



NEW YORK
CITY BAR

CRIMINAL COURTS COMMITTEE

TERRI S. ROSENBLATT
CHAIR
terrirosenblatt@gmail.com

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Via email

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

Honorable Tamiko Amaker
Administrative Judge
New York City Criminal Court
346 Broadway
New York, NY 10013

Re: Recommendations Regarding the Reopening of New York City's Criminal Courts in Light of the Coronavirus (COVID-19) Pandemic

Dear Chief Judge DiFiore, Judge Marks and Judge Amaker:

I am writing on behalf of the New York City Bar Association's Criminal Courts Committee (with the endorsement of the Criminal Justice Operations Committee, Corrections and Community Reentry Committee and Council on Judicial Administration),¹ to address issues that we believe are critical for a safe return to our City's criminal courts in the aftermath of the COVID-19 pandemic. We believe that the City's criminal courts must have a concrete, cohesive and sensible plan for reopening, and we write with some concern following Chief Administrative Judge Marks's comment in the New York Times that the courts lack a "precise plan" for essential functions like jury trials.²

¹ This letter was updated on July 8, 2020 to reflect the additional endorsement of the Council on Judicial Administration.

² Alan Feuer, N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases, The New York Times (Jun. 22, 2020), available at <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html>. The Unified Court System's June 23 Press Release regarding Phase 2 reopening of the New York City courts references continuing measures of Phase One (e.g., use of masks, social distancing, hand sanitizers), but those measures are general guidelines only, applicable to the reopening of all courts and public places statewide, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_29.pdf. The recommendations made in this letter are specific to New York City's criminal courts and we urge their serious consideration as well as greater communication with stakeholders regarding the reopening process.

We know that this deadly virus has no vaccine and no universally effective treatment. Our committees, composed of members of the judiciary, prosecutors' offices, public defenders and the private defense bar all have lost colleagues and friends to this disease. And we've seen the people who come into the courts as defendants, witnesses, and friends and family, felled at even higher rates.

We would like to ensure that any re-opening plan contains appropriate and sensible precautions. To that end, we raise the following concerns and make the following recommendations, designed to protect our members and colleagues, clients, witnesses and anyone else who comes into or works in the criminal courts. These recommendations bear in mind the sacrosanct function of criminal courts to protect due process and promote justice -- especially critical tasks as this City takes part in a national reckoning on racial bias and disparities in the criminal justice system.

Our recommendations and requests fall into three main categories, detailed here: (1) issues related to resumption of court operations that balance both public safety with the fundamental rights of litigants in criminal court; (2) court-wide safety protocols for all who wish to enter the courthouse; and (3) a request for further dialog and communications as this process continues.

I. ISSUES AND RECOMMENDATIONS CONCERNING CRIMINAL COURT PROCEEDINGS

a. End routine calendar calls, and instead have virtual check-ins through phone or internet

Before the shutdown, courtrooms across the City were packed with defendants all required, as a condition of release, to appear in a single courtroom, all at 9:30 am. Each courtroom operating under this system easily filled with 100 or more people a day. Almost all of these people were simply "checking in," and having their cases adjourned for trial or disposition at a later date.

Instead of this crowded and dangerous procedure, defendants should be allowed to check in virtually with the court as a condition of release, either by phone or internet. A toll-free call in line should be established for this purpose. Defendants should only appear for date and time certain trials, or other dispositions; not merely to have their cases adjourned.

On the occasions where an appearance by a litigant is required, for example, to execute a protective order over discovery, to enter a plea, or to be arraigned on an information or indictment, these appearances should be made time-certain, with both attorneys for the prosecution and defense required to confirm that they will be ready to proceed at least 48 hours in advance.

While these changes are suggested in response to the COVID-19 pandemic, we note that they are common sense measures that cut down on the heavy burden placed on litigants to miss work and arrange child care, even beyond this crisis. It will also make for a more orderly courtroom, which benefits court personnel as well.

b. Concerns About Expansion of Other Virtual Proceedings

We have serious concerns about any attempts by the Office of Court Administration to attempt to expand virtual proceedings beyond what already is in place for arraignments and preliminary hearings.

