proceed was recently repealed. See, G.L. c.

234, § 34B, repealed by St. 2016, c. 36 § 1.

The words of Article 15 dictate that the right to a jury trial, as it was understood when the Constitution of the Commonwealth was drafted "shall be held sacred." The jury of twelve system has served the Commonwealth well for centuries. It has been modified through legislation only in civil cases where the amount in controversy is less than $25,000, and in criminal cases where the potential criminal sentence will not include a term of incarceration in the State penitentiary. The COVID-19 pandemic presents challenges but it would be premature for the Court to alter the jury of 12 system at this time when other alternatives, including allowing cases to proceed when all parties assent to proceed under emergency COVID-19 protocols.

III. Objection to Reducing Jury Size in Professional Liability Cases

Medical malpractice cases have formalities and safeguards that are not present in other civil litigation, including the requirement that there shall be a medical malpractice tribunal to screen out cases that may not have substantive merit. G.L. c. 231, § 60B. These cases proceed in the Superior Court where there has always been a right to a jury of twelve. The cases tend to be complex, including testimony from multiple fact witnesses and multiple expert witnesses, who are often called to testify from other jurisdictions. As civil cases go, the stakes are very high. A plaintiff, or the estate of a deceased often allege very substantial losses, and physicians or other health care providers are often named along with past or present medical providers and health care facilities with which they have been associated. The consequences for all parties are serious.

Such professional liability cases should only be scheduled for trial at a time when a full complement of jurors will be available, when all lawyers and fact and expert witnesses are available to appear for trial, and when jurors will be able to use all of the traditional tools available to them to evaluate credibility of witnesses, including the ability to see their faces unobstructed by masks or shields. These cases tend to bring the largest number of lawyers, witnesses, and support staff into a court room, often for the largest number of days, making them among the least suitable civil cases to be tried while COVID-19 conditions prevail. The PLF recommends that unless all parties to a medical malpractice case agree to proceed to trial subject to whatever COVID-19 protocols and restriction may be adopted, such cases should be deferred for trial until conditions allow trials without such restrictions.

Respectfully,

Edward J. Brennan, Jr.
Executive Director

John J. Barter
Legal Counsel

From: Denise Simonini
Sent: Friday, August 14, 2020 3:16 PM
To: Burak, Christine <Christine.Burak@sjc.state.ma.us>
Subject: CPCS Comments on JMAC regarding Resumption of Jury Trials

Dear Attorney Burak,

Attached please find CPCS' comments on the Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials.

Do not hesitate to contact our office if you have any questions or require additional information.

Thank you,

Denise
Denise Simonini
Executive Assistant to the Chief Counsel
Committee for Public Counsel Services

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ANTHONY J. BENEDETTI
CHIEF COUNSEL

August 14, 2020

Chief Justice Ralph D. Gants
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square, Suite 2500
Boston, MA 02108

Sent via electronic mail to: Christin Burak, Legal Counsel to the Chief Justice
Christine.Burak@jud.state.ma.us

RE: CPCS Comments to JMAC Recommendations

Dear Chief Justice Gants:

Thank you for the opportunity to comment on these important recommendations. We appreciate the time and effort that was spent by this committee to develop these thoughtful and comprehensive recommendations.

I. THE IMPORTANCE OF TRIAL BY JURY

We share the Committee's concern about the growing backlog of cases ready for trial while jury trials have been suspended. We agree that jury trials must begin again expeditiously provided it is safe for all participants and the constitutional rights of accused people are fully protected. We recognize that it will be very difficult to "balance the goals of recommending jury trial in Massachusetts as expeditiously as possible, protecting constitutional rights, maintaining public confidence, and minimizing risk to the health of all participants,"

We urge the Supreme Judicial Court and the Trial Court to consider the temporary use of trial *de novo*. As the JMAC recognized, "[A]lthough the vast majority of cases in Massachusetts, both civil and criminal, do not go to trial, a credible [jury-]trial date is key to resolution."

A. Preparation for Jury Trial

The right to counsel is a foundational right of our justice system. The right to counsel cannot be fully actualized unless every accused person has had adequate time to meet with counsel to prepare their case for trial or other meaningful event. The JMAC recommendations do not address the core need for attorneys and clients in custody to confidentially meet to prepare for the jury trial. In normal times, attorneys can safely meet with their custody clients at the place of detention. During a time of a dangerous and contagious pandemic, lawyers must be assured that there are safe places to meet with clients. We understand that the Department of Corrections is planning to institute virtual visitation throughout the prison system. Some sheriffs have established virtual visit protocols so that attorneys and clients can meet virtually via a zoom platform. Some sheriffs are exploring using the JurisLink platform for virtual visits. The cost of the JurisLink virtual visit is borne by the attorneys who may seek reimbursement from CPCS. Many sheriffs have, to date, insisted that attorneys can safely visit their institutions. We are not convinced and have asked for documentation about the ventilation systems in each facility. We have not received any information or documentation that sheriffs have evaluated the ventilation in each visiting room in each institution and have concluded it is safe to visit. We urge the JMAC to engage with the sheriffs to address the essential need for meaningful preparation for jury trials. If this component is not fully operational, the right to counsel will not be realized. And jury trials for those people awaiting trials in custody will not proceed because attorneys will not be fully prepared.

II. CONSIDERATIONS BASED ON EXPERT ADVICE

A. Ventilation

We urge that prisoner holding areas within courtrooms be prioritized for expert evaluation of air exchange rates and overall ventilation. These areas must be safe for confidential communications between attorneys and clients and for detained clients who will be transported from the detention facility to the courthouses for trials.

Jury trials should not commence in courthouses or courtrooms until the Trial Court has received expert testing of air exchange rates and air volume per person per minutes and expert advice that the ventilation in each courtroom and each space that will be occupied

by trial participants meets or exceeds industry accepted COVID-19 standards for room size and occupancy and the Trial Court publishes the expert testing results and information for each courthouse and courtroom within the courthouse.

III. RECOMMENDATIONS

PRACTICES THROUGHOUT ALL PHASES

The Trial Court should prioritize criminal and youthful offender and delinquency custody cases for jury trials over all civil cases. Jury trials for people in custody must take precedence over civil cases, unless the civil case meets a clearly defined standard of "particular significance", such as civil proceedings that may result in a loss of liberty.

1) Health Risks pp.16, 18, and 21:

Problem: The report underestimates the risk posed by conducting jury trials. Anything short of complete mask compliance at all times in an enclosed area that will be occupied by a number of people for hours at a time, presents a danger of contagion. Further, self-screening does not provide adequate protection and will not protect the courtroom from the asymptomatic.

When available, daily rapid testing for all individuals entering the courtroom should be employed.

Footnote 24 (p. 18) is very concerning. The report seems to suggest that the reason for waiting 2 months before moving to phase 2 is to wait to see if anyone involved in a jury trial spreads the disease, becomes seriously ill, or dies. The implication is that those involved in Phase 1 are a test group. Dangers should be worked out prior to entering Phase 1, rather than taking a wait and see approach, that could result in death and illness, before moving on to Phase 2.

Without a vaccine, there is no way to guarantee safety for participants in a trial. The only way to maximize safety is by minimizing constitutional protections of the defendant by mandating masks at all times. Further, there are too many instances in the report wherein attorneys might have to choose between their safety and that of their clients, thus creating a conflict of interest. We need more time and input from experts with the perspective of the litigants before we impose a trial process upon defendants and jurors.

2) Priority of Cases pp. 16-19:

The court will determine which cases are the priority cases. The concern is that "consulting" without input from defense counsel will result in a defendant being forced to trial.

Defendants should be provided the option to opt out of trial and to not be considered a "priority" should they not want to go to trial for health or fairness concerns. Further, there should be an initial focus on serious cases that are shorter in duration, or simpler in terms of the number of people involved, rather than the seriousness of the offense.

It is particularly important that trials be prioritized for juveniles in custody. Except in the rare instance where a juvenile receives an adult prison sentence, juveniles do not receive jail credit for time in custody awaiting trial. Moreover, there is a significant difference between the programming provided to youth in pretrial detention and those committed to the Department for treatment. Indefinite detention awaiting trial undermines the healthy development of adolescents, thus undermining the purpose of the juvenile court to assure that "the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."

3) Voir Dire:

a) Number of Jurors. p.28

The JMAC should clearly state that in criminal cases in Superior Court, juries of 12 shall not be changed. As Justice Quirico stated in his dissent in Opinion of the Justices, 360 Mass. 877, 886 (1971):

> "The size of the jury at common law had become generally fixed at twelve sometime in the Fourteenth Century. Williams v. Florida, 399 U.S. 78, 89, 90 S.Ct. 1893, 26 L.Ed.2d 446. It had continued at that number for the next four centuries to the adoption of our Constitution in 1780. It is therefore reasonable to conclude that by 1780 trial by jury was commonly understood and accepted to mean trial by a jury of twelve persons. In the period of almost two centuries since 1780 we have never compelled a defendant in a criminal case or a litigant in a civil case who was entitled to a trial by jury to go to trial before a jury of less than twelve persons."

