



Virtual Lawyering:

A Practical Guide

Editor

Mark A. Berman, Esq.



NEW YORK STATE BAR ASSOCIATION

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Virtual Lawyering:

A Practical Guide

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FOREWORD

Most New York lawyers will remember March 20, 2020 as the day they were sent home from work after Governor Andrew Cuomo ordered all non-essential offices in New York State to close, as a precaution against the ravages of a fast-spreading virus known as COVID-19.

But March 20th should be remembered for something else as well: it was the day the future arrived—the day that virtual lawyering became the new normal. Ready or not, lawyers had to master a laundry list of new skills necessary to survive in this new technological environment. Ready or not, the classic and traditional model for a law practice, a 9 to 5 (or often later) work day in an office surrounded by partners, associates and staff, was no longer a sure thing—working from home, or working at any number of remote locations at a considerable distance from the office, often with flexible and constantly changing hours, was becoming routine. And traditional lawyers who may have relied on their assistants to handle technology found themselves becoming masters of Zoom and Skype.

Of course, the signs that change was on the horizon have been discernible in recent years, in calls to meet the myriad challenges of technology, including, to name but a few, cybersecurity, electronic filing of court papers and participation in remote court proceedings, depositions, meetings and conferences. But those challenges still might have seemed far off in the future. There would be time to adapt, surely. And then, suddenly, there was no more time. Tomorrow was here. Were we prepared for it?

I'm proud to say that NYSBA was indeed prepared. Under the vision and leadership of my predecessor, Immediate Past President Henry M. Greenberg, and the Association's Executive Director Pamela McDevitt, we had been producing both live continuing legal education programs and remote webinars on topics aimed at helping our members prepare for tomorrow. Our Bar Journal had begun publishing a new section devoted to articles on preparing to transition from the old way of doing things to the way things would be done in the future. Our publications department had begun offering books in electronic format. And as attorneys were held ethically responsible for being competent in the use of today's technology, NYSBA devoted more and more programs to help our members comply.

As helpful as these initiatives were, however, they took place separately, on their own timeline and with a limited perspective. There was no central resource for lawyers to turn to when seeking guidance on navigating this new world. This book—*Virtual Lawyering: A Practical Guide*—

fills that void. Written by leaders in their fields of law, it is the first book of its kind to be published by a bar association in the United States. It is comprehensive in scope and authoritative on matters of law and procedure. On behalf of a grateful Association, I extend my sincere thanks to those who participated in its preparation.

No matter how prepared—or unaware—you were when the future arrived on March 20th, this book is there to guide you through the new virtual world in which we now practice law. One glance at the table of contents will show you just how thorough it is. Everything is there, from state and federal trial court practice, to appellate practice, to civil and criminal practice, to arbitration and mediation, to ethics and law practice management—and so much more. And all of it is focused on just one goal—to help you, our members, become better lawyers even in rapidly changing times like these. It is a tradition that dates back nearly 150 years, when the Legislature established the New York State Bar Association. That tradition has not changed since—and it never will.

Scott M. Karson
President
New York State Bar Association

INTRODUCTION

Mark A. Berman, Esq.

As the founding chair of the Committee on Technology and the Legal Profession and the former chair of the Commercial and Federal Litigation Section, as well as co-chair of the Technology Working Group of the Commission to Develop Comprehensive Vision for Court System of the Future just recently created by Chief Judge Janet DiFiore, I am honored to serve as the editor of this incredible New York State Bar Association member benefit entitled *Virtual Lawyering: A Practical Guide*.

A first-of-its-kind publication in the United States: it just confirms that the New York State Bar Association is the leading bar association in the United States on technology issues. *Virtual Lawyering* contains 26 practical chapters and subchapters authored by former federal judges, former law clerks to judges, and some of the leading New York practitioners in their fields.

