

HISTORICAL SOCIETY *of the* NEW YORK COURTS

**Dispensing Justice from a Distance: Journal of the NYS Courts During the  
2020 Pandemic**

**Interview with Hon. Ellen N. Biben & Alexander C. Drylewski  
July 27, 2020**

**Alex Drylewski:** [0:00] Hi, everybody, and welcome to *Dispensing Justice from a Distance: Journal of the New York State Courts During the 2020 Pandemic*. This is a project by the Historical Society of the New York Courts that highlights the personal accounts of individual judges who are meeting the needs of litigants appearing before them during this period of virtual court proceedings.

I'm Alex Drylewski. I'm a litigation attorney at Skadden Arps here in New York City, and I'm also a member of the Young Lawyers Committee of the Historical Society, which is conducting these interviews.

Today, I'm happy to be interviewing the Honorable Ellen Biben. Judge Biben was appointed to the Court of Claims by Governor Cuomo in 2015, and sits as a justice of the New York State Supreme Court. Since 2017, Judge Biben has served as the administrative judge of New York Court Supreme Court, Criminal Term.

Judge, thanks very much for joining us today.

**Ellen Biben:** Alex, thank you so much for all of your efforts. I think it's a great project, and thank you so much for taking the time to talk with me.

**AD:** It's our pleasure, and we're thrilled to have you. Why don't we start off, if we could, would you just describe for our audience your roles and responsibilities that you have now in your current position within the court system?

**EB:** Sure, I – as you said, I sit as a justice of the New York State Supreme Court in the Criminal Term where I have been since 2015. Since 2017, I’ve also been serving as the administrative judge in New York County Supreme Criminal Term. So I sit both as a calendar judge – I preside over a trial assignment part – but I’m also the administrative judge [2:00] in the Criminal Term here.

**AD:** If you could just tell us briefly, what led you to your position, and more broadly, what led you to pursue a career in the law in the first place?

**EB:** Yeah, it’s a great question, and a complex one, but I think kind of in the simplest terms, I was drawn to the law to serve – to do service and public service, and most of my career, the great majority of my career has been dedicated to public service. I did always know that I wanted to be on the bench. I had a great mentor who I clerked for right out of law school, and that greatly informed my goal. I think it’s just a further extension of wanting to do service.

**AD:** Great, so why don’t we talk a little bit now about the early days of the pandemic. If you could, just walk us through how those days unfolded for you in your role in the court system.

**EB:** Yeah, I mean, it’s really astonishing, if you think about the timeline for all of the courts, and the Criminal Term, in general, I mean we had a sense that things were happening mid-March, but it was probably around March 12<sup>th</sup> when we became aware that something was really going to change and the pandemic was real. It was going to hit us hard, by I believe it was March 15<sup>th</sup>, when there was the first Executive Order issued by the governor, and we really had to reorient and adapt within days.

**AD:** And what were those first steps that you took to reorient in those beginning days?

**EB:** We had a unique issue in the Criminal Term, probably one that's shared with other [4:00] criminal term courts. We are not a digital or e-filing court. Our files are still very much the old-school hard copy paper files. We run the court as the court has been run in the Criminal Term. There's some innovations here and there, but in terms of the day-to-day management and case processing, we run this court as it's been run for years, and we've not yet integrated – or we had not yet integrated – many of the technological innovations that many of the other courts were. I think we were slated to do that over the next few years so it was a particular challenge for us to face to have this hard copy, everything in person court face this prospect of how do we go online? How do we go remote and be accessible as soon as possible?

Right around that time, that mid-March, we had Skype. I had actually only recently learned how to use Skype. We did not use it in a regular – I did not use it on a daily basis. We had early conversations that we were – we had Skype. We need to use Skype. I had very, very brief, but early conversations with Chief Jennings at Rikers. I said you've got to get Skype capable, and I think OCA worked with Rikers and some of the agencies – corrections and the other agencies – that are in control of custody of some of the defendants to make sure that they did have Skype access, I want to say, in a matter of days. We also have conversation – similar conversations I should say with stakeholders about that which is at least in the near term, we're going remote, because we're not closing the courts. I mean, that was – the clear message was we are not closing the courts, even if there is a lockdown. We are going to be available remotely [6:00] and it's going to be by Skype and that's exactly what happened. I mean, we – they usually say you can't really turn a ship so fast – we turned this ship really quickly.

It was really – I have to emphasize – it was the work and great efforts of a great team of people here who are on the ground and in the court, and really helped us flip a switch.

**AD:** Yeah, it's incredible to think how that happened in a matter of days as you just said. You mentioned stakeholders, by that, who do you mean? Who were the different constituents that you needed to reach out to immediately and get on board with this plan to turn the ship?

