

**Testimony by New York Legal Assistance Group (NYLAG)**

**Before the New York State Standing Committees on the Judiciary, Codes, and Housing, Construction and Community Development regarding:**

**The Unified Court System and COVID-19**

**August 21, 2020**

Chairs Hoylman, Bailey, and Kavanagh, good morning and thank you for holding this hearing and for giving me the opportunity to speak about the reopening of courts in New York State in the wake of the COVID-19 pandemic. My name is Beth Goldman, and I am the President & Attorney-in-Charge of the New York Legal Assistance Group (NYLAG). NYLAG uses the power of the law to help New Yorkers in need combat social and economic injustice. We address emerging and urgent legal needs with comprehensive, free civil legal services, impact litigation, policy advocacy, and community education. NYLAG serves immigrants, seniors, the homebound, families facing foreclosure, renters facing eviction, low-income consumers, those in need of government assistance, children in need of special education, domestic violence survivors, persons with disabilities, patients with chronic illness or disease, low-wage workers, members of the LGBTQ community, Holocaust survivors, veterans, and others in need of free civil legal services.

We are grateful for the immediate steps taken by the Office of Court Administration (OCA) in March to shut down the courts to protect the health and safety of court staff, attorneys and paralegals, litigants, and visitors. On March 15<sup>th</sup>, Chief Administrative Judge Marks announced procedures to reduce courthouse traffic statewide by temporarily suspending non-essential court functions and consolidating essential and emergency matters into a limited number of court houses. We are also thankful to OCA for the very

important steps it has taken to provide substantive protections to our clients consistent with the Governor's executive orders. Most recently, on August 12<sup>th</sup>, Judge Marks issued AO 160-20, which extended the moratorium on evictions until October 1, 2020.

The challenge of reopening courts is great. We are mindful of the complexity facing the Office of Court Administration in planning given varying local conditions and the pressing need to prioritize the health and safety of everyone who steps foot in a courtroom. It is a monumental task that requires serious thought and the input of stakeholders throughout the state, especially from the legal services providers who are in courts everyday representing New Yorkers.

### **Safety in Courthouses**

The first and most important priority as we think about the reopening of courts is that in-person appearances should not be mandated unless required by law or necessary for due process purposes. As a civil legal service provider, we are keenly aware of the fact that this pandemic has disproportionately impacted low-income people of color<sup>1</sup> – these are our clients. In considering court reopening, it is critical that those most vulnerable to the virus are not mandated to come to court. We believe that given that the health risk from COVID-19 persists, given the risks associated with indoor and extended interactions, and given the uncertainties regarding a potential second wave of the virus in the fall, OCA's priority should be to minimize in-person proceedings. Lessening the foot traffic in courthouses is clearly beneficial to those who work and appear there. Courts should

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<sup>1</sup> Oppel, Jr., Richard A., Robert Gebeloff, K.K. Rebecca Lai, Will Wright, and Mitch Smith. "The Fullest Looks Yet at the Racial Inequity of Coronavirus." *The New York Times*. 5 July 2020. <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>

therefore allow litigants to appear virtually whenever requested and utilize remote hearings to the greatest extent possible. Virtual appearances should be the norm, not the exception.

For those who do need or choose to be in courthouses, OCA must take steps to enhance safety protocols. OCA has shared some of its plans but has not yet come forward with comprehensive health and safety plans consistent with existing guidelines issued by the Governor or recommended by the New York City Department of Citywide Administrative Services (DCAS). We still await plans regarding the following, among other things:

- **Traffic Flow and Social Distancing:** All courthouses need to have plans to keep people six feet apart in all areas where they congregate. Adequate signage and an enforcement plan for social distancing and traffic flow are critical.
- **Density Limits:** Setting maximums for courthouse and courtroom occupancy is essential to the safe use of each of the courthouses.
- **Strict Enforcement of Personal Protective Equipment (PPE) Requirements:** All courthouses must have strict policies requiring every visitor to the courthouse and every employee to wear a mask while on premises. Data has shown that wearing a mask is a key step to reduce transmission of COVID-19.<sup>2</sup> Staff must be trained in the proper use of PPE, signs must be posted to instruct the public, and, most importantly, these measures must be strictly enforced.
- **Heating, Ventilation, and Air Conditioning (HVAC):** Properly filtered and mixed air and air circulation are critical in any indoor environment to protect

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<sup>2</sup> Centers for Disease Control and Prevention. "Considerations for Wearing a Mask." 7 April 2020. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>

against COVID-19 exposure and transmission. OCA has not included air circulation and filtration plans in the plans they have disseminated. Nor do the ventilation systems at all the courthouses fall within the parameters set by New York State.

