



Tech Topics

Key Takeaways From NYSBA Questionnaire Report on Virtual Procedures

By Danielle Gatto and Lauren Bernstein

I. Introduction

In this post-COVID-19 world, practitioners have been fully acquainted with all things “virtual”—conferences, depositions, oral arguments, and trials. While there can be no serious doubt that this technology is here to stay, the question that the Federal Procedure Committee of the NYSBA Commercial and Federal Litigation Section sought to answer was whether lawyers and the Court actually like this significant change to the practice of law.

Towards this end, the Federal Procedure Committee of the Section sent an online survey to all NYSBA members, as well as separate requests to the various members of the judiciary. The survey was open from June 1, 2022, to December 16, 2022, and over that time the Committee received over 170 responses from judges (approximately 21) and lawyers (approximately 158).

The survey was entirely voluntary and no efforts were made to obtain a representative sample. As a result, respondents were overwhelmingly commercial litigators concentrated in Albany, New York City, and Nassau County, and anyone without access to email and a web browser was entirely cut out (albeit such individuals were unlikely to have any opinion on these types of virtual practices). Despite the non-scientific nature of this sampling, the results the Committee received made it clear that many types of virtual proceedings are popular and likely here to stay.

In particular, virtual depositions and status conferences appeared to be widely popular—over 75% of respondents favored both remaining an option in a post-pandemic world. The reason for this popularity was simple: efficiency. Overwhelmingly, practitioners responded that having a virtual option for these more quotidian aspects of lawyering frees up their time and allows them to deliver better client service at a lower cost.

That said, the results were not nearly as favorable for virtual hearings or trials. Few respondents reported much experience with these types of virtual proceedings, and many expressed skepticism about their practicality and effectiveness, particularly when it comes to having the ability to confront a witness face-to-face or to present a large number of exhibits.

Ultimately, the key takeaway from our survey appears to be that commercial lawyers in New York have fully embraced virtual proceedings as a new, useful, and cost-effective tool that in many cases may be more suitable than traditional in-person proceedings, but no one wants the option to conduct in-person proceedings to be off the table in any case that demands them.

II. Virtual Depositions

A majority of the attorneys who participated in the survey have conducted between 0-10 virtual depositions since February 1, 2020. According to the results, approximately half of the attorneys described their experiences with conducting, defending, or attending virtual depositions as neutral or favorable. This included their experience with the use of technology, stenographers, and the costs associated with conducting a virtual deposition. However, with respect to the utilization of exhibits and whether virtual depositions are more efficient than in person depositions, the results varied, and there was no majority opinion. When asked whether virtual depositions should continue assuming COVID-19 remains sufficiently receded to permit in-person depositions, approximately 40% of the participants responded with the quintessential lawyer response—sometimes (and nearly 36% of the participants responded with an affirmative “yes” to this inquiry).

III. Virtual Conferences

While more than 60% of the respondents had not participated in virtual court conferences before the onset of the pandemic, more than 80% of the participants had participated in six or more such conferences since. Their experience with the format has been overwhelmingly favorable, particularly because of the associated monetary costs, with nearly 70% of respondents finding virtual conferences both more effective and more efficient than in-person conferences. While judges mostly expressed no view on the matter, the limited number of judges that did express an opinion (only 25) expressed similarly favorable views as practitioners.

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IV. Virtual Hearings

The survey also asked various questions on experience with virtual hearings. According to the survey, before COVID-19, hearings were primarily conducted in person and infrequently conducted virtually.

Since COVID-19 began, almost all attorneys who answered the survey said that they have participated in at least one virtual hearing, and approximately 50% of attorneys surveyed said they have participated in more than six virtual hearings (with nearly 12% of attorneys who participated in more than 40). Most of the attorneys who answered the survey said that their experience using technology was favorable (including using exhibits, eliciting testimony from witnesses, and using a court reporter) and cost effective. More than 50% of participating practitioners described their experience with judges in remote court hearings as favorable as well.

Most of the judges who answered the survey similarly described their experience as favorable and effective (as compared to in-person hearings).

Lastly, the majority of attorneys who answered the survey said that they believe virtual hearings would and should continue after COVID-19 sufficiently receded for in-person court hearings to return unabated.

V. Virtual Trials

Despite there being significant input from the participants on the various other virtual procedures that have been utilized since the onset of COVID-19, unfortunately, few participants have been involved in virtual trials. Indeed, nearly 94% of the participants had no experience with virtual trials (either as a practitioner or as a judge) and, thus, had no opinion on, *inter alia*, use of exhibits, eliciting testimony, or costs.

VI. Conclusion

As can be seen from the results of the survey, commercial lawyers in New York recognize that virtual proceedings are a useful tool that can be helpful in certain cases to lower costs and increase efficiency. With that being said, the complete elimination of in-person proceedings is not a concept that individuals who participated in the survey would support.



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