**EB:** Well those are private – you know, our primary court users, so for the Criminal Term, those are the lawyers, primarily prosecutors, the defender organizations, the private bar, and then also the other agencies who work and support us, corrections certainly, some of the other program providers. Those are who I would largely call stakeholders to make sure that when we're having proceedings, and they're remote, everyone who is participating in that proceeding understands what we're doing and has access to the proceeding.

**AD:** And how would you go about reaching out to all of these stakeholders? What was the communication plan?

**EB:** I mean, that's a really interesting question, because traditionally, I have open – pretty open – communication with my judges and with the stakeholders, and we would do it in a traditional way. You call a meeting, you reserve a conference room, but in – very quickly that we couldn't have in-person communication, and so very quickly, we went to Skype because that was the technology that was available for us. It has – and I use that, and [8:00] I continue to use it almost every week, I have meetings with my judges. And if not every week, may every other week with the stakeholders. It does allow us a fairly robust kind of candid town hall kind of way of communicating. That's how we proceeded, and how I continue

to proceed. The changes were very fluid, right, we were kind of – as there were new executive orders or as we came up with new ways to innovate and conduct proceedings, we would have Skype meetings and explain, here's how we're handling the map, the bail applications, or the rips, and as policies and procedures changed, we would communicate that both through Skype meetings and then would follow up email. I think it allowed for, as I said, a frequent and robust communication that continues to this day.

**AD:** Give us a sense of the volume of cases that you were dealing with at the time that the pandemic hit. Roughly speaking Judge, how many cases were you talking about a day in person?

**EB:** Before the pandemic hit, how many cases would we see a day? Hundreds, Alex, hundreds of cases a day. In our, you know, kind of normal proceedings, we've got 13 or 14 calendar parts that are up. We probably have another six or eight trials that are going. Calendar parts can see between 50 and 80 days a day. I mean, hundreds of cases a day. We then shifted quickly because of the pandemic to a system where at [10:00] least initially we went remote quickly. We met, we went remote initially with two urgent matters parts, and our goal was to make sure we were open and available for urgent matters. By that we really characterize that as any matter that related to a release. That was the priority in the beginning of the pandemic, was for incarcerated individuals. If there was any mechanism or reason for their release, we would have that proceeding so bail applications, habeas risks, dispositions that involved release sentencing – that involve release. Those were what we were prioritizing. I should also mention, because it happened very early on, we initiated a consent release initiative, which was a very collaborative effort, where the defense bar working with the prosecutor and working with the courts, if they came to an agreement relating to a release, we would do it on the

record without anyone even needing to appear remotely. By that, we were able to do hundreds -- and I think it was city-wide, hundreds of releases, which were done through that consent initiative.

**AD:** So I want to touch on a couple points of your answer there. First, in terms of urgent matters in the Criminal Term, and this is something I'm not accustomed to as a civil litigator, but you have all sorts of considerations involving constitutional rights to speedy adjudication. How are you able to take those considerations into account in trying to work forward with this huge volume of cases that you were dealing with?

**EB:** So it's -- I should have noted that although not immediately, [12:00] but fairly soon after the lockdown, the Governor did issue an executive order that suspended many of those statutory requirements and time requirements in particular that would apply. That did ease up some of the concern that you're right to raise, which is defendants in a typical case under typical circumstances do have rights to speedy trial and to release under certain instances after a certain period of time. Most if not all of those requirements were suspended, given COVID, and actually remain suspended to this day. It's July 28<sup>th</sup>, and those suspensions are still in place largely because we don't have any alternative. We're in a situation, while the courts are open, we're not able to bring in petit jurors, so there's no trials. We're not able to bring in grand jurors, so there's no grand jury proceedings, and no indictments. We're -- although, we are starting in-person appearances, very limited on what we can do in-person. Some of those requirements have been suspended, and it did allow us to operate within those suspensions. You're also right to note that in the criminal context, there's all kinds of rights to in-person proceedings and to be present for certain proceedings, and have the right to confer with counsel and all those issues are obviously implicated when everyone is participating remotely. We're very mindful of that. That said, most if not

all of these initial urgent matters, and the proceedings that we heard [14:00] were done at the request and on the consent of counsel and the defendants because – with the understanding that you simply couldn't do it in person, and but for the remote appearance, they wouldn't be heard. So it really was a situation where we were able to accommodate their requests to be heard and as I said, in some instances, dispose of cases or at least come to a disposition relating to a release that certainly serves the defendant's interest.

**AD:** I think you touched upon this, but in terms of that, access to justice for criminal defendants, what steps did you take to ensure that they could personally participate in things like virtual hearings and Skype conferences, where they may not have the technology available?