There should be no ambiguity about this requirement.

b) Peremptory Challenges p. 29:

The number of peremptory challenges should be increased, not decreased. In this pandemic time, it will be much harder to achieve trial juries that represent a fair cross section of the community because large groups of people; for example those who are elderly or those who live in marginal communities will be more likely to be excused because of their greater vulnerability to the COVID-19 virus. More peremptory challenges are needed to achieve trial juries that represent a cross section of the community. More peremptory challenges will likely mean more time will be needed to empanel a trial jury but where the goals are "protecting constitutional rights, maintaining public confidence, and minimizing risk to the health of all participants," the additional time will be well spent.

OPENINGS, EVIDENCE AND CLOSINGS

1) Attorney/Client Communication pp.32-33:

There needs to be more guidance for trial judges regarding attorney/client communication before and during the trial. A core element of the right to counsel is the ability of clients to confidentially confer with their attorneys during the trial (and before trial to properly prepare – see comments at page 1). When counsel and client are masked and separated by distance or a plexiglass barrier, there is limited opportunity for confidential communication. The Court should be responsible for assuring the right to counsel during jury trials. The Court should provide a "fix" that allows attorneys and clients to communicate confidentially in real time during the trial. One suggested "fix" would be to furnish a closed-circuit two way audio system ("walkie-talkie") so client and attorney can confidentially communicate during the trial. Of course, additional arrangements will be needed in cases needing interpreters.

The juvenile bar has a special responsibility to ensure their clients are engaged and understanding the proceedings. Even when a young person is competent to stand trial, adolescents can often process and understand information at a different pace and method than adults. A standard of juvenile court practice is to constantly check a young person's understanding, even if in subtle ways (a whisper, a quick note, short eye contact, etc.).

The Court should be very liberal in granting recesses for these "check-ins" and/or institute frequent, short breaks. The Court should also provide an agreed upon jury instruction explaining the reason for what may be seen as repeated interruptions (e.g. young people need more instruction and explanation, a break for relief from the mask wearing) and the need for the officer to accompany the youth (e.g. the law requires court officers for a courtroom in session with jurors, witnesses, parties, judges, etc. and this

courtroom is necessarily spread out over a number of separate spaces so additional court officers are needed) so that the juvenile is not prejudiced.

2) Sidebar Conferences pp.33-34:

The lack of a sidebar would eliminate counsel's ability to preserve objections and argument for appeal. The cumbersome practice of excusing the jury for every sidebar could also result in a judge requiring counsel to voice the reason for a sidebar, thus violating the client's constitutional rights or be a basis for a mistrial. Emails between the judge and counsel may be a solution and better than texting because of record preservation but not all courts have Wi-Fi. Another solution would be a separate room where sidebar participants can gather, while socially distanced, and a record can be maintained is the preferred course of action. Given the restrictions on sidebars, judges need to make timely rulings on motions in limine in order to avoid litigating them at sidebar.

3) Racial Composition of Juries pp. 13, 19, 23, and 28:

Problem: As stated in the report on page 28, pursuant to the 6th Amendment, the jury shall provide "a representative cross-section of the community. Ballew v. Georgia, 435 U.S. 223, 230 (1978), citing Williams v. Florida, 399 U.S. 78, at 100 (1970). The fact that COVID-19 has been shown to disproportionately impact minority communities, there is great concern that members of those communities will either defer service or will be excused from service, thus skewing the venire. The result would be a non-representative jury pool. It would also likely disproportionately exclude parents of school aged children.

A suggested solution would be to give parties on trial access to excusal/deferral information so jury pool racial composition can be fully litigated. Further, in order to assure that the venire is a fair cross section of the community, the OJP should provide timely and transparent data about the potential jurors. *See*, *e.g.*, "The OJC will track characteristics of jurors who are excused on these grounds, as well as those age 70 or over who elect not to serve, and those who defer for up to one year, in order to identify promptly any effect on racial, ethnic, or gender composition of the jury pool." In order to "maintain jury pool composition consistent with demographics of each judicial district" we need to all agree on the relevant baseline demographic composition for each matter as it moves through the jury trial process. This data should be collected and published to litigants on weekly basis.

Data should include racial, ethnic and gender demographics for the following stages in the process:

- Overall demographics of each judicial district (e.g. a baseline) from the master jury list, including the characteristics being tracked for excusals, see, page 23.
- Overall jury pool list/mailing list
- Summonses sent out
- Response rate
- Deferral requests including information on how far out deferrals are being requested (e.g. as far out as possible?)
- Excusal requests (to OJP), see, page 22.
- Excusal permission (from OJP/without having to appear for summonsed date), see, page 22.
- Venire that is called for day in question
- Venire that actually appears
- Venire that is turned away on day of service due to COVID concerns, see, page 24.
- Though these are YAD suggestion, many should also be adopted in criminal cases when possible.

4) Voir Dire pp.26-30:

There has been a concerted effort over the past five years to expand the use of panel voir dire. The procedures suggested in the report are extremely vague and leave too much discretion to the court. It is unclear whether there will be panel voir dire. This could hamper the efforts by counsel to obtain meaningful voir dire. There is no clear statement of what type of voir dire is available and the report distinctly only refers to individual voir dire.

Specific procedures should be put in place to allow for panel voir dire. Jurors should be unmasked for all voir dire questions, both in individual and panel voir dire, which might require smaller groups called in panels. The use of written supplemental questionnaires should be encouraged to reduce the individual voir dire process. Panel and personal voir dire should be allowed.

5) Alternative Venues; 41- 53 (App. 2) and 54-55 (App. 3):

The proposal for the use of former jails and Sheriff's facilities for trials is alarming. Holding criminal trials in an executive branch facility run by law enforcement is highly inappropriate and prejudicial and hosting a trial therein would prejudice defendants and suggest a lack of impartiality. Pp. 54-55

Any facility that has direct contact with law enforcement should be excluded as a proposed site for criminal case jury trials.

The juvenile bar is also concerned about individual buildings, especially since juvenile courtrooms are often smaller than the general courthouse courtrooms.

The JMAC should publish information provided to the Trial Court JMAC by its various experts (e.g. Dr. Michael Ginsberg, Norwood Hospital, Dr. Joseph Gardener Allen, HSPH), and the HVAC contractor(s) reviewing the air circulation system of each potential building, *see*, footnote 17. (p. 15)

6) Masks: pp. 13, 14, 27, and 35:

There is a fundamental conflict between a defendant's 6th Amendment right to confrontation and courtroom safety when discussing the wearing of masks during trial. The credibility of witnesses cannot be determined and proper cross-examination of witnesses cannot be conducted unless their faces can be seen. The best way to ensure safety in the courtroom is for all participants to wear masks at all times. These two competing interests cannot be reconciled, however all witnesses must testify without a mask.

There must be a court order requiring all courts to establish extraordinary procedures to ensure a witness's face can be seen while also minimizing the dangers presented by COVID-19. One possibility is to provide and use multiple of clear face masks by witnesses that are to be thoroughly sanitized after each use. Cloth face masks cannot be worn by witnesses during their testimony.

The judge is authorized to waive the mask requirements for anyone upon a finding of "substantial necessity." P. 27. This allows individual judges to determine the trial policy for the wearing of masks, so the term needs to be clearly defined. There are courts that are already lackadaisical with respect to masks in the courtroom. To leave that much discretion to individual judges could a safety hazard.

The report needs to be clearer on who must wear a mask and when with an emphasis to protect the rights of the defendant. The use of Plexiglas for the witness box creates a dangerous situation for witnesses, as there is no circulation within and proper cleaning will be required after every witness. We have already seen courtrooms that are not compliant with the current court orders. The requirement of all in the courtroom to wear masks, with limited exceptions, must be drafted and followed.

7) Exhibits 34-35 (exhibits):

The report mentions that physical exhibits cannot be handed out, but court technology does not support any other means of exhibit distribution. The use of physical binders invite COVID-19 transmission, while the use of virtual binders is beyond technology of many courts.

Any court approved for the resumption of jury trials must have the technological capability to present exhibits to the jury in an electronic form. If they do not, they should be excluded from resuming jury trials.

8) Jury Selection pp.19-25:

Problem: Jury pools will have to be limited due to the limit of people allowed in a courtroom at any one time. For the selection of a jury in a complex trial, taking into account the number of potential jurors that will voice discomfort in participating in a trial, it seems size of the jury pool will exceed the number of people allowed into an individual courtroom. Bottlenecks regarding the jury pool should be expected.

Suggestion: COVID-19 specific jury instructions should be drafted, in consultation with epidemiologists and public health communication specialists to address COVID-19 related issues in the jury selection process.

