MOBILIZATION FOR JUSTICE
Advocacy & Legal Services Since 1963

100 William Street, 6th Floor
New York, NY 10038
Tel 212-417-3700
Fax 212-417-3890
www.mobilizationforjustice.org

VIA EMAIL (lmarks@nycourts.gov)

May 15, 2020

The Honorable Lawrence K. Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Re-Opening New York State Courts

Dear Judge Marks:

We write concerning the re-opening of New York courts amid the ongoing COVID-19 crisis, with attention to implementation of Administrative Orders (AO) 85/20 and 87/20, and Directive and Procedure (DRP) 208 of the Civil Court of the City of New York. We appreciate the Office of Court Administration's leadership in physically closing the courts in mid-March to protect court personnel, attorneys, litigants, and members of the general public. As the courts shift to virtual operations to prevent backlogs and comply with social distancing protocols, we recognize the challenges faced by the court system and the bar. We are concerned, however, that certain considerations impacting the populations we serve have been overlooked in the most recent orders and directive. We respectfully seek to highlight those considerations and suggest appropriate modifications.

Mobilization for Justice (MFJ) envisions a society in which there is equal justice for all. Our mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised, or have disabilities. We do this by providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation. We assist more than 10,000 New Yorkers each year, benefitting over 25,000. Our services include providing representation and *pro se* assistance to litigants in New York City Civil Courts and Supreme Courts, and includes staffing courthouse clinics across New York City.

I. *Pro Se* Litigants Will be Adversely Impacted by Strict Implementation of AOs 85/20 and 87/20 and DRP 208.

While MFJ recognizes the important and difficult task of carefully re-opening the courts, we urge OCA to consider the needs of unrepresented parties as it transitions to virtual operations. We are particularly troubled by implementation of AO 87/20, which does not identify exceptions

for *pro se* litigants from the Electronic Document Delivery System (EDDS). Although AO 87/20 is silent on EDDS's application to unrepresented parties, the Civil Court of the City of New York has specifically directed, pursuant to AO 87/20 authority, that "[u]nrepresented litigants may make motions and other applications to the Court through EDDS and *are expected to respond* to motions made through EDDS." DRP 208 (emphasis added). This directly contradicts sound public policy and the Civil Practice Law and Rules (CPLR). We are also concerned about the application of AO 85/20, which provides for virtual conferencing of pending cases, on unrepresented litigants. As drafted, these measures will adversely impact our most vulnerable New Yorkers, particularly communities of color.

Most *pro se* litigants are individuals who are low-income, seniors, of limited English proficiency (LEP), and/or have disabilities. Because of these special circumstances, many unrepresented parties do not have the technology and/or ability to use the EDDS or participate in virtual appearances.[1] They do not have email addresses, much less computers, printers, scanners, fax machines, and, importantly, high-speed internet. Many *pro se* litigants will also be unable to navigate the EDDS on their own. For example, Mr. B, who is facing a foreclosure proceeding in Kings Supreme Court, is a 99-year-old African-American Brooklyn homeowner who is visually impaired and does not have a computer or email address. Although Mr. B was able to retain our services prior to this pandemic, his lack of technology access and computer literacy is representative of the many New Yorkers who contact MFJ every day for *pro se* advice and counsel. Ms. N, a 70-year-old African-American tenant, is one such litigant who is currently *pro se*, and is facing a complex holdover proceeding in New York County housing court. She has no reliable access to email and relies on her children, who live out of state, to manage many of her personal affairs. Additional technological requirements will exacerbate the challenges that *pro se* litigants like Ms. N already face in defending their cases and protecting their rights. The New York State Legislature has previously recognized these concerns, which is why it explicitly exempted *pro se* litigants from electronic service and mandatory e-filing programs. *See* CPLR Rule 2103 (prohibiting electronic service upon unrepresented parties); CPLR § 2111 (requiring unrepresented parties to affirmatively opt into mandatory electronic filing).

Further, although the difficulties faced by *pro se* litigants are often mitigated by limited scope legal assistance programs, these court-based programs are currently suspended. While *pro se* litigants like Ms. N would typically be able to access a court-based clinic or "friend-of-the-court" volunteer attorney for the day, these services—which are often of mutual benefit to the courts—are otherwise unavailable to assist unrepresented litigants in managing the legal process. Faced with the difficult choice of addressing their legal problems or maintaining social distancing, a *pro se* litigant who receives a motion by mail or e-mail pursuant to AO 87/20 and DRP 208 will likely travel to a courthouse for assistance, where these legal assistance programs will not be available to them, or attempt to comply with EDDS procedures by going to libraries, copy shops, and other businesses that may remain closed.

[1] A review of MFJ's client database revealed that less than 10 percent of the people who sought our help in 2019 provided us with email addresses, and 30 percent of them indicated that English is not their primary language.

