

The logo for the New York City Bar, featuring the words "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

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Via Email

April 6, 2020

Honorable Janet DiFiore
Chief Judge of the State of New York
New York State Unified Court System
25 Beaver Street
New York, NY 10004

Honorable Lawrence K. Marks
Chief Administrative Judge
New York Unified Court System
25 Beaver Street
New York, NY 10004

Dear Chief Judge DiFiore and Chief Administrative Judge Marks:

We write on behalf of the New York City Bar Association, first, to extend our deep appreciation for everything that you and the Unified Court System are doing to protect the public, court personnel, lawyers and litigants during the COVID-19 crisis. We fully understand the balancing act that needs to take place given so many – and sometimes competing – interests, not to mention the near-daily changes in the facts and circumstances. The UCS, under your leadership, should be commended.

We write, secondly, to offer our assistance as you continue to chart a course for UCS's operations going forward. Our members have been following closely the Governor's Executive Orders, the Chief Judge's video messages, and the Administrative Orders as they pertain to representation of clients, particularly in essential matters (which we agree should be a priority). They also have been engaging in conversations among themselves in order to ascertain how best to represent their clients and resolve disputes without requiring immediate court intervention.

To that end, we endeavored to collect reactions and thoughts from our committee members, in particular, those who litigate civil cases in Supreme Court.¹ We pass them along here and remain available to discuss any of these issues further if that would be helpful. Of course, we understand that you may not be in a position to take up these issues right away and we certainly do not intend that any of these suggestions be read as to require court personnel (or anyone, for that matter) to physically be in a courtroom. We raise them here more in the vein of flagging areas

¹ The City Bar members who litigate in New York City's high-volume courts may experience the court's directives in a manner that differs from those who practice primarily in Supreme Court. Thus, this letter does not represent the views of our Housing Court Committee, Civil Court Committee or Family Court and Family Law Committee. If appropriate, we will present those views via separate letter at a later date.

for further consideration as virtual operations continue to unfold and as the bench and bar work together so that legal matters, wherever practicable, can move forward and reach resolution.

The first and most prevalent reaction among our committee members was how to distinguish “essential” versus “non-essential” matters. Although the list of presumed “essential” matters is very helpful, practitioners are unsure how to proceed if they believe a matter is essential but it does not appear on the pre-approved list (beyond the guidance to proceed by order to show cause seeking emergency relief). They would greatly benefit from a clarification of (1) how the determination of “essential” will be made, and (2) whether UCS is open to expanding the “essentials” list to include certain discrete items or if the preference is for such items to be decided on a case-by-case basis. For example, when a federal action for which the Governor’s tolling order may not apply is ready to be filed in state court and the statute of limitations is approaching, will counsel be permitted to file? Can the need for a receiver generally be deemed an “essential” matter?

Second, our members are acutely aware of the myriad difficulties associated with court personnel working from home. That said, it would be beneficial to know whether guidance is forthcoming as to how lawyers can responsibly and within the boundaries of court directives communicate with court personnel remotely. We also would urge that consideration be given to the special circumstances present when one party is represented and the other party is not. It may be that actions with unrepresented parties cannot proceed remotely except under certain circumstances.

Third, members believe that the Court generally should encourage attorneys to work remotely and, to the extent possible, conduct discovery and engage in motion practice, although some expressed concern about the potential imbalance of resources and access to technology and clients. In those cases where proceeding remotely is possible on both sides, they suggest that motions could be fully briefed and bundled without needing to file in court, and then presented to the judge either remotely (if that becomes an option) or placed with priority status on the calendar when operations resume. For cases that are already fully briefed and teed up, members believe that most lawyers would consent to having arguments heard remotely, so long as that option is administratively and technologically available.

Fourth, although current circumstances may cause lawyers and clients to resolve disputes outside of court processes so that cases can move forward and possibly settle, in those situations where voluntary resolution is not possible, might there be a way to access a mediator from the court’s existing list? Our understanding is that mediators, including many on the Commercial Division’s roster of neutrals, are prepared to conduct virtual Zoom mediations, which would be appropriate in many cases. At a minimum, perhaps the Court could advise parties of this opportunity. We believe the use of mediators in this fashion presents a good opportunity to keep moving forward with presumptive ADR - particularly mediation, where the parties and attorneys have the capacity to do so and have access to necessary documents and records. Alternatively, perhaps parties should be encouraged, where appropriate, to enlist the help of a private discovery referee.

Fifth, members are unsure that the April 19 tolling order will prove to be a sufficient amount of time and urged that, as the deadline approaches, the bench and bar collaborate on requesting that the Governor extend tolling beyond April 19.

Sixth, there is widespread support for continuing to build out all feasible “virtual” options so that lawyers, clients and court personnel can communicate and resolve disputes outside of the confines of the courtroom.

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We hope you find these thoughts helpful and, as always, we stand ready to assist. Our members are eager to work with UCS to get through this crisis together. We hope that you and your family, friends and colleagues remain safe and well, and that those who have fallen ill have a full recovery. Please also accept our deepest condolences on the passing of Justice Baynes.

Respectfully,

Roger Juan Maldonado
President

Bart J. Eagle
Chair, Committee on State Courts of Superior Jurisdiction

John M. Lundin
Chair, Committee on Litigation

Michael P. Regan
Chair, Council on Judicial Administration