

**NEW YORK CITY BAR ASSOCIATION TASK FORCE ON
TOWN AND VILLAGE COURTS**

MEMORANDUM ON JUSTICE COURT TECHNOLOGY

Our conversations, interviews and questionnaire responses as well as the experience of the members of the Task Force and the testimony given before the State Legislature, all demonstrate that substantial improvement in technology and training in the use of the technology is needed for Justice Court administrative and fiscal operations, for communication with other courts, government agencies and attorneys, for creating and preserving a record of all proceedings, and for establishing and maintaining transparency.

In November of 2006, the Office of Court Administration (“OCA”), issued an Action Plan in which it directed its attention to the technological needs of the Justice Courts. Pursuant to that plan, OCA has begun efforts to fulfill those needs. The Task Force has several suggestions and recommendations with respect to the Action Plan and has decided to state them now as the OCA gears up to make substantial financial investments in hardware and software and in training for Town and Village Justices and their clerks. The Task Force will continue to examine the whole range of issues and possible changes with respect to the Justice Courts. These recommendations will not limit the scope of our continuing study or the range of the suggestions which will appear in our final report.

A. RECOMMENDATION 1

The Task Force recommends that proceedings in every case be recorded by court reporters using current technology or by digital recording in lieu of a court reporter present in the courtroom. Measures, including locating and retaining court reporters, should be taken immediately in order to begin the recording in courts with no present system for recording or in which tape recorders are currently used.

1. Practice

The importance of having a verbatim record of court proceedings is no longer a matter of dispute. A report of the court proceedings provides not only the basis for appellate review but is, like the right to a public trial, crucial in maintaining transparency and oversight. A major issue in Justice Courts is the absence of a requirement that all proceedings be recorded and the resulting haphazard pattern in which some courts record and some do not.

In the 1997 Annual Report of the New York State Commission on Judicial Conduct, the Commission noted that there was no requirement of transcripts or recordings of the proceedings in Justice Courts and that, while some courts made transcripts and recordings, most did not do so. Further, tape recordings were not considered a public record, but assistance to the courts and the practice of making the tapes available to the public varied. The Commission explained that, without a record, the memories of the participants in the proceedings were disparate and did not show, for example, whether a defendant in a criminal case had been given notice of rights or whether a complaint against a justice was unjustified. The Commission was especially concerned about the lack of a record in vehicle and traffic and in criminal cases. The Commission urged the recording of all criminal and vehicle and traffic cases and of civil cases if possible, and the preparation of guidelines for preservation and access to the records.

The Task Force research shows that since that report the situation has not changed. There is no uniform practice with respect to making a record of the court proceedings. Our interviews and questionnaires show that, in a very few courts, the justice requests a reporter's presence for all proceedings -- the cost of which is assumed by the town or village. Generally, there is no record kept of proceedings that do not involve testimony. For proceedings without testimony, it is the justices' or clerks' notes, if made, that provide information about what occurred in the court. For hearings and trials in criminal cases in some courts, the attorneys retain court reporters. However, the practice as to which party retains the court reporter varies -- sometimes it is left to the defense in a criminal case and sometimes the prosecutor retains the court reporter. Other times, a tape recorder is used. The justice's notes may be the only information available. In one county, whether or not a record is made is determined by the judge. In at least one court no record is made of any proceeding.

2. The OCA Action Plan

The Action Plan stated that even today there is no requirement that proceedings be recorded whether by reporter or machine resulting in timely and costly reconstruction hearings. To resolve this problem, the Action Plan is that, in the next year, OCA will begin buying and distributing modern digital recording devices to the Justice Courts commencing with the courts that have the 100 largest case loads. The equipment will have fail safe alarms to show malfunction. The judge will be required to activate the recorder. The Action Plan does not provide for court reporters and does not set out how the parties will obtain copies of recorded material or how hard copy will be obtained and certified as accurate.

3. Task Force Recommendation

Both court reporting and digital technology have developed enormously. Court reporters now use digital equipment that show the text in real time while the backup paper system is still available. Hard copy transcripts can be prepared through the computer with proofreading all that is required. Using court reporters should require no expenditure from the state or locality for equipment because the equipment belongs to the reporter who is trained prior to certification. The state should be responsible for the payment of the reporters.

