



December 7, 2022¹

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By Email

Anthony R. Perri, Esq.
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**Re: New York City Bar Association Response to Request for Public Comment on
Proposal to Amend Commercial Division Rule 36**

Dear Mr. Perri:

We write to provide comments with respect to the Request for Public Comment on Amending Commercial Division Rule 36 to Clarify the Courts' Authority to Order Virtual Evidentiary Hearings and Bench Trials (the "Proposal").

¹ The City Bar is grateful for the two-week extension to submit these comments. The Committees engaged in significant deliberation and debate regarding the Proposal and, although not without some dissent, we are pleased to be in a position to submit our views for consideration.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

The City Bar’s Council on Judicial Administration, State Courts of Superior Jurisdiction, and Litigation Committees have considered and discussed the Proposal. As set forth herein, we suggest two changes to the Proposal and provide some related observations, which we hope that you will adopt.

First, subpart (a) of the proposed amendment to Rule 36 should be modified to provide that the court may conduct an evidentiary hearing or a non-jury trial utilizing video technology in the absence of consent or a motion by a party only upon a finding of good cause to do so.²

Second, we believe that the “good cause” standard in subpart (d) should be modified. Implicit in this rule is the concept that one party—over the objection of the other party—must make a showing of “good cause” to overcome the traditional preference for live proceedings. We believe that the “good cause” analysis must be tied to tangible factors, such as cost of travel, the location of the witnesses, health issues, and scheduling delays, as opposed to nebulous concepts such as the “*convenience to all parties involved.*” Some practitioners believe that virtual proceedings are more convenient and efficient, but not all prefer virtual proceedings to live proceedings, especially with respect to evidentiary hearings and bench trials. Further, if one party is making a motion to establish “good cause” to conduct a virtual proceeding, it necessarily means that the other party does not believe that a virtual proceeding is more efficient, convenient, or otherwise superior to a live proceeding. Otherwise, the parties would have stipulated to it.

Accordingly, we recommend that the proposed subpart (d) be modified, as follows:

(d) For all purposes under this Rule, the Court shall determine the existence of “good cause” by considering at least the following factors:

- (1) The necessity of conducting a virtual proceeding, dictated by considerations of, including but not limited to, the financial or other hardship of a party, attorney, or witness in traveling to the location of the trial or hearing;
- (2) Avoiding undue delay in case management and resolution;
- (3) 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
- (4) Prejudice to the parties.

² We note that C.P.L.R. 4013 provides: “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 specified place other than the courthouse.”

Thank you for considering our comments. If you believe that it would be beneficial, we would be happy to discuss these comments with you further.

Sincerely,

Fran Hoffinger, Chair
Council on Judicial Administration

Seth D. Allen, Chair
Litigation Committee

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction

Contact: Maria Cilenti | Senior Policy Counsel | mcilenti@nycbar.org | 212.382.6655



CRIMINAL JUSTICE SECTION

2021-2023 Officers

Via Email and USPS
November 23, 2022

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

BENJAMIN OSTRER

Secretary
Ostrer & Associates
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Dear Mr. Perri,

DAVID M. COHN

Treasurer
New York County
District Attorney's Office
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212/335-4098

The Criminal Justice Section of the New York State Bar Association objects to the proposed amendment to Commercial division Rule 36, which would permit a Judge, without the consent of all parties, to order that an evidentiary hearing or a non-jury trial be conducted virtually.

IMMEDIATE PAST CHAIR

Robert J. Masters

The Section's position is that Judges should not be permitted to order, without all parties' consent, that any substantive proceeding be conducted virtually, where issues relating to the admissibility of evidence or non-jury trials are involved.

Current Rule 36, adopted in June 2020, was proposed by the Advisory Committee, and required all party consent prior to a court ordering remote evidentiary hearings or a non-jury trial. Since adoption, the Rule has permitted the parties to agree to such remote proceedings and it appears to be working. Counsel should be the party to determine, based on their knowledge of the case and more importantly, their clients and witnesses' ability to access and utilize the required technology, when a remote hearing or non-jury trial is appropriate.