Where certain *pro se* litigants might otherwise be capable of attending virtual court appearances or filing documents with EDDS, many are facing additional scheduling pressures due to COVID-19 that make these new requirements impractical. Many litigants who cannot afford attorneys work in service industries that are deemed essential, including healthcare, grocery stores, food service, delivery service, laundromats, and building maintenance. While these essential workers are busy keeping the State running, their ability to take time off to attend virtual appearances or file papers through EDDS will be limited. For *pro se* litigants who can work from home, and may have computer, printer, and scanner access, many are facing unexpected scheduling pressures, including caring for children and other loved ones.

Because of the disproportionate impact of COVID-19 on communities of color, OCA's technological requirements will likely have a parallel disproportionate impact on these same communities. As of May 13, 2020, according to the New York State Department of Health (NYSDOH), although Black and Hispanic residents account for 51 percent of the NYC population, they account for about 62 percent of NYC's COVID-related fatalities. Across the State, excluding NYC, NYSDOH reports that Black and Hispanic residents account for just 21 percent of the population, but over 33 percent of COVID-related fatalities.[2] As recognized by the New York State Legislature, this disproportionate impact is reflected nationally in COVID-related infection, hospitalization, and fatality rates.[3] One explanation for this stark disparity is that persons of color are less likely to be able to work from home. If they are able to work at all, minorities are more likely to work in essential services, meaning they are subject to increased viral exposure. In NYC, according to the New York City Comptroller, 75 percent of frontline workers—such as nurses, janitors, grocery clerks, and transit employees—are people of color.[4] These workers are unlikely to be able to afford an attorney or participate in virtual court operations. If OCA imposes technological requirements that litigants cannot meet while practicing social distancing, it will exacerbate the widely recognized disproportionate impact of COVID-19 on minorities.

In addition to the practical and policy concerns of the Court's orders and directive raised above, they are inconsistent with the CPLR. DRP 208 specifically directs unrepresented litigants to respond to motions filed through EDDS, and AO 87/20 requires that all documents filed through EDDS "be served by electronic means, including electronic mail or facsimile." The use of service by "electronic means" upon *pro se* litigants is expressly prohibited by CPLR Rule 2103, which states: "[i]f a party has not appeared by an attorney . . . service shall be upon the party by a

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[2] New York State Department of Health, *NYS COVID-19 Tracker: Fatality Data* (May 2020), *available at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n* (preliminary data as of May 13, 2020, with 99 percent reporting for NYS and 63 percent reporting for NYC as provided by the New York City Department of Health and Mental Hygiene).

[3] On May 1, 2020, the New York State Legislature announced it would "receive testimony to examine the disproportionate impact of COVID-19 on minority communities," in light of data reports that show "a wide disparity in the disease's impact."

[4] New York City Office of the Comptroller, *New York City's Frontline Workers* (Mar. 2020), *available at https://comptroller.nyc.gov/wp-content/uploads/documents/Frontline_Workers_032020.pdf* (citing United States Census Bureau, American Community Survey 2014-2018 5-Year Estimates).

method specified in paragraph one, two, four, five or six of subdivision (b) of this rule" and which specifically excludes paragraph seven, which allows transmitting papers "by electronic means." And CPLR § 2111, which pertains to e-filing, requires participation to be "strictly voluntary" and "upon consent of all parties." CPLR § 2111(b)(1). Such consent cannot be eliminated in certain actions, including **"**residential foreclosure actions" and "proceedings related to consumer credit transactions." CPLR § 2111(b)(2)(A). Furthermore, under CPLR § 2111(b)(2)(C)(ii), the consent requirement may not be eliminated without public comment and only after the chief administrative judge has "consulted with members of the organized bar including but not limited to city, state, county and women's bar associations; with institutional legal service providers; [and] with not-for-profit legal service providers," among others. CPLR § 2111(b)(2)(C)(i).

To address these concerns, we urge OCA to immediately withdraw DRP 208 as it applies to *pro se* litigants and issue additional guidance as to AOs 85/20 and 87/20. In light of the above, unrepresented litigants should not be penalized in any manner for failing to participate in electronic/virtual operations. No default judgments should be entered against *pro se* litigants at this time, either for failure to appear for a virtual court appearance, or for failure to respond to improperly served documents. The AOs must also clarify that papers should not be served upon *pro se* parties at this time under any means, unless the *pro se* litigant has affirmatively consented to participation in electronic filing pursuant to CPLR § 2111. Failure to do so may impose unnecessary risks on *pro se* litigants and the general public.

Even if measures were put in place for *pro se* litigants to affirmatively opt in to electronic service and EDDS filings, OCA must address several additional questions this would raise as to whether the Court will verify proper service, whether parties may serve documents on their own behalf, and how litigants may notify courts and adversaries of an appropriate e-mail address for serving papers.

II. Moving Nonessential Matters Forward Prematurely Will Prejudice Low-Income Litigants Represented by Legal Services Organizations and Will Undermine Public Confidence in the Judicial System

We are also concerned about the ethical and practical implications of prematurely requiring virtual appearances in nonessential matters involving represented parties. Courts should move these cases forward cautiously, or not at all, because represented litigants will not have the ability to meaningfully participate in their own cases, and records will not be fully developed due to law offices and courthouse closures. Courts must also ensure that any judicial proceedings take place on the record and are open to the public. Moving non-emergency matters forward before clearing these obstacles is contrary to attorneys' ethical obligations to act in our clients' best interests, will erode the faith of the public in our judicial system, and will significantly undermine the administration of justice.

