

# REMOTE JUDGING SURVEY: EXPERIENCES WITH VIRTUAL PROCEEDINGS

*SECOND REPORT - APRIL 2021*



# TABLE OF CONTENTS



<b>INTRODUCTION.....</b>	<b>3</b>
<b>EXECUTIVE SUMMARY.....</b>	<b>5</b>
<b>TECHNOLOGY EDUCATION.....</b>	<b>7</b>
<b>BANDWIDTH ISSUES.....</b>	<b>7</b>
<b>ACCESS TO JUSTICE.....</b>	<b>9</b>
<b>DIGITAL CALENDERING AND DOCKET MANAGEMENT.....</b>	<b>9</b>
<b>VIRTUAL PROCEEDINGS.....</b>	<b>11</b>
<b>VIRTUAL COURT REPORTING.....</b>	<b>17</b>
<b>VIRTUAL INTERPRETERS.....</b>	<b>19</b>
<b>HYPERLINKING AND BOOKMARKING.....</b>	<b>21</b>
<b>EVIDENTIARY ISSUE CHALLENGES TO VIRTUAL PROCEEDINGS.....</b>	<b>21</b>
<b>TECHNOLOGY WORKING GROUP.....</b>	<b>23</b>

## INTRODUCTION

The Technology Working Group (“Working Group”) of the Commission to Reimagine the Future of New York’s Courts (“Commission”) is pleased to present its Second Report based, in part, on the survey (“Survey”)<sup>1</sup> that it created and which was distributed throughout the New York State Unified Court System (“UCS”) to all New York judges<sup>2</sup> and their judicial staffs to inquire about their use of remote technology.

Consistent with the press release announcing the creation of the Commission, the results of the Survey and the Working Group’s recommendations will help serve as a “blueprint for the court system of tomorrow” and to “make innovative proposals for the justice system of the future.” The recommendations set forth below, as Chief Judge DiFiore noted in the UCS’ Press Release, will further pave the way “for the embrace [by the Courts] of new technologies and approaches, with a focus on fairness, efficiency and efficacy.” In the words of Chief Judge DiFiore, the Working Group’s recommendations strive “to remove barriers to justice and prepare the Court System to effectively meet the justice needs of New Yorkers in the years ahead.”



As the Second Report addresses the challenges encountered as Courts use technology to facilitate remote court communications and virtual proceedings, the Working Group expects this Second Report to be a “living” document that will be periodically updated as technology and learning changes and the Courts further adapt to operating virtually.

This Second Report analyzes data and comments from the Survey on key issues to make court use of technology even more effective and efficient.

Those issues include:

- *Judge, attorney and litigant connectivity to virtual proceedings;*
- *Judges' and staffs' comfort level with technology;*
- *chambers and courtroom technology;*
- *the benefits and challenges to holding virtual proceedings;*

---

<sup>1</sup> This Second Report assumes the readers' familiarity with the First Report (referred to as Report in the “First Report”) and thus knowledge of how the Survey was distributed, its structure and limitations, as well as the data as to who responded to it. This Second Report will use the same definitions as the First Report unless otherwise specifically noted.

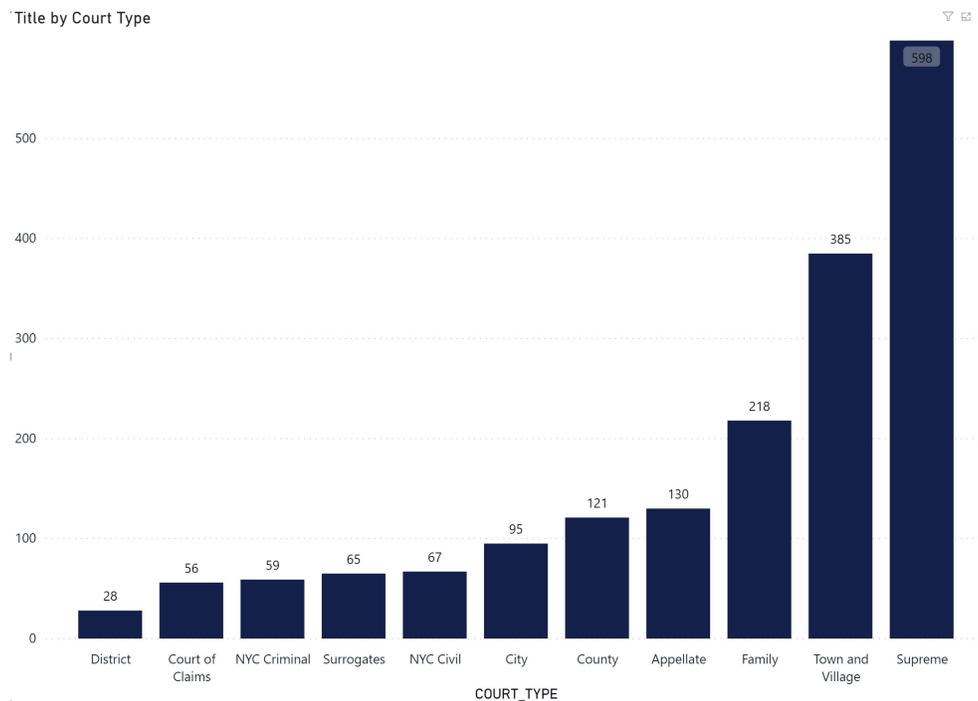
We are pleased that some of the recommendations made by the Technology Working Group in its First and Second Report predicated upon the Survey data have also been raised through various approaches by other working groups of the Commission.

<sup>2</sup> In the Survey, Judges were defined to include judges, justices, magistrates, referees and judicial hearing officers. Law clerks, court attorneys and law secretaries (collectively, “Court Attorneys”) were grouped together, and the Survey included a category of respondents entitled “Non-Lawyer Staff.” Survey results were analyzed by court type and role (e.g., Judges, Court Attorneys or Non-Lawyer Staff), where appropriate.

- *electronic communications concerning court appearances;*
- *effective memorialization of virtual appearances;*
- *issues relating to virtual court reporters and interpreters;*
- *serving lawyers and litigants with disabilities;*
- *issues relating to the use of documentary, audio and video evidence in virtual proceedings;*
- *hyperlinks to authorities and bookmarking; and*
- *improved education of Judges, Court Attorneys and Non-Lawyer Staff regarding legal technology issues.*

The Working Group acknowledges that implementation of certain of its recommendations will need to take into account the administrative structure of the Courts. Appropriate effectuation of such recommendations over time will need to be based on the learned experience and insights of the Chief Judge, the Chief Administrative Judge and the other Administrative Judges of the State, whether enacted on a state, regional or district-wide basis.