Consent of all parties to a virtual proceeding would enable the parties to craft a case specific procedure. The Advisory Committee's Proposal does not indicate that the current Rule is not working, but rather argues that there are some decisions indicating that Judiciary Law Section 2-b(3), already confers this power to judges.

The proposed amendment would generate significant additional motion practice whenever all party consent could not be obtained. The Criminal Justice Section believes that the current Rule should not be amended as proposed.

Respectfully,
David Louis Cohen, Esq.
Chair, Criminal Justice Section

Rule 4013. Trial or evidentiary hearing elsewhere than at courthouse.

AN ACT to amend the civil practice laws and rules, in relation to the conduct of trials or evidentiary hearings at a specified place other than the courthouse, including the use of remote audio-visual technological means.

(a) *Alternate place of trial or evidentiary hearing.* Upon stipulation of the parties, the court may direct that a trial or evidentiary hearing be held in whole or in part at a specified place other than the courthouse.

(b) *Trial or evidentiary hearing by audio-visual technological means.* Upon stipulation of the parties, the court may direct that a trial or evidentiary hearing be held in whole or in part using remote audio-visual technological means.

(c) *Use of audio-visual technological means over a party's objection.* If a party withholds consent to the use of remote audio-visual technological means for the trial of an issue, the court, upon the request of any other party, may exercise discretion to direct that a jury trial proceed in part, or a non-jury trial or evidentiary hearing proceed in whole or in part, with the use of remote audio-visual technological means over the party's objection, provided that:

(i) circumstances prevent all or part of the trial or evidentiary hearing from being timely conducted in person, and a witness is unable to attend and testify in person because of difficulty related to significant distance from the place of trial, age, sickness, infirmity, or imprisonment, and

(ii) either consent is withheld unreasonably by the party, or there would be undue prejudice or hardship to another party or witness.

Upon ordering that a trial or evidentiary hearing be held in whole or in part over the objections of a party, the court shall, after giving due regard to the importance of presenting the testimony of witnesses orally in open court, state its reasons on the record or in a written order.

(d) *Conduct of trial or evidentiary hearing by remote audio-visual means:*

(i) A trial or evidentiary hearing held in whole or in part by remote audio-visual technological means must be conducted so as to permit the participants to see and hear each other and to assure public access to the proceedings in compliance with section 4 of the Judiciary Law. The court may, in its discretion, exclude prospective witnesses who are not parties from the courtroom and from access to the proceedings by remote audio-visual technological means.

(ii) An oath or affirmation may be administered to a witness using remote audio-visual technological means by a person authorized by subdivision (a) of section 2309 of this act, and the oath or affirmation shall be deemed to be taken, and the testimony shall be deemed to be given, in the place where the action is pending.

(iii) The chief administrator of the courts may adopt rules further regulating the conduct of the trial or evidentiary hearing by remote audio-visual technological means. The court may provide additional directions in a particular trial consistent with the rules of the chief administrator.

NEW YORK STATE BAR ASSOCIATION CPLR COMMITTEE

JUSTIFICATION FOR PROPOSED AMENDMENT TO CPLR 4013 PERMITTING THE USE OF REMOTE AUDIO-VISUAL TECHNOLOGICAL MEANS AT JUDICIAL PROCEEDINGS

CPLR 4013, in its original form since 1962 (L.1962, ch. 308), authorizes the judge presiding at a trial to direct that it be conducted in whole or in part at a place other than the courthouse. The statute recognizes that there are occasional circumstances where a trier of fact might benefit from conducting certain proceedings at an alternate location, such as to view an accident site in a personal injury action. The conduct of trials within the courthouse is the implicit rule, with trials outside the courthouse being the expressed exception. While the statute vests the trial judge with discretionary authority to direct that the trial of an issue be performed outside of the courthouse, that discretion is restricted by an important qualifier – that it be exercised “[u]pon stipulation of the parties.” The statutory language therefore requires that for trials to ever be performed at a location other than the courthouse in whole or in part, there must be a unanimous consensus to do so between the stipulating parties on the one hand and the court directing it on the other.

