

# TRIAL ADVOCACY

## in the Age of COVID-19

### A Roadmap to the Effective Creation and Preservation of the Record for Appeal

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Within the last year, courts, litigants and members of the bar were compelled to adapt to an ever-evolving legal landscape in the wake of COVID-19. The practice of law itself soon acclimated to include remote depositions, virtual hearings, and Zoom video conferences. In the context of trial advocacy, the pandemic has amplified existing challenges of creating and preserving an effective record for trial lawyers.

In response to the challenges presented to the judiciary, the New Jersey Supreme Court directed “the implementation of a two-phase approach to virtual civil jury trials during the pandemic” in its Jan. 7, 2021, Notice and Order.<sup>1</sup> The Court’s order authorizes civil jury trials to be held by virtual format across the state with no consent requirement as of April 5, 2021.<sup>2</sup>

It is against this backdrop that discussion is warranted for trial lawyers navigating the new normal. A roadmap to effectively bolstering the record for appeal necessarily involves anticipating issues during discovery, pretrial proceedings and through trial. The introduction of remote technology platforms and the absence of in-person proceedings do not obviate the basic principles underlying record preservation. Trial lawyers must keep abreast of rule changes and amendments while taking care to adequately develop the factual record.

### Depositions in a Remote World

While remote depositions have now become commonplace, lawyers continue to struggle with effective use of remote deposition technologies. Depositions provide parties with the opportunity to elicit significant admissions and to confront witnesses with critical documents. It is this well-developed record that provides a party with the best opportunity to establish a lack of disputed material fact in order to obtain summary judgment, or admissions for use at trial.<sup>3</sup> In practice, however, the use of exhibits has been greatly reduced given the challenges of remotely presenting documents to witnesses. This lack of formality, not likely present if the deposition were held in person, can easily lead to confusion or open the door to the creation of disputed facts if there is not a clear record of which document a witness was reviewing during the course of a remote deposition.

As lawyers have adapted, so too have court reporters responsible for transcribing depositions. Most court reporters offer tutorials for attorneys in presenting exhibits and effectively using their remote technologies. Most will also assist in pre-marking and presenting exhibits that a lawyer intends to use at a deposition. The extra layer of preparation necessary to effectively use remote video technology is just as integral to a successful deposition as the attorney’s familiarity with the facts of a case.

### The Record and Scope of Appellate Review

Given that virtual civil jury trials will be replacing traditional in-person courtroom trials and hearings—at least for a time—lawyers must be aware of the applicable rules of evidence and the development of the trial court record.<sup>4</sup> Lawyers may be traversing a new technological landscape for purposes of remote proceedings, but must still raise objections and legal arguments as if in a pre-pandemic, physical courtroom. Although the setting is remote, the record remains limited by the contents set forth in Rule 2:5-4(a). Lawyers must ensure that any objections, discussions, and agreements are placed on the record by the court reporter or appropriate recording platform. A failure to do so runs the risk of the issue being waived on appeal. An appellate court cannot appropriately review that which is not recorded in the trial record.<sup>5</sup>

Similarly, those issues not properly raised below are precluded from being raised on appeal.<sup>6</sup> The practice point to remember is that an objection must be explicit, on the record, and made in a timely fashion to be preserved.<sup>7</sup> Likewise, where a party does not object to evidence at trial, any objections to the admissibility of the evidence on appeal will result in the application of a plain error standard of review.<sup>8</sup> Generally, the



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Appellate Division will not consider points not preserved below as required by the Rules of Court.<sup>9</sup> Indeed, the Appellate Rules now require the party raising an issue to expressly identify where each point raised on appeal was raised and ruled upon in the trial court.<sup>10</sup>

### Maintaining the Virtual Record

Remote proceedings present challenges in adhering to principles common to trial advocacy. The remote nature of the proceeding should not take away from the formalities of the proceeding, and counsel should strive to maintain a level of attention to detail as if present in court. For example, while it may be cumbersome to request a “virtual sidebar,” counsel should not avoid this virtual walk to the bench or else risk losing the ability to raise the issue on

appeal. Unfortunately, moments of “lag” or frozen screens are common; but, when this occurs, counsel must ensure that the record reflects what occurred, and that any rulings by the Court are heard and reflected on the record. Although expensive, obtaining a daily transcript of remote proceedings may assist in ensuring that testimony is being accurately preserved, or to ensure that critical rulings are reflected in the record.

All practitioners recognize that significant colloquy may occur with the Court while formally “off-the-record” in chambers. When in court, it is critical that any arguments and rulings made in this context are placed on the record once counsel return to the courtroom. The same is true of virtual proceedings. Whether counsel may engage in telephone conferences with the Court, or even engage in remote discussions that are not necessarily part of the formal record, it is imperative that these discussions and any rulings arising from them be memorialized on the record to preserve them for appeal. The same is true of arguments raised in pretrial filings or *in limine* motions. The remote nature of the proceeding should not truncate the parties’ ability to fully develop the arguments raised in written submissions to ensure they are fully part of the record.

The failure to raise or argue an issue at trial will likely subject the appealing party to a plain error standard of review.<sup>11</sup> This high standard requires the appellate court to disregard any error or omission “unless it is of such a nature as to have been clearly capable of producing an unjust result.”<sup>12</sup> The failure to object “suggests that trial counsel perceived no error or prejudice, and, in any event, prevented the trial judge from remedying any possible confusion in a timely manner.”<sup>13</sup>

Counsel should also be mindful that preserving even minor issues is crucial to preserving any appellate arguments premised on cumulative error. The cumu-

lative error doctrine recognizes that “the cumulative effect of small errors may be so great as to work prejudice.”<sup>14</sup> While appellate courts will not simply “count mistakes,”<sup>15</sup> the failure to adequately preserve such issues will preclude consideration of a cumulative error argument.

