



**MEMORANDUM**

To: All Interested Persons

From: Anthony R. Perri

Re: Request for Public Comment on Amending Commercial Division Rule 36 to Clarify the Courts' Authority to Order Virtual Evidentiary Hearings and Bench Trials

Date: September 23, 2022

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”) 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 (Exhibit A). CDAC includes a redline of the proposed changes to Rule 36 in Appendix A of its memo. 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.” (Ex. A, p. 1). CDAC intends the amendment of Rule 36 to be codification of existing case law.

CDAC cites various court decisions from 2020-2022 that have established the court’s authority to order virtual bench trials under Judiciary Law § 2-b(3). Judiciary Law § 2-b(3) confers powers on the courts “to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.” (Ex. A, p. 5.) The 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.” *Wyona Apartments LLC v. Ramirez*, 137 N.Y.S.3d 653, 657 (N.Y. Civ. Ct., Kings Cnty. 2020) (Ex. A, p. 5).

However, the courts have also recognized there may be reasons to refrain from proceeding with virtual proceedings, and they may not want to order virtual proceedings in every circumstance. (Ex. A, p. 6). 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. (Ex. A, Appendix A.) 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. 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. (Ex. A, p. 7.)

In its concluding paragraph, CDAC reiterates that the proposed amendment to Rule 36 is “fully consistent with New York statutory and decisional law” regarding the court’s authority to order virtual proceedings. (Ex. A, p. 13.) CDAC believes that the clarification will allow the Commercial Division to increase efficiency and to reduce unnecessary litigation.

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Persons wishing to comment on the proposal should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: Anthony R. Perri, Esq., Acting Counsel, Office of Court Administration, 25 Beaver Street, 11<sup>th</sup> Fl., New York, New York, 10004. Comments must be received no later than November 23, 2022.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

# **EXHIBIT A**

## **MEMORANDUM**

**TO:** Subcommittee on Procedural Rules to Promote Efficient Case Resolution (“Subcommittee”)

**FROM:** Michael Carlinsky, Scott Mollen, Susan L. Shin

**DATE:** May 23, 2022

**RE:** Proposal for Amended Rule on Virtual Hearings and Bench Trials

### **INTRODUCTION**

This memorandum recommends amending Commercial Division Rule 36 to clarify the courts’ authority to order virtual evidentiary hearings and bench trials. Rule 36, as currently written, authorizes virtual evidentiary hearings and bench trials only upon the consent of the parties. Many New York courts, however, have also ordered virtual or remote evidentiary hearings and bench trials without the consent of the parties. This memorandum advises that the Commercial Division amend Rule 36 to explicitly authorize courts to order virtual evidentiary hearings and bench trials without the consent of the parties, upon a showing of good cause.

### **ORIGINAL RULE**

#### **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, 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, 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:
  - (i) a party and the party’s counsel to communicate confidentially;

- (ii) documents, photos, and other things that are delivered to the court to be delivered to the remote participants;
  - (iii) interpretation for a person of limited English proficiency;
  - (iv) a verbatim record of the trial; and
  - (v) public access to remote proceedings.
- (d) This Rule does not address the issue of when all parties do not consent.

### **PROPOSED RULE**

We recommend that the Commercial Division Advisory Council propose the following amended Commercial Division Rule 36 (the “Amended Rule”). Proposed changes to the original rule are also reflected in Appendix A.

#### **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;
  - (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) Prejudice to the parties.

(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 forgo a jury trial where a trial before a jury is demanded as provided by CPLR 4102.

### **FACTUAL BACKGROUND**

The COVID-19 pandemic has forced rapid and widespread changes in the practice of law: not least among these, the shift to virtual proceedings. Courts embraced virtual technology to ensure that justice would be done during the COVID-19 pandemic. Both state and federal courts have ordered certain proceedings to be conducted virtually, including evidentiary hearings and bench trials. Although the COVID-19 pandemic drove these changes, courts have noted that even after the pandemic, virtual proceedings are here to stay.<sup>1</sup> The technology for virtual legal proceedings is not new—in many instances, the technology was already being used by trial courts, and appellate courts consistently upheld their authority to do so.<sup>2</sup> There is good reason to

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<sup>1</sup> See, e.g., *Quattro Parent LLC v. Rakib*, No. 615555/2017, 2022 WL 135322, at \*3 n.3 (N.Y. Sup. Ct., N.Y. Cnty. Jan. 14, 2022); *Bonilla v. State*, 141 N.Y.S.3d 289, 290 (N.Y. Ct. of Claims 2021).