The language of CPLR 4013 has become problematic in light of the covid-19 virus and the development by the courts of the modalities for conducting trials and evidentiary hearings by remote audio-visual technological means. It is conceivable that even after the full re-opening of the courts, trials and evidentiary hearings may be conducted in the event of future public health crises, significant weather events, or unexpected emergencies such as accidents or illnesses involving attorneys or witnesses. Arguably, trials and evidentiary hearings conducted using remote audio-visual technological means are “at a place other than the courthouse,” as judges, clerks, stenographers, attorneys, parties, and witnesses are at scattered locations. If a court directs the conduct of remote proceedings over objection, as has been reported in certain recent case law (*e.g. Bonilla v State*, 71 Misc.3d 235 [Ct. of Cl. 2021]; *Perez v 1857 Walton Realty Corp.*, 71 Misc.3d 1203[A] *3-4 [Civ. Ct. Bronx Co. 2021]; *Matter of a Proceeding Pursuant to Social Services Law 384-B*, 71 Misc.3d 1218[A] *3 [Fam. Ct. Kings Co. 2021]; *C.C. v A.R.*, 69 Misc.3d 983 (Sup. Ct. Kings Co. 2020); *A.S. v N.S.*, 68 Misc.3d 767 [Sup. Ct. N.Y. Co. 2020]), the current form of CPLR 4013 is, at least technically, violated, notwithstanding the practical necessities of proceeding in those instances by remote means.

CPLR 4013 should be amended to address the conduct of trials and evidentiary hearings outside of the courthouse by remote audio-visual technological means, in light of the availability of new technology and the practical demands upon courts to use it, where and when warranted by circumstances. In-person proceedings should remain the preferable method of conducting jury and non-jury trials and evidentiary hearings, which also provide an

easy means of satisfying the open-to-the-public requirements of Judiciary Law 4 (*Hearst Corp. v. Clyne*, 50 NY2d 707, 715 [1980]).

The proposed amendment to CPLR retains the original core of CPLR 4013. But additionally, it permits the court to direct trials and evidentiary hearings using remote audio-visual technological means, in whole or in part, upon consent of the parties. Where consent is not obtained from a party, the proposed amendment to CPLR 4013 sets forth a series of well-balanced factors that are to be considered by the court in determining, in the exercise of discretion, whether to direct the use of remote audio-visual technological means over a party's objection. Chief among them is whether a proceeding, with a reasonable adjournment, can be conducted in-person in a timely fashion, without resort to other modalities, and whether a witness is unable to testify for a variety of statutorily-recognized qualifying reasons. Additionally, the proposed amendment to CPLR 4013 requires the court to consider whether the objection to remote proceedings is withheld unreasonably or whether there would be undue prejudice or hardship upon another party or witness.

The proposed amendment to CPLR 4013 specifically requires the court, in ordering the trial or evidentiary hearing to be conducted remotely over a party's objection, to state its reasons on the record or in a written order. This language is included for purposes of facilitating informed appellate review of the determination to conduct remote proceedings over a party's objection. While the proposed amendatory language avoids directing how remote audio-visual technological means shall be utilized in any given instance, it does specify that it be used in a manner that assures public access in accordance with Judiciary Law 4, and that participants be able to hear and see one another. It also clarifies that oaths be administered by a person authorized to do so under CPLR 2309, and that such an oath be deemed taken, and the testimony given, at the place where the action is pending.

The general language of Judiciary Law 2-b(3) authorizes courts to devise methodologies necessary to effect its powers and jurisdiction, which has been expansively used in some instances as authority permitting the use of remote audio-visual technological means, even over a party's objection. In our view, Judiciary Law 2-b(3), standing alone, may not be read as to permit courts to violate other more specific procedural statutes, such as the stipulation requirement of CPLR 4013, as specific statutes are to take precedence over conflicting general statutes (*Brusco v Braun*, 84 NY2d 674, 681 [1994]).

