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By Email

Jeh Johnson

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Re: Racial Inequities in the New York State Courts

Dear Secretary Johnson,

The Council on Judicial Administration (CJA) of the New York City Bar Association (City Bar) sincerely appreciates this opportunity to provide our input with respect to the presence and impact of institutional racism in the New York State court system.¹ Your immense knowledge, expertise and vision will undoubtedly provide an invaluable contribution in this journey to change the landscape of the New York State court system. Conceivably, the greatest overarching problem with the New York State court system is the distinct lack of legal services provided to indigent persons, regardless of their background. However, racism is a cancer that manifests itself in many aspects of the court system. In our view, this is particularly true in Criminal Court, Family Court and Civil Court.

The CJA is comprised of experienced practicing attorneys, judges and court attorneys who play a crucial role in the operation of our courts. We hope that our specific areas of concern will assist in addressing the racial inequities that exist in our courthouses. In our letter, we have highlighted some overarching recommendations for court staff, as well as specific areas of concern relating to practitioners and the public.

¹ This letter contains input from members of the City Bar's Criminal Courts Committee (Terri Rosenblatt, Chair), Civil Rights Committee (Zoey Chenitz, Chair) and Litigation Committee (John Lundin, Chair). It is submitted in addition to the comments conveyed by the chairs of the City Bar's Civil Court Committee (Shanna Tallarico), Housing Court Committee (Sara N. Wagner), and Family Court & Family Law Committee (Michelle Burrell) in your online meeting on July 13, 2020.

Need for Expanded (In)Sensitivity Training:

Expanded sensitivity training in the state court system is long overdue. We believe that there is a critical need for a more effective method of sensitivity training to all court staff – that includes, but is not limited to, judges, clerks, court attorneys, court officers, social workers, and the Department of Corrections. It is our belief that current training programs are inadequate. At a minimum, training programs should be updated regularly, should be interactive, and conducted in smaller groups in order to be effective and suitably instructional. And it is imperative that this training address the importance of appropriate workplace behavior and maintaining professional boundaries.

Indeed, the expression of inappropriate and offensive comments causes people to feel uncomfortable, regardless of whether the behavior is intentional or not. This needs to be made clear in training programs. Further, the inability to empathize with others' concerns (even if one may not espouse the same beliefs) is likewise harmful.

Such training should also be mindful of the psychological impact of traumatic public events, such as the recent events relating to Black Lives Matter. This is particularly pertinent to courts such as Criminal Court, Family Court, Civil Court and Housing Court. A lack of acceptance and inclusivity within the structures of the Office of Court Administration (OCA) and the Unified Court System (UCS) inevitably creates mistrust in the authority of the New York State Courts.²

A Measure of Accountability:

Along a similar vein, we believe that there is a need to create a mechanism to capture the public's experience with racial inequities within the court system. And, internally, there should be a mechanism for employees of the court system to report instances of racism. This should be factored into employment evaluations and promotion criteria to assist in supervising staff or judges within OCA.

A possible preliminary step toward this goal is the creation of an independent committee to provide objectivity. Ultimately, the adopted measure should be delineated both externally and internally within the court system, and inevitably align with a training model that provides for updates on progress, and allows for learning and growth. By creating such institutional accountability, the long-term hope is that there will be a commensurate decrease in biased decision-making, outward acts of racism or microaggressions within the courts.

Specific Areas of Concern Relating to Practice:

- **Excessive adjournments and delays:** When low-income individuals are required to attend court as witnesses or parties, they often do so with difficulty and at significant expense. Excessive adjournments and delays in court proceedings have a substantial adverse impact on them, as they must struggle to afford time away from work, arrange care for children and other dependents, pay for transit costs, etc. These costs are not adequately considered by the courts

² At the very least, we suggest that New York State Courts create a publication to be distributed to court staff and attorneys, but is also available to all New York State citizens akin to Chief Judge Judith Kaye's 1997 publication of the profound "Standards of Civility". The recent climate calls for an update and reminder of these rudimentary principles.

when deciding scheduling matters. The failure of the courts to resolve cases within a reasonable time frame can have a detrimental impact on indigent persons, in even the most minor cases.