Further, to properly understand the significance of our analysis of the Survey data, we restate from the First Report the chart below which shows the breakdown of the number of Respondents by court type:



## EXECUTIVE SUMMARY<sup>3</sup>



### INTERNET CONNECTIVITY

Internet connectivity difficulties have interfered with the ability of Judges and their staffs to effectively operate virtually, and this issue is being addressed continually by the UCS by making more technology options available to the Judiciary. A key improvement directly related to feedback from the Survey that is already underway is the purchase and distribution of hundreds of mobile laptop devices, which include the necessary hardware to connect to a UCS-provided data plan in order to

eliminate reliance on inconsistent and/or unsecure Wi-Fi connections. This single and relatively inexpensive adjustment to the laptops distributed allows for consistent bandwidth required for judges to reliably participate in virtual court appearances.

### VIRTUAL COURT COMMUNICATIONS

Court communications with lawyers and litigants regarding court appearances and motions are becoming more electronic, thus, “snail mail” and paper notices need to be eliminated. Communications from courts to lawyers and litigants should go beyond just email communications and include additional electronic options, such as text messages and automated phone calls. Electronic docket management and calendaring by lawyers and litigants would make judicial appearances more efficient. Courts should automatically register lawyers for the UCS *eTrack* system which sends electronic updates on court appearances to ensure that lawyers properly calendar their court appearances.

### CONTINUING OUR VIRTUAL CULTURE CHANGE

The pandemic has afforded Judges and attorneys a unique opportunity to use technology to reimagine how court appearances are conducted, to continue to build on the culture change that the Judiciary has been undergoing as a result of the Court’s *Excellence Initiative* and during the pandemic, to alter the culture of attorneys when communicating with the Courts, and to further streamline and improve the virtual court appearance process.

### TECHNOLOGY EDUCATION

Judicial comfort levels in conducting virtual proceedings is improving. The Survey data demonstrate, however, that additional education of Judges, Court Attorneys, and Non-Lawyer Staff on best practices to facilitate and support judging in a virtual setting would further improve the efficiency of remote judging and virtual appearances. The Working Group sets forth below ideas on how to further improve judicial education.

---

<sup>3</sup> The Working Group fully appreciates that the implementation of some of its recommendations would involve significant expense, and effectuation of them might be limited due to budgetary constraints.

## ACCESS TO JUSTICE

Survey results support that the unrepresented and under-represented litigants may lack access to, knowledge about and experience with appropriate technology to be able to navigate this new world of remote communications and virtual court appearances. The Working Group sets forth below some technology-related suggestions to further address this problem.

## CHALLENGES TO VIRTUAL PROCEEDINGS

The Survey asked open-ended questions to the Judge Respondents about the benefits and challenges to virtual proceedings, which are further discussed below. There are, of course, structural limitations to virtual proceedings, but some of the challenges should slowly become less of an issue as Judges and their staffs, as well as attorneys, litigants and correctional facilities, improve their Internet connectivity by relying less on inconsistent and/or unsecure Wi-Fi connections. By seeking to reduce issues associated with poor connectivity, obtaining better and more sophisticated hardware and software, as described below, and becoming more facile with the technology, many of the challenges should dissipate.

In addition to connectivity-related issues, Survey responses identify challenges to virtual proceedings, including:

- judicial and staff comfort level and experience with virtual technology;
- attorneys' lack of technical knowledge in effectively communicating;
- judging the credibility of witnesses;
- ensuring that counsel and client can communicate confidentially;
- counsel and litigant decorum;
- technology permitting only one person to speak at a time; and
- ensuring a proper record of the court appearance is memorialized.

## COURT REPORTERS AND INTERPRETERS

Court reporters and interpreters working remotely also have connectivity issues. The UCS also needs to address inefficiencies in court proceedings due to court reporters and interpreters. Courtrooms state-wide are to be upgraded with the appropriate technology to allow for "real time" court reporting capacity, and court reporters need standardized hardware and software and to be proficient with it to effectively transcribe in "real time." The UCS should consider implementing a pilot program on using digital recordings when a court reporter is not present, whether in-person or virtually, to ensure that a proper record of all court proceedings is made.

## VIRTUAL EVIDENCE

Finally, Survey questions inquiring about issues relating to the presentation of physical, audio and video evidence during virtual proceedings demonstrate that judicial and attorney education is needed as Judges encountered many problems with the authentication and admission of such evidence.

## TECHNOLOGY EDUCATION

Judicial comfort levels in conducting virtual proceedings is improving. The Survey data demonstrate, however, that there should be additional education of Judges, Court Attorneys, and Non-Lawyer Staff on best practices to facilitate and support judging in a remote and virtual setting.

The UCS has recognized this and, for the first time, in January 2021, included a technology education component in the new judges' orientation. Since August 2020, the UCS has provided self-led instruction tools for the virtual platform used Microsoft Teams ("Teams") for all UCS employees and the general public.

The Working Group suggests that short weekly live training sessions be available to all Judges and, equally as important, to all Court Attorneys and Non-Lawyer Staff, on technology issues. Such state-wide training, for instance, could include appropriate use of Wi-Fi; Teams "breakout rooms;" effective use of UCS issued mobile devices; technology accessories and techniques to improve the virtual court experience; presentation of documents and digital evidence over Teams; and maximizing use of all the features of the UCS's case management programs and software to assist with, among other things, e-signature and editing pdfs. The Working Group also recommends that the Administrative Judges on a district-by-district level implement monthly technology training for Judges, Court Attorneys and Non-Lawyer Staff. Lastly, the Working Group also suggests that the Judicial Institute, during its summer meetings, devotes time to mandatory technology education.

All such judicial training should not just be available to UCS employees, but it needs to be marketed well and be held at times that are convenient for Judges, Court Attorneys and Non-Lawyer Staff. It is important that Judges, Court Attorneys and Non-Lawyer Staff continue with their technology education and become more fully comfortable with technology. If Judges lead, then attorneys will follow soon thereafter.

There also needs to be much more wide-spread publicity of the availability of educational resources to the legal profession and the public in order to be effective. For some guidance, see <https://nycourts.gov/appear>. A marketing campaign by the UCS is needed on virtual education, which would include use of these tools.

## BANDWIDTH ISSUES

One thousand ninety-one (1,091) Judges and Court Attorneys responded to questions pertaining to the devices they used to connect to the Internet to conduct court business. These Judges and Court Attorneys used two thousand one hundred thirty-six devices (2,136) to connect to the Internet as follows:

- 378 used an UCS unlimited data plan;
- 646 used a personal data plan; and
- 1,112 used Wi-Fi.