A possible model for digital recording in the Justice Courts is the digital recording system used in the Court of Claims and the Housing Courts in Manhattan and the Bronx which is a highly reliable system. Interviews inform us that the digital recorders being used have four microphones, one each for the judge, witness, and lawyers. Each track can be played separately to remove background noises and voices. The separate tracks also allow for hearing one voice when several people speak at the same time. It is possible to speed up the voice on the recording to move more quickly through the material.

The effectiveness of the Court of Claims system is enhanced by the utilization of a "monitor" -- an individual who controls the technical aspects of the digital recorder and indexes by log number key aspects of a proceeding, such as the admission of a document into evidence. The judge and the parties may then go directly to the place on the recording where the logged event is located. Parties may, if they wish, obtain a CD recording of the proceeding for the cost of the CD and have it transcribed as necessary for a fee. It may be helpful, particularly in the more rural counties, for the OCA to maintain a central registry of people qualified to transcribe a CD recording.

Our interview revealed that the Housing Court system includes a main central computer in which all the recordings are stored. This system can be accessed by anyone with proper security having the date of the proceeding or number of the case. The record of a prior proceeding is easily available for appeal or examination for checking the record, clarifying an issue or preparing an opinion. The record also is available to examine complaints by litigants and to assure that the courts are conducted with proper decorum.

It is universally agreed that use of tape recorders is not acceptable because of the poor quality of the recording and the difficulty in transcribing from the tape. Those who use the traditional tape recorder find it does not always pick up the testimony or colloquy, often picks up surrounding noises and voices which blot out what is relevant, and does not accommodate for multiple voices. Further, there are storage, retrieval, and preservation issues associated with the use of tapes.

4. Issues Concerning Where To Start

The Action Plan proposes to begin digital recording with the 100 Justice Courts having the largest caseloads. Interviews have indicated that there is no systemic caseload count maintained at the present time, although it might be capable of being obtained from past filings. The Task Force suggests a modification of the plan so that the Justice Courts that presently have no recording, very limited capabilities for recording, or only tape recording are included in the initial phases of the project. It seems contrary to the purpose of the Plan to provide digital recorders to courts where either there are already reporters in the courtroom or they are available on short notice, while other courts have no satisfactory mechanism for reporting.

The Task Force recommends that a survey of all the Justice Courts be done to determine the current capability of each Justice Court to make records of its proceedings. The provision of digital recorders can then begin with the courts that are most lacking in the resources needed to make a record.

Our interviews disclosed that the digital systems used in the courts as described above are costly and that, given the large number of Justice Courts, it is likely that less costly systems will be sought out for some courts, especially those with small dockets and infrequent sittings. It also is likely that some courts have no present internet connections, which connections will have to be supplied for a central transcript repository. The Task Force supports the less costly approaches in some of the courts as long as the quality of the recording and its security are preserved.

Both court reporters and digital equipment will involve substantial cost to the State. It is nonetheless an essential one for the reasons already set out.

5. Issues as to Digital Recording

The use of digital recorders in jury trials presents an important problem. If the jury asks for a readback of testimony, the readback must exclude objections, colloquy, stricken questions and answers, as well as legal rulings and testimony that is not relevant to the subject matter of the jury's question. The court reporter, with the court and counsel, usually prepares the read back to include only the proper portions. So far, the courts in New York that use digital recorders have not been those that conduct jury trials. For jury trials in Justice Courts using digital recorders it will be necessary to evolve procedures for preparing a readback. Further,

because in most cases the court reporter reads the readback to the jury (some judges also do it), the procedure should be worked out for this as well.

The OCA Action Plan proposal explicitly places the responsibility for control of the mechanical recorder with the judge. This responsibility is not properly placed with the judge. The importance of having a recorder working is not to be underestimated and that is why the judge should not be charged with operating it. The judge's obligations to observe, to guide, to rule on issues before him/her and to keep order -- recall the lack of security and court officers in the Justice Courts -- are very intense obligations and require focus. Under the pressures of a hearing or trial, especially when there is testimony being given with perhaps hostile parties or a jury, the judge's attention can, and probably should, be focused elsewhere than on the control and maintenance of the recorder. In normal circumstances, it is possible, that the recorder will not be activated or will remain running when the matter before the court ends but the occupants in the room are not aware that the recorder is still going. Further, it is important that there should be no question that the act of turning the recorder on or off is done by someone who is not a participant in the proceeding. Some member of the Justice Court staff, other than the judge, should have training in using and monitoring a digital recorder and actually be the one to use it. We understand that in some Justice Courts, the small size of the staff may prevent the presence of a person other than the justice but efforts should be made to accomplish this goal.

