



WRITTEN TESTIMONY OF THE COUNCIL ON JUDICIAL ADMINISTRATION
PUBLIC HEARING OF THE PANDEMIC PRACTICES WORKING GROUP OF THE
COMMISSION TO REIMAGINE THE FUTURE OF NEW YORK'S COURTS

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The New York City Bar Association's Council on Judicial Administration ("CJA") collected anecdotal data and input from various court committees, practitioners, judges, court attorneys and court personnel regarding the impact of the pandemic court practices and which should be continued or discontinued post pandemic.¹ While the practices in and opinions about the different courts varied, there were some universal observations and comments, **the most prevalent of which was that there needs to be more uniformity of rules and protocols within each court, at a minimum countywide if not citywide, and especially in the areas of e-filing and virtual or in person appearances.** For the most part there seemed to be agreement that some conferences and appearances might or should continue to be conducted virtually or to be available virtually, but that most hearings and trials -- and all jury trials -- should be conducted in person. There was also agreement that the nycourts.gov website needs to be updated and revamped. And finally, the loss of highly trained clerical staff, both before and during the pandemic, needs to be addressed and ameliorated. A large number of senior clerks from the County Clerk's Office and from the individual court's clerk's offices retired during the pandemic, and at present many of the clerk's offices are operating with an insufficient number of clerks and in particular, highly trained senior clerks. The loss of so many clerks is undoubtedly a contributing factor in the backlogs and longer delays in the processing of cases, judgments and orders.

One further uniform observation: virtual appearances fared the best in the Commercial Division, and there is widespread enthusiasm for retaining virtual appearances in conferences and in many instances, for hearings and some bench trials. The virtual appearances have been cost effective for represented litigants and practitioners. In other courts, however, virtual appearances and other pandemic practices have had mixed results and reviews.

¹ In addition to at-large members who practice across a wide variety of courts, the Council on Judicial Administration includes representatives of the following City Bar committees, all of whom contributed views and anecdotal data to this report: Civil Court, Family Court, Housing Court, Criminal Court, State Courts of Superior Jurisdiction, and Litigation.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

This testimony is presented in sections, with each section focusing on a particular court and issues relevant to that court. Our intent is to highlight the issues that arose most often during our information-gathering phase; therefore, some topics may appear in one section, but not another. We also have included an Appendix that lists the City Bar's prior statements, letters and reports addressing pandemic-related court practices, along with some highlighted recommendations that are incorporated herein.

I. SUPREME COURT, MATRIMONIAL PARTS AND OTHER CIVIL TERM PARTS

a. Efiling in Matrimonial Cases

In the Supreme Court Matrimonial Parts, the feedback regarding efilings through NYSCEF generally has been positive, with some backlog issues which are now being addressed by the courts and the County Clerk. Prior to the pandemic, all papers in matrimonial actions were filed in person, including uncontested divorce papers. In New York County for example, the time from filing uncontested divorce papers through receipt of a signed judgment was approximately 2-4 months. Before filing final divorce papers, matrimonial clerks reviewed papers and litigants and attorneys had the opportunity to make necessary corrections prior to the papers being submitted to a judge or referee for signature. That process shortened the time from filing through judgment. During and since the pandemic, papers have been efiled, without prior clerical review to correct errors and omissions, and the length of time from filing the final papers through a signed judgment increased to one year or more. The County Clerk is now working to address the backlog, and lengths of time from filing through judgment are lessening but the problems inherent with efilings without preliminary clerical review remain. The same is true of filing Orders to Show Cause: pre-pandemic, an Order to Show Cause would be reviewed first by clerks prior to submission to a judge, and attorneys or litigants had the opportunity to make corrections or provide additions before submission, making the process more efficient. The pre-filing review no longer takes place.

b. Virtual / In Person Appearances in Matrimonial and Other Civil Term Parts

During the pandemic, appearances in matrimonial cases were virtual, with some courts requiring the parties to appear in person in certain instances (especially where there was disagreement between the parties and where there were settlement opportunities), but now more appearances seem to be in person again. While it is still too soon to assess the ultimate impact of more in person appearances, it seems that where litigants are either not working together or productively, or where a case appears to be near a settlement, in person appearances may be preferable and useful, while for routine court check-ins or control dates, virtual appearances may be more efficient. There is still a backlog of decisions on motions and delays in getting preliminary or other conferences.

