

**NEW YORK STATE SENATE JUDICIARY COMMITTEE  
NEW YORK STATE SENATE CODES COMMITTEE  
NEW YORK STATE SENATE HOUSING, CONSTRUCTION AND COMMUNITY  
DEVELOPMENT COMMITTEE**

**ONLINE PUBLIC HEARING TO EXAMINE THE RE-OPENING AND OPERATION  
OF NEW YORK'S COURTS DURING THE COVID-19 PANDEMIC  
AUGUST 21, 2020**

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**WRITTEN TESTIMONY OF PROFESSOR CONRAD A. JOHNSON,  
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My name is Conrad Johnson. I am a Clinical Professor of Law at Columbia Law School, where I've been a full-time member of the faculty for thirty-one years. For the past twenty years, I have co-directed Columbia's Lawyering in the Digital Age Clinic along with Prof. Mary Marsh Zulack and Brian Donnelly. The Clinic was the first nationally to focus on the intersection of technology and law practice. Our clients have exclusively been public interest legal organizations such as, The Legal Aid Society of NYC, the Legal Services Corporation and the Western NY Law Center. These organizations come to us seeking help with integrating technology into their service delivery systems. We have also worked closely with prominent jurists, including Chief Judges Jonathan Lippman and the late Judith S. Kaye, who sought our help in using technology to expand access to justice. Prior to becoming a professor, I served for twelve years as a student, staff attorney and Attorney-in-Charge of The Legal Aid Society's Harlem Neighborhood Civil Office.

The chickens have come home to roost. My experience as an academic and an attorney working in the public interest arena for more than forty years makes it abundantly clear that the unequal distribution of resources that afflicts our society generally is also manifested in the resources available to many New York Courts. Most, if not all court proceedings that involve predominantly lower-income communities are afforded far fewer resources than are available in venues that adjudicate the claims of more monied interests.

This results in many shortcomings. However, the pandemic has brought some into sharper focus because they point to the many ways in which the overcrowded courtrooms, inadequate staffing, bulging dockets and insufficient space allocations make it unsafe to reopen proceedings in person.

We are all in this together. This has always been true, but it was easy for some to ignore the problems that face certain segments of our population in the past. If this pandemic as taught us anything it is that we are inextricably interconnected. Therefore, the caution with which the courts have, until now, approached reopening is wise. I commend Judge Marks and those working under extraordinarily challenging circumstances at UCS and OCA for their good works and prudent precautions.

Chief among those precautions is the moratorium on evictions. This is vital to our collective public health. We cannot have more people in the courts or traveling to and from the courts on mass transit to defend against eviction. Allowing summary eviction proceedings to resume will inevitably lead to more New Yorkers doubling up in cramp quarters and in the shelters or living in the streets at a time when we desperately need to flatten the curve to protect everyone.

Specifically, Administrative Order 160/20 issued on August 12<sup>th</sup> permitting more than 200,000 eviction cases filed before March 17<sup>th</sup> to proceed and another 14,500 pre-pandemic eviction warrants to move forward is unwise. The virus does not care whether judges, court personnel, attorneys and litigants are forced together to resolve old or new cases. The threat of infection transmission as a result of in-person proceedings is just as real whether the cases were filed before or after March 17<sup>th</sup>.

I am also troubled by the comments made today by Judge Marks during his testimony indicating that the eviction moratorium will end on October 1<sup>st</sup> without legislative intervention.<sup>1</sup> *See also*, the note about the CDC Moratorium that appears at the end of this document.

If in-person litigation is unwise at this time, what can the courts do to move forward responsibly? Are virtual proceedings the answer?

First, it's important to understand that the digital divide is real and it exists along the fault lines of inequality that have been exposed by the pandemic. Technology is still in short supply when it comes to meaningful access to virtual proceedings for huge swaths of New Yorkers. For example, 1.5 million New York City residents have neither a mobile connection nor a home broadband connection. 46% of New York City households living in poverty do not have broadband in the home.<sup>2</sup>

These barriers are not reserved for low-income communities or communities of color, they extend to many seniors, as well as those grappling with the physical and cognitive deficits.