When Judges and Court Attorneys were further asked if they have bandwidth/connectivity issues when using their devices remotely for UCS business, they responded as follows:

Court Type	Percent of Judges who had connectivity issues	Means of Connection <sup>4</sup>		
		UCS Data Plan	Personal Data Plan	Wi-Fi
Court of Claims	29%	2	2	10
District Court	36%	4	4	8
NYC Civil Court	17%	3	6	9
County Court	16%	3	3	10
Surrogate's Court	29%	3	5	12
City Court	15%	5	6	11
Supreme Court	21%	16	27	98
NYC Criminal Court	16%	2	2	9
Family Court	17%	5	7	24
Town and Village	13%	5	10	29
Appellate Division	16%	2	3	19

Across the board, Internet connectivity issues were reported by Judges and Court Attorneys and, in particular, with their use of Wi-Fi,<sup>5</sup> when working remotely. As noted below, connectivity issues also existed with court reporters and interpreters. Wi-Fi connectivity difficulties ranged from slow speeds due to Internet plan speed to reduced bandwidth when Wi-Fi service is shared at the same time with others, to intermittent loss of connection and of audio and video transmission. Such connectivity issues have interfered with Judges being able to effectively conduct virtual proceedings.

Of course, home or remote Wi-Fi connectivity difficulties are personal to each Respondent and not within the control of UCS. However, UCS should require Judges and Court Attorneys to have a minimum level of bandwidth on their personal Wi-Fi. Such issues would likely significantly decrease

<sup>4</sup> The figures in the "Means of Connection" columns refer to the number of devices that Judges and Court Attorneys used to connect virtually and who reported connectivity issues with them, and not to the actual number of Judges and Court Attorneys who responded to the question.

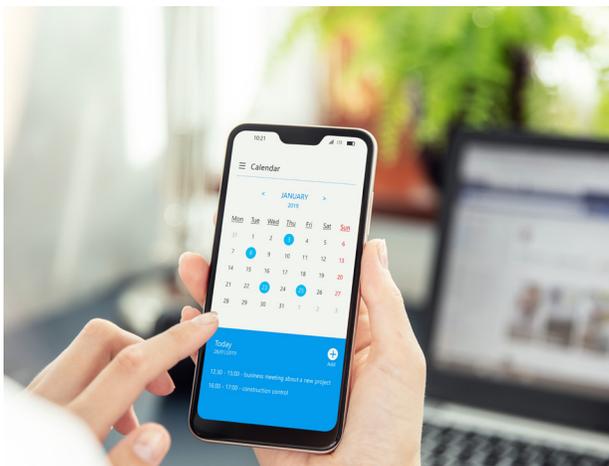
<sup>5</sup> Wi-Fi is a technology that uses radio waves to provide network connectivity. A connection is established using a wireless adapter to create hotspots — areas in the vicinity of a wireless router that are connected to the network and allow users to access Internet services. Private Wi-Fi is a virtual private network provider that focuses on providing secure Internet connections for those using public Wi-Fi hotspots.

if Judges and Court Attorneys were able to use a UCS-supplied mobile device utilizing a data plan<sup>6</sup> which does not need to work off of Wi-Fi. In addition, some Judges and Court Attorneys indicated that they had connectivity issues using Wi-Fi from their courthouses, which the UCS should rectify.

Separate and apart from Wi-Fi, many Judges and Court Attorneys indicated that their UCS-provided virtual private network (VPN) connection used to connect to UCS's various systems often failed, became disconnected, or was too slow. However, the UCS VPN has been upgraded since the time of the Survey and problem has been remedied. UCS's continued investment to improve connectivity is one of the single most important improvements that it can make to ensure stable and fast connections in order for Judges and Court Attorneys to work efficiently without interruption and for participants in virtual court appearances to have as optimal an appearance as possible. For instance, UCS has recently upgraded its VPN environment to support higher usage in order to provide improved performance. Priority is being made to provide such upgrades to all Judges and Court Attorneys to minimize connectivity issues when holding virtual court appearances.

## ACCESS TO JUSTICE

The Survey results support that unrepresented and under-represented litigants often lack access to, knowledge about and experience with appropriate technology to be able to navigate this new world of court remote communications and virtual appearances. The Working Group suggests that a state-wide hotline be created dedicated solely to assisting such individuals. The hotline, for instance, could provide guidance on how to use Wi-Fi to connect to a virtual proceeding through a personal mobile device; how to join a Teams conference with a court; how to sign up for e-courts and e-track and what information they can provide, and how to e-file a document. The Working Group also suggests that a clerk in each courthouse be available to assist these individuals in person. In addition, the Working Group suggests that there should be areas in each courthouse where members of the public are able to communicate virtually with the court and to scan and e-file documents.



## DIGITAL CALENDERING AND DOCKET MANAGEMENT

Effective and efficient electronic communications between the judiciary, litigants and attorneys concerning cases is critical. Improvement should be pursued in UCS's electronic communications between and among its judges, court staff, counsel and litigants.

### A. ELECTRONIC CALENDARING FOR ATTORNEYS AND LITIGANTS

With repeated electronic communications by courts to attorneys and litigants through an email message, an Outlook calendar invite, via a NYSECF court notice or a Teams invite, attorneys and litigants should avoid missing court appearances that thus could be scheduled for a "time certain." In fact, the Survey indicates that reminder communications of court appearances were sent out by only eleven (11) percent of the Judge Respondents.

<sup>6</sup> A data plan refers to data quotas from a telecommunications or data hosting contract. Data plans are offered by Internet Service Providers. These include mobile data plans offered on cellular networks.

Missed or mis-calendared or late appearances result in “second calls,” which impede Judges’ and attorneys’ efficiency. The proper use of digital calendaring by the courts should remedy that inefficiency. Consideration should be given for all courts to use text messages and automated calls to communicate with attorneys and litigants about court appearances and submission dates. Notice by mail through the United States Postal Service, which is still quite prevalent, needs to be eliminated except for *pro se* litigants who opt out of electronic communications. Many attorneys now increasingly communicate by electronic means, such as emails and texts, and the pandemic has likely intensified this practice. This trend of electronic communication is highly unlikely to change when business returns to “normal,” and court communications should operate similarly.

The Courts’ *eTrack* system is a case tracking service which enables lawyers and litigants to track Civil Supreme Court cases from all 62 counties of New York State and cases from all currently available Local Civil and Criminal Courts. When attorneys opt in, the tracking service automatically provides updates, appearance dates and submission reminders for cases. The Survey reveals that almost none of the Judge Respondents require attorneys to sign up for *eTrack*. This practice should change. The Working Group’s suggestion that *eTrack* be automatic using attorney registration data, rather than allowing for a voluntary opt-in mechanism as currently exists, would further eliminate missed calendaring.