Until the court system has implemented best practices to ensure the safety of those entering their facilities, in-court proceedings must be kept to a minimum.

### **Establishing Protocols for Virtual Proceedings**

In order to proceed effectively on a remote basis, including where unrepresented parties are involved, the Court system needs to work with legal service providers and other stakeholders to implement fair and equitable systems and processes that comply with due process requirements.

As a July 1, 2020 report prepared by OCA’s Office for Justice Initiatives states, the “clear and present concern is that those in desperate need of access to our courts may be excluded” as a result of the digital divide.<sup>3</sup> The report identifies the many technology barriers faced by the unrepresented, including lack of access to computers, lack of internet access for financial or geographic reasons, and lack of smart phones or sufficient “minutes” on cell phone usage plans. In addition to these barriers, broadband access is not universally available, which means that parties who may have access to technology still may not have access to the internet. Even greater challenges face court users with disabilities or older adults, who already had to confront myriad obstacles to making court appearances before the pandemic.

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<sup>3</sup> New York State Office of Court Administration Office of Justice Initiatives. “Ensuring Access to Justice for Unrepresented Court Users in the Virtual Court Era – and Beyond: Report to Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks.” 1 July 2020.

Those who cannot use or cannot access the requisite technology should not be punished, nor should their due process rights be violated. We support the Office for Justice Initiatives' report's recommendation that Judicial Districts convene local interdisciplinary stakeholder work groups to draft protocols to enhance access for unrepresented court users in specific targeted areas, including family, housing, consumer debt, matrimonial, and Surrogate's matters.

In addition, OCA should issue a specific policy directive addressing people with disabilities who are unable to come to court. OCA's Advisory Committee on Access for People with Disabilities advised in a June FAQ that, if someone cannot come to the courthouse because a disability puts them at greater risk of serious consequences from COVID-19, they should "contact the judge who is presiding over the case, or the judge's staff. Explain to the judge that you need an accommodation because of your disability, and request that you be allowed to appear by video or phone instead, or that the case be adjourned until it is safe for you to appear in person."<sup>4</sup> This recommendation, however, is not backed up with a policy directive that requires OCA personnel, including judges, to implement it. As a result, it may not be consistently applied across courts. We seek a clear public policy from OCA directing all OCA staff to implement consistent and uniform procedures providing accommodations to attorneys and litigants who need them.

Whether a party is represented or unrepresented, virtual hearings present significant issues that need to be addressed by the court system in consultation with the

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<sup>4</sup> New York State Office of Court Administration. "Covid-19 and ADA Accommodations Frequently Asked Questions." 15 June 2020. [http://ww2.nycourts.gov/sites/default/files/document/files/2020-06/ADA%20COVID%2019%20FAQs%202020\\_0.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2020-06/ADA%20COVID%2019%20FAQs%202020_0.pdf)

stakeholders to ensure fairness to all parties and protect the integrity of the process. These issues include:

- Is the technology platform used by the courts secure for the parties and their data?
- How does the platform provide for confidential consultation between lawyer and client in the course of proceedings?
- How will the courts protect against unauthorized recording, rebroadcasting?
- How will the proceedings be incorporated into the court record?
- How will attorneys approach the bench to address the judge without being heard by witnesses or other observers?
- How will the courts ensure language access and interpretation services for virtual appearances?
- What is the impact of technological glitches and error on the process? How do we protect against errors in the court record that may occur as a result of the technology, e.g. when a speaker with a distinct accent is testifying remotely?
- What is the impact of technology on credibility determinations? Will a low-quality internet connection make a litigant appear less truthful? Does the technology as intermediary impair the fairness of the proceedings?
- What are the due process implications of the physical separation of client and attorney?
- How will the courts handle the important issue of the public's right of access to court proceedings?