<sup>2</sup> *Bonilla*, 141 N.Y.S.3d at 290; see *People v. Wrotten*, 923 N.E.2d 1099 (N.Y. 2009) (explaining that courts have the authority to fashion a procedure whereby witnesses are permitted to testify via live, two-way television at trial); *People v. Cintron*, 551 N.E.2d 561 (N.Y. 1990) (taking of televised testimony from a child witness from a separate room was permissible).

regulate virtual evidentiary hearings and bench trials while encouraging their continued use, as circumstances warrant, after the pandemic is brought under control. The Commercial Division, in its role as one of the nation's leading courts for the resolution of business disputes, must continue to carry out its vital functions through the pandemic, and should welcome the opportunity to innovate in ways that may improve the practice of law after the crisis is controlled.

With these concerns and goals in mind, Commercial Division Rule 36 (allowing virtual evidentiary hearings and bench trials upon consent of all parties) and Rule 37 (allowing remote depositions upon consent of all parties *or* upon motion to the court showing good cause) were each promulgated during the pandemic. Since the time Rule 36 was proposed during the earliest days of the pandemic in June 2020, however, courts have addressed the issue of the court's authority to order a virtual hearing or bench trial in the absence of consent by all parties, and have made clear that it indeed has the authority to do so under N.Y. Judiciary Law § 2-b(3) (discussed below). We believe Rule 36 should be amended to 1) confirm this point in order to reduce unnecessary litigation and 2) be more consistent with Rule 37 on remote depositions.

### **LEGAL DISCUSSION**

Courts have the authority to order virtual bench trials. *Quattro Parent LLC v. Rakib*, No. 615555/2017, 2022 WL 135322, at \*3 n.3 (N.Y. Sup. Ct., N.Y. Cnty. Jan. 14, 2022); *see Wyona Apartments LLC v. Ramirez*, 137 N.Y.S.3d 653 (N.Y. Civ. Ct., Kings Cnty. 2020) (denying the respondents' motion for a stay because conducting a virtual trial did not violate their due process rights); *see also Ciccone v. One W. 64th St., Inc.*, 132 N.Y.S.3d 261 (N.Y. Sup. Ct., N.Y. Cnty. 2020) (denying plaintiff's motion for an in-person hearing before a special referee on the issue of attorney's fees). In *Quattro Parent*, the Commercial Division explained

that contrary to the defendant’s objection, “the court has the authority to order a virtual trial” and “courts have embraced virtual technology to ensure that justice would be done during Covid and probably long thereafter; virtual proceedings are here to stay.” 2022 WL 135322, at \*3 n.3.

Courts have authority to order virtual proceedings under New York Judiciary Law § 2-b(3). *Ciccone*, 132 N.Y.S.3d at 265; *Wyona Apartments*, 137 N.Y.S.3d at 657. This statutory provision confers powers on the courts “to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.” N.Y. Judiciary Law § 2-b(3). This section “explicitly authorize[s] the courts’ use of innovative procedures where necessary to carry into effect the powers and jurisdiction possessed by the court.” *Ciccone*, 132 N.Y.S.3d at 265. Although courts typically use COVID-related circumstances to justify virtual proceedings, trial courts “used this authority to conduct proceedings by virtual means, and appellate courts consistently upheld that authority long before anyone had heard the words ‘COVID-19’ or ‘social distancing.’” *Perez v. 1857 Walton Realty Corp.*, 71 Misc. 3d 1203(A), at \*3 (N.Y. Civ. Ct., Bronx Cnty. 2021); *Bonilla v. State*, 141 N.Y.S.3d 289, 290 (N.Y. Ct. of Claims 2021).