9) Full-Day Trials and Multi-Day Trials: pp. 13 and 34

Problem: Footnote 14 (p. 13) references Dr. Allen's opinion that trial days need not be shortened. This statement does not take into consideration the challenges defense counsel is having with respect to communication with clients, witnesses, experts, and other.

Considering the complexities in the daily preparation for trial while it is in progress, we should consider a shorter day during the duration of the trial. This will allow attorneys to make the daily preparations needed to adequately prepare to the unexpected issues and challenges that arise in every trial.

There is no discussion in the report with respect to sequestration. Sequestration during the pandemic raises additional safety issues and concerns to the process.

In addition to sequestration, multi-day trials should have a quarantine requirement for all participants in the trial for the duration of the trial, including the judge, attorneys, courts

staff, jurors, and security. Whether a person is able to quarantine should be a questions asked in the voir dire process.

10) Jury Deliberations (p. 35):

Jurors are historically placed in conference rooms to allow them to freely deliberate without the possibility of being overheard. The report suggest they will be deliberating in an open courtroom which does not provide the same sort of protection of control.

Court officers must be placed outside a courtroom being used as a deliberation/jury assembly room to preclude public access and ensure deliberations cannot be heard by the public (especially in older and smaller courtrooms).

There is concern that even social distanced deliberations will be complicated by COVID-19 anxiety and the continuous enclosure in one room might influence deliberations. Further, not providing jurors with food and drink could also increase the anxiety during deliberations.

There should be a clear and detailed discussion of the measures taken to ensure juror safety during deliberations. Further, all jurors should be given the opportunity to provide the judge with any safety concerns they might have during deliberations, anonymously if necessary.

11) Family Members and Supporters (pp. 30-31):

The plan severely limits the number of non-participants in the courtroom. This can have a serious detrimental impact on defendants, especially juveniles, due to the pressures exerted upon them during trial.

Suggestion: Every effort should be made to give supporters of the defendant/juvenile access to the courtroom. There should be no access preference given to supporters of either party in the proceeding. Finally,

12) Approaching the Witness:

This issue is not addressed in the report. During the course of the trial, counsel will have to approach a witness for various reasons. This will happen during trials and could present a health hazard if not properly done.

A more detailed rule on when and how to do so must be made clear prior to the jury empaneling, setting ground rules for the particular courtroom setting and space.

13) Sightlines and Audio in the Courtroom pp. 12, 17, and 32:

It is important for counsel to be able to view the jury peripherally throughout the trial. With the various suggestions in the report, we cannot be certain this will happen.

We cannot try our case with our backs to the jury and without the ability to see them. Each courtroom must be vetted for these concerns prior to trial.

Many courtrooms will have trouble with audio, especially if some are wearing masks. Further, audibility could be a safety issue, as people speaking loudly over a period of time could increase the likelihood of contagion.

Counsel tables will need table-top podiums with microphones. Further, all microphones should be amplified to adjust for masks. Audibility and usage/volume of microphones should be tested well before trial to ensure all can hear and all is recorded.

There could be a perception of partiality or preference if the jury is closer to one party's observers over the other.

Care should be given so that wherever jurors are placed in the courtroom, they are not seated in closer proximity to one party's observers or the other.

14) Mock Trial:

On page 16 there is a discussion of a mock run-through of a trial in one location. Each courtroom has its own trouble spots and challenges that a mock run-through in one location will not address.

Each courthouse to be used should have its own mock run-through before having jury trials.

15) Resumption of Trials:

This is not particularly addressed in the report but was a concern. Presently, defense counsel has jury trials set in September, but have no idea whether they are going to proceed.

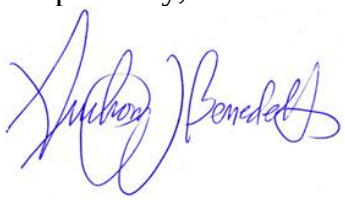
An announcement or amendment to the present standing orders should clearly state whether trials will resume in September. If so, at what levels will trial resume?

16) Feedback from Jurors after the Verdict p. 18:

The reports mentions the need for feedback from jurors after Phase 1 trials through questionnaires which will not be available for weeks after the trial. This misses the opportunity to address the jurors while their comments and concerns are fresh.

As we are dealing with an entirely new situation with the health and comfort of jurors a primary concern, there should be relaxed rules regarding counsel-initiated contact with jurors after the trial in order obtain their feedback, including reporting improprieties in the process.

Respectfully,



Anthony J. Benedetti
Chief Counsel

From: Hill, Carrie (SDA)
Sent: Friday, August 14, 2020 3:50 PM
To: christine.burak@jud.state.ma.us
Subject: MSA Comments on Resumption of Jury Trials

Hi Christine,
I hope this email finds you doing well. The MSA will be submitting a response on the resumption of jury trials, however, the President is unavailable this afternoon and therefore I have to wait to hit "send". Hopefully, you will accept our input even if it is after the 5:00 COB hour.

The report includes the suggestions, comments and recommendations from Sheriff Peter Koutoujian on behalf of the MSA. We greatly appreciate including the Sheriffs. Our letter re-enforces Sheriff Koutoujian's comments as well as the support we have for video conferencing, when feasible.

Please let me know if you have any questions or concerns.

All the best and thank you for your patience.

Carrie Hill, Esq.
Executive. Director
Massachusetts Sheriffs' Association

From: Hill, Carrie (SDA)
Sent: Tuesday, August 18, 2020 4:16 PM
To: Christine Burak <christine.burak@jud.state.ma.us>
Cc: Larocque, Jennifer (JUD) <Jennifer.Larocque@jud.state.ma.us>
Subject: MSA Comments on Resumption of Jury Trials

Good Afternoon Christine,
Attached please find the MSA's response regarding the Resumption of Jury Trials.
We greatly appreciated the opportunity to be a part of the process. If there are any questions or could provide any additional input, please do not hesitate to contact me.

Once again, thank you for your continued patience.

Respectfully,

Carrie Hill, Esq.
Executive. Director
Massachusetts Sheriffs' Association

Massachusetts Sheriffs' Association

132 Portland Street, 2nd Floor
Boston, Massachusetts 02114
(857) 233-5706 / Fax: (617) 936-3267

August 14, 2020

The Honorable Ralph D. Gants
Chief Justice of the Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

To the Honorable Chief Justice Gants,

On behalf of the fourteen (14) duly elected Sheriffs of the Commonwealth, we thank you for the opportunity for the Massachusetts Sheriffs' Association (MSA) to provide input to the Jury Management Advisory Committee (JMAC) as well as the opportunity to provide comments on the JMAC's recommendations on the resumption of jury trials.

As a precursor to our remarks, in response to the COVID-19 Pandemic and the Governor's State of Emergency in March of 2020, the Massachusetts Sheriff's Association (MSA) hired Dr. Alysse Wurcel, MD, MS, who specializes in Infectious Diseases, from Tufts Medical Center and the Department of Public Health and Community Medicine at Tufts University School of Medicine in Boston, to advise and guide the Sheriffs, Superintendents and medical personnel in matters regarding COVID-19 prevention and mitigation. Dr. Wurcel is also MSA's liaison with the Massachusetts Department of Public Health (DPH) on all matters COVID-19 related in the Jails and Houses of Corrections. Dr. Wurcel is a nationally-recognized correctional expert on COVID-19 who is in close communication with other nationally-recognized medical doctors in corrections who are advising and assisting the United States Centers for Disease Control and Prevention (CDC) on the management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities. Dr. Wurcel continues to advise and guide the MSA on all matters COVID-19 related including the re-opening of the courts and matters related to screening, transportation, housing at the courthouse, quarantining etc.....

In addition, the MSA has been working closely with Director of Security Jeff Morrow prior to the Court's re-opening as well as after to address continued safety and exposure concerns. Most recently, the Sheriffs had a ZOOM call with the Chiefs of the various courts, led by Chief Justice Carey, to discuss the challenges for the Sheriffs in keeping the inmates safe from exposure to COVID-19 as a result of transporting, housing at the court, exposure to others and the potential for quarantining upon return. It was and remains a very productive, important and continuing dialogue.

The Sheriffs are no strangers in managing infectious diseases in their facilities, to include Influenza, H1N1 and Tuberculosis. Each facility adopted in-depth protocols to address

operational preparedness, prevention and management of COVID-19 as recommended by the CDC to include: screening for inmates and staff; medical quarantining upon intake; testing protocols; medical isolation; cleaning supplies; education on COVID-19; dedicated housing units; sleeping; eating; showering; recreation; visitation; hygiene supplies; PPEs; contact tracing; social distancing; cohorting based on COVID-19 status. The Sheriffs have been involved in litigation in the case of CPCS and Association of Criminal Defense Attorneys v. Chief Justice of the Trial Court & Others. At all times during the course of the litigation, there have been no findings by the SJC that the Sheriffs are violating the inmates' constitutional rights as a result of their response to the COVID-19 Pandemic. After four months of responding to the COVID-19 Pandemic, the Sheriffs have done a remarkable job of keeping the inmates, staff and communities in which they serve, safe. The resuming of in-person jury trials, absent a vaccine or rapid reliable testing greatly increases the risk of exposure for the very inmates and staff the Sheriffs are working so hard to protect.

