

Ground Rules For Live-Video Testimony Spelled Out In NJ

Law360 (January 23, 2020, 6:30 PM EST) -- A New Jersey state appeals court on Thursday said judges should consider the substance of witness testimony, among other factors, in deciding whether someone can testify via live video at a civil trial, ending at least eight years of uncertainty about the parameters of testimony permitted by the state Supreme Court but unaddressed in state court rules.

In a published opinion, the appellate panel proposed such guidelines when it nixed a trial court ruling barring a husband from testifying by video at a divorce trial. Court rules don't prohibit such testimony, but don't provide guidance for when it may occur either, the panel said.

"In most respects, the bench and the bar might — with apologies to Gilbert and Sullivan — proclaim the court rules to be 'the very model of a modern' set of civil guidelines," the three-judge panel said, citing W.S. Gilbert and Arthur Sullivan's 1879 comic opera "The Pirates of Penzance."

"But, in one respect, the rules haven't quite caught up to the technological revolution."

The panel noted that if a party is not allowed to testify via live video and cannot attend in person, "the ruling could have the undesirable effect of turning the trial into a proof hearing in favor of the one party able to attend."

"Judges, in the final analysis, should be wary of the impact such a ruling would have on the overall presentation of the proofs," the panel said.

The instant matter deals with Phaninder Pathri's request to testify by video from India in his matrimonial action against his wife, Srivani Kakarlamath, saying he could not obtain a visa to enter the U.S., according to the appellate opinion.

The trial court denied the motion, concluding that the procedure would interfere with the judge's ability to assess Pathri's testimony and credibility, the opinion said. The state Appellate Division stayed the trial and agreed to consider Pathri's appeal.

The court had relied on the state Appellate Division's 1988 [Aqua Marine Products v. Pathe Computer Control Systems](#) opinion, which dealt with allowing telephonic testimony. The state Supreme Court indicated in its 2012 [State v. Santos](#) opinion that live video testimony was allowed, but did not spell out when it might be permitted, according to the appellate opinion.

Referring to Aqua Marine, the panel said Thursday, "The fact that the opinion was written over thirty years ago — decades before [Skype](#), FaceTime, and the like were even dreamt of — should give us pause."

In approaching the issue of live video testimony, however, the panel assumed, "as Santos suggests, that Aqua Marine still provides guidance in this century and that its two-part test requiring 'exigency' and certainty in the witness' identity must be satisfied."

"Because — as the Santos Court held — the rules do not prohibit remote video testimony in civil matters, we see no reason why a family judge could not permit testimony by contemporaneous video transmission in appropriate circumstances," the panel said.

The panel identified factors judges should consider in weighing an application for live video testimony, including "the witness' importance to the proceeding" and "the severity of the factual dispute to which the witness will testify."

"A judge asked to consider the propriety of a witness' testimony by contemporaneous video transmission should inquire into the scope and substance of that testimony, and whether that testimony is actually in dispute, before determining whether that witness should testify in person," the panel said.

The court should consider whether the trial is before a judge or jury, the panel said, adding that in many instances, "a judge would likely overcome whatever barrier to ascertaining the witness' credibility and demeanor is created by contemporaneous video transmission than would a jury of laypersons not accustomed to weighing testimony in any form."

A judge also should take into account the costs of requiring the witness to appear in-person instead of video testimony, as well as the delay caused by demanding that the person physically show up in court, the panel said.

An additional factor is the "foreseeability of the circumstance that called for the application to testify by contemporaneous video transmission," the panel said.

At the end of the day, courts weighing such rulings should keep in mind court Rule 1:1-2, "which declares that the court rules are to be 'construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay,'" the panel said.

"The factors we have proposed should aid in determining whether the principles stated in Rule 1:1-2, which undergird the application of all court rules ... favor or disfavor allowing plaintiff to testify by contemporaneous video transmission," the panel said.

For Pathri's case, the panel said, "We simply require a 'do-over' or, in legal terms, we vacate the order under review and remand to allow plaintiff to move again, this time with a more fulsome presentation than previously provided."

Pathri's attorney, Gregory A. Pasler of [Townsend Tomaio & Newmark LLC](#), told Law360 on Thursday that the appellate decision "signals a paradigm shift in how the New Jersey judiciary views and utilizes testimony provided by video teleconferencing."

"The court provided clarity to an otherwise vague issue while also acknowledging the reality of an increasingly mobile society as well as the benefits to be provided by utilization of [video teleconferencing]," he added. "The decision and standard established by the court cements New Jersey's status as a forerunner in this emerging area of law."

Vikki Ziegler, managing partner of Ziegler Zemsky & Resnick, and firm lawyer Adam Weisberg, who represented Kakarlamath, said Thursday in a statement: "The factors enumerated by the appellate division provide additional guidance as to this modern-day legal issue which was not explicitly outlined by the court, statute or court rules clearly to date. This decision will likely impact out-of-state/out of country parties and their need to appear in-person to testify at a hearing or trial in the future."

Judges Clarkson S. Fisher Jr., Robert J. Gilson and Lisa Rose sat on the panel for the Appellate Division.

Pathri is represented by Gregory A. Pasler of Townsend Tomasio & Newmark LLC.

Kakarlmath is represented by Adam Wiseberg of Ziegler Zensky & Resnick.

The case is Pathri v. Kakarlmath, case number A-4657-18T1, in the Superior Court of the State of New Jersey, Appellate Division.

--Editing by Adam LoBelia.