In other Supreme Court Civil Term Parts there are still lengthy delays to get a discovery conference or a decision on submitted motions due to the backlogs, and some courts continue to conduct virtual appearances while others are doing a hybrid of remote and in person. The consensus is that some remote appearances are still preferable such as for conferences, especially

discovery conferences, while there is a preference for in person hearings and trials, particularly jury trials, and settlement conferences.

In addition, many practitioners believe that public access to view court proceedings should be easier and that NYSCEF and E-Track should be linked.

II. CRIMINAL COURT AND SUPREME COURT, CRIMINAL TERM

a. Virtual/In Person Appearances

In Criminal Court and Supreme Court Criminal Term, most if not all appearances are now taking place again in person. Some practitioners would prefer defendants to have the option to appear virtually, especially for brief routine court appearances, where they are at risk of losing jobs due to having to take off a whole day to appear in court, or do not have child care, for example. One suggestion is to have a day set aside each week for virtual appearances which could be staggered with a specific time frame assigned for a number of cases (e.g. a 9:30-11:15 am call, 11:15-1 pm call, 2:15-3:30 pm call and 3:30-4:30 pm call) with hearings and trials to take place in person. Defense attorneys or defendants who test positive for Covid should appear remotely.² In other instances, a defendant in a criminal matter may prefer to appear in person. Accordingly the default procedure should be to give defendants the choice of type of appearance.

Where the defendants are incarcerated, however, the responses to remote appearances are mixed: they may be preferable in some instances provided (a) the technology is available at the defendant's location; and (b) the defendant does not need to meet with his/her attorney on the same day as the court appearance. The trip from prison or jail to the courthouse is often arduous and lengthy and may be unnecessary for routine court appearances where the defendant's interactions with the court and counsel is limited. But if the defendant needs to see counsel in person and/or discuss or take a plea, or see family who may be appearing in court to view the proceedings, then in person is preferable. Finally, sentencings, hearings and trials should be conducted in person.

For criminal cases being heard in the Appellate Division, the public has not been allowed to return to the courthouse for arguments and defendants in criminal matters wishing to attend arguments in their cases have been excluded. This should be rectified as it is an issue of basic fairness for a defendant to be able to attend.³

b. Efiling in Criminal Cases

While reviews about e-service between prosecutors and defense counsel have been enthusiastic and therefore e-service should be adopted uniformly, efileing in criminal matters requires further and fulsome discussion among judges, prosecutors, defense attorneys, OCA and the County Clerk about the pros and cons of doing so. There are privacy concerns (for example,

² While this protocol is appropriate in other courts as well, it is particularly important to set it as a protocol in Criminal Court where a defendant's failure to appear may result in a bench warrant and a charge of bail jumping, and where defendants must have representation.

³ This applies to other parties appearing before the Appellate Division as well.

once efiled, there are questions as to whether sealed matters due to dismissal or acquittal are truly sealed) and there need to be uniform protocols and instructions for e-filers. For example, in Supreme Court, Criminal Term, an efiled motion may take weeks to be delivered to the assigned court, and the best practice is for the efiler to deliver a courtesy hard copy to the court attorney for the assigned part. However, the efilings system does not notify the efiler that a hard copy should be filed as well, and it is difficult to find the information identifying the court attorney and where the hard copy should be delivered. Reworking the efilings system (EDDS, in criminal cases) to give efilers that information and instruction upon efilings a motion would be an important step to improve efficiency.

Finally, digitalization of criminal court records should be done contemporaneously so that records for appeal may be collected efficiently and in a timely manner.