Prior to the State of Emergency, in February of 2020, the Massachusetts Sheriffs enthusiastically endorsed the initiative of the District Court to increase the utilization of video conferencing technology across the District Courts of the Commonwealth. We applauded the initiative and urged not only all District Court Justices to take advantage of this enhanced and expanded technology but also that the Superior Court to make a special effort to expand their use of the technology across the fourteen Superior Court jurisdictions as well. Once COVID-19 presented, the value and need for expanded video conferencing became more apparent than ever. The lives of many within the criminal justice system depended on it.

Throughout the Pandemic, we know that video conferencing provides a viable means of conducting meaningful court hearings while enhancing public safety, protecting against COVID-19 transmissions, permitting effective use of resources by reducing transportation costs and freeing up resources that would otherwise be spent on ensuring safe and efficient movement of inmates, reducing the potential for introduction of contraband, while promoting productivity and efficiency for both the courts and the correctional facility. Anecdotal evidence suggests many, if not most, defendants prefer the convenience of remaining on site at a correctional facility.

We can assure the Court that each of our respective correctional facilities enthusiastically support the use of expanded video conferencing and have the required technology in place to conduct these judicial proceedings. Additionally, we can offer assurances that each facility has the means to ensure defense counsel has adequate means for privileged attorney-client communication in preparation for the subject of the video conferencing event. Each of the facilities has gone to extra measures to ensure that the inmates' constitutional rights of Access to Courts and Counsel are met. As just one example, Sheriff Tompkins added 16 sound barrier booths in the Jail and 10 sound barrier booths in the House of Corrections to assist with providing access to both attorneys and the courts for the purpose of accommodating hearings. To date, Suffolk County has accommodated more than 12 video remote bench trials within their facilities with over 1,712 hearings having been conducted. It has been effective and efficient, providing assurances the inmates' constitutional needs are being met while providing the necessary protections to keep all protected from the ails of COVID-19. We continue to support and encourage all courts to utilize the expanded use of video technology to conduct all forms of hearings and trials when feasible during the COVID-19 Pandemic.

The specific concerns addressed in the report with the re-opening include:

- We re-emphasize the concerns previously raised by Sheriff Koutoujian on behalf of the MSA and DOC representatives of the "acute concerns about maintaining the health and

safety of incarcerated defendants and the inmate populations within their institutions while transporting inmates between custodial facilities and courthouses. Each transportation event creates an expanded network of potential contact with court officers, attorneys, other inmates from DOC and House of Correction facilities, and other detainees from police department holding cells." As raised by the Sheriffs with the JMAC, placing multiple inmates in a van, and the potential for numerous inmates in cells mixed with inmates from other facilities or courthouses is of significant risk and concern. The Director of Security also raised the challenge of bringing in defendants on a "staggered basis and ...that limited occupancy space was a concern". The goal is to limit the amount of movement and interaction with other individuals. These remain heightened concerns for the Sheriffs in our continuing conversations with the Chief Justices and Director Morrow and our concern with the resuming of jury trials in the Commonwealth at this time.

- In addition, the Sheriffs are concerned over inmates having to be quarantined upon returning to the facility from court. Inmate frustration and the potential for unrest in these scenarios is heightened despite assurances to the returning inmate that the quarantining is not punishment, but rather a layer of protection to ensure their safety as well as the safety of the other inmates. The Pandemic is nowhere near being over. Upon the advice of Dr. Wurcel, the inmates will be quarantined on a case-by-case scenario when returning from court. With the increase in hearings and the consideration for the resuming of jury trials, the Sheriffs will, if they have not already, run out of space to quarantine, thus the potential to put even more at risk of being exposed to COVID-19.

- In regards to the Phase 3, and utilizing *"non-courthouse spaces" to meet trial needs, the security concerns intensify.* As mentioned in the report, "All participants in this meeting expressed concerns about holding jury trials in off-site locations, and believed that doing so would make issues such as security, staffing, evidence transportation, technology and FTR, more difficult." P. 68. Non-courthouse spaces present a significant security concern. The use of buildings not designed to secure in-custody individuals could present an issue for the safety and security of all individuals present. If the non-courthouse spaces are utilized, would the normal business remain in place? Would the non-courthouse space have the ability to secure the individual defendants? The Director of Security expressed similar concerns "that off-site locations would require more court officers and coordination with other agencies such as police and sheriffs' departments and DOC. Security raised concerns about where detainees would be held during court recesses, and questioned whether transportation vans would be suitable for holding an inmate." All of these security questions must be addressed prior to jury trials resuming. An increase in the volume of persons with access to a shared non-custodial space increases the potential for additional health and security concerns.

- The recommendations offer various model concepts when considering options for the reconvening of jury trials. All, with the exception of Model 12, require the defendant (inmate) be present. Again, the concerns raised over transportation, holding cells, exposure to other individuals and the need for quarantining upon return to the facility raise significant security and health concerns. Remote video options allow the defendant(s), witnesses, jurors and counsel to all see one another, without the concern of being in the same room and the potential for exposure to COVID-19. The inmate defendant could wear court room appropriate clothing, without a mask, in the privacy of a room within the Jail or House of Correction, so as not to potentially prejudice the jury. As we move forward in this day of unknowns with COVID-19, potential resurges or

other Pandemics to follow, we must be mindful of the extraordinary benefit that video technology allows for the criminal justice system. We encourage the Courts to expand video technology capacity so that the rights of the defendant inmates are met as well as the protections for all who are participating in the criminal justice system.

The Sheriffs stand with the JPJC in balancing the goals of recommencing jury trials in Massachusetts as expeditiously as possible, protecting a defendant's constitutional rights, maintaining public confidence, and minimizing the risk to the health of all participants are paramount during the COVID-19 Pandemic.

For these reasons, we specifically request and urge the Supreme Judicial Court to continue to urge all justices to embrace and increase the utilization of video conferencing technology for jury trials when feasible. We urge consideration for the safety of all the participants in the criminal justice process to ensure that the outstanding work of the Sheriffs to keep the inmates in their care, custody and control are safe and the risk of exposure to the COVID-19 is not compromised. The safety and well-being of the inmates and staff in the Jails and Houses of Corrections must remain the highest priority and commitment for our Sheriffs. We respectfully request that the Court postpone the resumption of jury trials, absent the expanded utilization of video technology, until such time as the availability of a vaccine or rapid, reliable testing are available.

Respectfully,

Carrie Hill, Esq.
Executive Director

From: Camire, Lauren
Sent: Friday, August 14, 2020 5:00 PM
To: Christine.Burak@jud.state.ma.us
Subject: The MAL Defendants' Response to JMAC's Recommendation to the SJC Regarding Resumption of Civil Jury Trials

Dear Attorney Burak:

1. On behalf of Lawrence G. Cetrulo, Esq., please find attached Defendants' Liaison Counsel's response to the Jury Management Advisory Committee's report to the Supreme Judicial Court.

2. Thank you for taking the time to consider our comments.

Best,
Lauren

Lauren K. Camire, Esq.
Associate
Cetrulo LLP

CETRULO LLP
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August 14, 2020

VIA E-MAIL
Christine Burak, Esq.
Legal Counsel to the Chief Justice
John Adams Courthouse
1 Pemberton Square, Suite 2500
Boston, MA 02108

Re: Defendants' Liaison Counsel's Response to the Jury Management Advisory Committee's Recommendations to the Supreme Judicial Court

Dear Attorney Burak:

I write to you in response to the Supreme Judicial Court's Notice inviting comments on the Jury Management Advisory Committee's ("the Committee") recommendations regarding the resumption of jury trials in Massachusetts. On behalf of the Defendants in the Massachusetts Asbestos Litigation,[1] we ask the Court to reject the Committee's recommendation to the Court requiring six person juries in Superior Court civil cases during phase one. In addition, although we understand the need to resume jury trials to avoid an unmanageable backlog of cases, the integrity of the judicial system depends on maintaining a jury that is representative of the community. As pointed out in the Committee's recommendations, particular groups of people, including the elderly, and racial and ethnic minorities, are at an increased risk of becoming ill from COVID-19. If the Court proceeds with six-person juries and the available pool of jurors is not representative of the population, the likelihood of an unjust outcome will increase dramatically. In order to avoid the potential prejudice that comes with a jury that does not reflect the composition of the community, the Defendants of the Massachusetts Asbestos Litigation will not stipulate to a jury of less than twelve members pursuant to Mass. R. Civ. P. 48.[2] For this reason and the reasons more fully articulated below, we ask the Court to reject the Committee's recommendation.

