

Garden State CLE Presents:



**When they make you try your DWI Case via
ZOOM**

Instructor:



Evan Levow, Attorney

Lesson Plan

Part I – Preliminary Issues

a.) The underlying authority of a municipal court to conduct a DWI trial via ZOOM was established in April of 2020 under Directive 12-20. [<https://www.njcourts.gov/notices/2020/n200427b.pdf>]

In part this Directive provides as follows:

Directive 12-20 (April 27, 2020) –The following matters will be conducted remotely using video and/or phone options only with the consent of all parties: (1) **sentencing hearings in Criminal, Family, and Municipal matters;** (2) juvenile delinquency adjudications; (3) evidentiary hearings and bench trials in Criminal matters; (4) **evidentiary hearings and trials in Municipal matters that involve a reasonable likelihood of a jail sentence or loss or suspension of license;** (5) termination of parental rights trials; and (6) hearings for an adjudication of incapacity and appointment of a permanent guardian. In the absence of consent of all parties in these categories of matters, judges will adjourn the matter and reschedule it for date in the future when in-person appearances are again possible.

Discussion: The requirement of consent eliminates by waiver the profound constitutional issues associated with the right to a public trial as well the right of the defendant to personally confront witnesses.

However, as in all matter related to representing a client, the final decision about whether to object should be based upon what will be in the client’s best interests and obtaining an outcome that will meet (or exceed) the client’s needs. The results of a ZOOM trial or a pre-trial agreed-upon disposition may yield a better result than a traditional “in-person” trial.

Part II – Constitutional Issues

- a) **Public trial** – The right to a public trial is enshrined in the 6th Amendment to the United States Constitution and has been made applicable to the states by way of the Due Process clause of the 14th Amendment.¹ The public trial right is also guaranteed to criminal defendants under Article 1, paragraph 10 of the New Jersey Constitution of 1947.² This right also implicates the First Amendment by way of the due process clause of the 14th in the sense that the press and other media have a right to track the public operations of the criminal justice system.³ Notwithstanding the COVID-19 health threats posed by social gatherings, some procedure needs to be adopted to permit free public access to municipal court trials. Apart from allowing complete or limited access to the public to the courtrooms, this problem could be resolved by use of internet technology which would allow any person to watch a municipal court trial over the internet. Regardless of the ultimate solution to this challenge, it is an issue that must be argued and insisted upon by defense counsel.

Discussion I: The use of the word “criminal” in the New Jersey Constitution does not limit the application of the right to a public trial to non-petty offenses. Petty offenses, like DWI, are subsumed within the protections of the 6th and 14th Amendments.

One is the requirement of a ‘public trial.’ [We have previously] held that the right to a ‘public trial’ was applicable to a state proceeding even though only a 60-day sentence was involved. Respecting the right to a speedy and public trial, the right to be informed of the nature and cause of the accusation, the right to confront and cross-examine witnesses, the right to compulsory process for obtaining witnesses, it was recently stated, ‘It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf.’ *Argersinger v. Hamlin*, 407 US 25, 28 (1972).

¹ *In re Oliver*, [333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 \(1948\)](#); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010).

² “In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury[.]”

³ *Press–Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, [464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 \(1984\)](#).

Discussion II: What is a public trial? The idea behind a public trial was to provide open access to the public and press to the court room as a method of providing a check on unbridled abuses of the trial judge or prosecutor.

The United States and New Jersey Constitutions contain nearly identical guarantees of a criminal defendant's right to a public trial. The guarantee of a public trial helps assure that a defendant is “not unjustly condemned” and that the judge and jury remain “keenly alive” through the “presence of interested spectators” of “their responsibility and ... the importance of their function. The right to a public trial extends to pretrial proceedings such as jury selection. If a defendant's right to a public trial has been denied, the error is considered to be “structural” and therefore requires a reversal of a conviction without a showing that the defendant was prejudiced by the denial. *State v. Venable*, 41 NJ Super. 458, 462-63 (App. Div. 2010).

