

## Advocate's View: New York judges provide important trial tools



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Thanks to the work of several judges, New York lawyers and litigants can access free online resources that are invaluable for trying cases. The Guide to New York Evidence ([nycourts.gov/judges/evidence](http://nycourts.gov/judges/evidence)) collects and interprets the state's evidentiary rules in a convenient

format. The Virtual Bench Trial Protocols and Procedures ([nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf](http://nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf)) provides best practices for calling a witness or conducting a trial virtually. Both guides fill gaps in New York practice and help level the playing field for lawyers and pro se parties with limited trial experience.

### The Guide to New York Evidence

Unlike most states and the federal system, New York does not codify all of its evidence rules. CPLR Article 45 ("Evidence") contains a sampling of rules but is not comprehensive. For example, it does not define fundamental terms like relevance, hearsay, and authentication, or define the court's role in the presentation of witnesses and tangible evidence.

Instead, it has been up to courts to establish many rules of evidence. Traditionally, the only way to learn these rules — or even know what they are — has been to read cases and the treatises that summarize them.

The rules governing hearsay are obvious examples. Because the CPLR does not

define hearsay, an attorney must research cases to understand what testimony qualifies as hearsay. But that is not all: the CPLR also lacks a definitive list of hearsay exceptions. An attorney looking at CPLR Article 45 cannot know what qualifies as an excited utterance, present sense impression, or other hearsay exception catalogued in the Federal Rules of Evidence. The attorney would not even know what hearsay exceptions New York courts recognize.

The same problem arises for most evidentiary questions, creating needless confusion in discovery and at trial.

The Guide to New York Evidence ends this confusion by serving as an unofficial code of evidence, organizing, summarizing, and interpreting the evidence rules scattered throughout the cases and CPLR. Its authors — a team of active and retired judges — published the Guide exclusively online to ensure its accessibility. Its rules are concise and easy to quote at trial. It provides extensive commentary and citations to support each rule, making it an excellent research tool.

The Guide is required reading for litigators and an effective way to frame crucial discovery and trial questions.

### The Virtual Bench Trial Protocols and Procedures

Many lawyers are familiar with online proceedings, but the role of virtual court appearances continues to expand. Judges throughout the state are experimenting with conducting bench trials through Microsoft Teams with the parties' consent. The Virtual Bench Trial Protocols and Procedures impose predictability and reliability

on this process based on "a collection of the Best Practices from all of the Judicial Districts throughout the State."

Including a proposed stipulated order setting rules for a virtual trial and a judge's questionnaire confirming that witnesses are alone and uncoached, the Protocols should look largely familiar to attorneys who have experienced the highs and lows of online proceedings. Critical to the process is testing the Teams connection with the witness and court prior to trial and planning ahead for the quirks that invariably arise when a witness appears through a computer screen. The Protocols address, and attorneys must consider, questions such as how to present documents to the witness and ensure the witness can hear the attorneys and judge.

Once the court and counsel are comfortable with the virtual process, they are free to implement it with particular witnesses in an otherwise conventional, in-person trial. In particular, the virtual option makes sense for non-party witnesses who live far from the court and are not expected to testify at great length.

The fact that these evidence and virtual trial guides are free, available online, and the product of significant effort by judges statewide is a good sign. Giving attorneys and litigants free access to the rules of the game is critical to ensuring the game is fair.

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