- **Implementation of staggered court appearances:** We support the implementation of staggered and fewer in-person court appearances. Unnecessary and all-day court appearances have a disparate economic impact on poor persons, who need to sacrifice pay to take off from work, or need to pay for childcare, in order to make their court appearance. Low-income litigants are disproportionately persons of color. This is particularly important with the Courts' emergence from the COVID pandemic.
- **Defendants return to court on bench warrants:** There should be changes made in the process used to bring the accused into court. Very often a summons will work instead of an arrest in one's home or in a public place that forever brands the accused. Poor people are more often subjected to these public encounters with arresting authorities. The issuance of a summons would also make staggered appearances possible.
- **More copious placement of proceedings "on the record":** This is inherently a concern that must be adequately balanced between a need for accountability and the desire of litigants to facilitate an amicable settlement (which may often be reached through off-record discussions). However, the concern arises because often times, instances of inappropriate and offensive behavior happen off the record and in courts where the overwhelming majority of litigants are unrepresented individuals. The more copious placement of proceedings on the record aims to alleviate instances of distasteful comments and microaggressions.
- **Fine-tuning of "no-knock" warrants:** This concern was raised by several judges who have presided over serious criminal cases. The presentation of "no-knock" warrants has been noted to be particularly worrying and should be more finely tuned and carefully evaluated. We acknowledge that the "no-knock" provision in certain search warrants is necessary depending on what the search warrant seeks and the need for the element of surprise. However, these competing interests should be carefully evaluated. Judges must be adequately trained to question the officers and detectives more precisely when a search warrant application includes a "no-knock" provision. For instance, a novice Civil Court Judge may be assigned to Criminal Court with little to no experience and may be unaware of how critical such an inquiry is.
- **Bail Reform Education/Data Collection:** With the sweeping changes in the law regarding bail reform, there is a dire need for intensive training for judges who preside over criminal court arraignments. A defendant's arraignment is the first, and arguably the most crucial appearance before a judge; and many of the individuals appearing before the court are indigent persons of color. Training should encompass not only legal issues, but also teach methods to humanize a defendant, rather than treating the defendant as just another "number" in the system that has been assigned a docket number. There should be an effective mechanism for tracking the number of defendants for whom bail is being set and for which types of cases. This would assist in creating transparency, fairness and accountability.

Language access:

Individuals of color are not always provided with adequate or timely language access services, limiting their ability to fully engage in the court system.

Disability rights:

Though sometimes overlooked as a racial justice issue, the New York State Courts lack basic architectural ADA accessibility. In a 2015 report by the New York Lawyers for Public Interest (NYLPI), the organization found: “Multiple clients who use wheelchairs have reported to NYLPI that they have been carried up and down several flights of stairs to be booked and processed at MCC’s central booking area following an arrest.”³ CDC statistics show a higher percentage of Black, Native American, and Pacific Islander people, as compared to white people, have mobility difficulties affecting walking and climbing stairs.⁴

Moreover, Black and Latinx people are disproportionately charged and prosecuted in New York City, so they are more likely to be affected by the barriers in court buildings.⁵ The ADA was passed almost 30 years ago and applies to courthouses.⁶ While there are many other issues where disability and racial justice intersect in courts, this discrimination is built into the very walls. We would urge the inclusion of architectural access and compliance with the ADA Accessibility Guidelines (ADAAG)⁷ in all areas of the courthouses, as a basic civil rights issue with disparate racial impact.

Family Court - Removal of children from their homes:

Lastly, we would like to bring to your attention an issue raised by the CJA with regards to the practice in Family Court. Although we recognize that there have already been discussions regarding Family Court, we would like to make sure this concern is noted, if it has not already been raised. There should be more scrutiny with regards to the powers of Family Court to remove children from their homes, in the absence of imminent risk: Article 10 of the Family Court Act and related case law provide that a child should be removed from a guardian only if the judge finds that the child’s remaining in the home poses “imminent risk to the child’s life or health.” Such a finding is meant to involve a fact-intensive balancing test, whereby the risk posed by the child’s staying in the home is weighed against the harm that removal may bring. However, in practice, because of their often very different backgrounds (and biases) Family Court judges may rely upon a set of parenting and familial values and concerns that are quite different from those of the families before them, and thus conclude that imminent risk exists when, in fact, it may not. The effect of this practice is that families involved in the family court system, which are disproportionately poor families of color, may be held to a higher standard of parenting than other families, and thus may suffer the traumatic and often irreparable consequence of a

³ See <https://www.nylpi.org/wp-content/uploads/2015/03/Accessible-Justice-NYLPI-3-23-15.pdf> (p.9).

⁴ See https://ftp.cdc.gov/pub/Health_Statistics/NCHS/NHIS/SHS/2018_SHS_Table_A-10.pdf.

⁵ See e.g., <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf> (p. vi-vii).

⁶ See *Tennessee v. Lane*, 541 U.S. 509 (2004).

⁷ See <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/adaag>.

child's removal unnecessarily. We strongly urge that this issue be studied closely and that appropriate remedial training be provided to judges and other court personnel.

We thank you again for taking the time to consider the concerns and recommendations set forth in our letter. With an issue as profound and important as this one, we would be remiss not to acknowledge that there are a wide range of opinions and perspectives on these issues. We believe that it is critical to stress that open discussion and debate of these topics is a fundamental component of achieving change and progress.

This is a complicated and sensitive subject that warrants careful thought and continuous attention. Therefore, we would welcome the opportunity to provide a follow-up letter to you in the near future. Indeed, this letter simply grazes the surface in addressing concerns by CJA and various other City Bar members. We have every confidence that as special adviser to Chief Judge DiFiore, you will help us move toward a better and fairer court system that truly serves every constituent of New York City with integrity, respect and justice.

Respectfully,

Michael P. Regan, Chair
Vidya Pappachan
Council on Judicial Administration