Although litigants have raised due process concerns with virtual proceedings, courts typically reject these arguments. In *Wyona*, the court explained that it “may fashion procedures during the virtual trial to preserve the traditional elements of a fair trial, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for th[e] [c]ourt and the parties to view the witness’s demeanor as he or she testifies.” 137 N.Y.S.3d at 657. Similarly, the *Ciccone* court stated that “technology used for video conferencing is straightforward and easy to use; and all that is required to participate in a trial by video-conference is a computer and Internet access, which should be readily available to counsel.”



132 N.Y.S.3d at 268 (internal quotations and alterations omitted). In *Perez*, the court refused to grant the respondents an in-person trial, stating that “[r]espondents simply do not offer a compelling reason to have an in-person trial where both sides are represented by counsel and the court has established processes to address evidentiary concerns.” 71 Misc. 3d at \*3. The *Perez* court also noted that other courts have conducted “numerous virtual trials and hearings where the parties have been able to introduce visual evidence and documentation.” *Id.*

However, courts have expressed some hesitation about requiring virtual proceedings in every instance. For example, many courts have noted that because virtual testimony is not the equivalent of in-person testimony, the decision to order virtual proceedings may require “a ‘case-specific’ finding of necessity.” *Wyona Apartments*, 137 N.Y.S.3d at 657; *see Perez*, 71 Misc. 3d at \*3 (“[W]hile this court has the power to hold virtual trials, it will not do so in every circumstance.”). For example, in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 651612/2010 (N.Y. Supreme Court, N.Y. Cnty. 2010), Dkt. # 57, Judge Peter Sherwood granted the plaintiff’s motion to stay the proceedings instead of conducting the scheduled virtual trial. Judge Sherwood first stated that the court had the authority to order a virtual trial over the plaintiff’s objections. Dkt. # 57 at 1–2. He rejected the plaintiff’s argument that CPLR 4013 prevents the court from requiring a virtual trial without the parties’ consent. *Id.* at 2.

CPLR 4013 states: “Upon stipulation of the parties, the judge who is to preside at the trial of an issue may direct trial in whole or in part at a specific place other than the courthouse.” Judge Sherwood explained, “[n]othing in this provision prevents the court from holding the trial over objection in a location other than the courthouse in exceptional circumstances.” Dkt. # 57 at 2. He further explained:

Even if the court were to hold that the trial must be held in the courthouse absent consent of the parties, the conduct of this trial would qualify because it would be conducted from the courthouse in either Manhattan or White Plains.

*Id.* Even though the court had the authority to require the parties to proceed with a virtual trial, Judge Sherwood found that even with a virtual trial, the health and safety risks posed to the individuals involved (counsel, the parties, the witnesses, etc.) were too great. *Id.* at 3. Given these health and safety risks, the court granted the plaintiff's motion to stay the trial until it could be safely held in person or virtually.

### **PRACTICAL CONCERNS**

The concerns litigants have raised to resist virtual evidentiary hearings and bench trials are not frivolous. However, these issues can be effectively addressed through planning by counsel and the court or by the State of New York Unified Court System's Virtual Bench Trial Protocols and Procedures ("Protocols and Procedures"). This memorandum briefly discusses some of the practical considerations that bear upon virtual evidentiary hearings and bench trials. In addition to the Protocols and Procedures, it is expected that the parties may resolve some of their concerns by stipulation prior to the evidentiary hearing or bench trial,<sup>3</sup> or that the court will fashion whatever other appropriate procedures it deems necessary to ensure fairness to the parties for each case. Further, the use of the Protocols and Procedures will reduce avoidable motion practice and address some of the practical considerations that are better resolved on a case-by-case basis rather than by a generally applicable rule.

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<sup>3</sup> For a Proposed Stipulation and Order for Virtual Bench Trial Protocols and Procedures, *see* Protocols and Procedures, Ex. A.