## B. HOLDING VIRTUAL COURT APPEARANCES

### 1. Identification of Counsel and Litigants

It is critical for any court appearance, whether in-person or virtual, that the individual at counsel table properly identify himself or herself and his or her client each time they speak. Accordingly, as an initial matter, based on comments received by Judge Respondents, lawyers need to have their last name identified on the Teams screen during a virtual proceeding. Lawyers should then further modify

their name to reflect the initials of their clients in order to ensure a proper record of who is speaking. The name of an attorney’s client could also be noted in the chat/message function. It needs to be noted that a litigant or counsel, who has joined a court-initiated Teams meeting or breakout room, cannot record the proceeding. We recommend that the UCS keep an open dialog with Microsoft representatives to request ongoing improvements to the Teams platform.

In addition, based on Judge Respondents’ comments, lawyers should be permitted to use a telephone to call into a virtual proceeding only if they certify in advance of the proceeding that they are unable to communicate by video. Comments by the Judges make clear that quality and clarity issues were most prevalent when a person was participating in a virtual conference solely by telephone.



## 2. The Need for Timely Attending Scheduled Appearances

Judge Respondents (other than Town and Village (“T&V”) Justices) indicate that nineteen (19) percent hold virtual mass or bulk calendar calls for conferences. Sixty-two (62) percent of Judge Respondents indicate that attorneys need to remain “on-line” until their case is called and fifty-six (56) percent of Judge Respondents indicate that they use the lobby feature and admit parties when ready to hold the actual conference.

Judge Respondents (other than T&V Justices) indicate that eleven (11) percent hold virtual mass or bulk calendars for oral arguments on motions. Seventy-three (73) percent of Judge Respondents indicate that attorneys need to remain “on-line” until their case is called and fifty-eight (58) percent of them indicate that they use the lobby feature and admit parties when ready to hear the motion.

The pandemic has afforded Judges and attorneys a once in a lifetime opportunity to reset how court appearances are conducted, to change the culture of attorneys being nonchalant in timely appearing for court (virtually or in person), and to further streamline the appearance process. The goal would be to make the administration of justice function more smoothly, to make appearances more efficient, and to save time and money. There, of course, will be bumps in the road as all participants in the process will have to re-engineer their approach to court appearances.

## VIRTUAL PROCEEDINGS

### A. JUDICIAL COMFORT LEVEL WITH TECHNOLOGY

As the data below demonstrates, Judge Respondents, not surprisingly, are more comfortable conducting virtual conferences than conducting hearings or trials. Expectations are that judicial comfort level will slowly improve over time.

Is your court attorney/law clerk or courtroom clerk sufficiently comfortable with technology so that you may rely upon them to assist you with technology such as Skype for Business (or Teams, when it is implemented) when conducting a virtual appearance?	80%
Do you feel comfortable conducting virtual court conferences?	95%
Do you feel comfortable conducting virtual court hearings?	76%
Do you feel comfortable conducting virtual court trials?	43%
Would you want a technical support person to assist you live with technology such as Skype for Business (or Teams, when it is implemented) as you learn the system, when conducting a virtual appearance?	51%

However, as evidenced above, the desire for technical support, as well as some discomfort felt by Judges (other than T&V Justices) and their chambers’ staff, demonstrates the need to increase formal judicial education on technology, which was suggested by this Working Group’s First Report. As the UCS continues to improve case management systems by requiring less manual functions by

Non-Lawyer Staff, UCS should use this an opportunity to repurpose and retrain those staff members who are performing manual tasks to be technical adjuncts to Judges. As noted above, such staff can be used to help assist the unrepresented and underrepresented in virtually communicating with the courts.

## B. CHAMBERS AND COURTROOM TECHNOLOGY

This Second Report does not address UCS's ongoing program to modernize its courtrooms, as well as the Judges' need for mobile devices as discussed in the Working Group's First Report. However, Survey data demonstrate that the UCS needs to ensure that chambers and courtrooms can scan documents as only seventy-four (74) percent and fifty-six (56) percent of Respondents (not including T&V Justices), respectively, currently have such capability. All chambers and courtrooms should also have color printers, which are needed to print out redlines and colored exhibits. Only 12% of Judge Respondents indicated that they had a color printer in chambers or in the courtrooms. These issues can be addressed through the installation of free or inexpensive apps on mobile devices as well as through the appropriate purchase of hardware.

## C. BENEFITS OF VIRTUAL COURT PROCEEDINGS

The Survey data, not surprisingly, reveal that Judges across all courts feel that virtual proceedings are safer than in-person proceedings given the current need for social distancing. The Survey results indicate that virtual proceedings work equally well for conferencing cases as they do for holding oral argument on motions and settlement conferences. The current use of breakout rooms in the Teams platform will likely increase the percentage of Judges who would view virtual settlement conferences as being effective.

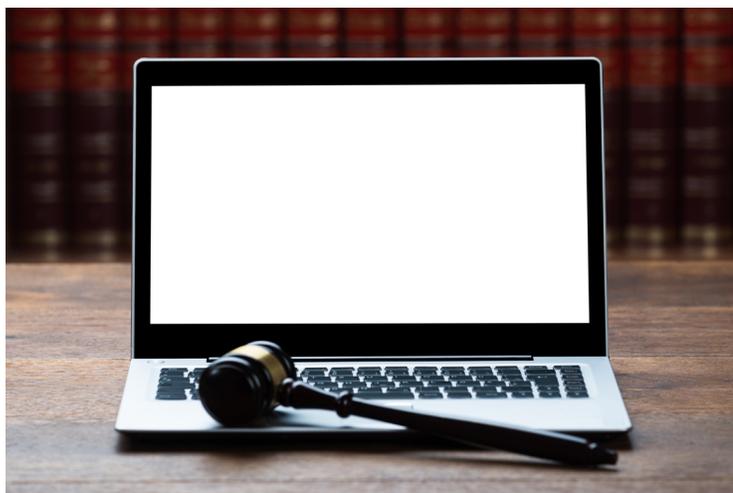
The Survey data also reveal that Judges believe that virtual proceedings save attorneys and litigants time, and thus expense, although the Survey data does not necessarily support that court time is saved.

When asked about the benefits of hearing cases virtually, Judges commented generally as follows:

- *it is easier for scheduling and they can spend more time on each case;*
- *it is more convenient for attorneys and litigants;*
- *they can hear more cases;*
- *they can work at home with proper equipment;*
- *they can hold middle of the night arraignments;*
- *attorneys have better access to court for an emergency;*
- *it is helpful to out-of-state attorneys who then need not have to travel to court;*
- *it is easier to schedule out-of-state witnesses and it is helpful to litigants who are unable to travel to court;*

- *it allows virtual work to be done from home which improves productivity, court employee satisfaction, overall health and saves travel time; and*
- *trier of fact is less distracted by behavior of opposing party/counsel during testimony.*

## D. CHALLENGES TO CONDUCTING VIRTUAL COURT PROCEEDINGS



As Judges and attorneys become more comfortable with conducting virtual court proceedings and the associated technology, some of the issues identified below will likely dissipate.