III. CIVIL COURT

Civil Court's pandemic practices have been bumpier, in part because Civil Court filings during the pandemic required emailing documents and using a system that was not as efficient as efilings, and each county handled cases differently. A more uniform and more consistent set of protocols would be helpful particularly in the area of exchanging documents. Remote proceedings did not do as well with unrepresented litigants, although they may still be preferable in many instances to ensure that pro se litigants who must appear do not risk losing jobs by sitting in court for hours waiting for their cases to be heard. In those instances, however, the pro se litigant must have access to the necessary technology. If access to technology is a barrier to participating remotely, then in person appearances become necessary, with the proviso that circumstances may change and the option to proceed remotely should remain available. Consumer debt cases were particularly challenging, having been very backlogged; returning to in person appearances might help move more cases in that area.

The pandemic did highlight the need to move forward with electronic filing in Civil Court. During the pandemic, the court utilized the electronic delivery service EDDS, which served its purpose over the past two years. However, its continued use is not being advocated and often documents served and filed through EDDS are not being brought to the court's attention. A more sophisticated and user-friendly electronic filing system should be developed and utilized. Accessibility to vital court documents is a necessity and a more efficient court requires more efficient systems, especially in high-volume courts.

IV. HOUSING COURT

a. Tenant's Right to Counsel

Housing Court has had mixed experiences. While it was able to use technology throughout the pandemic to hold virtual conferences and trials, and the court filing system was able to update to online filing, once eviction proceedings were permitted to move forward, Housing Court became flooded with cases, more than the legal services providers were and are able to handle. The latest update is that almost all the legal services providers have stopped taking on new cases, and the

Court is allowing eviction cases to proceed without counsel, running directly afoul of New York City's right to counsel law.

In written testimony submitted for the Chief Judge's Statewide 2022 Civil Legal Services hearing in September (*see* Appendix #1, pp. 7-8), City Bar President Susan Kohlmann said this about the status of tenant's right to counsel post pandemic and offered four recommendations:

“While we understand that the entire judicial system has changed and that some court processes are returning thoughtfully and gradually, the perception is that RTC is fair game to be whittled away, as cases simply move forward without it. The consensus cannot be in favor of returning to the “cattle call” of old - this is precisely what Secretary Johnson warned against. Things can be different. The City Bar's Housing Court Committee, which is comprised of tenant and landlord lawyers, as well as Housing Court personnel, has suggested the following:

- Court calendars should be temporarily modified by first scheduling pre-pandemic cases that already have two attorneys; then, adjourned new cases that have two attorneys can be added to the calendar.
- Appearances should be adjusted to ensure that attorneys who are engaged virtually are not required to appear physically at the same time.
- Requests for virtual proceedings to accommodate a disability should be routinely honored in accordance with law.
- RTC attorneys should be given a sufficient amount of time to establish the attorney client relationship and research and investigate complex cases. Anything less is not meaningful right to counsel.”

b. Virtual/In Person Appearances

While there has been support for continuing some component of virtual appearance, such as in some conferences, many litigants in Housing Court do not have access to the necessary technology and therefore there needs to be some thoughtfulness as to which proceedings in which matters should be virtual and which should be in person, although there has been consensus that trials should be conducted in person.

Finally, Housing Court in particular is in dire need of more non-judicial personnel, as many left and have not been replaced.

V. FAMILY COURT

a. Virtual/In Person Appearances

Family Court experienced many delays during the pandemic and had been experiencing backlogs even before the pandemic. There are very lengthy delays in getting dates for support and enforcement hearings, some caused by the court's transition to Skype for Business and

subsequently to Microsoft Teams. Thereafter some litigants were given the choice to proceed virtually and chose not to, to be followed by the Court deciding to proceed virtually after allowing litigants the choice. Presently, some parts continue to operate remotely but there appears to be little if any uniformity of practices or protocols and there are differing opinions among counsel who appear in Family Court about whether some hybrid model should be retained. After all, there may be some instances where virtual appearances are preferable so the litigant need not miss work, find childcare, etc., or where the litigant or attorney tests positive for Covid, provided the litigant has access to the necessary technology for remote access. Therefore, the litigants should have the option of in person or virtual appearances. However, since Family Court relies on hearings and assessing witness credibility in cases that involve, for example, potentially stripping a parent of rights or removing a child from a parent's care, assessing credibility remotely is not optimal and therefore hearing and trials should take place in person.