Like the phoenix rising from the ashes, keeping with NYSBA being innovative and forward thinking, this electronic publication went from start to finish in just over two months. *Virtual Lawyering* directly results from the Covid-19 pandemic when our legal profession was forced without any real preparation to go “remote.” Solo practitioners, small firms and, even the largest New York laws firms, were provided with effectively no notice, and tens of thousands of attorneys left their “paper” files on their desks to relocate to their new digital “remote” offices. The virtual future is now.

A few attorneys were prepared for such transcendental shift in their legal practice, but most were not, and thus the need for *Virtual Lawyering*. Indeed, because of this, right from day one when New York shut down, NYSBA has provided true guidance to our membership during this unprecedented time by offering scores of CLE and non-CLE programs to educate virtually our membership on virtual lawyering. But for the New York Pause, the technological progress made by New York lawyers during the last five months would have taken a decade to occur. The legal profession will never be the same.

This publication is only one aspect of NYSBA’s mission to educate our membership of all ages in all areas and in all communities on technology issues. Indeed, in June 2020, our House of Delegates, under this author’s leadership, overwhelming passed a report that approved the inclusion of

one credit of cybersecurity education as part of attorneys' continuing legal education requirements. This editor also organized and, with other members of NYSBA, taught and will be teaching entire law school courses on technology and the law at three different New York State law schools. NYSBA thus became the first bar association in the United States to have taught an entire semester-long law school class.

However, rather than just focusing on working remotely during the New York Pause, the purpose of this publication is to address how virtual lawyering will be the "new normal." The legal profession is now operating and will continue to operate virtually more and practice in person less. Instead, we will be mediating, arbitrating, litigating and arguing in court, closing transactions, and counseling individuals, families and corporate clients over virtual platforms, on issues ranging from the most commonplace tasks, such as a virtual notarization or executing a will, to holding a virtual hearing or trial before a court or closing on a multimillion dollar transaction.

Each chapter of *Virtual Lawyering* is designed in its own unique format chosen in order to best get its message across to the reader. Some chapters contain footnotes as appropriate, others are more conversational, and others consist of PowerPoints or are annotated, bullet-pointed outlines. Chapters will be periodically revised and added during the year to keep this book current and live as a go-to resource for practicing law virtually.

We begin by including a short emergent introduction by the Deputy Executive Director and General Counsel of the New York State School Boards Association. Vital to our members is their children's education and he addresses how the over 700 school districts in state were thrust into the position of having to figure out how to keep students safe as well as how to continue to provide them with a quality education and whether education is to take place virtually in whole or in part.

Virtual Lawyering starts off, as it must, with how to protect lawyers from cyber-predators at your "home" office and on your mobile devices and addresses New York's new cybersecurity statute entitled the SHIELD Act (see Ch. 1). Then, we address best practices in storing client and law firm information in the "cloud" and how to protect such information (see Ch. 2).

Law practice management and the efficient operation of a law practice has been "turned on its head" when operating virtually, and this chapter provides step-by-step practical advice on how turn your legal practice into

a “lean, mean operating machine” in our new, remote, mobile virtual world (see Ch. 3). However, to do that most efficiently, lawyers should consider incorporating artificial intelligence in their legal practice, and former Southern District of New York Judge Katherine B. Forrest explores those issues in the context of virtual legal counseling (see Ch. 4).

Lawyers’ compliance with their ethical obligations under the New York Code of Professional Responsibility is much harder and nuanced when counsel is engaged in the virtual representation of a client, and those issues are identified for you, which are frequently not so apparent (see Ch. 5). Effective and sound law firm risk management has taken on new significance in our virtual world, especially when you are operating remotely and not from the safety of your office, and this would include reviewing every aspect of your insurance coverage. There are new and special risks that accompany a virtual practice and they are currently on every lawyer’s mind (see Ch. 6). With your litigation documents now secure at your “digital” fingertips, the next question is how to properly communicate with and present documents to a trial court over Skype for Business in order to prosecute and defend your client in court? Over 800 attorneys listened to programs moderated by the undersigned within the first two months of the pandemic on how to communicate virtually with the court. This chapter, put together by the Office of Court Administration, reprints an easy to follow PowerPoint slide presentation on the topic and will be updated as the court system migrates by the end of the year to the more robust and user-friendly Microsoft Teams platform (see Ch. 7).