The Survey data reveal that lawyers speaking over witnesses has interfered with conducting virtual proceedings. Judicial admonitions on this issue should be clear and repeated. Judges should not delay in formally setting out the rules of their virtual courtroom, as lawyers need to be trained on how to appropriately argue over virtual platforms as soon as

possible. Also, clear instructions or a detailed introduction by Court Staff as to the requirements of the Court Part at the beginning of the court appearance would be of assistance.

In addition, the data show that video and sound “breaking up” during virtual court proceedings has effected the judiciary. As an example, Supreme Court Justices and Family Court Judges, who made up the two largest groups of Judge Respondents in the Survey (other than T&V Justices who will be the subject of this Working Group’s Third Report), indicated that a significant amount of them had issues with sound quality “breaking up” and with video quality degradation. As Judges and attorneys rely less on a Wi-Fi connection and more on data plans for connecting to the Internet, these issues should decrease.

Judges should consider, depending on the circumstances, using the Teams closed-caption feature to assist litigants, who may not need an interpreter, with English language comprehension issues. Closed-captioned text cannot be saved and thus cannot be viewed as the official record of the court proceeding. The Working Group understands that in the future Teams will have “live transcription” of a participant’s speech, which would provide for the text of what is being said to appear alongside the meeting video in “real time,” including the speaker’s name. Utilizing either of these features would make court appearances more inclusive for participants with hearing impairments and for people with English comprehension limitations.

In a Court-initiated Teams court appearance, Judges would need to decide whether to activate either of these transcription features. If “live transcription” is activated by the Judge or clerk, only the Judge has the ability to download the text from the live transcription and save it securely.<sup>7</sup> The text

<sup>7</sup> It needs to be noted that “live transcription” can be activated only by the Judge and only the Judge has the ability to download the text, which will remain available for only a limited amount of time so the decision to download needs to be made shortly after the court appearance.

of the live transcription is not the official record of the court appearance, but may be made available for court use only to assist a Judge in recounting the prior appearance.



Attendees' sound volume over virtual platforms is another concern of Judges. It is unclear why this is an issue. It could be due to attorneys working at home with others in the background, not being comfortable with managing the computer settings needed to adjust their volume or that they are just sitting too far from their computer or mobile device to be heard. Consideration should be given, as appropriate, to issuing to Judges a high-quality webcam, a

podcasting microphone and/or a headset with an attached microphone to improve video and audio quality. In addition, in order to improve video clarity, as appropriate, Judges and Court Attorneys should consider using a ring light, the main purpose of which is to cast an even light on to the person and to reduce shadows. If Judges were to lead in this regard, lawyers would likely follow. These simple hardware additions would improve the overall quality of the virtual appearance for all participants.

In addition, court personnel should make themselves available in advance of the court appearance, to do a test run in order to work out any video or audio issues. Lawyers will need to take advantage of this opportunity.

The Survey data indicate that Judges are less comfortable with having virtual proceedings where the Court wants to observe the witness. The Survey data further demonstrate that there is not a comfort level in conducting a virtual sentencing, and Judges bemoan the inability for in-person observation of a witness' body language and/or facial expressions. The Survey data reflect that Judges have concerns with whether witnesses, when testifying, are reading documents or being coached and whether a witness is recording the virtual proceeding. The Working Group notes that these issues are generally the same that concern the administration of the bar exam, and can be minimized through the use of auto proctoring software that could monitor, during testimony, witness behavior and witness computer activity via audio and video recording, and which could detect suspicious activity that may be construed as improper. Such software works with a 360-degree video and audio capturing webcam attached to the witness's computer screen or headgear worn by the witness with a camera, which would capture the witness's gaze and observe what the witness is looking at. This specific data could be transmitted automatically solely to the witness's attorney. However, careful consideration must be given by Judges in using such technology as it could be viewed as overly invasive as it captures images of everything in the room where the witness is testifying and might make a witness nervous. Careful staging of the room, however, could minimize these issues.

The Working Group notes that, while this Second Report was being finalized, the UCS issued a report entitled "*Virtual Bench Trial Protocols and Procedures*" (the "*Virtual Bench Trial Report*") addressing the conduct of virtual trials including a section entitled "Witness Testimony." This "Witness Testimony" section includes proposed witness admonitions and an Exhibit B that attaches a "Sample Witness Inquiry" which lists questions that a witness could be asked by the Judge or counsel seeking to address some of the above concerns expressed by Judges. The Working Group had presaged such

report and had included a proposal that the UCS form a judicial committee to suggest best practices relating to witness testimony.

Set forth below are some of the textual responses from the Survey organized by subject when Judges were asked “[w]hat are the biggest challenges to hearing cases virtually”:

### ***Counsel and Litigants’ Technology Skills and Lack of Appropriate Technology***

- *lack of comfort with technology;*
- *not having Skype/Teams and/or not being able to use it properly, including the “sharing” of documents with the court;*
- *connectivity issues with the court; and*
- *self-represented parties lacking access to technology.*

The above issues are not within the control of the Judges and presumably will likely diminish over time as attorneys and litigants become more comfortable with virtual technology. Consideration should be given to requiring that an attorney affirm in advance that he or she has done a test run appearance using Teams and knows how to share documents over Teams.

### ***Counsel’s Decorum***

- *counsel speaking over judges;*
- *attorneys arguing from an appropriate place;*
- *improper attire;*
- *attorneys eating and drinking during virtual proceedings; and*
- *lawyers displaying the back of their heads, eye-rolls and deep, loud exhales.*

The impropriety of these issues is self-evident and should never be an issue. Unfortunately, however, they are, and should diminish over time as virtual proceedings become the “new normal” and some of the other recommendations of the Second Report, including judicial admonitions, become the norm. The Working Group notes that UCS’s *Virtual Bench Trial Report* includes an entire section on “Trial Decorum.”

### ***Litigant’s Decorum***

- *lack of respect for virtual proceedings;*
- *litigants refusing to acknowledge the authority of the judge;*
- *litigants not cooperating virtually and the need to maintain order where the court does not have the usual recourse to restore order (e.g., court officers);*
- *litigants yelling into the computer, regardless of whether they should be talking; and*
- *litigants’ use of profanity.*

Counsel should be advising their clients on appropriate virtual behavior. To the extent a party is unrepresented, however, consideration should be given to having court staff present during virtual proceeding to address these situations.

