

Client Alert Product Liability Law

Jury Trials In New Jersey: The Impact of Modern Technology on Jury Requests to “Read-Back” Trial Testimony

Over the years, the use of court reporters during trials or other court proceedings has declined sharply. According to the New Jersey Administrative Office of the Courts, over 400 courtrooms throughout the state are equipped for audio or video recording, while only 62 court reporters are available statewide. When audio or video recordings are used during a trial, it is not possible to immediately “read-back” the testimony of a witness. In some cases, counsel hire their own stenographer who can provide a “read-back” or a real time transcript. But what happens when there is no court reporter present during a jury trial and during deliberations, the jury requests that a portion of the testimony be read back? Should the trial judge permit the audio or video recording of a witness’ testimony to be re-played for the jury? If so, should the testimony be played back in its entirety? The New Jersey Supreme Court answered these questions with a resounding “yes” in *State v. Miller*, A-94-09, 2011 LEXIS 320 (N.J. Mar. 14, 2011), finding that “[a]s advances in modern technology make their way into the courtroom, the Judiciary – like the rest of society – must adapt.” *Id.* at *8-9.

In *State v. Miller*, the defendant was charged with seven counts of robbery of two construction workers. During a three day trial, the two victims and several police officers testified for the prosecution. *Id.* at *12. While deliberating, the jury requested to “get a read-back or playback” of one of the victim’s testimony. *Id.* Since there was no court reporter present, the trial court agreed to play the video of the witness’ full testimony to the jury. The defense counsel objected, arguing that a playback would prejudice the defendant because it “would have the effect of having the witness testify

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over again.” *Id.* The trial court disagreed, and allowed the jury to view a video of the witness’ entire testimony in open court, with all parties present. *Id.* at *13. The jury ultimately found the defendant guilty on all counts. The trial court’s decision was affirmed on appeal (*State v. Miller*, 411 N.J. Super. 521 (App. Div. 2010)), and defendant petitioned the New Jersey Supreme Court for Certification.

In affirming the courts below, the New Jersey Supreme Court found that the trial judge “properly exercised its discretion by permitting the playback.” *Miller*, 2011 LEXIS 320, at *20. The Court noted that “[j]uries routinely ask to review trial testimony when they deliberate” and that “absent ‘some unusual circumstance’, those requests should be granted.” *Id.* at *18 (quoting *State v. Wolf*, 44 N.J. 176, 185 (1965)). The Court reasoned that juror requests for read-backs are part of the deliberative process, and reflect the “reality that jurors cannot be expected to have perfect recall” of all of the testimony they heard during trial. *Id.* While acknowledging the practical difficulties of providing a traditional read-back in the absence of a live court reporter, the Court concluded that “juries should be provided with the best available form of evidence, upon request, unless there is a sufficiently strong, countervailing reason not to proceed in that way.” *Id.* at *21. The party opposing a read-back or playback has the burden to object and establish prejudice. *Id.* at *25. Where the objecting party does not carry its burden, there is a presumption that video and audio taped testimony should be played back if the jury so requests. *Id.* at *21.

At the request of the New Jersey Attorney General (appearing as an *amicus*), the Court went beyond the factual scenario before it, and issued the following guidelines for the playback of audio and video taped trial testimony:

- (1) [J]udges should ordinarily grant a jury’s request to playback testimony and should not decline a request simply because it would take time.
- (2) As a general rule, after redacting sidebars and inadmissible testimony to which counsel objected, the entire testimony requested should be played back – including direct and cross examination. The trial judge has the discretion to narrow the jury’s request if it calls for the playback of extensive testimony.
- (3) Courts should honor a jury’s specific request to hear only limited parts of a witness’ testimony – provided . . . that playbacks include relevant direct and cross examination. Jurors should not be required

to watch or hear more testimony than they ask for. If necessary, the trial judge can clarify what testimony the jury wants repeated.

(4) Playbacks, like read-backs, should take place in open court with all parties present. That practice avoids the selective replaying of only a portion of testimony.

(5) Judges should take precautions to prevent juries from placing undue emphasis on the particular testimony that is replayed. To that end, at the time the testimony is repeated, judges should instruct jurors to consider all of the evidence presented and not give undue weight to the testimony played back.

(6) Judges should make a precise record of what was played back to the jury.

(7) [B]ecause video evidence captures a more complete picture of a witness' testimony, trial judges must continue to exercise discretion to deny playing back all or part of the evidence requested when necessary to guard against unfair prejudice. For example, a judge should use care not to replay an outburst or bout of crying that would appeal to emotion. No bright-line rule can apply to the limitless situations that might arise; instead they must be addressed on a case-by-case basis.

The party opposing a playback has the burden to object and demonstrate prejudice. That party must offer specific reasons why the particular testimony would be unduly prejudicial if played back. Generalized arguments that the nature of videotaped testimony is prejudicial will not suffice. In evaluating an objection, trial judges should consider ways to ameliorate any prejudice, like editing out portions of the video testimony or playing the audio track without video if feasible.

Id. at *23-25 (citations omitted).

Practitioners should consider the impact of the *Miller* ruling to their particular case. Before trial, counsel should investigate the technology available in a particular courthouse or courtroom and determine whether the proceedings will be recorded by

audio only, by video, or whether a court reporter will be used. According to statistics cited by the *Miller* Court, there are only sixty-one courtrooms in New Jersey equipped for video recording and 353 courtrooms equipped for audio recording. *Id.* at *19. Depending on the circumstances of a particular case, counsel may consider hiring a court reporter to have a real time transcript available in lieu of audio or video recordings and establishing pre-trial parameters as to the method to be used if a jury requests to re-hear certain testimony. If faced with a jury request for the video playback of testimony, counsel must be prepared to articulate specific reasons why the particular testimony will be unduly prejudicial if played back. Otherwise, be prepared for the witness' testimony to be replayed in its entirety.

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