How the four federal district courts throughout the state are currently operating virtually differ and that was addressing during a recent Commercial & Federal Litigation Section town hall that this editor moderated and is summarized in Chapter 8, Part A. After you win or lose at the trial level, what is now different in how you would argue an appeal virtually to a panel of federal or state judges is addressed in Chapter 8, Part B and Chapter 9.

However, if you are not in court, you will likely be engaged in a virtual dispute resolution. We start from the neutral’s side to understand the entire virtual mediation process from the mediator’s eye, and then switch in the next subchapter to educate on how to be successful in your virtual mediation (see Chs. 10A and 10B). If the matter is unable to be mutually resolved, next comes virtual arbitration, and you can hone your virtual arbitration skills with guidance provided from the arbitrator’s point of view and then in the next subchapter you are taught how to successfully arbitrate a case on a virtual arbitration platform and best practices from

the practitioner's perspective. Then, you (see Chs. 10C and 10D). Finally, the section in *Virtual Lawyering* on dispute resolution closes with a subchapter on best uses of technology in virtual alternative dispute resolution forums (see Ch. 10E).

Defending criminal clients in this new virtual world has become more complicated, and a defendant's Fourth, Fifth and Sixth Amendment rights must be protected. Virtual appearances, motion practice and hearings are not what they were, and will likely never be the same. How to ethically and securely communicate privately with a client when he or she is subject to criminal charges is trying! Procedures and concerns about both representation and process upstate and downstate differ, and they are addressed in Chapter 11, Parts A and B.

Virtual legal practice is not just limited to issues that only concern litigation. Litigators and transactional attorneys need to understand what clients are going through with a much more virtual workplace with employees working from home and clients having to deal with confidentiality and security concerns. Practitioners need to both hear and appreciate the new demands placed on their clients of all sizes, who are in a far different economic position than they were at the beginning of 2020 (see Ch. 12). Employment and labor law issues for clients, as well as for law firms, have drastically changed, as new employment legislation has been enacted and executive orders issued on an emergency basis, which have affected employment benefits, employment protections and how work is to be performed. Difficult counseling of employers, unions and individuals as to layoffs, furloughs and recalls back to work is the new norm and will continue. Our discrimination and whistleblower statutes also are taking on new meaning due to the pandemic (see Ch. 13).

Clients and law firms, unfortunately, are suffering economically during these stressful times. Thus, former Bankruptcy Judge Melanie L. Cyganowski explains the options available to both clients and law firms, including filing for bankruptcy, and how the bankruptcy courts are virtually operating to assist clients and law firms during these challenging times (see Ch. 14).

As both clients and lawyers work remotely, the pandemic has interfered with, for instance, closing on the mundane, but extraordinary personal, issue of the purchase and sale of a cooperative apartment, which are now occurring virtually and more complicated than they used to be (see Ch. 15), and extends to the most personal of issues concerning life and death planning. Trust and estate and family succession planning, where

clients are now fearful of their own health, is weighing heavily on everyone's mind, and how these issues are being addressed is not "business as usual." Such issues could not be more personal and addressing them virtually is trying to say the least (see Ch. 16). COVID-19 has changed the way we live. Indeed, elder law remote counseling is very different now, and addressing virtually client health, disability, long-term health care and end-of-life decisions is similarly challenging (see Ch. 17). Child visitation, custody and support issues have always been problematic and sensitive when families were not together, let alone now when interaction is virtual, and tackling such issues virtually is even more difficult, as is virtual enforcement of agreements among family members and court orders (see Ch. 18). Matrimonial law always presents different obstacles to lawyers, and that is a stressful practice under the best of times. *Virtual Lawyering* addresses the operation of the matrimonial court parts and the nuances associated with matrimonial practice (see Ch. 19). Finally, the new laws addressing remote, virtual notarizations are discussed in Chapter 20.