**EB:** That's always been on our mind, and it's a really important point, which is access to justice is our priority always, pandemic or not. In many ways, the remote Skype proceedings presented a great opportunity for access. As I said, we early on – we facilitated connections with corrections and the other facilities where defendants were being held so that they would have ready access to the Skype proceedings. That really was done, maybe some kinks along the way, but for the most part, that system worked very well. We were concerned, and we remain concerned though, when we're remote with the access and the connectivity of defendants who are not incarcerated, who are out and in some instances, if they didn't have access to devices, phones, or laptops that would give them connectivity [16:00] in some instances, certain programs were able to provide those devices, but I think you're right that was an area – that was a challenge, continues to be a challenge, and that we continue to be focused on. I'll note, one of the reasons that we have been eager, slowly and cautiously, but eager to bring back in-person appearances is actually precisely for that point, which is to make sure that we are capturing or

allowing access to all individuals and defendants even if they – even in that small group that may not have good connectivity. Right now, we’re mostly remote, but with some in-person appearances, hopefully, we are having that impact of making sure we have access to the greatest number of defendants.

**AD:** That’s great, and speaking of access, aside from access to justice, criminal defendants, there’s also the principle of public access and transparency within the court system. Talk if you could a little bit about those considerations, and how you were able to navigate those in the context of implementing this new structure.

**EB:** That was a concern for all of us, I think, from the outset. These are, you know for the most part, except for some limited circumstances, these are public proceedings, and under normal traditional circumstances, courtrooms are open. Anyone can come in and out of a courtroom, whether you’re press or family or friends, and that’s kind of a fundamental tenet, right, or what we do. When you go remote, and you go on Skype, in some ways, there’s the potential to be very open and available, but in other ways, it can also be limiting, if you don’t have Skype access, so what we did [18:00] early on was to the extent that there were very limited numbers, because we were trying to keep the numbers of in – of people, obviously, court traffic. We were trying to limit early on here and there, members of the press, if there was something of significance to them, they would come into a courtroom so that they could view the Skype proceedings on the monitor in the courtroom.

As we became a little more sophisticated, and I think, as we all became a little more accustomed to our remote proceedings, we would, on request, send out a Skype link if there was a press inquiry, to allow them to participate by Skype. That’s what we have continued to do, and will continue to explore that, but for right now – and by the way, there have



been a few proceedings too where family or friends couldn't come to the courtroom. We've sent them a Skype link as well, so where we can, we've really tried to accommodate people remotely.

**AD:** You mentioned this before, but the role that court staff played in all of this and helping to ensure that the courts remained open. Could you just talk a little bit about that, and the – really the acts of heroism that you saw from members of court staff?

**EB:** I'd like to talk more than a little bit because, as you said, it was really acts of heroism. I mean these were really noble courageous court staff that were the heart of our operation. They were the reason we were able to flip that switch. They remain the reason that we are able to do what we're doing, and in fact what we're doing is pretty extraordinary if you consider back in March, we didn't – we weren't electronic. We had no electronic presence. Most of us didn't even know how to use Skype. We didn't have any way to – there were no [20:00] e-filings. We had no kind of digital presence. We went from that to a fully remote online Skype court. We conducted thousands of proceedings, thousands of proceedings, and it was because of really heroic public servants, our court staff, and by that, I mean our Chief Clerk Christopher DiSanto, his deputy is Julia Valette. We've got Lisa White-Tingling, who supervises all the case management coordinators, and also just as critically, the clerks and the officers in the courtroom. They were literally in the courtrooms every day throughout the crisis even at our most extreme and had to be, because, given the fact that we are not really an electronic court, they were the engine. They were in the courtroom. They were pulling the files. They were the ones that were coordinating the Skype appearances, so while we were all remote, they were here and they were here day in and day out – even as I said at kind of the pinnacle of the crisis. Without them, we could not have done what we

did, and we could not do what we're continuing to do, which is being very productive under very difficult circumstances.

**AD:** The other things that the pandemic has brought into focus, at least for me, is the trust that the system places on attorneys, who although they may be adversaries in cases, they are officers of the court. There is a significant amount of trust placed in their ability to cooperate and act responsibly as part of the greater system. Could you talk a little bit about that? You've experienced that?

**EB:** I do think – [22:00] I'm not sure that that's pandemic specific, although, I do – I'm always struck, and I do feel strongly, that it's a noble profession, right, where lawyers are officers of the court and we must all be able to trust and work together. I've always been impressed particularly in the Criminal Term, where that does exist. They – you know even adversaries, I see all the time, prosecutors and defense attorneys, they're advocating for their different sides, but at the end of the day, they're reasonable. They trust each other, and I often rely on their representation as officers of the court. I think that was all the more critical during this time when we were not only conducting these urgent proceedings, but we had to work collaboratively. We had such – we had both the – it was really a triage. We were triaging. We had limited capacity. We were up and running but with only certain proceedings that could happen, and certain limited time spots during the day. We really did have to come together as a family, really a court family and the family of stakeholders. We had to work collaboratively together to make sure that we were prioritizing the right pieces, and that we were working as efficiently and effectively as possible. I do think also the communication that we had served that, and there were times where they would raise concerns or complaints and we tried to be as responsive as possible. I. to this day, I feel I'm better and our system is better because they raise issues. They're issues we may or may not have

thought about, and we make changes when [24:00] they – when needed. That’s a healthy process. It’s an iterative process that relies, as you said, on kind of the trust and communication among the lawyers.