### *Technical Issues*

One of the most common concerns regarding virtual proceedings is technological failure or problems. There is always a risk that the parties could suffer connectivity issues, but these issues can be mitigated if all participants ensure they have sufficient bandwidth and sufficient hardware, such as computers or tablets equipped with cameras. Counsel are also encouraged to test the applicable software before any virtual hearing or bench trial.

As stated in the Protocols and Procedures, counsel, parties, and witnesses should exchange back-up contact information with the court prior to the virtual proceeding and discuss a protocol on how to reconnect in case technical issues arise. At all times, the court should immediately take steps as appropriate to ensure the fairness and integrity of the proceedings.

### *Security Issues*

Virtual evidentiary hearings and bench trials may be vulnerable to unapproved entry by third parties. Court technology personnel have taken extensive measures to ensure the security of the platform. Further, as outlined in the Protocols and Procedures, it is incumbent that all participants in the hearing or trial be instructed not to allow any non-participant to gain unapproved entry to the proceeding. Parties, counsel, and witnesses should be strongly encouraged to attend the proceeding via a secure password protected Internet connection, not a public WiFi connection.

## *Witness Testimony*

Many litigants have expressed concern about assessing witness credibility during virtual testimony. While courts have recognized the disadvantages of virtual testimony, they have “not prevented the use of virtual proceedings as long as they ‘enable the Judge, the jury and the defendant . . . to see and hear the witness and evaluate the witness’s demeanor, facial expressions, voice and mode of speaking while the testimony is being given.’” *Bonilla*, 141 N.Y.S.3d at 292 (quoting *People v. Cintron*, 551 N.E.2d 561, 568 (N.Y. 1990)). Further, “improvements in video technology now facilitate transmission of virtual images that are clear and closeup, and allow for sufficient consideration of a witness’s demeanor.” *Id.*; see *In re RSC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020).<sup>4</sup> Therefore, while the use of virtual technologies may have prevented courts from adequately assessing a witness’s credibility in the past, courts have agreed that technological advancement has enabled them to do so today.

The Protocols and Procedures address some of the procedural and technical concerns with virtual witness testimony. For example, absent extenuating circumstances, all witnesses must give testimony with both audio and video on and operational. The witnesses should log onto the proceeding when it commences and wait in the virtual “lobby” area until called as a witness and admitted by the court into the virtual courtroom.<sup>5</sup>

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<sup>4</sup> In *In re RSC*, the court explained that while “[c]ertain features of testimony useful to evaluating credibility and persuasiveness, such as the immediacy of a living person can be lost with video technology, and the ability to observe demeanor, central to the fact-finding process, may be lessened,” advances in video technology permit the court “to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration.” 444 F. Supp. 3d at 970 (internal quotations omitted).

<sup>5</sup> Alternatively, the court can establish various login times for each witness which is at least a half hour before their testimony time.

Some litigants may be concerned about communications between witnesses and counsel during virtual proceedings. Such communications should be restricted as if the virtual proceeding were being conducted in person. In other words, counsel and the parties may not speak to the witness until his or her testimony is completed. Witnesses should also be instructed by counsel and the court that written or oral communications of any kind, via electronic means or otherwise, between a witness or party and counsel for the witness during the testimony is strictly prohibited.

In addition, the Protocols and Procedures state that there should not be any information available to the witness out of the court's sight. Witnesses should be instructed by counsel and the court that they are not permitted to read or refer to any exhibit, image, document, or other writing of any kind during their testimony other than those provided to them by counsel in the course of direct or cross-examination. They should also be instructed that no other individual may be present, either physically or electronically, in the same room as the witness or so near the witness as to be seen and/or heard by the witness.<sup>6</sup>

It is the responsibility of counsel who calls the witness for direct examination to ensure the witness has a suitable location and access to suitable hardware that is necessary for the virtual proceeding. Unless specifically authorized by the court in advance, witnesses shall not be permitted to testify from a cell phone.

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<sup>6</sup> The Protocols and Procedures include an exception if a person is present to assist the witness in the use of computer equipment/camera or because the witness requires physical assistance due to a medical condition.