[1] Lawrence G. Cetrulo of Cetrulo LLP was appointed by the Massachusetts Superior Court as Defendants' Liaison Counsel in the Massachusetts Asbestos Litigation ("MAL") in 1985 by the Honorable William C. O'Neill. As Liaison Counsel, Cetrulo LLP acts on behalf of MAL Defendants by communicating and liaising between the Court and all MAL Defendants. Cetrulo LLP's role as Liaison Counsel also requires proposing case development schedules and filing briefs to protect the interests of all MAL Defendants. When an issue arises that may impact every Defendant involved in the MAL, it is the role of Defendants' Liaison Counsel to intervene to protect those interests effectively and efficiently. There are currently over four hundred Defendants in the MAL and approximately two hundred and twenty-two active cases.

[2] The parties of the MAL have been working well together to resolve cases remotely during the ongoing COVID-19 pandemic. Every case in the MAL is assigned to a trial list with set pre-trial deadlines, including a deadline for a

I. The Defendants of The Massachusetts Asbestos Litigation Do Not Stipulate to a Jury of Less than Twelve Jurors.

We have polled Defendants in the Massachusetts Asbestos Litigation and, at the resumption of jury trials, we will not agree to stipulate to a jury of less than twelve jurors. Under Mass R. Civ. P. 48, "the parties may stipulate that the jury shall consist of any number less than twelve, or less than six in the District Court, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury." Consistent with Mass. R. Civ. P. 48, Defendants have a right to withhold our stipulation to a jury of less than twelve jurors. If there are members of the bar who would rather proceed with six jurors in order to obtain earlier trial dates for their cases, they should be able to do so, as is their right under Mass. R. Civ. P. 48. If, however, Defendants in the Massachusetts Asbestos Litigation would rather wait until it is safe to move forward with a twelve-person jury, they should not be forced to try their case(s) during the pandemic with half of the jury present.

Mass R. Civ. P. 48 establishes a twelve person jury for civil jury trials in Superior Court, and this right can only be limited if all parties agree. *See Donovan v. Edgartown, Mass.*, 570 F. Supp. 2d 174, 175 (D. Mass. 2008) ("A Massachusetts Superior Court civil jury consists of twelve persons (or fewer by stipulation")). Consent is required by all parties because of the inherent risk that comes from fewer jurors.[3] Smaller juries have proven to be unreliable, inconsistent, less accurate, less representative, and less capable of overcoming potential biases. *Ballew v. Georgia,* 435 U.S. 223, 242 (1978), citing M. Saks, Jury Verdicts (1977) ("[L]arger juries (size twelve) are preferable to smaller juries (six). They produce longer deliberations, more communication, far better community representation, and, possibly, greater verdict reliability (consistency)"). "While a bare majority of the Supreme Court has upheld six person juries as constitutional, the studies reviewed by Mr. Justice Blackman in *Ballew v. Georgia* 'suggest . . . increased reliability where juries . . . consist of more than six jurors.'" *Cabral v. Sullivan*, 757 F. Supp. 107, 110 (D. Mass. 1991), aff'd in part and rev'd in part, 961 F.2d 998 (1st Cir. 1992), quoting *Hanson v. Parkside Surgery Center*, 872 F.2d 745, 750 (6th Cir. 1989).[4] Rights under Rule 48 should not be abrogated as there may well be other parties that stipulate to six, ten, or twelve jurors. Those parties should be able to proceed, but parties who do not want to give up their right to a twelve-person jury should not be required to do so.

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mandatory mediation. Although the Supreme Judicial Court modified the pre-trial deadlines in most civil cases in its "order regarding court operations under the exigent circumstances created by the COVID-19 (coronavirus) pandemic", cases in the MAL have been moving forward remotely during the pandemic. Defendants' Liaison Counsel would be happy to provide testimony or otherwise be heard further on this topic.

[3]The Advisory Committee on the Federal Rules of Civil Procedure has acknowledged the harmful effects of six person juries. *Minutes of the Advisory Comm. on Civil Rules* (Oct. 20-21, 1994).

[4] *See also Unshrinking the Federal Civil Jury*, 110 HARV. L. REV. 1466, 1484-1485 (1997)(finding smaller juries and more likely to return verdicts that are "inconsistent with community norms"); The American College of Trial Lawyers, *Report on the Importance of the Twelve-Member Civil Jury in the Federal Courts*, 205 F.R.D. 247, 266-270 (2002)(finding that twelve person juries "act as a more rational and representative fact-finder" as they are more representative of the community, exchange more ideas and information, and have a better collective memory); A. Horowitz & Kenneth S. Bordens, *The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial*, 87 J. Applied Psychol. 121, 124, 126 (2002)(finding that twelve person juries deliberate longer, recall more information and rely less on non-probative evidence).

II. The Risks Associated with a Six-Person Jury Have Only Been Increased Due to the Disproportionate Impact COVID-19 has had on Certain Groups in Our Community.

Because certain groups are less likely to serve on a jury during the pandemic, the probability of an unfair verdict is made more likely with a six-person jury.[5] The Committee recognizes in its report that older people and racial and ethnic minorities are more likely to become ill from COVID-19: "An individual's age and health conditions affect both the risk of infection if a person is exposed, and the risk of severe illness if the person is infected. Prevalence of health conditions that increase risk varies among demographic groups, with higher rates of such conditions among people of color; that difference, along with disparity in access to health care, place those groups at higher risk." *See* pg. 13.

As COVID-19 disproportionately affects older individuals and minorities, it is more likely that parties will face more jury pools that do not reflect the composition of the community. The parties cannot obtain a fair jury trial if these groups are excluded. As the Supreme Court has held, "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[6] Diverse juries increase public acceptance of the justice system and enhance the deliberation process as more viewpoints are represented.[7] Racial and age diversity is essential in eliminating groupthink in jury pools.[8] Diverse juries tend to deliberate longer, discuss more trial evidence, and rely on fewer inaccuracies.[9] Increased representation of different viewpoints forces jurors to abandon positions unsupported by evidence when they are challenged.[10] Thus, if the parties are forced to proceed

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[5] Jill Huntley Taylor, & Dan Gallipeau, Who Will Show Up For Jury Duty? Dispute Dynamics, Inc. (May 4, 2020) *available at* https://calemploymentlawupdate.proskauer.com/files/2020/05/COVID-jury-differences.pdf

[6] *Peters v. Kiff*, 407 US 293, 503 (1972).

[7] *See* Kim Forde-Mazrui*, Jural Districting: Selecting Impartial Juries Through Community Representation,* 52 VAND. L. REV. 353, 377 (1999) ("First, as with juries, participation in the legislative process by a broad range of groups enhances the likelihood that substantive decisions will properly take account of minority interests, racial and otherwise . . . The acceptability of legislatures, like juries, depends in part on the extent to which their membership represents the diverse constituencies within their jurisdictions."); *see also* Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1945 (2015) ("Diverse juries better protect public confidence in the jury system and the acceptance of verdicts as legitimate.").

[8] *Id.*

[9] *See* John J. Francis, *Peremptory Challenges, Grutter, And Critical Mass: A Means Of Reclaiming The Promise Of Batson,* 29 VT. L. REV. 297, 327-335 (2005) ("Diversity not only improves cultural understanding; evidence demonstrates that the presence of diversity in group dynamics collectively enhances cognitive skills and improves insights of the group . . . In much the same way that diverse work groups demonstrate superior ideas and decision-making capabilities over non-diverse groups, diverse juries exhibit decision-making benefits. For example, they cover a wider range of information, 'deliberate longer, discuss more case facts, and bring up more questions about' evidence missing from trials.") *(citing* Steven A. Ramirez*, A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?,* 77 ST. JOHN'S L. REV. 837, 848-50 (2003) and Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research,* 78 CHI.-KENT L. REV. 997, 1030 (2003)); *see also* On racial diversity and group decision-making: Identifying multiple effects of racial composition on jury deliberations, *Journal of Personality and Social Psychology, vol. 90*, 597.

[10] *Id.*

with less than twelve jurors, the parties will likely face a jury that is not fairly and properly constituted.

Based on the risks associated with proceeding with six jurors and a diminished jury pool, the Defendants of the Massachusetts Asbestos Litigation ask the Court to reject the Committee's recommendation. In the absence of consent, Defendants request the following: (1) the Court establish a criteria specific to the MAL for what constitutes a "more serious" vs. a "less serious" case in order to avoid unnecessary pressure to accept a jury of six; (2) "more serious" cases should not be reached until "phase two" and should consist of twelve jurors; and (3) the Court establish a minimum of ten jurors for "less serious" cases. Because asbestos personal injury cases are undoubtedly "more serious" cases that often involve allegations of wrongful death, claims of causation based on complex science, and complicated product identification and state of the art issues, the Defendants request that MAL cases proceed during "phase two" as defined by the Committee.