### ***Court Technology Issues***

- *inability to create a proper record;*
- *court staff needs to monitor every virtual proceeding to ensure that no one has dropped off the video or uninvited individuals have joined; and*
- *having court papers signed and/or so-ordered during or right after the virtual proceeding.*

The Working Group believes that the use of “For The Record” (FTR) digital recording software, which supports transcription of a court appearance by a reporter, should suffice to make an appropriate record of a virtual proceeding.<sup>8</sup> However, depending on the technology available in the courtroom, FTR may be able to be activated remotely, which feature should be made standard in every courtroom that uses FTR. It needs to be noted that FTR technology is less effective when used in connection with remote proceedings. This is because FTR technology is predicated on picking up voices from different microphones (or multiple tracks) installed at the bench and at counsel table to separately record each voice, which is what occurs when the participants are in the courtroom. During a remote court proceeding, however, FTR can record participant voices only as they are heard through the microphone in the Judge’s computer at the bench (a single track), and then only when the computer in the courtroom is properly engaged.

Only recently has the FTR technology in some courtrooms been able to be activated remotely without someone being present in the courtroom. As such, FTR technology has its limitations, and Judges using FTR during remote proceedings must make clear to all participants that, to ensure an accurate record, they need to identify themselves every time they speak, because, as noted above, they are all being recorded on a single track. Multi-track recording through virtual platforms currently is in development by third parties and the UCS should consider upgrading to it when it becomes available to improve the accuracy of a formal record of a court proceeding.

The Conference of State Court Administrators (“COSCA”) notes that “digital recording will require a change from longstanding traditions. ‘The physical presence of a court reporter in a courtroom had been a mainstay of the traditional system.’”<sup>9</sup> COSCA further found that digital recording “enhances accuracy and completeness of the record by preserving language translations” and “allows a court to integrate the recording system with other digital applications, including case management and calendaring systems.” As many states have made the transition to digital recordings, the UCS should consider a pilot program using digital audio recordings (not video recordings) when there is no court

---

<sup>8</sup> Until a decision is made to allow cameras or videos in New York State courtrooms, UCS need not decide if a video record, as opposed to a digital audio recording, should be made of virtual proceedings. However, whether virtual proceedings should be broadcast live does not implicate this issue.

<sup>9</sup> “Digital Court Recording Makes the Record Effectively,” 2015 Trends in State Courts, National Center for State Courts, at 45.

reporter immediately available to record court proceedings, which recording could later solely be used by the Judge when trying to re-create what had been said during a prior court appearance.<sup>10</sup>

Further, the Survey data suggest that court staff need to monitor virtual proceedings to ensure that they are paused when a participant is mistakenly dropped. Such designated court staff could ensure that documents are properly shared with the court and the parties, and orders are digitally signed and e-filed promptly.

### ***Attorney Client Relationships***

- *attorneys have difficulty with confidentially consulting with clients during virtual proceedings; and*
- *criminal defendants make incriminating statements during virtual appearances before their attorney can stop them.*

Judges need to be understanding to permit pauses in virtual proceedings to allow client and counsel to communicate privately. In criminal matters, consideration should be given to providing defense counsel with the ability to mute their client. The Working Group notes that the *Virtual Bench Trial Report* acknowledges this issue and specifically addresses the need for Judges to provide opportunities for counsel and client to speak privately off the record.

### ***Witness Credibility***

- *hard to access witness credibility generally; and*
- *inability to assess whether a litigant is under the influence of drugs and/or alcohol on matters involving custody of children.*

The issue of witness credibility and ways to seek to address those issues are discussed above.



## **VIRTUAL COURT REPORTING**

Technology and continued experience will overcome many of the obstacles identified by Judge Respondents (other than T&V Justices) when utilizing court reporters who are operating remotely. Apparently, not all court reporters possess the appropriate technology and necessary skill set to seamlessly transcribe virtual proceedings remotely, and Judges' responses suggest that an audio and video check occur every time a Judge uses a remote court reporter to insure there are no issues with clarity, feedback and/or

<sup>10</sup> The Working Group appreciates that there are divergent views as to whether a digitally-recorded proceeding that is then transcribed electronically is as accurate as when a court reporter is present in person or virtually to transcribe the proceeding. That issue, however, should not prevent the UCS from effectuating digital recording technology to record a court appearance in order to have an official transcript made therefrom.

any lag due to the court reporter’s Internet connection to the proceeding. Court reporters must affirm to the Judge that he or she does not have Internet connectivity issues, and, if that cannot be represented, then the court reporter should not be permitted to report a proceeding remotely. In addition, to ensure that court reporters are sufficiently proficient in transcribing in “real time,” the court reporter job description or title standard for future hires needs to require “real-time” capability.

Court reporters must be on camera in the event they need to signal an audio dropout and must be able to view all attorneys and parties to appropriately determine who is speaking. Periodic checks by the Judge need to be made to ensure the court reporter has not been dropped from the proceeding due to technical issues. For electronically-recorded proceedings, where there is no court reporter, courtroom staff need to ensure the system is active and microphones are functioning.

Court reporters need to use a headset and corded (not wireless) microphone, or other appropriate hardware, rather than relying on the microphone from the computer, to maximize clarity. Judge Respondents reported issues with the quality and clarity of the audio in virtual proceedings. There cannot be background noise emanating from the court reporter’s connection to the remote proceeding. The court also needs to provide admonitions that lawyers and witnesses cannot talk over each other as discussed above.

Survey results indicate that few Judge Respondents use “real-time” court reporting, and that there is a need for courtroom technology to be appropriately upgraded to allow for it. On the other hand, more than three quarters of the Judges surveyed would like to utilize “real-time” court reporting. Courtroom upgrades to provide for this technology would add to the efficiency and comfort level of all attorneys and parties in virtual (and in-person) appearances.

When asked about “real time” court reporting and digital recordation of court proceedings, Judges responded as follows:

Does your courtroom have the setup to utilize real time court reporting?	35%
Have you ever ordered that real time court reporting be utilized?	16%
Would you want the capability to utilize real time court reporting?	76%
Would you be willing to utilize technology that could digitally/electronically record a court proceeding without the need for a court reporter?	65%

As it relates to “real time” court reporting, the first three questions above were answered in the affirmative generally by Supreme Court Justices whose courtrooms are in the process of being retrofitted to accommodate such technology.

If “real-time” court reporting is to be relied on by Judges, court reporters’ electronic devices and software must be standardized for them to work seamlessly with the new hardware and connections that are being installed in courtrooms. Standardization should be required so that all proceedings are transcribed in as accurate and timely a manner as possible.