### **Motions *in Limine* and Pretrial Exchange**

Practitioners should be aware of the Court’s recent adoption of Rule 4:25-8 governing *in limine* motions and pretrial exchange procedures. The rule defines a motion *in limine* “as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant’s case.”<sup>16</sup> Its adoption comes in the wake of much needed clarification around the function of *in limine* motions and to articulate concrete procedural standards for civil practitioners moving forward.

Rule 4:25-8 is a codification of the general proscription set out in *Cho v. Trinitas Regional Medical Center*, which held that a party may not file a dispositive motion in the form of an *in limine* motion shortly before trial.<sup>17</sup> The new rule authorizes the practice of filing such motions and “defines and sets forth procedures for submitting, serving and responding to motions *in limine*, including various deadlines, page limits for briefs, a requirement for timely rulings by the trial court, the consequences of non-compliance, and preservation of rights.”<sup>18</sup>

Notably, Rule 4:25-8(a)(1) makes clear that a dispositive motion shall be filed in a timely manner in accordance with the rules governing summary judgment motions.<sup>19</sup> Lawyers wishing to file *in limine* motions are also required to submit them as “part of the pretrial exchange subject to the timeframes of R. 4:25-7(b).”<sup>20</sup> Given the significance of the pretrial conference under the Court’s Jan. 7, 2021 order authorizing virtual civil jury

trials, the Court’s ruling on how the trial should proceed should be clearly detailed in the pretrial order and any discussion of the issues should be done on the record for preservation purposes.<sup>21</sup>

### **Ethics in a Virtual World**

While few could have foreseen the breadth and duration of the COVID-19 pandemic, the use of remote technology has become the rule, and most courts will no longer tolerate a reluctance to use these technologies moving forward. Nor has the “informality” of remote proceedings allowed for the relaxation of the ethical requirements that guide each lawyer’s practice.<sup>22</sup> Given the prevalence of remote technologies during the pandemic, one must reasonably assume that use of these technologies will likely fall under the general ethical duty of competence imposed on all lawyers.<sup>23</sup> Further, lawyers should conduct themselves no differently in a remote proceeding than they would if personally appearing in court. Unfortunately, anecdotes about attorneys appearing in court from bed, or without professional attire, have become commonplace, as some have improperly equated the perceived informality of a remote proceeding with the informality of daily life.<sup>24</sup>

### **Conclusion**

Until our nation sees relief from COVID-19, the business of the courts and the lawyers who appear before them will live online. Courts and lawyers have performed admirably in adapting to unprecedented circumstances, but all must be mindful of the unique challenges presented by the use of remote proceedings. The practices that have led to success in the courtroom must be adapted to the virtual courtroom or conference room to ensure that a case’s record is competently created and preserved. The professional obligations of lawyers to the justice system and the clients they serve require adaptation of trial practice to a remote world. ☪

## Endnotes

1. *New Jersey Supreme Court Notice and Order to the Bar, "COVID-19 – Virtual Civil Jury Trials"* (Jan. 7, 2021).
2. *Supra*, at Note 1.
3. R. 4:46-2(c).
4. *Supra*, at Note 1.
5. *See Yoon v. Effah*, 2019 N.J. Super. Unpub. LEXIS 1583, at \*8-9 (App. Div. July 10, 2019) ("We do not know what was discussed or agreed on in chambers because no record of that conference was made thereafter by the trial court. Without any of this, we cannot know with certainty what the court considered and relied on in making its decision.").
6. R. 1:7-2. *State v. Hernandez*, 334 N.J. Super. 264, 268, n.1 (App. Div. 2000), *aff'd as mod.*, 170 N.J. 106 (2001)(objection to proposed evidence raised and overruled at pretrial hearing preserves question for appeal); *cf. Kurak v. A.P. Green Refractories Co.*, 298 N.J. Super. 304 (App. Div.), *certif. denied*, 152 N.J. 10 (1997)(failure to articulate objection that jury instruction was inconsistent with prior stipulation precluded argument of point on appeal)).
7. R. 1:7-2. *State v. T.J.M.*, 220 N.J. 220, 231 (2015)(objection not clearly raised when counsel made only a "tepid complaint" before dropping the issue).
8. R. 2:10-2.
9. *State v. Hernandez*, 334 N.J. Super. 264, 268, n.1 (App. Div. 2000), *aff'd as modified*, 170 N.J. 106 (2001)(objection to proposed evidence raised and overruled at pretrial hearing preserves question for appeal).
10. R. 2:6-2(a)(1)("It is mandatory that for every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below.").
11. *State v. Scherzer*, 301 N.J. Super. 363, 421 (App. Div. 1997)(applying plain error standard of review where defendant never raised objection at trial).
12. R. 2:10-2.
13. *Bradford v. Kupper Assocs.*, 283 N.J. Super. 556, 573-74 (App. Div. 1995).
14. *Pellicer v. St. Barnabas Hosp.*, 200 N.J. 22, 53 (2007).
15. *Id.*
16. R. 4:25-8(a)(1).
17. 443 N.J. Super. 461 (App. Div. 2015), *certif. denied*, 224 N.J. 529 (2016).
18. Pressler & Verniero, *Current N.J. Court Rules*, Comment R. 4:25-8 (GANN 2021).
19. R. 4:25-8(a)(1); R. 4:46.
20. Pressler & Verniero, *Current N.J. Court Rules*, Comment R. 4:25-8 (GANN 2021).
21. *Supra*, at Note 1.
22. *See* Pennsylvania Bar Association, *Ethical Obligations for Lawyers Working Remotely*, Formal Opinion 2020-300 (April 10, 2020).
23. *See* Comment 8 to Model Rule of Professional Conduct 1.1 (To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.).