
Appellate Division Develops Factors Regarding Remote Testimony at Trial

The New Jersey Court Rules do not explicitly provide for a party's trial testimony "by way of contemporaneous video transmission," but they do not specifically prohibit such testimony either. This gap is somewhat surprising given the many ways in which technology has been incorporated into the practice of law. In *Pathri v. Kakarlamath*, A-4657-18 (App. Div. Jan. 23, 2020), the Appellate Division updated and refined the factors a court should consider when evaluating a party's request to appear by video transmission at trial.

This guidance could not have come at a more opportune time given the challenges presented by COVID-19. Indeed, Chief Justice Rabner's March 12, 2020, Notice regarding the status of court operations during the COVID-19 pandemic made clear that for the "coming days and weeks," the judiciary would conduct much of its business, including non-jury trials, with the use of video and telephonic equipment. Notice, COVID-19 Coronavirus – Status of Court Operations; Immediate and Upcoming Plans (Mar. 12, 2020). In the current environment, it is essential that practitioners familiarize themselves with the circumstances in which remote trial testimony is permissible.

The Facts

Pathri was a matrimonial action involving a family with two minor children. The family immigrated to the United States from India in 2007. Plaintiff (husband) brought suit in 2018, and shortly thereafter, returned to India. Defendant (wife) filed a counterclaim for divorce. At the time of trial, defendant resided in Maryland with the parties' two minor children.

In May 2019, the trial judge scheduled the trial for the following month. One week prior to trial, plaintiff moved in limine for an order permitting him to appear at trial from India, and to testify via contemporaneous video transmission. Plaintiff claimed he was unable to obtain a visa to enter the United States. Defendant opposed the motion. The trial judge, relying principally on *Aqua Marine Products v. Pathe Computer Control Systems Corp.*, 229 N.J. Super. 264 (App. Div. 1988), denied the motion. In *Aqua Marine*, the court created a two-part test that allowed telephonic testimony only in: (1) "special situations in which there is either exigency or consent"; and (2) "in which the witness'[s]



Beth S. Rose

Beth S. Rose is a Member of Sills Cummis & Gross in Newark. She is Chair of the Product Liability Practice Group and a Co-Chair of the Litigation Practice Group.

This article was co-authored by Natalie R. Colao who was an Associate in the Firm's Litigation Practice Group until early April 2020. She is currently a judicial law clerk.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect those of Sills Cummis & Gross P.C.

identity and credentials are known quantities.” *Id.* at 275. The trial judge in *Pathri* found the lack of plaintiff’s physical presence would diminish her ability to assess his testimony and credibility. An appeal followed.

Court’s Analysis

The Appellate Division began its discussion with a review of the Court Rules. It noted that the Rules allow for trial testimony to “be presented in a number of ways that do not require the witness’ physical presence. For example, treating physicians often appear at trial via videotaped testimony (R. 4:14-9(e)), and telephonic testimony is authorized in actions to determine whether an individual is incapacitated (R. 4:86-6(a)). *Pathri*, slip op. at 3. The court then turned its attention to the unusual circumstances presented by *Aqua Marine*, namely that a party offered trial testimony by telephone when there had been no prior discovery involving the witness, and the testimony was “sprung on the other side” *Id.* at 7. The court noted that the facts presented in *Pathri* were far different from those in *Aqua Marine*, including the fact that the case was decided decades before technological videoconferencing platforms like FaceTime and Zoom were part of anyone’s vocabulary.

Still, the court concluded that, conceptually, *Aqua Marine* correctly articulated the test for evaluating whether testimony via live video transmission should be permitted. It noted that Federal Rule of Civil Procedure 43(a) allows trial testimony via contemporaneous video transmission “[f]or good cause in compelling circumstances and with appropriate safeguards” The court reasoned that although *Aqua Marine* and the Federal Rules employed different language (i.e., “exigency” vs. “good cause in compelling circumstances”), the rationale underlying both of them was the same; to wit: witness testimony via alternative means is permissible under appropriate circumstances.

The court then articulated the following seven factors a trial judge should consider when determining whether good cause exists to permit a witness to testify via contemporaneous video transmission:

1. The witness’ importance to the proceeding;
2. The severity of the factual dispute to which the witness will testify;

3. Whether the factfinder is a judge or a jury;
4. The cost of requiring the witness’ physical appearance in court versus the cost of transmitting the witness’ testimony in some other form;
5. The delay caused by insisting on the witness’ physical appearance in court versus the speed and convenience of allowing the transmission in some other manner;
6. Whether the witness’[s] inability to be present in court at the time of trial was foreseeable or preventable; and
7. The witness’ difficulty in appearing in person.

Pathri, slip op. at 8. Regarding the first factor, the court stated that contemporaneous video testimony is more appropriate when the witness is not essential. For the second factor, the court noted that disputed matters weighed against allowing contemporaneous video testimony; thus, judges “should inquire into the scope and substance of [a witness’s] testimony ... and whether that testimony is actually in dispute” With respect to the third factor, the court observed that judges have more experience in weighing witness testimony, and therefore, a jury’s involvement weighs against allowing contemporaneous video testimony. As to the fourth factor, the costs of live, as opposed to video transmitted, testimony should also be considered. Regarding the fifth factor, the court noted that allowing contemporaneous video testimony is favorable when it alleviates scheduling difficulties and promotes judicial efficiency. Finally, in discussing the sixth and seventh factors, the court explained that a court should be wary of allowing contemporaneous video testimony when the witness’s potential presence at a trial is foreseeable or such difficulty is self-created. In other words, in determining whether contemporaneous video testimony is appropriate, “a judge has a right to know what steps [a] plaintiff took in advance of his [or her]” requesting an exemption from testifying in person. *Id.* at 10-13. The court remanded the matter back to the trial court to allow the trial judge to consider plaintiff’s motion in light of its newly fleshed out factors.

What Does This Case Mean for the Practice of Law?

This opinion reflects at least one panel’s preference for “testimony in a less than desirable form” rather than no testimony at all. *Id.* at 14. The court expressed concern that if a party were denied the right to testify via live video

transmission, “the ruling could have the undesirable effect of turning the trial into a proof hearing in favor of the one party able to attend.” *Ibid*. The court made clear that if a trial judge permits contemporaneous video testimony, he or she may impose additional conditions on the testimony, such as requiring a particular size monitor or multiple monitors, insisting on particular angles of video feed (e.g., both a witness’ face and body to “better appreciate ... overall demeanor”), and requiring the witness to testify from a particular location. *Id.* at 15. Of course, the trial judge may revoke his or her decision allowing contemporaneous video testimony if the witness cannot satisfy those conditions.

Whether the principles in this case make their way into the Rules remains to be seen. The court did request that the appropriate Supreme Court rules committee consider the issue presented, but it is unclear if and when such a review will occur. There are certainly risks associated with trial testimony via video transmission, ranging from technical glitches to the possibility that presenting a witness remotely will make it difficult to assess credibility. And at least one source has reported that New Jersey lawyers are quite skeptical about remote trial testimony.

With the ongoing health emergency, practitioners are deluged each day with emails from vendors offering tips and other services to facilitate the “remote” practice of law. Given the current pandemic, it is reasonable to expect an uptick in the requests to present trial testimony via live video transmission. Ironically, a practice that has historically been seen as the exception to the rule may well become the new normal.