As part of such standardization, the UCS needs access to court reporters' personal digital dictionaries, as appropriate under the circumstances, to facilitate transcription where the original court reporter is unable to do so. The use of another court reporter's dictionary would eliminate deciphering the nuances associated with individual shorthand writing styles in the event the original court reporter is unavailable due to demise, incapacitation or otherwise not able to transcribe the proceedings. Standardization is necessary to ensure an accurate transcription is always produced.

As to the fourth question above, when a court reporter is not available, the UCS should consider addressing this through a pilot program given that sixty-five (65) percent of the Judge Respondents (other than T&V Justices) answered in the affirmative when asked if they would be willing to utilize technology that could digitally/electronically record a court proceeding. The breakdown of the responses by number of Judges (excluding T&V Justices) is below. It reveals an overall interest in utilizing such technology to record a court proceeding as follows:

Appellate Division	11
City Court	52
County Court	21
Court of Claims	11
District Court	9
Family Court	93
NYC Civil Court	34
NYC Criminal Court	11
Supreme Court	95
Surrogate's Court	16

## VIRTUAL INTERPRETERS

Have you had experience with computer-assisted interpreters?	11%
Have you had any issues with interpretation of testimony when an in-person interpreter was used?	25%
Have you had any issues with interpretation of testimony when a remote interpreter was used?	41%

In virtual proceedings, it is even more imperative, when a remote interpreter is used, for the Judge and staff to ensure that all participants identify themselves when they speak so that the person who requires interpretation can follow the proceeding. Judges also should take into account that the use of an interpreter in a virtual proceeding will increase the length of the proceeding as compared to an in-person proceeding, and to advise all participants in the virtual proceeding of this unfortunate, but necessary, fact. Judges should strongly consider giving a direction that the virtual proceeding needs to be slowed to take into account the increased time needed to interpret in a virtual proceeding.

As a result of this Working Group's involvement, interpreters are now experimenting with a more robust Teams platform to determine if an interpreter can interpret with the court user on a separate audio track. Other participants in the proceedings would not hear the interpretation, but they would be able to see the court user and interpreter and the court user and interpreter would be able to see them. The interpreter would hear the conversations in English and would *simultaneously* interpret them into the target language for the court user in order that the proceeding would not need to stop for each interpretation.

Judges, lawyers and clients in a virtual proceeding need to be able to see both the witness and interpreter on the same screen and, in that way, interpreting in a virtual setting would be similar to what occurs in an in-person court proceeding. Judges and their staff need to ensure that with a virtual interpreter, especially a sign language interpreter, the interpreter is on the screen from the start of the virtual proceeding. Without this, there will be delays from having to repeat what had previously occurred and, concomitantly, there would not



be equal access to justice if the witness was not able to understand what had previously transpired. With respect to sign language interpreters, when using Teams, the court needs to ensure that the interpreter is “pinned” so that the image of the sign language interpreter takes up the top three quarters of the computer screen, with the other participants, including the Judge, appearing at the bottom, as facial expressions and hand motions are critical to being seen by all participating in the virtual proceeding, especially the witness and the interpreter.

Going forward, use of remote interpreters would promote access to justice because with a finite number of interpreters employed by UCS, they more easily can be spread across the state if they do not need to travel to a courthouse and can cover more appearances virtually per day. In fact, remote interpreters allow the UCS to use appropriately credentialed interpreters located even outside of the United States to interpret less common languages. Judges need to note, however, that use of interpreters from Video-Relay Service, a personal communications service for the deaf provided by the Federal Communications Commission, may not be UCS credentialed and thus may not be able to serve as a remote interpreter in a virtual proceeding in New York State courts without proper credentialing.

Now that Teams has breakout rooms, witnesses can speak privately with their attorneys using an interpreter. In criminal proceedings, additional time in advance of the proceedings needs to be factored in to allow for sufficient time for defendants to speak with counsel using a remote interpreter.

Finally, as with a court reporter, an interpreter must be technologically proficient, use a secure UCS connection to communicate with the court and have uninterrupted Internet connectivity. Interpreters should not, if possible, participate over the telephone, and should use a headset and corded microphone or other appropriate technology to minimize issues of clarity.



## HYPERLINKING AND BOOKMARKING<sup>11</sup>

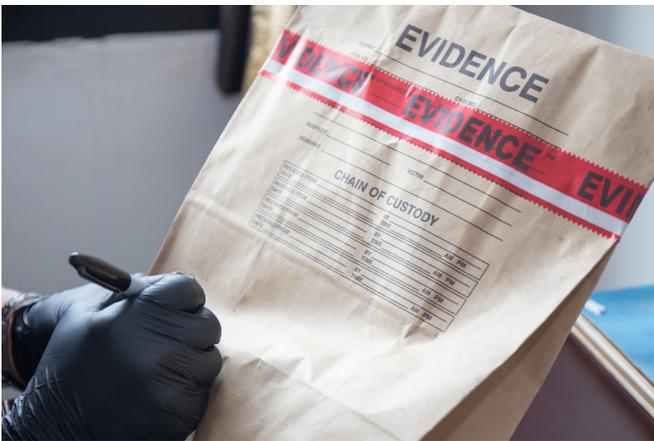
Hyperlinks are clickable links that would immediately pull up external sources to facilitate Judges' access to parts of the record and authorities cited in an e-filed document. While few Judge Respondents mandate it, sixty (60) percent would consider requiring it, and now the new state-wide rules require electronic bookmarking.

Bookmarking allows electronically-submitted memoranda of law and, where appropriate, affidavits and affirmations, to provide a listing of the document's contents, typically displayed alongside the document when viewed on a computer screen. It further provides a means of facilitating navigation efficiently from section to section within an e-filed document. As with hyperlinks, while few Judge Respondents mandate bookmarking, sixty-two (62) percent would consider requiring it.

## EVIDENTIARY ISSUE CHALLENGES TO VIRTUAL PROCEEDINGS

Survey questions inquiring about evidentiary issues during virtual proceedings demonstrate that additional judicial and attorney education should take place as to best practices in presenting such virtual evidence. In fact, while this Second Report was in the approval process, the newly released *Virtual Bench Trial Report* anticipated this need for guidance and devoted two Sections in it called "Virtual Pre-Trial Conference" and "Exhibits." It also included as Exhibit A a "Proposed Stipulation and Order for Virtual Bench Trial Protocols and Procedures," which raised many of the issues this Second Report addresses as they relate to evidence used in virtual proceedings.

Law schools also should take the opportunity presented by the pandemic and the increased use of virtual proceedings to educate students and to incorporate use of virtual platforms into their curriculum.