Thank you for your time and consideration of our requests.

Very Truly Yours,

/s/ Lawrence G. Cetrulo
Lawrence G. Cetrulo

LGC

CC: Michael C. Shepard, Esq. (Plaintiffs' Liaison Counsel in the MAL)
Special Master Maria Walsh

From: Pavel Bespalko
Sent: Friday, August 14, 2020 6:15 PM
To: Christine.Burak@jud.state.ma.us
Subject: Comment re: JMAC report on Restarting Jury Trials.

Dear Ms. Burak,

I am directing my comments on the above-referenced report. Thank you for your consideration. I am available to discuss at your convenience.

Have a good weekend!

Very truly yours,

Pavel Y. Bespalko, Esq.

TRICORNE

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August 14, 2020

VIA ELECTRONIC MAIL
(Christine.Burak@jud.state.ma.us)

Christine P. Burak, Esq.
Legal Counsel to Chief Justice
Supreme Judicial Court
1 Pemberton Square
Boston, MA 02108

Re: **Comment on Recommendations of the Jury Management Advisory Committee (JMAC) Regarding Resumption of Jury Trials**

Dear Ms. Burak,

Taking advantage of the Court's invitation, I am writing to comment on the JMAC report and recommendations concerning resumption of jury trials in the Commonwealth. The purpose of my letter is to encourage the Court to take advantage of the remote trial option. It is safer, more cost-effective, and efficient, than conducting in person jury trials in the middle of a pandemic. Adopting the novel instrument of remote trials is a fitting continuation of the Commonwealth's laudable tradition as a trailblazer in matters of national concern.

This letter addresses some concerns with respect to remote jury trials and offers some practical steps to alleviate them. I hope the Commission and the Court will find these helpful in formulating a plan for resuming jury trials in the Commonwealth.

I have been in practice for almost 20 years. My experience with remote proceedings includes serving as an arbitrator in over 80 matters conducted via video and telephone conferences. In addition, I have a keen interest in judicial technology and have served as an organizer of a local chapter of a legal technology think-tank. I have also recently published an article on the subject. A copy is attached for your information. I have also studied the plethora of resources addressing the remote proceedings, including the Remote Courts Worldwide initiative and others.

The JMAC is to be commended for reviewing a wealth of materials, obtaining input from many stakeholders, and producing a comprehensive report in a very short period of time.

Based on its findings, the JMAC advises that jury trials should resume in person, albeit in a very different format. The potential participants are to be screened, their entrance and seating positions to be choreographed, masks are to be worn as much as possible, except by witnesses during testimony. Plexiglas barriers are to be erected. Courthouses are to be evaluated to ensure their HVAC systems are sufficiently powerful and safe to recirculate air. At the same time, additional exceptions from service are to be added (e.g., for those at risk and essential workers). The number of jurors would be reduced to six whenever possible. A trial would require two courtrooms to reduce the risk of COVID transmission.

The Report explains that the approach is not to ensure there is a zero risk of infection, but a reasonably acceptable level of risk. While this premise is accepted for the purposes of this analysis, it is at least debatable. The potential jurors and parties may have a right to expect a higher level of safety when it comes to jury service. It is not unreasonable for a juror to expect a zero risk of contracting a deadly virus while in service.

However, if our goal is an "acceptable" level of safety, then the same is true of the judicial process and its outcomes. In other words, our goal is not a flawless jury trial, but one that complies with "due" process and leads to a reasonably acceptable outcome (I use the term loosely as an equivalent to "substantive due process").

1. HOW LARGE IS THE PROBLEM?

In general, according to the statistics from the Federal courts, about 2% or less of all cases proceed to a jury trial. The number has been dwindling over the last several years. The Appendices to the Report, show that as few as several hundred and as many as several thousand cases are awaiting scheduling for a jury trial. We can expect that many of those will settle before jury empanelment; some will settle before a verdict is reached. In other words, jury trials are an important, but exceedingly small part of the overall caseload of our trial courts.

2. THE REPORTED OUTCOMES OF REMOTE PROCEEDINGS ARE EQUAL TO THEIR IN-PERSON COUNTERPART

The JMAC report posits that jury trials are the foundation of our judicial system. The main reason for conducting such trials is to promote the public trust and confidence in the judiciary, including via personal participation. How do remote trials fit into this equation?

As pointed out in many sources cited in the attached article, there is no evidence that the parties have less confidence in a decision reached via videoconference. To the contrary, the rapid report from England tells us that the parties are at least as satisfied with the decision as they would be with one reached after an in-person proceeding. The parties felt heard, that their evidence was duly considered, and the decisions were well

articulated. This is understandable since a remote hearing includes all of the elements of its in-person counterpart.

Many reported a higher level of satisfaction with remote proceedings because it involved no travel, no need for accommodations, less waiting time, and other efficiencies.

Speaking anecdotally, from personal experiences over the last three months and from canvassing a number of colleagues, none has reported that appearing remotely was so different than being there in person, as to render the decision flawed in some form.

The complaints mostly have to do with some technical difficulties resulting from unfamiliarity with the equipment or the software. For instance, during one of my hearings, one of the attorneys had difficulty turning on his microphone. This issue, however, was resolved in five minutes and the hearing proceeded in the regular course.

In other words, there is no evidence that the public is less confident or trusting of a decision made as a result of an online proceeding. We may also assume that the level of trust and confidence will increase when measured against the alternative. That is, subjecting the jurors, parties, witnesses, attorney, and court personnel to the risk of potentially fatal infection and having to deal with the inevitable delays and inefficiencies of the in-person protocol suggested by the Report.

One may argue that this may be true for motion hearings and even bench trials, but jury trials are so different that they should be afforded special treatment. In other words, they suggest a remote jury trial is akin to a marriage proposal made over telephone. It conveys the same information but is somehow less satisfying. This is an assumption that is appealing, but untested. Many things assumed by astute practitioners to be self-evident are actually inaccurate if one were to look at the scientific data. These are described below.

3. WHAT ABOUT PROCEDURAL DUE PROCESS?

The Report indicates that the DA's office and the CPCS raised some unidentified constitutional concerns. These concerns, can and should be properly analyzed in the context of precedent and the deadly pandemic.

Let us use the Confrontation Clause as an example. As a cornerstone of criminal process, it is assumed that the accused has an unfettered right to "confront" the accuser "face to face," which includes facing the plaintiff/ victim and witnesses. However, a 2014 article from Cornell Law Review discusses the Confrontation Clause in the context of remote trials. *See* Kostelak, Russell, *Videoconference Technology and the Confrontation Clause,* Cornell Law School J.D. Student Research Papers, Paper 33 (2104), available at http://scholarship.law.cornell.edu/lps_papers/33. Without belaboring the points discussed in the article, a. the Supreme Court has already ruled that remote appearances pass the constitutional muster of the Confrontation Clause and b. a two-way videoconference has been held in some circumstances to constitute a "face to face" confrontation for these

purposes. While the case may not be open and shut (*see e.g., United States v. Cotto-Flores,* No. 18-2013, at *57 (1st Cir. Aug. 10, 2020)), at least the in-person rule is not absolute. Exigent circumstances, such as a global pandemic constitute valid grounds to accept remote testimony.

Another area of frequent concern centers on jury tampering of various kinds. What if there is someone else in the room? What if a juror looks something up on Google in real time and thus considers information outside of the case? What if she records the proceedings? These concerns are commonsensical, but purely speculative at this juncture. There is no evidence that such transgressions are any more pervasive in remote proceedings than in their in-person counterparts. There is no guaranty that jurors do not conduct own research outside of the courthouse. Further, some proposals suggest allowing jurors to keep their cell phones. Thus, their ability to Google case information, record audio or video, is unaffected, regardless of their location.

Over the last several months hundreds, if not thousands, of matters have been heard remotely in the Commonwealth and in other states. Moreover, some states (for instance, Texas) made entire proceedings open to the public via livestreaming on YouTube. There is no evidence of significant violations of the rules against recording, or that such breaches have been disrupting the administration of justice.

Finally, there are concerns that remote trials are less effective for credibility determinations. As pointed out in the attached article, the so-called "demeanor" evidence is considered to be unreliable to the point of speculative. Many jurisdictions expressly caution not to take such evidence into consideration and focus on the substantive testimony instead. Even if we were to accept these concerns as potentially valid, there is simply no evidence (at least not yet) that seeing someone lie in real time on TV is inferior to witnessing lie in person. The attorneys also raise concern that they would have trouble observing jurors via video conference. Again, such concerns are not supported by data. Also, the recommended in-person trials will require jurors and most participants to wear masks at all times. Is seeing a person in a mask more effective than observing him or her close on television without a mask?

More importantly, we must measure these concerns against the real-life alternative, that is, a jury trial that is largely unrecognizable due to the pandemic.

