***Adoption of Patty* Appellate Practice Tip:**

**Raising (and Preserving) Zoom Trial Problems**

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In *Adoption of Patty*, 489 Mass. 630 (2022), the SJC held that Zoom termination trials, in a time of pandemic, do *not* present “a per se violation of due process provided that adequate safeguards are employed.” Not a surprise. But the Zoom trial in *Patty* lacked the necessary due process safeguards – to put it mildly, it was a disaster – so the SJC vacated the decree and remanded the case for a new trial.

Here are the safeguards that the SJC required in a Zoom termination trial. The court must:

* inquire, before trial, as to whether the parent has access to the technology necessary to participate via Zoom. If the parent lacks that technology, the court should determine what steps are necessary to help her get it. *Id*. at 645.
* ensure, preferably in advance of the hearing, that the parent understands the procedures to be used when the technology does not work as intended (that is, how to re-connect to the Zoom hearing, how to reach the clerk’s office, how to reach counsel, etc.). *Id*. at 648.
* explain, and provide access to, the private “breakout room” Zoom function so that parents can consult with counsel or stand-by counsel at any time during trial. *Id*. at 645-46.
* explain how to offer exhibits and share documents using the “share screen” (or similar) function during trial. If a *pro se* parent is participating by phone, the court must ensure that all exhibits and other documents are shared ahead of time. *Id*. at 646.

If technological problems cannot be fixed, or parents (or their counsel) cannot be reached, the court must suspend the proceedings until the problems are fixed or the court has an explanation for why the parent is not participating. If a parent cannot timely reconnect, the court must explore other options, such as giving the parent time to review missed testimony before conducting cross-examination. *Id*. at 647.

**The Road to *Patty*:**

*Patty* is just one in a long line of fantastic due process cases – like *Rory, Jacqui, Parker, Edmund,* and *Whitney –* where the deprivation was so great that the appellate court didn’t even look at harm or prejudice.[[1]](#footnote-1) That’s hugely important! If a parent can’t meaningfully participate in the proceedings, then it’s wrong to even consider whether a sham trial made a difference to the outcome.

Before its decision in *Patty,* the SJC had already dealt with the issue of Zoom trials in the criminal context. In *Vasquez Diaz v. Commonwealth*, 487 Mass. 336 (2021),and *Commonwealth v. Curran*, 488 Mass. 792 (2021), the Court considered whether post-pandemic virtual hearings in criminal matters violated defendants’ Sixth Amendment rights to confrontation, presence, and public trial. The SJC concluded that they did not, primarily because, in both cases, the technology worked well; the Zoom hearings were much like in-person hearings.

Our cases, of course, are not criminal in nature and parents do not enjoy Sixth Amendment (confrontation, presence, or public trial) rights. *See*, e.g. *Custody of Two Minors*, 396 Mass. 610, 616 1986 (“The full panoply of constitutional rights afforded to criminal defendants does not apply in these cases.”) “Fair trial” rights for parents are grounded in procedural due process, which is flexible and offers weaker protections than those afforded under the Sixth Amendment. What sets *Patty* apart from *Vasquez Diaz* and *Curren* is that the virtual trial in *Patty* was a technological nightmare.

**What Happened in *Patty*:**

In September 2020, the Juvenile Court in *Patty* held a Zoom termination of parental rights trial. The *pro se* mother objected and asked for an in-person trial. She had no video connectivity; she could participate only by cellphone audio. The court insisted on going forward anyway.

Technological problems started immediately. The mother’s connection dropped during direct examination of the first witness, a DCF social worker, and it was unclear to the judge what she heard. After a short recess, the judge decided to continue the trial without the mother, proceeding with the testimony of two additional witnesses who also experienced connection problems. When the Zoom trial resumed two days later, the mother was able to connect. She told the judge that her cell service was “really bad” on the first day of trial. The judge did not ask her what she had been able to hear on the first day of trial; instead, he offered her the chance to cross-examine the witnesses whose direct examination she had never heard. Then, the judge terminated the mother’s parental rights, and the mother appealed. Appellate counsel filed a motion for new trial, explaining that the mother had heard only parts of the first witness’s testimony, that she had not heard any of the other two witnesses’ testimony, and that she had tried to reach the clerk’s office to be reconnected. The judge denied the motion without a hearing. The mother appealed the denial of the new trial motion and moved (successfully) to consolidate the two appeals.