An accused person has a fundamental right to a full and fair opportunity to conduct cross examination, consult with their attorney and have public and transparent proceedings. Virtual hearings, especially suppression hearings, as well as bench trials, threaten those rights. The way the present system for virtual preliminary hearings plays out, in the experience of attorneys on our committees, is that defense attorneys are severely constrained in assessing and challenging witness credibility. Body language, facial expressions, and even tone of voice do not come through in virtual proceedings, depriving any true assessment of the witness. Current technology also diminishes an attorney's ability to confront witnesses and use evidence. Our current virtual connection (Skype for Business) does not permit attorneys to take control of screens to display evidence, hampering any ability to admit such evidence or question witnesses over relevant documents or videos. Internet connectivity issues and time constraints often curtail cross-examinations.

Unfortunately, the person accused in these proceedings is often treated as an afterthought. Breaks for consultation are nearly impossible under the current technological system, depriving the accused of critical and invaluable input into their own case. Attorney-client communication is, of course, not only a fundamental right but also essential to effective representation. Any proceedings need to allow for confidential conversations to happen as frequently as necessary and without burden.

Meanwhile, public access to proceedings is minimal, to the extent it exists at all. While the courts employ various procedures for granting public access, such as public Skype logins and limited courthouse viewing, none of these options provide for full, open and transparent courts. Public access must be a priority in any reopening plan, with an emphasis on making sure that courts are available for members of the community who may not have access to high speed internet or other advanced technology. On the other hand, public access cannot violate the same privacy for the accused and witnesses that they would have in court. The sanctity of court proceedings cannot be violated by recordings, which could be posted on social media and never sealed.

Under the present conditions, any expansion of virtual hearings or other proceedings is, at best, premature and, at worst, simply impossible. We respectfully submit that before any plans are made to expand the virtual criminal courtroom, all of the concerns we have raised, along with those of other stakeholders, must be addressed. We suggest that court administrators investigate technological solutions, such as alternate software providers that would allow for confidential communications, which may meet these concerns, but we caution that sufficiently advanced programs may not yet exist.

c. Grand Juries and the Suspension of CPL 180.80

The Governor's Executive Order #202.28 largely suspended grand juries in New York City, while also limiting mandatory release under Section 180.80 of the Criminal Procedure Law. As a result, prosecutors are unable to secure indictments, while people accused of crimes who cannot afford bail are languishing in jail without having a grand jury review their case. We urge the Office of Court Administration to prioritize creating safe, socially distant, ways to re-convene grand juries, and then fully restore the protections of CPL 180.80. In the meantime, people in City jails should have preliminary hearings as close as possible to the CPL § 180.80 date.

II. CONTINUED SAFETY IN THE COURTHOUSE FOR THE PUBLIC, LITIGANTS, ATTORNEYS AND COURT PERSONNEL

a. Require PPE for all people who enter the courthouse, and provide it for those who don't have it

Consistent with all other public spaces, and as recognized in the June 23 press release, New York City courts must require people who enter to wear masks and not show symptoms of illness. However, the courts should not turn litigants, victims, or members of the public away for lack of PPE and instead should provide masks for those who do not have one.

b. Consult with health experts prior to, and during, re-opening

Ensuring the safety of the courts should not be left only to judicial administrators. Instead, the Courts should engage a certified OSHA specialist to approve of all re-opening plans, and monitor progress through the Fall in the event of a second wave.

c. Expand the electronic capabilities of clerical services

In a further effort to reduce in-person traffic in and around courthouses, we would welcome a permanent e-filing/e-service system in criminal cases (while maintaining the ability to file in-person and mail for pro-se litigants), a virtual cashier's part to check the status and pay fees, and the ability to obtain certificates of disposition completely online.

III. CONTINUE COMMUNICATIONS WITH THE CITY BAR CRIMINAL JUSTICE CLUSTER

a. Maintain an open dialogue

Finally, as an active bar association with members from all criminal justice stakeholders, we would welcome the opportunity to meet with you and discuss your plans, and our concerns in greater detail. The committees of the Criminal Justice cluster request walk-throughs prior to reopening, and to be involved in conversations about the process going forward. We request that all court procedures concerning cleaning, safety and other related matters be communicated in written memoranda, available to stakeholders and the public.

Thank you for your consideration. As always, we stand ready to assist.

Respectfully,

Terri S. Rosenblatt, Chair
Criminal Courts Committee