

**NYLAG ISSUE BRIEF**

**ACCESS TO JUSTICE IN VIRTUAL  
COURT PROCEEDINGS: LESSONS FROM  
COVID-19 AND RECOMMENDATIONS FOR  
NEW YORK COURTS**



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**The COVID-19 crisis has upended many aspects of New Yorkers’ lives—endangering their health, causing record unemployment rates, creating new fears of eviction and homelessness, and severing the fragile threads of the social safety net on which so many New Yorkers experiencing poverty rely. Critical among these changes were the sudden limitations on New Yorkers’ ability to access the civil justice system.**

New York’s courts went almost entirely virtual in March 2020, and, for more than a year, only limited proceedings were scheduled. Even where proceedings were scheduled, litigants faced significant hurdles in obtaining court documents, filing papers, and meaningfully appearing by telephone and computer to vindicate their rights. These challenges have been especially acute, and the consequences particularly significant, for the 1.3 million New York City residents who live below the federal poverty level.<sup>1</sup> The courts are the final bulwark between these individuals and homelessness, loss of income, imposition of debt, or continued abuse—and most often they navigate the court system on their own.

Numerous administrative hearing systems experienced similar disruptions, including those that adjudicate disputes between individuals and government bodies over public assistance, Social Security, special education, and immigration. This Issue Brief explores the most significant hurdles posed by virtual court and administrative proceedings during the COVID-19 pandemic and recommends steps for improving such proceedings in the future. These lessons are particularly important as we contemplate a less-than-full return to a pre-pandemic justice system.

**The New York Legal Assistance Group (NYLAG) has helped thousands of New York City residents in legal proceedings since the outset of the pandemic crisis, including:**

- Tenants fighting removal proceedings in Housing Court,
- Domestic violence victims seeking orders of protection in Family Court,
- Public benefits recipients challenging wrongful denials in administrative fair hearings,
- Detained immigrants asserting defenses to removal in Immigration Court,
- Consumers opposing improper debt collection in New York City Civil Court,

- Social Security recipients seeking to reinstate benefits before administrative law judges,
- Individuals seeking to serve as guardians for incapacitated loved ones,
- Students with disabilities seeking special education services, and countless others.

This Issue Brief is based on the experiences of NYLAG case handlers representing these clients, as well as consultations with our peer legal services providers and other stakeholders. We want to express our gratitude in particular to our peer organizations, whose advocacy and experiences contributed substantially to this Issue Brief. This document compiles and synthesizes the advocacy of both NYLAG and our many coalition partners, with the goal of amplifying the effect of those efforts for the benefit of New York communities experiencing poverty.

## WHAT COVID-19 TAUGHT US ABOUT ACCESS TO JUSTICE

NYLAG’s experiences litigating on behalf of low-income New Yorkers during the pandemic have taught us critical lessons about accessing justice during this time of crisis—and, in particular, the unique challenges of “virtual” judicial proceedings.

**We have seen many successes**, demonstrating that meaningful access to justice remains possible even when in the virtual format. Certain types of proceedings pivoted effectively to a virtual model, and, for some participants, such proceedings were in fact easier to attend than those conducted in person.

**But we have also observed critical failures** that have undermined access to due process for NYLAG’s clients and, even more egregiously, those who face the court system unrepresented. What is most remarkable about these failures is that they are extremely consistent regardless of the forum—judicial or administrative, state or federal. But what is also noteworthy is that each type of challenge is fundamentally capable of being either fully solved or significantly

mitigated with careful, consistent, and concerted action.

It has become increasingly clear that courts and other adjudicative bodies will not be returning to “pre-pandemic” practices in the near future. Even as some proceedings return to a traditional live format, many others may continue remotely for a long time—and perhaps, for some types of proceedings, forever. The way in which this transition is managed has critical consequences for New Yorkers. If handled correctly, it could not only ensure access to justice at pre-pandemic levels, but, for some individuals—such as those with disabilities who were historically unable to access brick-and-mortar courts—provide greater accessibility.