**So Where Does that Leave You, as Appellate Counsel?**

So you were appellate counsel and the Zoom (or hybrid) trial in your case was flawed. What do you do? Some initial thoughts:

First, remember that Zoom trials must satisfy the procedural safeguards of *Patty* even if the parent agrees to hold the trial by Zoom. The efficacy, or legitimacy, of such consent rests on the assumption that the trial will meet minimum due process demands. That is, by agreeing to a Zoom trial, the parent isn’t agreeing to lose audio/video or lose connection to their counsel; they are only agreeing to a trial that isn’t in person. So your client hasn’t waived their “*Patty* rights” simply by agreeing to a Zoom trial.

Second, procedural due process means the right to notice and to participate in a timely and meaningful manner. The Zoom (or hybrid) trial in your case doesn’t have to be perfect, but it must allow for *meaningful* participation. That means that the client must have a meaningful opportunity to effectively rebut DCF’s adverse allegations. Did your client have such an opportunity? Could they hear the judge? Could they hear DCF’s case against them? Could they consult with trial counsel in order to make some form of rebuttal?

Third, in almost all cases, you don’t want brief a *Patty* issue unless it was adequately preserved. What does that mean? Here are some “preservation tips”:

Appellate Practice Tip #1 (Good Issue Preservation at Trial)

Let’s assume trial counsel (or a *pro se* parent) has made timely due process objections to:

* the lack of reliable devices or data service
* dropped audio or video
* the inability to hold attorney-client consults in breakout rooms
* the inability to offer exhibits or view the exhibits of adverse parties
* something else that prevented meaningful participation.

That’s awesome. Raise these issue in your direct appeal. No need for any post-trial motion, unless a necessary offer of proof wasn’t made by trial counsel. For example, the client dropped off the Zoom trial during his testimony, or the client’s expert dropped off the Zoom trial during her testimony, and the “lost” testimony was important to the case. You’ll need to supply the trial court with that “lost” testimony in a motion for new trial/relief from judgment. (See more below)

Appellate Practice Tip #2 (Issues Not Preserved)

What if the *Patty* issues were not preserved– that is, no objections, no offers of proof, no indication that the trial was problematic? File a motion for new trial/relief from judgment. You motion must explain the problems that occurred at the Zoom trial and how those problems prevented the client from meaningfully participating and rebutting DCF’s allegations. You’ll need an affidavit from the client (and/or from trial counsel) explaining the technological problems. You’ll need an affidavit stating the missing or dropped testimony. You’ll need to attach exhibits that the client or trial counsel thought were admitted but weren’t. The trial judge might not have been aware of the problems, and your motion gives the judge a chance to declare a mistrial, strike testimony, reopen the evidence, etc. The appellate courts are very reluctant to act if the trial judge wasn’t given the first shot at fixing things.

If the trial judge denies the motion, file a notice of appeal regarding that denial and move to consolidate that appeal with the appeal of the underlying judgment. *Now* you can brief the Patty issues.

Appellate Practice Tip #3 (Showing Harm – Or Not)

You do not need to show prejudice/harm where there has been a serious due process violation that calls into question the basic fairness of the proceeding. *Patty* and the other cases cited above and in footnote 1 were reversed without any discussion of harm, because harm is presumed when a trial is fundamentally unfair.

*Patty* issues (and other serious due process violations) should be the first argument in your brief. And, when making that argument, state right up front that no harm need be shown. Perhaps something like:

“No harm needs to be shown in this case as a result of the fundamental due process deprivation, just as no harm needed to be shown in *Patty*, *Rory*, *Parker*, and the other cases cited above. Harm is presumed when a trial is fundamentally unfair."

Then, as a second argument, explain how the client was, in fact, harmed by the *Patty* problems. To show harm, you’ll need the same affidavits and/or exhibits as discussed in Tip #2.

1. *Adoption of Rory*, 80 Mass. App. Ct. 454 (2011) (judgment void for failure to comport with due process where father was deprived of his right to counsel); *Adoption of Jacqui*, 80 Mass. App. Ct. 713 (2011) (termination of incarcerated father’s parental rights without notice was a due process violation); *Adoption of Parker*, 77 Mass. App. Ct. 619 (2010) (judge’s resolution of disputed facts through counsel proffers – even though lawyers agreed to the process – deprived mother of opportunity to be heard meaningfully); *Adoption of Edmund*, 50 Mass. App. Ct. 526 (2000) (out-of-state incarcerated father not afforded meaningful opportunity to be heard because phone participation failed and court offered no other procedure for meaningful participation); *Adoption of Whitney*, 53 Mass. App. Ct. 832 (2002) (judge failed to ensure meaningful participation by incarcerated parent in TPR proceeding, noting that how judge can do that is largely left to judge’s discretion based on circumstances). [↑](#footnote-ref-1)