4. <u>THE ALTERNATIVE IN-PERSON JURY TRIAL; PANDEMIC, COSTS, AND OTHER CONSIDERATIONS</u>

The recommended logistics of an in-person jury trials appear quite onerous; what with the temperature checks, social distancing, mask wearing, extensive COVID-related questions, excuses for additional categories of at-risk jurors, Plexiglas-encapsulated witness boxes, and the like. The mental effect of all these precautions on the jurors' ability to focus on the case at hand is difficult to calculate, but is probably non-negligible. These are augmented by the reduced jury pools and potentially reduced juries.

The prison administration reports that criminal defendants who are currently in detention prefer virtual appearances because of the risk of infection and the attendant inconveniences of being re-assigned to different rooms after the hearing.

In addition to these very practical considerations, does a trial conducted by jurors in these conditions pass the muster of constitutional due process?

We should measure the costs and benefits of a remote jury trial against its real life counterpart, which is radically different from a regular jury trial during the pre-pandemic times of hand-shaking and water fountains.

Administration of a pandemic jury trial requires a significant expenditure of the courts' resources, which are already strained. There are additional cleaning and disinfecting costs from sanitizing the Plexiglas witness box after every witness, to the jury box, to the additional cleanup of the restrooms, which are a known significant contributor. There are costs of ensuring the HVAC systems are compliant with the heightened sanitary standards. The functionality of these systems in many courthouses was a separate discussion topic even before the pandemic. The costs and resources to be expended on all these measures are substantial. There are also costs of contact tracing in case of infection.

In addition, there is the non-zero probability of an eventual infection. A court in Georgia had to quarantine 100 people when someone tested positive for COVID during a trial. If a juror contracts the disease during the in-person trial, one may foresee a claim against the Commonwealth. Even if such a claim is not successful, the damage to the public trust and confidence in the judiciary is self-evident.

Against these disadvantages, we have the additional benefits of remote trials in the form of reducing the transportation, lodging, waiting, and other inefficiencies.

As the report rightfully notes, there is already an established practice for using audio-visual depositions or even expert testimony from unavailable witnesses. A remote trial is but one step away.

Measured in this fashion, there are significant benefits to considering remote trial as a viable alternative to the pandemic in-person jury trials.

5. PRACTICAL RECOMMENDATIONS

A number of practical steps that can be taken to explore the possibility of implementing a remote trial system within the Commonwealth. I suggest conducting controlled experiments with measured outcomes that will inform our actions. While these merit a more substantive discussion, here are some examples:

A. Conduct a voluntary remote trial pilot project for civil matters in District Courts with an amount in controversy not to exceed a certain threshold, with

trials not to exceed three days, and with certain other identifiable characteristics (number of witnesses, for instance). This pilot project can last for one to two months.

B. Establish a similar pilot project for criminal matters with less serious charges, e.g., those that result in minimal incarceration, if any, a limited number of witnesses, and so on.

C. Establish a work group (perhaps within the Commission) charged exclusively with monitoring the pilot projects and producing a data-driven report for consideration of the Court. The work group can take advantage of a wealth of information available from other jurisdictions, who have conducted similar projects.

D. Establish a work group in coordination with the Court's IT department, to evaluate the Trial Court's needs to implement the pilot projects, the available tools, and the eventual adoption costs. This will also help answering the questions about whether there are large swaths of the population excluded from participating due to the lack of access to the Internet and other technology. Also, we will have an answer to the questions about the public's right to observe.

E. Establish a project management task force to identify specifically the number, location, and other characteristics of matters that need to be scheduled for trial on or before July 31, 2021. The starting point is the appendices to the Report, which contain some information about the numbers from 2018-2020.

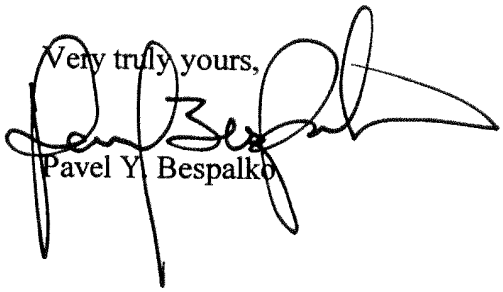
F. Establish a work group to address, possibly in coordination with the DA Office, the CPCS, and the local Bar association, the potential constitutional concerns in the context of online trials. These can be done within one month from formation of the group.

5. CONCLUSION

Again, I would like to thank the Court and the Commission for its tremendous effort. The judicial systems nationwide and globally are struggling to serve the needs of the public in the efficient and trustworthy administration of justice. Restarting in-person trials is a commendable goal. Unfortunately, the pandemic situation makes this goal far from readily attainable. Remote trials are a relatively easy, cheap, and equally effective alternative that should be seriously explored.

I appreciate your consideration and am available for further discussion or participation. As this is an area of my great interest and some expertise, perhaps my contribution will be helpful in the process.

Very truly yours,



Pavel Y. Bespalko

Enclosure

The Remote Jury Trial Is Not A Bad Idea

By **Pavel Bespalko**

Pavel Bespalko

Due to the recent pandemic, our courts made a quantum leap through decades of technological progress in just a few months. The litigation community suddenly discovered video and telephone conferencing tools. Some courts even started livestreaming via YouTube.[1] Motion hearings, jury selections and even trials via Zoom are now commonplace. Is this a good thing or the end of life as we know it?

The public's response has been muted. To be sure, late night comedians mocked the sound of a flushing toilet during telephonic U.S. Supreme Court argument. Otherwise, technology has not led to the collapse of the justice system or other global calamity.

Online dispute resolution is over 20 years old. From eBay's automated dispute resolution systems to arbitrations by video, the legal community has been using the various forms of ODR for some time. Most large arbitration providers now offer some form of virtual dispute resolution.

Against this background, Law360 published a guest article titled "The Remote Jury Trial Is a Bad Idea." The central premise of the piece is that "the fundamental genius of the jury trial ... can only exist in a live, in-person setting in a courtroom." Our collective energies should be best spent returning to the old ways of "bring[ing] people to a location to resolve disputes in the same way we have been doing for hundreds of years."

The utility of doing the same thing the same way simply because it has been done this way for hundreds of years is outside of the scope of this essay. Here, I address the common arguments advanced by the authors as to why an in-person hearing is superior to their remote counterpart and offer an alternative take.

First, we need to remember that a trial is a process with a distinct purpose of resolving a dispute in a fair, impartial and efficient manner. Many great minds have debated the meaning of these three terms; the debate continues today. For our purposes, we accept the authors' premise that a trial by a judge or a jury of peers produces a desired outcome.

Is a trial administered via a videoconference so different from an in-person trial that it produces a radical outcome that is unfair, biased or inefficient?

The Present Times and COVID-19 Make Online Trials Inevitable

Reality Check: Video Trials Are Here to Stay

There is no going back to the horse-and-buggy. Videoconferencing is in such wide use that its adoption by the legal community is a matter of when, not if. Many alternative dispute resolution providers (arbitration and mediation services) already use virtual hearings. The courts have been using video testimony for years; virtual trials have followed in the last three months.

No Return to the Past During COVID-19, and No One Wants It

We are in the middle of a pandemic that will take months. The article acknowledges the current pandemic but argues for "return[ing] to the courtroom safely."

To ensure safety in the courtroom, the authors suggest a "very detailed, choreographed process" for empanelment, entering the courthouse a certain way, implementing special sitting charts, and other rituals. The authors also recommend taking "everyone's temperature upon arrival," mandatory masks, a daily "deep clean" of the rooms, "expanding" the jury box, and "any other commonsense approaches."

No jury trial should be this kind of a health risk. One would rightly question the quality of decision-making of anyone who had to endure the described choreographed routine and then sit in a courtroom in a mask, behind Plexiglas.

The National Association of Criminal Defense Lawyers has already declared that any "court proceedings, especially jury trials, present a grave risk to all participants, including the public which has a fundamental right to attend."[2] Subjecting the public to the "grave dangers," the disruptions due to taking precautionary measures, and the resulting inefficiencies and costs, simply will not work.

We need not speculate on the subject. Some courts have reopened and we have heard from jurors called back to decide cases during the pandemic.[3] From witnesses wearing masks, to concerns about excluding older and minority communities, to social distancing issues, all of these have already fundamentally altered the jury trial experience.

Can a party secure a fair trial in these circumstances? A criminal defendant should be able to see the accuser who is wearing a mask. If a judge orders the witness to remove the mask and this leads to an infection, was the trial fair?

In Arizona, the number of peremptory challenges has been reduced to two instead of six. In Georgia, more than 100 people had to be notified after a juror was hospitalized with COVID-19. In Ohio, an attorney told a jury pool that he was exposed to COVID-19 and advised to self-isolate. The judge refused to continue the trial. Were the jurors who stayed invested in the decision? As one attorney said, "[t]here's an inherent conflict between the rights of someone on trial and our social distancing policies."[4]

There is also no call from the public that it wishes to return to the in-person service immediately. To the contrary, the courts expect a sharp drop in jury response rate. A return to normal today is simply impossible. A jury trial that has to be administered like a ballet performance is simply not the "the same way we have been doing for hundreds of years."