This Issue Brief outlines NYLAG’s observations about what has worked—and, more importantly, has not worked—about virtual proceedings during the pandemic, and suggests how courts can address concerns going forward so that all New Yorkers are meaningfully able to access justice in virtual forums. Specifically, we describe four primary categories of challenges that we have seen arise across multiple forums:

1. **The digital divide** and technological obstacles to accessing virtual court proceedings, including limitations on the courts’ own technological access;
2. **Need for transparent, clear, and consistent procedures** to govern virtual proceedings;
3. **Meaningful access to filing, court files, evidence, and counsel**, which are critical systems underlying court proceedings; and
4. **Accessibility of courts**, particularly for litigants with disabilities or limited English proficiency.

We emphasize that for each of these categories, these observations and recommendations offer only a starting point. None of these challenges can be managed successfully unless the administrators of courts and similar bodies are seeking and acting on detailed advice from stakeholders, including partners within the legal services community. NYLAG is eager to engage in an ongoing dialogue on these critically important issues.

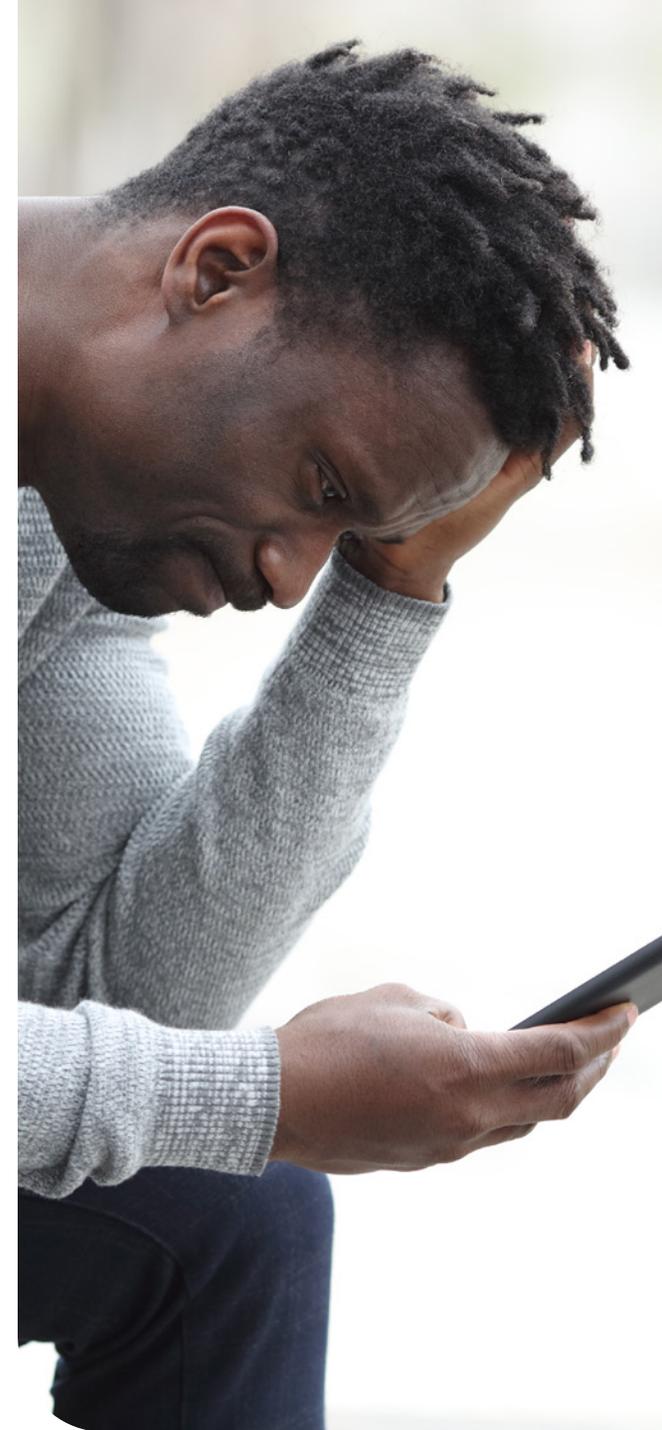
# 1: THE DIGITAL DIVIDE

## ISSUE: MANY LITIGANTS LACK ACCESS TO NECESSARY TECHNOLOGY

Vast swaths of American life have shifted to telephone and video conferences, and judicial proceedings are among them. In the first year of the pandemic, for example, there were almost one million virtual appearances by litigants, lawyers, and other participants in Family Courts statewide.<sup>2</sup> All administrative hearings conducted by the Office of Temporary and Disability Assistance (OTDA)—including hearings related to Public Assistance, SNAP, and Medicaid—have been held telephonically since March 2020, and OTDA has already announced that hearings will continue in this manner until at least March 2022. The same is true in other forums. But NYLAG’s clients face tremendous obstacles in accessing these virtual proceedings.

Many litigants simply cannot access proceedings via the Internet or even phone. Some do not have reliable telephone access, much less digital access, because they have cellular service subscriptions that rely on purchasing minutes. For these individuals, time spent on the phone is equivalent to money. Other litigants have phones, but the phones are not “smart,” and thus cannot be used to effectively access the Internet: approximately 30% of low-income adults do not own a smartphone.<sup>3</sup> Some have no Internet access, because, for example, they live in homeless shelters. New York City’s own Internet Master Plan, published in 2020, found that 18% of New York City Residents—more than 1.5 million people—have neither a mobile nor a home broadband connection.<sup>4</sup> Over 40% of these households live below the federal poverty line.<sup>5</sup> The federal courts have recognized this serious “disparity in internet access for individuals across New York and across the United States” and noted the “inarguable evidence that many people in America, including many in New York, do not have internet access.”<sup>6</sup> When NYLAG represents clients, we can address these gaps by offering our own resources to clients, but a vast majority of litigants in situations like these do not have access to counsel.