Nothing in the proposed amendatory language to CPLR 4013 interferes with the right of the chief administrator of the courts and individual judges and justices of the courts from promulgating additional rules, consistent with the terms of the amended statute, regulating the use of remote audio-visual technological means, or the right of parties to pre-videotape and use civil deposition testimony under Uniform Rule 202.15.

The proposed amendatory language to CPLR 4013 is as set forth below:

Rule 4013. Trial or evidentiary hearing elsewhere than at courthouse.

AN ACT to amend the civil practice laws and rules, in relation to the conduct of trials or evidentiary hearings at a specified place other than the courthouse, including the use of remote audio-visual technological means.

(a) *Alternate place of trial or evidentiary hearing.* Upon stipulation of the parties, the court may direct that a trial or evidentiary hearing be held in whole or in part at a specified place other than the courthouse.

(b) *Trial or evidentiary hearing by audio-visual technological means.* Upon stipulation of the parties, the court may direct that a trial or evidentiary hearing be held in whole or in part using remote audio-visual technological means.

(c) *Use of audio-visual technological means over a party's objection.* If a party withholds consent to the use of remote audio-visual technological means for the trial of an issue, the court, upon the request of any other party, may exercise discretion to direct that a jury trial proceed in part, or a non-jury trial or evidentiary hearing proceed in whole or in part, with the use of remote audio-visual technological means over the party's objection, provided that:

(i) circumstances prevent all or part of the trial or evidentiary hearing from being timely conducted in person, and a witness is unable to attend and testify in person because of difficulty related to significant distance from the place of trial, age, sickness, infirmity, or imprisonment, and

(ii) either consent is withheld unreasonably by the party, or there would be undue prejudice or hardship to another party or witness.

Upon ordering that a trial or evidentiary hearing be held in whole or in part over the objections of a party, the court shall, after giving due regard to the importance of presenting the testimony of witnesses orally in open court, state its reasons on the record or in a written order.

(d) *Conduct of trial or evidentiary hearing by remote audio-visual means:*

(i) A trial or evidentiary hearing held in whole or in part by remote audio-visual technological means must be conducted so as to permit the participants to see and hear each other and to assure public access to the proceedings in compliance with section 4 of the Judiciary Law. The court may, in its discretion, exclude prospective witnesses who are not parties from the courtroom and from access to the proceedings by remote audio-visual technological means.

(ii) An oath or affirmation may be administered to a witness using remote audio-visual technological means by a person authorized by subdivision (a) of section 2309 of this act, and the oath or affirmation shall be deemed to be taken, and the testimony shall be deemed to be given, in the place where the action is pending.

(iii) The chief administrator of the courts may adopt rules further regulating the conduct of the trial or evidentiary hearing by remote audio-visual technological means. The court may provide additional directions in a particular trial consistent with the rules of the chief administrator.

Respectfully Submitted,
NYSBA CPLR Committee

Dated: May 20, 2022

From: Sanderson, Joseph <josanderson@Steptoe.com>
Sent: Friday, November 18, 2022 5:31 PM
To: rulecomments
Subject: Proposed Amendment to Commercial Division Rule 36

Dear Mr. Perri,

I oppose the proposed amendment insofar as it purports to reduce the “exceptional circumstances” standard found in the case law for permitting non-consensual remote trial to “good cause.”

The proposed amendment to Rule 36 to allow virtual trials (including evidentiary hearings on motions, which are a “trial” under CPLR 2218) absent a stipulation of the parties likely requires legislative action. CPLR 4013 only permits a trial to be wholly *or partially* outside the courthouse by stipulation of the parties. While provisions in Executive Order 202.8 likely suspended CPLR 4013 during the state of emergency, now that it has terminated, CPLR 4013 precludes the courts from adopting a rule without legislative action that would allow non-consensual remote trials (including CPLR 2218 trials on issues raised by motions). Courts permitting non-consensual virtual trials outside of the context of Executive Order 202.8 have recognized an implicit “exceptional circumstances” exception to CPLR 4103 by analogy to case law interpreting Section 4 of the Judiciary Law, but the proposed rule appears to lower the standard to mere good cause, which is difficult to square with the statute.