One important issue to be determined is whether live-streaming is an adequate substitute for live access to trials by the press and public. This issue implicates an offshoot of the *Heisenberg Uncertainty Principle* to the extent that observing an event has a tendency to change it. It may not have the same impact on judges and prosecutors as live audience members in the court room.

The Rules of Court provide only a limited exception for excluding members of the public. Rule 7:8-7(c) provides:

In matters involving domestic relations, sex offenses, school truancy, parental neglect, and as may be otherwise provided by law, the court, in its discretion and with defendant's consent, may exclude from the courtroom any person not directly interested in the matter during the conduct of the trial or hearing.

Municipal court trials are not available to be live-streamed to the general public. The judiciary’s answer to the issue of public access is set forth in Directive 12-20:

We are maintaining our Judiciary’s commitment to transparency while avoiding potential inadvertent disclosures of confidential information and accommodating the finite nature of our resources. Because the ability of the Judiciary to live-stream remotely conducted court events is limited by finite available resources, Civil, Family, General Equity, Probate, Special Civil Part, and **Municipal matters** will not be live-streamed, absent a showing of good cause in a particular matter, with the judge to make that determination. While the Judiciary can live-stream events, such resources are limited. Proceedings that do not need to be broadcast live by default should not be live-streamed in order to ensure real-time public access for other matters. Certain categories of proceedings should not be

live-streamed because of risks in a virtual setting that may not exist in the same way or to the same degree in an in-person forum, for example, the risk of inadvertent disclosure of confidential information in a civil commitment hearing or of information about the location of a party in a hearing on domestic violence or for other protective orders.

Interested persons, including members of the public and the media, may request real-time access to observe events that are not live-streamed but are not proscribed from public access. Such access will be permitted, subject to resource limitations, as determined by the court. Information and directions for requesting real-time access to events that are not live-streamed will be readily available to the public, including by posting on the Judiciary's public webpage.

Requests to observe court events that are not live-streamed will be submitted to the judge handling the event, either by email or by phone. Requests will be granted on the condition that the court event must not be recorded or broadcast absent specific written permission from the Assignment Judge or designee, consistent with the Supreme Court Guidelines on Media Access and Electronic Devices in the Courts(Directive #11-20). The Request for Audio or Video Records of Remote Court Proceedings. During COVID-19 Crisis form (attached) should be used to request records of court events that are not closed. Transcripts of court events may be requested according to existing Judiciary policies and procedures. For all events that are or may be live-streamed, judges have discretion not to live broadcast, including based on resource limitations; technical difficulties; preferences expressed by the parties, attorneys, witnesses, victims, or other interested persons; risk of disclosure of information that is confidential; or for other reasons including but not limited to public safety concerns. Real-time public access to events still must be enabled consistent with the above provisions

b) Right of confrontation – The right of the defendant to confront witnesses against him under the 6th Amendment has been applicable to the states by way of the Due Process clause of the 14th Amendment.⁴ The confrontation right is also guaranteed to criminal defendants under Article 1, paragraph 10 of the New Jersey Constitution of 1947.

The historical concept of the right of confrontation has included the right to see one's accused face-to-face, thereby giving the fact finder the opportunity of weighing the demeanor of the accused when forced to make his or her accusation before the one person who knows if the witness is truthful. The confrontation clause also implicates the right of the defendant to conduct a meaningful cross-examination of the witnesses against him.⁵ It is only through the engine of cross-examination that the municipal court judge can make a determination as to the credibility of a witness.

⁴ Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

⁵ State v. Garron, 177 N.J. 147, 827 A.2d 243 (2003).

Discussion: A ZOOM trial involves the prospect of witnesses testifying remotely via closed circuit television or through the internet. The use of closed circuit television testimony has been approved in New Jersey for child sexual assault cases.⁶ In addition, a deposition *de bene esse* can be taken and used in a municipal court trial under Rule 7:7-6, although this practice has been highly disapproved by the Appellate Division.⁷ Notwithstanding the dangers of COVID-19 infection, it does not appear that remote witness trial testimony in municipal court trials is a viable option.