b. Efiling

Efiling has recently been made available in the New York County Family Court in the following case types: custody/visitation; guardianship; parentage – assisted reproduction; parentage – surrogacy; paternity; and support, and only in new cases filed on or after August 1, 2022.⁴ Efiling in Family Court should be expanded and there should be further guidance to litigants and court personnel on how to implement its use. The Court should also have an easy to access repository connecting the links to every Part.

c. City Bar-Fund for Modern Courts Report

In February 2022, the City Bar and the Fund for Modern Courts released a report entitled “The Impact of COVID-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants” (*see* Appendix #2). The primary goal of the report was to highlight the significant and longstanding inequities faced by litigants in Family Court; to analyze the choices Family Court made about which cases would move forward during the pandemic; to identify the types of proceedings that did not go forward and the impact felt by litigants in those cases; and to address the urgent need—that long predates COVID-19—for increased Family Court resources and meaningful reform.

Several of the report's recommendations are worth highlighting here since they remain vitally relevant as the court system assesses pandemic-related practices and recovery. In addition to other recommendations contained in this testimony as pertains to Family Court, the report urged OCA to: provide the public with regular statistical reporting, by court Term, on all Family Court proceedings; build an effective, user-friendly website (including mobile website) that comprehensively informs the public of current court operations and provides guidance to unrepresented litigants; conduct litigant surveys so that real time feedback can be obtained from the clients of Family Court; adopt NYSCEF to the fullest extent permitted by law; enable litigants without access to adequate technology to participate in remote proceedings by providing access to the appropriate technology; adopt a communications strategy to ensure litigants and attorneys are

⁴ New York State Unified Court System, New York State Courts Electronic Filing, <https://iapps.courts.state.ny.us/nyscef/AuthorizeCaseType>. (All websites last accessed on Nov. 7, 2022.)

kept up to date on the status of their cases as well as the status of Court operations generally; provide appropriate resources from other trial courts as necessary and appropriate to tackle backlogs and delays; and enact uniform procedural rules. The City Bar is continuing to engage with all stakeholders on ways to improve access to justice in New York City Family Court.

d. Family Court Vacancies and Reassignments: Disruption and Delay

As to this longstanding area of concern for Family Court practitioners, we commend to the Working Group our December 2020 report, “The Family Court Judicial Appointment and Assignment Process” and the recommendations therein. (*See* Appendix #7.) Recommendations that particularly relate to OCA’s role in this process include: maximize advance planning opportunities and allocate short-term cases to judges during any six-month transition periods; collect robust data on judicial vacancies and their impact; better coordinate with the Mayor’s Advisory Committee on the Judiciary; and increase transparency in the appointment and assignment process. The City Bar is continuing its efforts to spotlight the urgent need to improve the process of identifying and filling Family Court vacancies.

VI. CONCLUSION

While there are many different opinions about specific courts, there seems to be unanimous support for retaining some of the pandemic practices: e-filing in most instances, virtual appearances for many types of court conferences, with the choice of virtual or in person to be given to the litigants or attorneys, and e-service of documents between the parties. For the most part, there is support for hearings and trials to be conducted in person, with some leeway for some hybrid models and some virtual appearances for witnesses in limited instances. And there is an overwhelming cry for uniformity of protocols and practices in each court, with more information and clear instruction to be provided to litigants and attorneys.

Thank you for your consideration and please do not hesitate to call upon the City Bar if we can provide any additional information or assistance to the working group.