Virtual proceedings also present a myriad of difficulties that can make meaningful participation impossible. These challenges include:

- Hurdles of presenting relevant evidence
- Maintaining confidentiality generally
- Allowing for private attorney-client consultation in real time that allow for the “effective assistance of counsel”.

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<sup>1</sup> It appears that the intimation by Judge Marks that the moratorium will not be continued by OCA without intervention by the legislation or the Governor has been reaffirmed by OCA. *See*, [https://www.law360.com/newyork/articles/1306310/ny-courts-say-state-has-1-month-to-act-on-eviction-hold?nl\\_pk=12d64b2a-c270-4a43-b595-243c8932fccd&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newyork](https://www.law360.com/newyork/articles/1306310/ny-courts-say-state-has-1-month-to-act-on-eviction-hold?nl_pk=12d64b2a-c270-4a43-b595-243c8932fccd&utm_source=newsletter&utm_medium=email&utm_campaign=newyork)

<sup>2</sup> <https://www1.nyc.gov/office-of-the-mayor/news/010-20/de-blasio-administration-releases-internet-master-plan-city-s-broadband-future>

- Not to mention the simple ability to see, been seen, hear and be heard in the face of unstable internet connections and expensive data plans.

OCA should take the time to consider, with input from stakeholders, how best to create viable, legally sufficient measures to support fair and fruitful virtual proceedings that do not undermine public health objectives.

By way of an offer, my clinic at Columbia would be pleased to work with the Senate to create workable safeguards for representing parties in virtual proceedings.

I will leave you with one simple principal that can guide these efforts. In considering these measures, courts should abide by the principal that litigants can waive their due process rights to the extent that the waiver is based on informed consent. This is a time-honored problem-solving tool that courts already use in all the time. In Housing Court, litigants in a Resolution Part can choose to waive their right to a trial through a mutually agreeable stipulation of settlement, just as criminal defendants can consent to plea bargaining.

However, due process rights should not be trampled by the court through procedural devices that fail to recognize and mitigate the disparate impact and due process consequences that significant segments of the public will face if virtual proceedings are imposed without sufficient regard for the technological challenges these processes present. The use of waivers can be helpful if counsel can be consulted. Waivers by unrepresented parties can lead to unknowing forfeiture of significant due process protections.

In addition to the above I want to:

- Endorse the recommendations by the Fund for Modern Courts and the NY Legal Services Coalition regarding a centralized part for eviction proceedings outside of New York City.
- I also favor the very wise the recommendations from Western NY Law Center regarding the need for consumer and foreclosure cases to go forward virtually with ample safeguards.
- Finally, I join The Legal Aid Society in urging the legislature to create adequate rent subsidies to prevent wholesale homelessness resulting from the economic impact of the pandemic. Senator Salazar and Assembly member Niou were kind enough to solicit our findings in support of that subsidy. I would be happy to forward our report to this body as well.

Post-hearing note about the new CDC Moratorium:

The Centers for Disease Control and Prevention issued a [four-month eviction moratorium](#). This moratorium would stay many, though not all, evictions through the end of the calendar years. While the moratorium is certainly a step in the right direction, it is at best a partial and temporary respite for some.

Unfortunately, the CDC regulation will not extend relief to tenants in unregulated apartments where the landlord can avoid the moratorium by bringing a “Holdover” eviction

proceeding based on the non-renewal of the tenant's lease. This means that tenants in the thousands of unregulated units in New York City and the many more such units throughout the State will not be protected. Given the additional burdens incorporated into the sworn "declaration" that all tenants on the lease must create and the litigation that will likely ensue, it is imperative that the legislature and Governor immediately enact a full-fledged moratorium to cover all tenants statewide. Thank you.