So, given this important issue, a determination will have to be made at an early date as to whether witnesses are to be permitted to testify wearing masks.

c) Use of masks in court - The challenge to confrontation posed by COVID-19 is the use of masks. The gauging of credibility by human beings is founded on a wide variety of factors, including body-language and facial expressions. These critical cues to veracity can be blocked when a witness is permitted to testify behind a mask that partially obscures most of his facial features.

The most recent Supreme Court June 9, 2020 order requiring the wearing of masks in court facilities and related Notice to the Bar provides as follows:

The Supreme Court by Order dated June 9, 2020 has required that all persons who enter or occupy courthouses or court facilities, including Judiciary areas of mixed-use facilities, must wear masks or other face coverings in community settings (e.g., entranceways, indoor parking garages) and common areas (e.g., courtrooms, elevators). The Court's June 9, 2020 Order is attached. The Court's Order applies statewide, including in courtrooms in the Municipal Courts. It incorporates exceptions for persons who require accommodations and permits removal of face masks by judges and court staff in private areas. The Order also provides that judges have discretion in removing their face coverings or masks when on the bench, and directing others to do so, so long as social distancing guidelines [be] maintained. See link at: <https://www.njcourts.gov/notices/2020/n200610a.pdf?c=8U1>

⁶ N.J.S.A. 2A:84A-32.4. See *State v. Crandall*, 120 N.J. 649, 577 A.2d 483 (1990).

⁷ *State v. Benitez*, 360 N.J.Super. 101, 821 A.2d 547 (App. Div. 2003).

Part III – Strategy and Tactics

When a municipal court judge insists on having a ZOOM trial over the defendant's objection, defense counsel has the following options:

a.) Do Nothing – Let the trial convene and try the case if necessary. This leaves open the possibility of an advantageous outcome for the defendant by way of a pretrial agreement or on the merits. Of course, objections to the procedure should be placed on the record after jeopardy attached. (First witness has been sworn). At that point, an objection based upon the relevant constitutional issues should be raised under Rule 7:7-1 based upon lack of jurisdiction (i.e. no jurisdiction to try a ZOOM DWI case without consent):

Pleadings in municipal court actions shall consist only of the complaint. A defense or objection capable of determination without trial of the general issue shall be raised before trial by motion to dismiss or for other appropriate relief, except that **a motion to dismiss based upon lack of jurisdiction** or the unconstitutionality of a municipal ordinance may be made at any time.

The defendant should also request a mistrial on the same basis at this point.

Discussion: If the defendant is convicted at trial, the relevant objections will have preserved. If the judge grants the application to either adjourn or dismiss, issues as to double jeopardy or speedy trial will become relevant. The main argument is that by calling the first witness, the prosecutor “goaded” the defendant into requesting a mistrial.

Where a mistrial is declared at the behest of the defendant, however, different considerations come into play. In such a case, the defendant himself has elected to terminate the proceedings. To that extent, the decision to abort the trial is within his power and control. His decision to terminate the proceedings may be viewed as a renunciation of his right to have the trial completed before the first jury empaneled. The problem with such a view is that an errant prosecutor, sensing that completion of the trial will result in an acquittal, may purposely “goad the [defendant] into requesting a mistrial.” Since an acquittal would bar a retrial, it is only fair that in such a situation the same result should attach to a mistrial deliberately provoked by the prosecutor. In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if a mistrial provoked by the prosecutor would not invoke the double jeopardy prohibition. And surely, a prosecutor who has deliberately provoked a mistrial in order to avoid an acquittal has had his day in court and cannot complain. *State v. Torres*, 328 NJ Super. 77, 86-87 (App. Div. 2000).

b.) Contact the vicinage municipal court presiding judge or Assignment Judge – Your objections should note the Directive, Rules of Court and constitutional issues.

c.) Get an order from the municipal court judge and file an interlocutory appeal. See Rule 3:24(a)

Either the prosecuting attorney or the defendant may seek leave to appeal to the Superior Court, Law Division from an interlocutory order entered before trial by a court of limited criminal jurisdiction.

Part IV – Conclusion

The path to be selected in a DWI ZOOM trial is strictly a function of what strategy will be serve the client's interests and produce the best result. Whatever decision is made should be ratified in writing by the client.