Virtual lawyering may actually improve the ability of disabled attorneys to practice of law. However, not unsurprisingly, it will have negative effects upon clients with disabilities seeking to secure equal access to justice where the burdens of the pandemic have disproportionately impacted people with disabilities (see Ch. 21). Finally, with disabled lawyers and clients working remotely and not being able to make it into the office or to court, compliance with website accessibility for those with disabilities is now even more important (see Ch. 22).

Whether you are a litigator, transactional attorney or in-house attorney, this ebook will provide you with practical, best practices as you seek to navigate through our ever-changing virtual legal world. We look forward to periodically providing updates with additional chapters on other areas that will continue to be affected by this new "normal" of our virtual legal practice.

INTRODUCTION: SERVING THE PUBLIC GOOD IN A COVID-19 ENVIRONMENT

Jay Worona, Esq.¹

COVID-19 is an insidious virus that has affected the whole of our lives. All others who have written sections for this practical guide have provided testament to how the shutdown of our State specifically impacted them in their capacity as lawyers. It certainly needs to be noted that all of the negative impacts on our professional lives pale by comparison to the loss of life that countless families have experienced.

I'm an attorney who represents the New York State School Boards Association as its Deputy Executive Director and General Counsel. There are over 700 school districts in the State of New York that were immediately thrust into the unenviable position of having to figure out how to keep their students safe as well as how to continue to provide them with a quality education when COVID-19 reared its ugly head upon us. My organization, which provides an array of services to our school district members, was suddenly being asked legal questions that we certainly didn't know the answers to, given the unprecedented circumstances we were all facing. For example, prior to Governor Cuomo ordering all school districts in the State to dispense with in-person education in exchange for distance learning, school districts were struggling with the question of whether they had the authority themselves to close their school buildings when individuals in their midst had tested positive for COVID-19. After some districts exercised this choice, further questions were raised as to who was authorized to make the decision about when school buildings would be safe again to reopen.

As school districts across our State (and nation) focus upon the issue of whether our students and staff can safely return to our brick and mortar institutions in the fall, in whole or in part, one thing is certain: the questions, discussions, and answers will remain at least in part, for the time being, in a virtual forum, and decisions will need to be in the best interests of our children and all the stakeholders.

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ABOUT THE EDITOR

Mark A. Berman is a Commercial Litigation Partner at Ganfer Shore Leeds & Zauderer LLP in New York, NY where he heads the Technology Counseling Practice and co-heads the Title Litigation Practice and represents both plaintiffs and defendants in commercial disputes, ediscovery conflicts, real estate and employment litigation.

He currently is on the Executive Committee of the New York State Bar Association (NYSBA) as a “Member-At-Large” and is the founding chair of its Committee on Technology and the Legal Profession.

Mark was recently appointed by Chief Judge Janet DiFiore to be a Commissioner on the Commission to Develop Comprehensive Vision for the Court System of the Future and he is Co-Chair of the Commission’s Technology Working Group. He is also a member of NYSBA’s Working Group on Re-Opening Law Firms in New York. Mark is a former Chair of NYSBA’s Commercial and Federal Litigation Section and currently co-chairs its Commercial Division Committee.

Mr. Berman is a frequent lecturer on topics ranging from cybersecurity, social media, professional responsibility and electronic discovery issues, and he has participated in education programs at the Appellate Division, First and Second Departments, the New York Judicial Institute, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers’ Association and the Asian American Bar Association of New York. He has authored a regular column on ediscovery in the New York Law Journal since 2005, and his articles have been quoted in both appellate and trial court decisions.

Mr. Berman designed and taught the first law school course on technology and the law in the United States through a bar association at CUNY School of Law. Mr. Berman has also taught technology classes at the Maurice A. Deane School of Law at Hofstra University, Syracuse University College of Law and Albany Law School.