## *Exhibits*

Litigants may be concerned about the use of exhibits during virtual proceedings. Exhibits are typically shown to witnesses through the “Share Screen” function of the virtual platform. The Protocols and Procedures outline how exhibits should be shared prior to the proceeding. Exhibits to be used in a virtual evidentiary hearing or bench trial should be submitted electronically to the court at a date and time set by the court before hearing or trial. Once agreed to by the parties and approved by the court, counsel introducing the exhibits must pre-mark them for identification prior to the proceeding. If an exhibit is not a document, it should be submitted to the court well in advance of the proceeding.<sup>7</sup>

The Protocols and Procedures also address how altered exhibits should be handled. In the event that an exhibit is altered in any way during the virtual evidentiary hearing or bench trial (e.g., written upon, highlighted, marked, enhanced, etc.), the exhibit will be saved at the time of the alteration and exchanged electronically with the court and all counsel in “actual size” immediately or as soon as practicable following the alteration of the exhibit.

## *Public Access*

Another concern is whether courts can maintain public access to virtual proceedings. *See O’Reilly v. Klar*, 90 N.Y.S. 3d 242, 243 (2d Dep’t 2018) (“New York law presumptively favors broad access by the public and the press to judicial proceedings and court records.”). The Procedures and Protocols address these issues. The proceedings should be live-streamed, both

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<sup>7</sup> The Protocols and Procedures state that the parties shall submit them to the court no less than fifteen days prior to the virtual pre-trial conference, but this is within the discretion of the court. For more detail on how counsel should handle physical exhibits, *see* Protocols and Procedures at 8.

audio and video, to ensure public access. In certain circumstances, the press and members of the public may be provided with a restricted link. Arrangements can also be made for virtual access to the virtual proceeding from a courthouse location where ample social distancing can be assured.

### *Sidebar Conferences*

Litigants may be concerned about how the court will conduct sidebar conferences in a virtual proceeding. Again, this is provided for in the Protocols and Procedures. For sidebar conferences, the court may use a “Breakout Room” feature of the virtual platform. Alternatively, the court may allow counsel to utilize the “mute” function on the virtual platform and communicate with the court via telephone.

### *Health and Safety Concerns*

Litigants have expressed concern that, under certain circumstances, counsel, parties, and the witnesses are at risk of contracting COVID-19 when preparing for a virtual proceeding. *See Ambac*, Dkt. # 57 at 2–3. Indeed, while virtual proceedings mitigate the risk of exposure to COVID-19, there may be circumstances where conducting a proceeding virtually will still seriously risk the health and safety of the participants.

These concerns are addressed by the Amended Rule. When deciding whether to order a virtual proceeding, the court should consider “the safety of the parties, counsel, and the witnesses.” In the event that a new variant of COVID-19 spreads across the United States and seriously threatens the health and safety of participants in a virtual proceeding, the court should

consider these circumstances in determining whether to conduct the virtual proceeding or simply postpone it.

### **CONCLUSION**

Virtual evidentiary hearings and bench trials have been occurring by necessity with increasing frequency. It would benefit parties, counsel, witnesses, and the courts to more clearly regulate virtual evidentiary hearings and bench trials in the Commercial Division. The Amended Rule would clarify the courts' authority to order virtual evidentiary hearings and bench trials upon a showing of good cause. The proposed amendment to Rule 36 is fully consistent with the New York statutory and decisional law with respect to the trial court's authority to order a virtual hearing or bench trial and the factors courts have considered in making the determination. The proposed rule's clarification with respect to the court's authority to order parties to proceed virtually will allow the Commercial Division to increase overall efficiency, and use of the Protocols and Procedures will mitigate some of the practical concerns expressed by counsel regarding virtual proceedings. The Amended Rule will serve litigants and courts in the Commercial Division well, not only for the duration of the COVID-19 pandemic, but for the future. Even once the challenges of COVID-19 are over, litigants may very well elect to participate in virtual evidentiary hearings and bench trials as a matter of preference. By amending Rule 36, the Commercial Division will be prepared for the new future of litigation.



## APPENDIX A

### 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;
  - (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  
\_\_\_\_\_.
- (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.