- How will the courts protect attorney-client privilege and prevent unknowing waivers of the privilege?

OCA should work with stakeholders on a plan that sets forth uniform rules and procedures for virtual appearances.

### **Housing Court**

I want to add some comments about specific courts.

The housing courts are particularly susceptible to overcrowding, and therefore pose a unique risk to public health with the potential to exacerbate the crisis. The vast majority of tenants responding to an eviction petition in housing court appear in court without an attorney. It is only after they have been to court that they are referred to a legal services organization such as NYLAG for representation. Before the housing courts are reopened, NYLAG seeks to collaborate with OCA to create a remote intake system that can effectively prevent people from answering an eviction petition in person, while at the same time fulfilling the statutory mandate of providing legal representation to qualifying tenants.

Furthermore, unlike gyms and restaurants, where patrons can assess whether the risk of infection is acceptable to them personally, tenants facing eviction do not have the liberty to make a decision. They are facing losing their homes; they must respond to the eviction petition or else. The legislature must keep this crucial distinction in mind.

Most importantly, all the procedures around safety of the courts and virtual proceedings will not solve the underlying issue that needs to be addressed. The legislature has taken a very important step in passing the Tenant Safe Harbor Act. But tenants in New York still face a massive number of eviction proceedings not covered by the Act, and

many others will face actions for unpaid rent. The impact of these eviction cases and judgments will fall most heavily on people of color, people with disabilities, seniors, veterans, and New Yorkers with low income who constitute the vast majority of respondents in eviction cases and who are the most critically affected by the COVID-19 pandemic. As set forth in the Recommendations of the Housing Working Group of the COVID-19 Recovery Task Force to the Chief Judge of the State of New York, “existing housing assistance programs will be woefully inadequate.”<sup>5</sup> We therefore need:

- To extend the eviction moratorium. We cannot have evictions starting up just as the second wave of the pandemic arrives. Homelessness will only exacerbate the public health crisis, and New York City shelter systems are already at capacity.
- Rent relief. The Housing Working Group highlighted an analysis that estimates that over 1.1 million households in New York State cannot pay rent, and these rent shortfalls, which began in mid-March, are projected to aggregate at a rate of over \$875 million per month.<sup>6</sup> Without additional rent relief, massive hardship will before an already vulnerable population. We ask the legislature to take all necessary action to provide a subsidy program to support rent-burdened tenants and access to rent arrears for undocumented families.

### **Civil Court**

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<sup>5</sup> COVID-19 Recovery Task Force. “Housing Working Group Report: Recommendations of the Housing Working Group of the COVID-19 Recovery Task Force to the Chief Judge of the State of New York.” 9 July 2020.

<sup>6</sup> Analysis prepared by Stout Risius Ross, LLC based on household data by income level rent burden based on U.S. Census Bureau table B25074 for New York State and rent payment confidence data based on the U.S. Census Bureau Household Pulse data for June 25-June 30.



I want to turn your attention to the NYC Civil courts, where NYLAG represents debtors in debt collection cases. The vast majority of debtors, however, are not represented by counsel. Currently, there are no plain language, publicly available documents that inform court users what the procedures, policies, and practices are regarding the filing of court papers with the NYC Civil Court clerks' offices. There is a lack of consistent and understandable messaging regarding the expectations of litigants in how to file answers, file motions to vacate, and take other litigation steps. We are concerned that this lack of clarity will cause people to go to court and put their health at risk because they are not given proper or contrary guidance.

It is also imperative that the court consider the challenges and needs of unrepresented defendants and how their policies and procedures affect unrepresented defendants in consumer credit actions. High-quality limited-scope programs such as Volunteer Lawyer for a Day (VLFD) and CLARO, which give debtors who would otherwise be unable to afford an attorney the opportunity to receive the representation they need are more important than ever to help address the justice gap.

There is no urgent need, at this time, given the disproportionate impact of the pandemic and of consumer debt collection cases on communities of color to go forward with consumer credit litigation.

Thank you for the opportunity to testify regarding the important and timely issue of courts reopening. We look forward to working with you on this issue.

Respectfully submitted,

New York Legal Assistance Group