In some courtrooms in which digital recording is now used, a dedicated computer is used for the recorder to assure that will be no mistakes. Given the importance of recording it appears to be important to use a dedicated computer in Justice Courts as well. This will necessitate the purchase of additional computers.

6. New Technologies

An evolving technology allows speech to be converted to text by voice recognition. (The names and capabilities of the systems can be seen on the web.) While the technology needs to be tested, if viable, it may provide some justices with an easy and quick means of recording verbally a decision or order or other necessary written document which will appear on the computer in writing.

B. RECOMMENDATION 2

The Task Force recommends that every justice and their court clerks be given access to a computer with accompanying uniform and appropriate software for case management, fiscal record keeping, and financial reporting. Further, training in the use of the software should be mandatory with monitoring and assistance available to aid the success of the training.

1. The Action Plan

The Action Plan relies heavily on technology to improve case management, money management and fiscal reporting to the State, counties and localities. The State will assume the cost of providing the technology and the training to use the technology.

2. The Justices' Obligations

The enhanced use of the technology for case and fiscal management purposes is critical

and necessary to the improved administration of the Justice Courts, and their fiscal integrity. The need for the computer enhancement is set out in the reports and audits of the Division of Local Government Services and Economic Development of the New York State Comptroller's Office and the Justice Court Fund. The Justice Court Fund was established by the Office of the State Comptroller ("OSC") to provide centralized accounting for the fines, penalties, forfeitures and fees collected by the Justice Courts. See "Handbook for Town and Village Justices and Court Clerks" (Justice Court Fund 2006)(hereinafter "Handbook").

As the Handbook states, a justice is personally responsible for moneys received by the justice court and is personally liable for loss. The justices are required to account for cash receipts and disbursements monthly. Each month justice court personnel are to compare information from accounting records with the information shown in their bank account statements, reconcile all bank accounts and "perform a determination of accountability." Handbook at 59. All of the processes and record keeping that go with meeting these monthly reporting requirements are set out in the Handbook at pages 59 to 72. The Comptroller has set out the reporting requirements in this way: "Justices are responsible for properly accounting for all financial transactions in keeping with sound management practices, and State laws and regulations, including OSC guidelines. Every justice is required to maintain suitable books, records, case files, and all related papers and information. It is important that Justices maintain complete, accurate, and updated accounting records, and that they maintain the records according to the standards found in OSC's [Handbook]." Justice Courts Accountability and Internal Control Systems, 2005-MR-10 at 10 (hereinafter 2005-MR-10).

To account for the money received, justices may use hand prepared documents or software that meets the record keeping requirements of the OCA. Handbook at 59. Each month each justice must file with the Justice Court Fund a report listing among other matters closed cases and cases in which the defendants are paying fines on an installment basis and must send received money to the Fund or the chief fiscal officer of the town or village (depending on whether computer filing is used). 2005-MR-10 at 5, 13, 16. The justice courts are to be audited by local town or village boards on an annual basis.

3. Current Problems in Record Keeping

With all of this record keeping supposedly in place, the justices are subject to periodic audits by the OSC. However, the audits of the Comptroller at least since 2003 have shown serious deficiencies in the mandated record keeping and processing and a subsequent loss of some money collected by the courts.

The report of the audit conducted in 2005 by the Comptroller (2005-MR-10 audit) concluded that there were, for the 12 justices audited, "deficiencies in recordkeeping, reconciling, depositing of moneys, and reporting. These deficiencies prevented local officials from effectively monitoring and controlling Court operations, and resulted in errors and irregularities occurring and being undetected and uncorrected, putting public resources at risk." Id. at 10. The 2005-MR-10 audit found a failure to maintain cash receipts, incomplete receipts, failure to keep bail records and records of restitution payments, and absence of checks or the copies thereof which would have shown disbursements. Id. at 11.

The 2005-MR-10 audit recalled that, from 2003 to 2005, 32 audit reports identified accountability problems and internal control problems and that 11 of the reports reported a total

of \$133,000 missing. 2005-MR-10 at 8.

4. Recommendations of the Office Of State Comptroller

In order to aid in correcting these serious problems identified by the OSC, the OSC itself has recommended that the Legislature “provide the resources for a uniform statewide technology system for all justice courts, including case management software that is inter-operative with software used by the OSC’s Justice Court Fund, and will enable all justices to file reports electronically with the Fund.” The OSC also suggests training in financial management and assigning at least one clerk to each court. The conclusion of the OSC is that the technology will address the serious record keeping issues and thereby affect the satisfactory fulfillment of the fiscal responsibilities and the security of the funds received by the justice costs. OSC Press Release (December 14, 2006).