**AD:** Apropos of all that, as we are hopefully coming out of this pandemic, what are some of the structural changes that are here to stay as far as you’re concerned? What are the ones that worked really well, that you see having now holding a permanent place in how justice is administered in New York State?

**EB:** Well, I think part of what I referenced earlier, I think is the ability to communicate with a large group of people. Whether it’s by skype or by some other technology that allows for remote and videoconferencing, I think that’s very helpful both for, as I said, stakeholder meetings or to have kind of basis, kind of town hall kinds of communications, but the other way that it was useful is many of the judges even if they weren’t conducting proceedings on the record, have been using Skype or whatever electronic means to conference cases, and have been able to conference hundreds of their cases using Skype. I think that’s really efficient, bringing parties together, through Skype or as I said, whatever electronic means, allows for very good use of time. We’ve reached a number of dispositions through that conferencing initiative. That’s something that has continued, and I hope will continue even beyond the pandemic. I think it’s also reason to explore in some of the kind of general update or conferencing of cases, even in the courtrooms, producing incarcerated defendants through Skype or other electronic means, [26:00] I think, in some instances, is quite efficient. I think it puts – it’s less onerous on the defendant, and it uses – it just really uses less of the corrections and other resources that are involved in the in-person production. So I think that’s something that we should certainly explore for routine appearances as opposed to hearings and trial. I think we’ll definitely look to integrating that in the future.

**AD:** Are there any aspects of the pre-pandemic system that you look forward to resuming?

**EB:** Oh absolutely. Absolutely, I – you know, we’re back in the courts, the judges and their staffs are back, but I do miss seeing people on a regular basis. We usually have a meeting a week or a brown bag lunch where everyone sees each other and can connect. With my colleagues, I also – I think so much of what we do here in the Criminal Term is predicated on the justice that is served through the jury trial, and all the proceedings that lead up to a jury trial. I’m looking forward to having that back in-person in the courtroom hopefully sooner rather than later.

I am – I think what we’ve been doing so far is really extraordinary and has been quite productive, but I am also looking forward to having in-person proceeding.

**AD:** In talking with practitioners and then some of my colleagues, there’s something -- as efficient and useful as these virtual meetings can be – there’s something missing, the personal, in-person touch that can be just casual or spontaneous we are realizing is a big part of what we do [28:00] day to day. Is that true with you and sort of your core team?

**EB:** Yeah, absolutely. I think it’s true not – it’s true with my core team. It’s true with my colleagues. It’s true with the other staff, and I have to say. It’s also true you know, we have a number of different problem solving courts, most of us do, but particularly New York County Supreme, I preside over one of them. While we have been able to stay up and available to the participants in these parts remotely, that’s a particular group that the in-person connection, being able to actually see how the individual is doing, understanding how they’re reacting to you in the courtroom and to the other – to their attorneys or to the program providers.

It just takes on a different dynamic when it's in-person. I am, I think I am particularly looking to resuming those cases in-person.

**AD:** A final question for you, Judge, that we've been asking folks in this series, are there any lessons learned? Anything that you learned regarding the case management or judges in the courtroom or the system more generally through all of this?

**EB:** I'm not – well, I'm not sure that I would call it a lesson learned because I think I already knew this, but I think that this has affirmed what I already knew which is we are stronger, more resilient, and more agile than perhaps we knew, but we are – we were able to function effectively and productively throughout this. We will also make sure that we continue to grow and be stronger and resume more and more cases. We'll do it as we've done it, which is always prioritizing and making sure that we are serving the needs of the court users and [30:00] overall serving justice.

**AD:** Hear, hear. Well, listen, I want to thank you, Judge, very much for participating in this project, again, for those listening, it's *Dispensing Justice from a Distance: Journal of the New York State Courts During the 2020 Pandemic*. For more interviews from this archive, you can visit the Historical Society of the New York Courts' website – you're probably already there if you're watching this, but it's [history.nycourts.gov](http://history.nycourts.gov). Judge, thank you again for your time, and we really appreciate you speaking with us.

**EB:** And Alex, thank you for all you're doing. Thank you so much.

**AD:** My pleasure.