Additionally, virtual trials present significant concerns for public access under Section 4 of the Judiciary Law. Any rule regarding virtual trials should make clear that the Court must maintain public access, either by videofeed in the courtroom or livestreaming.

Finally, a rule on virtual trials should discuss whether or not a court has the power to issue commissions for subpoenas to witnesses outside of the state to appear virtually at a hearing within the state and to discuss authority to administer oaths to such witnesses. Legislative action may be necessary to ensure that any such testimony remains subject to penalties of perjury in New York. There is a heightened concern in virtual proceedings that dishonest witnesses may believe that it is harder to prosecute them for perjury, and trial outside the courtroom lacks the same level of inherent formality to impress upon witnesses the need to testify truthfully. A witness in the physical presence of a judge and the symbols of state authority in the courtroom is less likely to lie than a witness sitting at home, so it is important to consider how to make sure that witnesses in virtual proceedings are actually taking valid oaths.

Sincerely,

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Please be CAREFUL when clicking links or opening attachments from external senders.

From: Hon. Mark Dillon
Sent: Tuesday, November 22, 2022 9:47 PM
To: Hon. Lawrence Marks; Hon. Tamiko Amaker; Anthony R. Perri; rulecomments
Cc: michaelcarlinsky@quinnemanuel.com; Mollen, Scott; susan.chin@weil.com; Hon. Lucy Billings; Wiegand, Thomas
Subject: Proposed Amendments to Commercial Division Rule 36
Attachments: OCA -- Remote Proceedings.docx; CPLR 4013 and OCA- Proposed Amendment and Memorandum.pdf

Dear Judges Marks and Amaker, and Mr. Perri,

Please find two attachments. The first is correspondence on behalf of myself, Hon. Lucy Billings, and attorney Tom Wiegand, writing on behalf of the NYSBA CPLR Committee, setting forth opposition to certain aspects of the proposed amendments to Commercial Division Rule 36 of the New York State courts regarding the conduct of virtual proceedings. The second attachment is the text of an amendment to CPLR 4013 recommended by the NYSBA CPLR Committee with its accompanying supporting memorandum, which is related to the subject matter of the proposed amendments to Rule 36. The correspondence and attachments speak for themselves.

We copy this correspondence to the three members of the Subcommittee on Procedural Rules to Promote Efficient Case Resolution, Mr. Carlinsky, Mr. Mollen, and Ms. Chin.

Thank you in advance for your consideration.

--Mark C. Dillon
Justice, Appellate Division, 2nd Judicial Department

Please be CAREFUL when clicking links or opening attachments.

**APPELLATE DIVISION OF THE
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**HON. MARK C. DILLON
JUSTICE**

Hon. Lawrence Marks
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Hon. Tamiko Amaker
Incoming Acting Chief Administrative Judge
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Anthony Perri, Esq.
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VIA E-MAIL

**Re: Opposition to Proposed Amendment to
Commercial Part Rule 36**

November 23, 2022

Dear Judges Marks and Amaker and Counsel Perri,

We write on behalf of the CPLR Committee of the New York State Bar Association which over the past few months has closely examined the issue of virtual proceedings in the courts. Collectively, we write to express opposition to portions of the proposed amendment to Rule 36 for the Commercial Divisions of the New York State courts.

The proposed amendment to Rule 36 correctly recognizes that the conduct of virtual proceedings is a development that is here to stay in some form or fashion. In varied instances the option of virtual proceedings is beneficial to parties and the court. Nevertheless, when conducted, often by necessity, the trier of fact loses the ability to assess fact witnesses as capably as when a witness is personally present in

court. Personal court appearances therefore should be the default position in the conduct of trials in the courts. The proposed amendment to Part 36 permits a court to order virtual proceedings over the objection of a party and even at its own initiative without a request from any party. The proposed amendment justifies such broad authority by citing trial-level decisions to conduct virtual proceedings over parties' objections, particularly in the Family Courts, and by citing further to Judiciary Law 2-b(3) which authorizes the courts to make new forms of proceedings necessary to carry out their business.