It must also be the obligation of the State to train the justices and their clerks to use the systems that are established. The 2005-MR-10 report states that training in management and fiscal obligations for the justices is relegated to a permissive one hour. The OSC noted that other courses on finance and management are often not attended because of their cost to the potential attendees. It is notable that in 2005-MR-10 it is reported that ten of the twelve justices audited stated they were unaware of the scope of their responsibilities and that their court personnel had not been adequately trained. *Id.* at 10.

Finally, to be sure that the OSC regulations are followed and the fiscal and case management obligations fulfilled, the Task Force recommends that the OCA include in the function of the newly appointed supervising judges oversight responsibility for training and record keeping.

C. RECOMMENDATION 3

The Task Force recommends that Justices each be given computer access for training, research, conferencing with other judges, and writing opinions and orders.

Technology is also relied upon in the Action Plan for study and research and providing access to Internet and the teaching facilities of OCA.

The Task Force recommends this expanded access to information through computers. The training should include Westlaw or Lexis, other research tools and general search techniques. Of course, basic training about the use of the computers themselves may be necessary. (For lawyers, this training is now accomplished at law schools or before, but OCA is obliged to conduct such training where needed to make the use of legal programs possible, such as for those justices who have not attended law school.)

Further, the court system must provide maintenance for the computers. In court houses that are centralized, the technicians are available at a nearby location, if they are not in the courthouse itself. Although difficult, the same service should be provided for all Justice Court locations.

The computers also should include software for writing opinions as well as form orders and letters.

D. RECOMMENDATION 4

The Task Force recommends the study and consideration of video conferencing for designated court proceedings to avoid delays when the lawyer cannot appear in person or the defendant cannot be transported from a county or local detention facility.

The large number of Justice Courts in each county makes it difficult for prosecutors and defense counsel to make appearances on regularly scheduled court sessions. Therefore, the Justice Courts, in their present number, may be aided by video conferencing equipment. That equipment is quite advanced and provides a viable method of “live” communication between remote sites.

Video conferencing equipment presently is being used in courts to permit attorneys to interview their clients who are in detention in a county jail and to permit defendants to “appear” in court for various calendar call proceedings. Whether such a system would benefit a Justice Court would require a county by county study which would include an analysis of the number and location of the Justice Courts in the county, the location of the detention facility, the number of appearances required before a disposition of the case, the ease or difficulty and costs in transporting prisoners to the various courts, the number of prosecutors and defense counsel available to appear in person.

As in counties where video conferencing is currently used, care must be taken to prevent video conferencing from interfering with the thoughtful and substantive face-to-face conversations that take place between lawyers as well as between an attorney and a client.

Video conferencing equipment can provide a prosecutor with greater access to and participation in the proceedings of these courts. Where there are a multitude of Justice Courts in a county and the District Attorney cannot have an assistant be physically present at all such courts, a video appearance in a Justice Court by an assistant in a central location should permit the prosecutor to participate in various Justice Court proceedings, including conferences with a defense attorney on the proper disposition of a case.

For the best transmission, video conferencing will require broadband capability. While the quality may not be as good, we understand that DSL capability also will permit such video conferencing.

E. RECOMMENDATION 5

The Task Force supports the expanded use of E-Mail to simplify communications between Justice Courts and everyone else.

The OCA Action Plan states that e-mail access will be made available to each justice. The Task Force supports expanded and improved communications systems for communications with other courts, judicial supervisors, court attorneys, defense attorneys, and district attorneys.

One responder to our questions suggested that there be a method of communicating with Justice Court clerks’ offices that are not open on every working day or in usual daytime working hours. The use of e-mail would enable people seeking aid or information from the clerk to make an inquiry and receive an answer without repeated phone calls.

F. Recommendation 6

Computers for both the justice and the clerk should be provided.

The OCA Action Plan supplies a desk top computer for each Justice Court. However, a laptop is needed so that the information can be immediately entered into computer when the courtroom and the judge's chambers are not in the same place and when the court clerk and the justice are doing different tasks (*i.e.* researching or writing an opinion and entering case data.) Therefore both the clerk and the justice must have a computer available.

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