Many of MFJ's clients will not be able to access the courts virtually because they are individuals with LEP, seniors, low-income, or have disabilities, or because they simply lack the necessary technology or resources. Our clients will thus be excluded from virtual court appearances where their homes, livelihoods, and families are on the line. Conducting such appearances when our

clients wish to be present will dramatically undermine the attorney-client relationship and further prejudices the most vulnerable litigants, even when they are represented by counsel. Further, because of limited technology access and social distancing requirements, many of our clients have been unable to provide documents necessary for their cases, presenting challenges to defending them. For example, Mr. B, the 99-year-old MFJ client referenced above, is isolated without computer access in his home. Because of his age and health, it is particularly unsafe for Mr. B to meet with his attorney or go to a postal office to mail documents at this time. Attorneys who are unable to obtain documents from their clients will be unable to develop full records, especially when our own physical files are inaccessible and public court files and documents maintained by other governmental entities are not easily accessible. Even when files are accessible, cases should not proceed without a formal record. This precludes meaningful appellate review of virtual proceedings. In cases with fully briefed motions, or in instances where a formal record is not explicitly required by law, it would be a dereliction of our duties to our clients to advance their cases without fully developing the record and with limited accountability to our clients.

The public at large is also not well served by off-the-record appearances, or by virtual court appearances that are not truly open to the public. As New York courts begin to re-open and consider an expanding docket of cases, they must ensure that the public at large has access to court proceedings, filed documents, and judicial decisions. Virtual court appearances should not result in the erosion of the public's fundamental right of access to judicial proceedings which promotes public trust in the judicial process.[5] Closed door proceedings reinforce the view held by many of society's most vulnerable members that the legal process is intentionally kept out of their reach.[6] It is important that non-lawyers and non-interested parties have access to ensure the system functions for all court users and that the judiciary process and its actors remain accountable to the public, no matter the format of the proceeding.

Parties and the public are also not served by EDDS, which, unlike NYSCEF, does not allow anyone outside of the court to see what has been filed. The system also does not allow multiple attorneys in one firm to opt-in to receiving service. As a result, papers may not be properly served or may be served using an inactive or inaccurate e-mail address. Attorneys have no way of knowing that papers were served. To that end, represented parties should be given the option

[5] The New York State Legislature has declared that "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same" with only limited statutory exceptions. Judiciary Law § 4. The Court of Appeals has also recognized that court proceedings are "presumptively" open to the public. *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 423 N.Y.S.2d 630 (1979). In civil cases, like in criminal ones, the right of public access promotes public trust in our justice system. *Id.* ("[P]ublic awareness serves to instill a sense of public trust in our judicial process . . . . Justice must not only be done; it must be perceived as being done.").

[6] *See, e.g.*, Willow Research, LLC, *Do Americans Have Confidence in the Courts?* (2019), *available at* https://willowresearch.com/wp-content/uploads/2019/10/Public_Confidence_in_US_Courts.pdf (National polling data shows that 70% of Americans believe that "the courts do not treat poor and wealthy people alike" and more than half believe that "the courts do not treat people of different races alike."); GBA Strategies, *2018 State of the State Courts – Survey Analysis* (2018), *available at* https://www.ncsc.org/~/media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2018_Survey_Analysis.ashx (national survey found that African American voters were significantly less likely than white voters to believe that state courts were fair and impartial, provide equal justice for all, and were administered by judges who understand reflect the values of their communities and the challenges they face).

to opt in to EDDS and to designate an appropriate e-mail address for serving process. The EDDS procedure should also prompt parties to make sure that they are not filing any sensitive personal information.

Further, the courts should not grant defaults with regard to court appearances, even in cases where both sides are represented by counsel while New Yorkers continue to face an unprecedented health crisis. Courts should also provide adjournments and should grant automatic extensions to ensure that represented parties are able to meaningfully participate and develop full records in their cases. Attorneys should not be required to conference their cases or argue motions off the record.

To further ensure public access to the Court system, OCA should ensure that all judicial decisions are posted on the New York Slip Opinion service and not merely distributed by e-mail or mail to the parties involved, as is often the case in the Civil Court of the City of New York. To the extent certain virtual proceedings do move forward, mechanisms must be in place to ensure that the public has a means of witnessing live proceedings, without traveling to the courthouse.

In summary, we urge OCA to state unequivocally that DRP 208 does not apply to *pro se* litigants; that *pro se* litigants not be penalized for failure to participate in or comply with electronic and virtual court operations; and that certain measures be implemented with regard to EDDS and virtual court appearances, even where all parties are represented, to ensure fairness and accountability. Until these concerns are addressed, the Court should continue to limit court proceedings to only essential cases, rather than move more operations into a virtual world with limited access and scrutiny by the public. We also ask that you consult with our office and other legal services providers when making future decisions about opening the courts further.

Sincerely,

Jeanette Zelhof
Executive Director
(212) 417-3727
jzelhof@mfjlegal.org