

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 36¹**

SUMMARY

The Administrative Board of the New York Courts (the “Administrative Board”) has requested comments on a proposed amendment to Commercial Division Rule 36 proffered by the Commercial Division Advisory Council (“CDAC”) (the “Amendment”). The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) recommends that the proposed rule amendments be adopted, as further explained below.

COMMENT

I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who litigate both civil and criminal bench and jury trials in state and federal courts in New York and throughout the country. Thus, in offering the following comments, the Section is drawing upon a broad range of experience. The Section’s comments below and its approval of the proposed rule change applies only to Commercial Division bench trials.

II. PROPOSED AMENDMENT

A. Proposed Revision to Rule 36

Rule 36. Virtual Evidentiary Hearing or Non-jury Trial

- (a) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties or upon a motion showing good cause, or upon the court’s own motion, conduct an evidentiary hearing or a non-jury trial utilizing video technology.
- (b) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties or upon a motion showing good cause, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.
- (c) The video technology used must enable:
 - (1) a party and the party’s counsel to communicate confidentially;

¹ Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

- (2) documents, photos, and other things that are delivered to the court to be delivered to the remote participants;
- (3) interpretation for a person of limited English proficiency;
- (4) a verbatim record of the trial; and
- (5) public access to remote proceedings.

(d) In connection with any opposed motion contemplated by paragraphs (a) and (b) of this Rule, the Court shall determine the existence of “good cause” by considering at least the following factors:

(1) The overall efficiency of conducting a virtual proceeding, including but not limited to consideration of the convenience to all parties involved, the time and costs of travel by counsel, litigants, and witnesses to the location of the trial or hearing, and avoiding undue delay in case management and resolution; and

(2) The safety of the parties, counsel, and the witnesses, including whether counsel, the litigants, and the witnesses may safely convene in one location for the trial or hearing; and

(3) ~~This Rule does not address the issue of when all~~ Prejudice to the parties. ~~do not consent~~

(e) Remote evidentiary hearings and non-jury trials shall replicate, insofar as practical, in-person evidentiary hearings or non-jury trials and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the hearing or trial. To that end, parties are encouraged to utilize the State of New York Unified Court System’s Virtual Bench Trial Protocols and Procedures.

(f) Nothing in this Rule is intended to require any party to forego a jury trial where a trial before a jury is demanded as provided by CPLR 4102.

B. CDAC Rational for Revision

The Administrative Board is seeking comment on a proposal to amend Commercial Division Rule 36 to clarify that courts have the authority to order virtual evidentiary hearings and bench trials, upon a motion showing “good cause.”

The CDAC believes the proposed rule amendment is important because it will “explicitly authorize courts to order virtual evidentiary hearings and bench trials without the consent of the parties, upon a showing of good cause.”

Courts have explained that virtual proceedings contain procedures that “preserve the traditional elements of a fair trial, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity . . . to view the witness’s demeanor as he or she testifies.” However, the courts have also recognized there may be reasons to refrain from holding virtual proceedings, and they may not want to order virtual proceedings in every circumstance.

The proposed rule amendment lists some of the factors that should be considered when the court is determining whether there is good cause to conduct a virtual proceeding without the consent of the parties. These factors include (but are not limited to): the overall efficiency of conducting a virtual proceeding, convenience to parties, travel costs, delay in case management and resolution, safety of the parties, and prejudice to the parties. The CDAC states that the concerns that parties have about virtual proceedings pertaining to technical issues, security issues, witness testimony, exhibits, and other factors can be addressed through planning by counsel and the court, and by greater reliance on the guidelines stated in the New York Unified Court System’s Virtual Bench Trial Protocols and Procedures. The CDAC believes that the proposed rule will allow the Commercial Division to increase efficiency and to reduce unnecessary litigation.

C. **Section’s Position**

Members of the Section have reported that they participated in multiple virtual hearings and bench commercial trials throughout the nation during the pandemic and, while they are not a replacement for “tried and true” “in-person” trials, they can result in a fair trial, and, with advance planning and education, technical issues can be realistically, easily overcome. Thus, a virtual commercial bench trial can be an appropriate substitute for an “in-person” bench trial.

The Section notes that public access to a bench trial can be addressed through live streaming and the provision of links to attendees. While there is always the potential of a disruptive attendee, the Section does not believe that is a credible basis to not adopt the proposed rule. As to the sealing of a virtual proceeding, the Section believes, as in an “in-person” proceeding, a court would be able to ensure through technology that the proceeding can only be attended by those with court approval consistent with New York law.

The Section acknowledges that preparing to try a virtual bench trial requires different technological skills. Technology consultants are available to assist litigators in addressing exhibits during trial, and exhibits can be shared in advance of trial as would occur in an “in-person” bench trial. Technology also permits exhibits to be highlighted by counsel during a bench trial and those changes can easily be memorialized electronically. Many courts have become adept in running a virtual bench trial. We have heard from judges that presiding over a virtual bench trial would go smoother if a judge were to have three monitors on his or her bench in order to be able to view all the participants on one screen, view exhibits on the second screen, and leaving a third screen available for reviewing other documents relevant to the trial. Side-bars with the court have been found to be effectively conducted through the use of breakout rooms.

Although some have expressed concerns that credibility assessments are more difficult when viewing a witness virtually, we suspect those concerns are from those with limited

experience in virtual proceedings. In any event, those concerns can be addressed, as suggested by the CDAC, by following the guidelines contained in the New York Unified Court System’s Virtual Bench Trial Protocols and Procedures. Others have indicated that credibility assessments are even easier for the judge and counsel during a virtual bench trial. Judges have observed that they have a better view of the witness looking straight into the computer screen, than in a live trial where the witness is in the box to the side of the judge, and the judge has only a partial side view of the witness during testimony. Concerns about witness coaching or improper communications between a witness and counsel can be addressed in many ways, but three possible ways are having a neutral third party in the same room as the witness, disabling the chat function of the platform or sending the witness a preset laptop.

The Section supports the proposed revision to the rule authorizing a court to order a virtual bench trial on its own motion after due consideration of the facts of each case. However, the Section suggests that the CDAC clarify if the “good cause” standard applies to a court ordering a virtual proceeding on its own motion.

If a party objects to a virtual trial or hearing, the proposed rule requires a factual inquiry considering “at least” the factors set forth in Section “(d)” above. This standard for “good cause” set forth in the proposed rule should eliminate the ability of a party to prevent a virtual hearing from taking place because counsel does not want to learn the technological skills needed to try a case virtually or simply to delay the matter until an “in-person” bench trial can be scheduled at a much later date.

Lastly, the Section suggests that the proposed amendment include language that courts encourage junior lawyers to actively participate in virtual proceedings so that they are able to get “virtual” courtroom experience.

In conclusion, the Section supports the proposed changes to Rule 36.

Respectfully submitted,

New York State Bar Association
Commercial and Federal Litigation Section
Ignatius A. Grande, Section Chair

November 17, 2022

Approved by the NYSBA Commercial & Federal Litigation Section Executive Committee,
November 15, 2022

Commercial Division Committee

Mark A. Berman,* Co-Chair
Ralph Carter, Co-Chair

*Denotes Principal Author of the Comment