We believe that the bench, the bar, and OCA have overlooked the language of CPLR 4013 and that the proposed amendment to Part 36 violates that rule, which provides that "[u]pon stipulation of the parties, the judge that is to preside at the trial of an issue may direct trial in whole or in part at a specified place other than the courthouse." The operative words for discussion here are "stipulation" and "other than the courthouse." The statute was enacted in 1962 with the omnibus provisions of the CPLR and has never been amended in the years since. CPLR 4013 was enacted for out-of-court proceedings such as jury site visits to the scene of an occurrence and exceptional circumstances when a witness willing to testify is unable to physically attend court (e.g. hospitalization). The concept of virtual proceedings was not envisioned in 1962, but the language of the statute nevertheless restricts how courts may permit one or more witnesses or attorneys to participate in proceedings from remote out-of-court locations. Judiciary Law 2-b(3), being the more general statute, must yield to CPLR 4013, which more specifically speaks to the conduct of out-of-court trials. Assuming, as we do, that virtual proceedings fall within the scope of CPLR 4013, then our courts are not statutorily authorized to conduct virtual trials at their own initiative or absent a stipulation of the parties. CPLR 4013 has been overlooked by the courts that have rendered decisions otherwise. Even if our assumption is debatable, it provides fertile ground for appeal of a judgment from a trial conducted virtually over a party's objection.

Our CPLR committee has proposed detailed amendments to CPLR 4013 to provide courts with more flexibility in ordering virtual hearings and trials and with better statutory imprimatur to do so. Legislative efforts are next on the NYSBA's agenda. In a nutshell, our proposed amendments to CPLR 4013 (attached here with a supporting Memorandum) recognize two broad circumstances where virtual proceedings may be conducted. One is where the parties consent, in which case the court may then proceed in that fashion if it so directs. The second is when a party objects. In that instance, the proposed amendment to CPLR 4013 grants the court authority to proceed virtually over the party's objection if the trial cannot otherwise be concluded timely, and if the court finds that consent to virtual proceedings has either been withheld unreasonably or would unduly prejudice another party. Thus, a court would have discretion to guard against delay tactics, to expedite trials for a party entitled to a statutory preference, and to take into account the expense and inconvenience of producing far-away witnesses for live testimony. Our proposed amendment to CPLR 4013 brings the statute into our century, balances the rights and interests of all parties and courts, and is a product of countless hours of informed consideration and debate among the large and diverse membership of the CPLR Committee and the NYSBA as a whole. Our proposal was circulated to all potentially interested NYSBA committees before we presented it to the Executive Committee for approval.

In sum, we believe that the proposed amendments to Part 36 violates CPLR 4013. We further believe that the better approach is for any amendment to the Rules of the Commercial Division to be postponed until such time that further action is undertaken to amend CPLR 4013. Alternatively, we believe that the proposed changes to Part 36 delete the language that globally authorizes virtual trials absent a request by a party, and absent consent of the parties, as the current proposal for Part 36 is too far-reaching.

Very truly yours,

Mark C. Dillon

Justice, Appellate Division, 2nd Judicial Department
Adjunct Professor of New York Practice, Fordham Law
Contributing Author, NY CPLR Practice Commentaries
Member, NYSBA CPLR Committee

Lucy Billings

Hon. Lucy Billings
Justice of the NYS Supreme Court, New York County
Co-Chair, NYSBA CPLR Committee

Thomas J. Wiegand

Thomas J. Wiegand, Esq.
MoloLamken LLP
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cc: Michael B. Carlinsky, Esq.
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Attachments

**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~~
~~—sent~~

(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

From: Stephen P. Haber, Esq. <sphaber@aol.com>
Sent: Tuesday, October 11, 2022 3:54 PM
To: rulecomments
Subject: Fwd: The Court's very understandable interest in conducting remote bench trials in the commercial parts

Please see my email to Justice Marks and the information and links contained. I would like to be of assistance if deemed appropriate. Best regards. SPH

Stephen P. Haber, Esq.
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-----Original Message-----

From: Stephen P. Haber, Esq. <sphaber@aol.com>
To: [REDACTED]
Sent: Tue, Oct 11, 2022 2:45 pm
Subject: The Court's very understandable interest in conducting remote bench trials in the commercial parts

Hon. Justice Marks:

I was very pleased, although I don't practice in the commercial parts, to see the pending proposal that remote bench trials may be directed by the Court under appropriate circumstances. I know that early in the pandemic, the City part in the Bronx had indicated a strong interest in remote bench trials of personal injury actions. I actually reached out the Bronx part in similar fashion to what I am doing now with Your Honor, to potentially assist in the conduct of such bench trials. I never did receive a response.