### A. PHYSICAL EVIDENCE

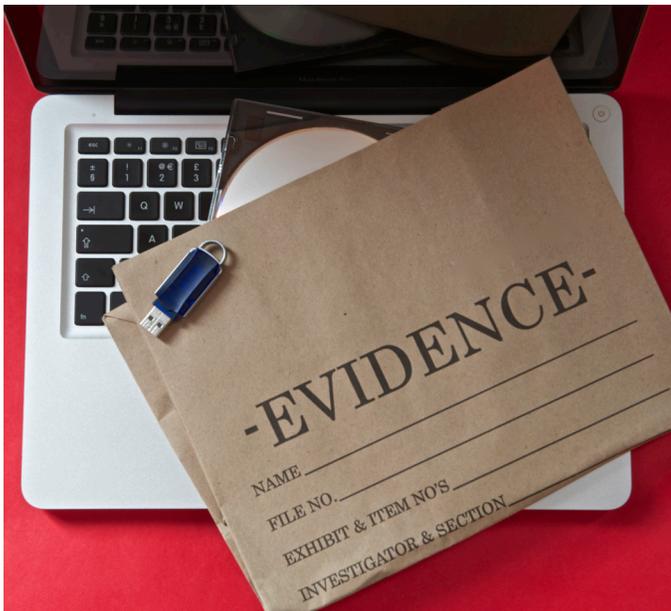
Judges, when asked "how is physical evidence (documents, objects, etc.) handled for virtual appearances," indicated that it sometimes was submitted via facsimile. The Working Group believes that facsimile transmission needs to be discouraged for a multitude of reasons, as set forth in the Working Group's First Report, but, for evidentiary purposes, it also results in a visual degradation of evidence. One comment by a Judge indicated that a mobile device could be held up to a monitor camera

---

<sup>11</sup> Rule 6 of New York's Commercial Division Rules provides that "[e]ach electronically-submitted memorandum of law and, where appropriate, affidavit and affirmation, shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document" and that "[e]ach electronically submitted memorandum of law or other document that cites to another document previously filed with NYSCEF shall include a hyperlink to the NYSCEF docket entry for the cited document enabling access to the cited document through the hyperlink."

in order for the court to see the digital evidence. This needs to be discouraged as well and, if the native format of such digital evidence cannot be provided, “print outs” or “screen shots” of such digital evidences should be transmitted to the court electronically, rather than as a “live” image from a mobile device, which display would need then to be properly recorded by video to seek to ensure a better record for admissibility and other purposes.

Best practices would be for attorneys to have a conference to pre-mark exhibits, which exhibits would then be “shared” with the court in a manner set forth in the pre-trial order or court rules, prior to the commencement of the virtual proceeding. The evidence should not be “shared” for the first time at the virtual proceeding. Such pre-hearing or pre-trial conferences with the court, importantly, also need to take place in cases with large volumes of documentary exhibits and/or with physical exhibits. The pre-hearing conference also must anticipate how to deal with the potentiality of the unplanned exhibit, such as one used during cross-examination. Judicial comments note that such conferences are needed in cases using financial documents and medical documents, such as x-rays, to ensure that the presentation of such evidence is orderly and allows for proper review of the physical evidence in advance and for appropriate cross-examination over a virtual platform. One Judge Respondent indicated that in virtual proceedings stipulations as to admissibility should be encouraged, and the Working Group notes that this suggestion is consistent with a recommendation included in the *Virtual Bench Trial Report*.



## B. VIDEO AND AUDIO EVIDENCE

Answers by Judges to the Survey question “[h]ow is video and audio evidence presented during a virtual appearance,” indicate that Judges want attorneys to “share” such video/audio evidence in advance of the virtual proceeding. The method most often employed by attorneys uses the “screen sharing” feature of Teams. Judges and lawyers apparently need better training in the use of the “sharing” feature.

When such evidence was presented to the court in advance of the proceeding, Judges noted that it was often accomplished through email. However, consideration also should be given to make the newly developed Electronic Document Delivery

System (EDDS) permanent and to use that secure system to send digital documents to the court. Best practices should include doing a “test run” with the court in advance of a virtual hearing with the Judge’s court attorney or clerk as to how digital evidence should be presented.

## TECHNOLOGY WORKING GROUP

### THE TECHNOLOGY WORKING GROUP IS COMPOSED OF:

#### Working Group Chairs:

Mark A. Berman, (*Co-Chair*), Partner, Ganfer Shore Leeds & Zauderer LLP

Sharon M. Porcellio (*Co-Chair*), Member, Bond, Schoeneck & King, PLLC

#### Working Group Members:

Robert J. Ambrogi, *Partner, Journalist, Media Consultant and Blogger*, Law Offices of Robert J. Ambrogi and Law Sites Blog and LawNext Podcast

Michael DeVito, *Manager, Office of Record Production*, Office of Court Administration Division of Professional and Court Services

Hon. David Otis Fuller, *Village Justice of Tuckahoe*, Partner, Bosworth, Gray & Fuller and Past President, New York State Magistrates Association

Maura R. Grossman, *Research Professor and Principal*, University of Waterloo and Maura Grossman Law

Scott L. Malouf, *Partner*, Law Offices of Scott L. Malouf

Mary C. McQueen, *President*, National Center for State Courts

Jack Newton, *Chief Executive Officer*, Clio

James M. Paulino II, *Partner*, Goldberg Segalla

Jeroen Plink, *Chief Executive Officer*, Clifford Chance Applied Solutions

Edward A. Steinberg, *Partner*, Leav & Steinberg, LLP

Patrick Turner, *Vice President, Associate General Counsel*, CBS Corporation

Ari Ezra Waldman, *Professor of Law and Computer Science*, Northeastern University School of Law and Khoury College of Computer Science

# REMOTE JUDGING SURVEY: EXPERIENCES WITH VIRTUAL PROCEEDINGS

*SECOND REPORT*

## MEMBERS OF THE COMMISSION

Hon. Rolando T. Acosta

Hon. Ariel E. Belen

Mark A. Berman

T. Andrew Brown

Hon. Anthony Cannataro

Mylan L. Denerstein

Hon. Craig J. Doran

Richard A. Edlin

Hon. Michael J. Garcia

Robert J. Giuffra, Jr.

Dennis E. Glazer

Alecia Walters-Hinds

Hon. Timothy C. Idoni

Seymour James

Brad S. Karp

Roger Juan Maldonado

Hon. Edwina G. Mendelson

Jack Newton

Sharon M. Porcellio

Paul C. Saunders

Arthur J. Semetis

Paul Shechtman

Michael A. Simons

Hon. Madeline Singas

Hon. Leslie E. Stein

Edward A. Steinberg

Ari Ezra Waldman

*Second Report on the Results of  
the Statewide Judicial Survey of  
Remote Judging.*

Produced by the Technology  
Working Group of the  
Commission to Reimagine the  
Future of New York's Courts.