Jury Participation

The authors also argue that because 10% of the population does not use the internet, remote jury trials will not work. They suggest that virtual courtrooms will inherently eliminate this segment of the population, assuming full participation in live settings. The evidence contradicts this assumption.

Today, approximately 15% of Americans receive jury summons and a total of 0.8% of Americans are impaneled in juries.[5] About 38% of Americans serve on a jury over their lifetime, far less than 100%.[6] The response rate to jury summons nationwide is 46%. A response, of course, does not result in attendance; potential jurors may claim exemption or defray the service. Compared to these figures, internet access is not determinative.

Most courts report that technology is their chief priority in increasing jury participation and representativeness.[7] To the extent some people cannot participate because they do not use the internet, the courthouses may offer alternative facilities for participation.

As of now, the courts are experiencing a sharp drop in jury participation. Online tools make juror engagement easier, faster and more convenient. Just as introducing automatic transmission made cars more accessible, so will the introduction of convenient online options for the jurors.

Participants so far report a high level of satisfaction with remote hearings.[8] In the U.K., 72% of the respondents reported a positive experience, with 87% stating that they would recommend remote participation to others.[9] Interestingly, the more experience one had with remote hearings, the greater level of satisfaction she reported.[10] In terms of access to justice, 70% of respondents felt that video hearings were effective in allowing both parties to participate and present their cases as effectively as their in-person counterparts.[11]

There is no evidence for the claim that online courts lead to lesser participation in jury selection.

The Question of Credibility

The authors suggest "an analogy we often use is [that a remote trial is like] attending a sporting event or a concert live versus viewing the event on television." Whether a jury trial is the same as a Broadway show is debatable.

Still, the authors argue that it's commonsense that seeing someone in person is better that observing on-screen behavior. But is there evidence that we can better tell that someone is lying by being in the same room with them?

The truth is that most people cannot tell a lie.[12] Studies show that one's ability to tell a lie is slightly better than that of flipping a coin (54% versus 50%). Indeed, the usual signals, such as fidgeting and lack of eye contact, are not considered good predictors. Instead, one needs to rely more on the factual evidence, rather than someone's facial cues, to find the truth. Indeed, the legal systems' overreliance on some form of "demeanor" evidence ignores the fact that it is largely meaningless.[13]

Juries are notoriously unreliable when it comes to determinations of credibility.[14] And "it is the jury's use of demeanor evidence that is the most flawed."[15] This flaw is so well-known that, for instance, the Canadian Social Security Tribunal specifically advises that "demeanour [be] generally recognised as an unreliable tool for credibility assessment."[16]

Thus, preserving the most dubious part of the jury process at the expense of the conveniences, safety and savings presented by online trials is hardly worth it.

However, is a lie told over a video different from the one told in person? One study suggests that people detect lies better when they cannot see the witness's face at all. [17]

In this study, the people were presented three groups of liars telling the same lie. One group was open-faced. The other wore a partial mask. And the third group was wearing a full-face covering. The participants were much better at detecting lies told by the latter two groups.[18]

Finally, the authors' advocacy of masks, distancing and other safety measures contradicts their insistence that personal observation is supreme. Videoconference offers a far better alternative.

Most courts have the long-standing practice of using video materials at trials, including audio-visual depositions and even conducting arraignments by video. These must have had some value since no court has moved to abandon the practice.

Most participants in video hearings feel that such hearings have been conducted with the same level of fairness and propriety as in-person hearings, they had the same ability to present their cases, and the decisions rendered were well-reasoned.[19]

As an arbitrator who has conducted dozens of consumer arbitrations via videoconferencing, I noticed no impact on my ability to observe the participants and determine their credibility.

Juror Privacy and Management

The authors also suggest that online trials present new challenges to juror safety and privacy. Based on hundreds of online hearings that have already taken place, there is no evidence that this is a pervasive issue.

Disclosures of personal information for voir dire remain limited; many states provide no information about jurors to attorneys before voir dire. Jury tampering is unlawful and unethical.

These concerns are no different in online trials. The taking of a photo is prohibited in person and online. Technology is available to prohibit screen shots altogether.

There is also no evidence that jurors in courtrooms are frequently subjected to threats or attacks. In any event, remote participation appears far safer than sitting in a public courtroom. Using the authors' analogy, it is like watching a fire on television, instead of sitting in a burning house.

The authors also suggest that in-person jurors pay closer attention, take the proceedings more seriously, and are less prone to be influenced by external information. Indeed, slightly more people report more fatigue from participating in a hearing via videoconference (55%).[20]

The fatigue, however, was attributed to technical difficulties and unfamiliarity of the process, not inability to present or process information. Those, who felt that "in video hearings, nuanced interactions are lost" were in a significant minority.[21] The half of the respondents who felt the remote hearings were no more taxing that their physical counterpart cited the convenience, lack of commute, the comfort of working from home, and increased efficiency.[22]

Litigators know that jurors do sometimes doze off during the less exciting portions of trials. There is simply no evidence that jurors daydream more in front of a computer than they do in a courtroom. If one were to guess, seeing oneself on a screen in real time and being watched by 11 fellow jurors, the judge, the parties, their lawyers and the court clerk will probably be sufficiently motivating.

What about taking the proceedings seriously? Based on the reports from the virtual fronts over the last two months, most participants are sufficiently respectful in virtual courtrooms,

obey the decisions as much (or as little) as they ordinarily do, and otherwise conduct themselves in the usual fashion.

We can expect the same level of civility (or incivility) as that displayed in a courtroom. If anything, it is far easier to silence a disruptive person in a virtual environment. All it takes is a press of a button.

Pressure to Participate in Pilot Programs

The authors hypothesize that some "economically disadvantaged litigants" will be "forced" to be used as "guinea pigs" for the new systems. However, litigants are routinely encouraged and do participate in alternative dispute resolution, rather than waiting for trials and incurring additional attorney fees or taking time off work. Parties routinely waive the right to a jury trial altogether for similar reasons. Here, the parties retain a trial by jury, albeit online.

As we know now, the online process is at least as fair as its in-person counterpart. So long as the resolution is of an acceptable quality and follows due process, it should be unimportant what means are employed to get us there.

Some of the Benefits of Online Trials

The inefficiencies built into the current jury trial system are too numerous to list.

Potential jurors are expected to brave the inconveniences of travel, waiting and, finally, the potential indignity of being dismissed without ever serving. The jurors routinely give low grades to what one court diplomatically called "the issue of scheduling prospective juror's time," that is, wasting time.[23]

The authors suggest that technical difficulties, such as dropped connections, may impede the process. Admittedly, the system is not yet functioning perfectly. Still, all involved acknowledge that it will improve once the processes become more familiar and the initial set-up costs are offset.[24]

Technical issues are inevitable in physical trials, from power outages to parties stuck in traffic and jurors falling sick in the middle of trials. Since all travel issues are effectively eliminated when the process is moved online, one may assume that the trade-off is at least fair.

Real estate, security, utilities, food are all reduced once there is no need to shepherd hundreds of jurors per day. There is no need to print multitudes of exhibit books, blowup charts and the like. The transportation and travel costs are limited. The evidence tells us that at least 60% of participants feel remote hearings are less expensive based on these factors.[25]

Florida attorneys, for instance, were happy with their video trial experience.[26] They cited witness convenience, lack of waiting around, and other factors that substantially improved overall efficiency.[27] Florida judges sound enthusiastic about the use of remote appearances.[28] Family law practitioners express a similar sentiment.[29]

Online trials improve access to justice by increasing capacity of the courts. Many trials in Massachusetts courts are limited to a half day or approximately four hours of time. A significant portion is spent on walking the jury back in and out of the courtroom. With online

trials, downtime is reduced to almost zero. The public benefit from such an increase is readily apparent.

There are many other arguments, scientific and philosophical, in favor of online trials. For example, most Americans view jury service as a valuable civic duty.[30] Most jurors report a high level of satisfaction from their involvement in the process.[31] By having more Americans involved, we can expect a greater level of public satisfaction with our legal and judicial system. As a matter of policy, the economists tell us that the level of social trust is directly related to the nation's prosperity.[32]

Conclusion

The authors of the article deserve our gratitude for expressing a clear viewpoint and inviting a discussion. The "commonsense" adages they advance are prevalent in the industry and need to be addressed directly, with evidence. The legal system is in the process of developing scientific tools to address its challenges in a data-driven fashion. Until we are comfortable developing measurable goals and diagnosing progress toward those goals, many arguments will remain in the sphere of opinions.

Hopefully, at least with respect to online trials, and based on the evidence we have so far, the answer is obvious.

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