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APPENDIX OF PRIOR CITY BAR REPORTS CONCERNING PANDEMIC PRACTICES AND RELATED CONCERNS

1. September 19, 2022, **Written Testimony Submitted for the Chief Judge’s Statewide 2022 Civil Legal Services Hearing**, https://s3.amazonaws.com/documents.nycbar.org/files/20221086-CivilLegalServices_KohlmannTestimony091922.pdf (proposing, among other things, alternate calendaring of cases in Housing Court to prioritize two-attorney cases and enforcement of housing maintenance standards).
2. February 4, 2022, **Report from Multi-Committee Working Group on the Impact of COVID-19 on the New York City Family Court: Recommendations on Improving Access to Justice for All Litigants**, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/family-court-covid-19-impact> (documenting crisis in Family Court during COVID and recommending, among other things, the adoption of NYSCEF in Family Court to the fullest extent permitted by law; appropriate support for unrepresented litigants; providing the public with regular statistical reporting, by court Term, on all Family Court proceedings; building an effective, user-friendly website (including mobile website) that comprehensively informs the public of current court operations and provides guidance to unrepresented litigants; enabling litigants without access to adequate technology to participate in remote proceedings by providing access to the appropriate technology; adopting a communications strategy to ensure litigants and attorneys are kept up to date on the status of their cases as well as the status of Court operations generally; providing enhanced training for jurists in case management strategies and techniques; assessing the Court’s needs with respect to remote proceedings to ensure that it purchases and utilizes up-to-date technology best suited for courtroom protocols, and provide sufficient user training and support; moving judges, staff, and other resources from other trial courts as necessary and appropriate to tackle backlogs and delays; and enacting uniform procedural rules).
3. December 6, 2021, **Recommendations to Improve the Housing Court’s Enforcement of Housing Maintenance and Standards**, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/enforcement-of-housing-maintenance-and-standards> (as part of overall recommendations, the Housing Court Committee recommends that cases seeking enforcement of housing maintenance standards be prioritized).
4. July 20, 2021, **Letter to Judge Ruiz Regarding Equitable Access to Justice in the NYC Family Courts**, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-judge-ruiz> (Promoting uniformity, the letter states that Judge Ruiz is “uniquely positioned to promulgate rules of court to identify when and in which proceedings litigants and attorneys must appear in person....Failure to do this only intensifies the pandemic-bred chaos that families are suffering now.”).
5. June 15, 2021, **Letter from Working Group on Racial Equity in New York State Courts to the Franklin H. Williams Judicial Commission Regarding their May 19, 2021, Meeting with New York City Family Court Stakeholders**, <https://www.nycbar.org/member-and->

[career-services/committees/reports-listing/reports/detail/racial-equity-in-courts-williams-commission-meeting](https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/racial-equity-in-courts-williams-commission-meeting)

(Recommendations included: the Family Court must create procedural rules that govern all parts so there is uniformity, particularly as to virtual courtrooms; the Family Court must either grant Universal Case Management System (UCMS) access to all attorneys with cases in the court, or preferably, create an electronic filing system, e.g., a New York State Courts Electronic Filing System (NYSCEF) model; conduct polling of litigants, which can be effectuated by non-legal staff who are culturally competent and relatable, can interpret and explain for litigants, and can help process complaints).

6. April 9, 2021, **Report from Domestic Violence Committee, Recommendations for New York City Virtual Family Court Proceedings, With Particular Focus on Matters Involving Litigants Who Are Survivors of Abuse**, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/comments-on-virtual-trial-rules-domestic-violence-cases> (makes recommendations as to specific needs and circumstances faced in cases involving domestic violence).

7. December 15, 2020, **Report from Multi-Committee Working Group on The Family Court Judicial Appointment and Assignment Process**, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-family-court-judicial-appointment-and-assignment-process> (reporting on the delays and disruption that result from judicial vacancies and transfers in Family Court, and recommending the following: increase the number of Mayor’s Advisory Committee on the Judiciary (MACJ) members; enhance communication and planning between MACJ and OCA; reevaluate the current rule that fully vetted judicial applicants who are identified as excellent candidates for appointment but are not appointed within six months must begin the application process anew if they wish to continue to be considered for appointment; select appointees before vacancies arise and take the additional steps necessary to fill vacancies expeditiously; enhance both MACJ’s and OCA’s technological resources and improve data collection and analysis; use a distinct application and review process for judicial reappointments in order to complete the reappointment process more expeditiously; improve training programs offered to judges presiding in the Family Court; allocate short-term cases to judges who are transitioning out of the Family Court; and increase transparency in the reassignment process managed by OCA.)