By way of background, I have 38 years of trial experience, both defendant and plaintiff and went out on my own in 1999, running my office totally paperlessly. That approach bridged into digital trial presentation which I use on all of my cases and those on which I consult (my trial consultation business, catering largely to plaintiffs' counsel) is YourTrialSupport.com. Recently, I co-designed a digital timeline app (iPad, Mac and iPhone) which can be used as a digital framework of a case with event creation which contain all case materials in fully text searchable form. I have to say, it is "way cool". Here is a video interview I gave to David Oddo, a recent past President of NYSTLA for whom I consulted on one of his cases, which shows the app's capabilities.

<https://youtu.be/R9tXCe4oEMI>

App Download Link: <https://apps.apple.com/us/app/timeline-presenter/id1583565729>

The app is a perfect framework for the bench trial litigants and the Court to use to efficiently and comprehensively understand a case. It can be virtualized into a zoom or other screen sharing app.

I would be happy to explore with the Court any approach that could facilitate the clearing of the Court's trial calendars via bench trials.

Many thanks for your attention and consideration. SPH

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Please be CAREFUL when clicking links or opening attachments from external senders.

From: Joseph Sanderson <joseph.sanderson@gmail.com>
Sent: Sunday, October 9, 2022 6:57 PM
To: rulecomments
Subject: Proposed Amendments to Commercial Division Rule 36

While I support a rule making explicit that courts may order virtual proceedings over the objection of a party - thus preventing parties from strategically objecting in order to cause delay - I am concerned that the “good cause” standard is too low.

Given that direct testimony may already be by affidavit in a bench trial, the principal purpose of the trial is to enable the judge to assess witnesses’ demeanor and credibility on cross-examination. It is frequently harder to do so through a videoconference than it would be in person, as well as being harder to enforce rules against witnesses using undisclosed notes or messages during their examinations. There is a danger that judges will feel under pressure to order remote proceedings nonconsensually for the sake of “efficiency” while compromising the important task of detecting perjury and otherwise assessing credibility.

I would suggest amending the proposed rule to make clear that, while trial judges are entitled to broad discretion regarding the form of proceedings, they should consider whether credibility is a central issue in the trial and whether in-person proceedings would allow for a better assessment of credibility.

Either the rule or the CPLR should also be amended to make clear courts’ authority to administer oaths to witnesses physically outside of the state in order to ensure that perjury prosecutions do not fail for lack of a valid oath, in any event. Given the lower feeling of formality in a virtual proceeding and the lack of a physical courthouse to impress upon witnesses the solemnity of the proceedings, it is important to ensure that the backstop of perjury charges are definitely available against witnesses who lie.

Please be CAREFUL when clicking links or opening attachments from external senders.

December 15, 2022

VIA EMAIL & FIRST-CLASS MAIL

Anthony R. Perri, Esq.
Acting Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
rulecomments@nycourts.gov

Re: Proposed Commercial Division Rule 36

Dear Mr. Perri:

I write as chair of the Advisory Committee on Civil Practice with regard to proposed Commercial Division Rule 36. The Advisory Committee believes that one of the important lessons of the COVID-19 crisis has been the usefulness of conducting much of the courts' business through video technology. The courts' use of that technology over the past two and a half years has not only allowed the courts to continue functioning but has also made many proceedings much more efficient and less costly to the parties. The Committee, therefore, endorses Rule 36 and further recommends that the Rule be adopted in the Uniform Rules for all civil courts.

Sincerely,

/s/ George F. Carpinello
George F. Carpinello

GFC/tjc