Yet another group of litigants have smartphones, but no computers (nearly half of low-income adults do not own a computer).<sup>7</sup> The result is that while they may be able to attend a video court conference, they do not have a second device available. This can be limiting when, for example, they are directed to convene a separate call to seek the advice of counsel. Moreover, many courts fail to provide instructions to litigants on how to use the technology required to access virtual proceedings, so even litigants who have the requisite devices may not understand how to



log on to access the proceedings. While the pandemic has increased many professionals' comfort with video conference platforms, that is dramatically less so for older individuals and those with limited education.<sup>8</sup>

For example, one *pro se* litigant in New York City Civil Court was sent a calendar invitation via email for her Microsoft Teams court appearance, with no instructions on what to do on the day of the appearance or how to log on. Until connecting with NYLAG, she could not understand what to make of the calendar invitation and was just planning to show up in person at the courthouse (which would almost certainly have been unsuccessful, as the courthouse was not admitting any litigants at the time).

## RECOMMENDATIONS

**Some of these problems can be mitigated with appropriate court procedures, such as the following:**

- ▶ Courts must make step-by-step instructions for accessing technology (including opportunities to test the technology in advance) public and easily available, and should direct litigants to these instructions prior to virtual court appearances. While these instructions do exist on the New York State Unified Court System website,<sup>9</sup> they are not always provided to litigants.
- ▶ Courts should have procedures in place that do not require access to two devices at a time.
- ▶ Courts should make sure that all videoconference proceedings provide an option for telephone access, so that individuals without access to smart phones or strong Wi-Fi connections can still attend their proceedings.
- ▶ Courts should take steps to help litigants with severe obstacles—including diminished capacity—access technology by obtaining assistance from those they trust.
- ▶ Courts must have a backstop for individuals who cannot access virtual proceedings. Ideally, this would involve the ability to come to the physical courthouse in person and access a live proceeding. Or, the Court could make technology available to be borrowed by litigants who must attend virtually. At a minimum, however, courts should make facilities available in courthouses where litigants can access the technology needed to attend their virtual proceedings. This practice is already in place at the New York State Office of Temporary and Disability Assistance's ("OTDA") administrative hearing office in New York City and in housing courts throughout the City.

## **ISSUE: MANY COURTS LACK ACCESS TO NECESSARY TECHNOLOGY OR LACK INFORMATION AND TRAINING ABOUT HOW TO EFFECTIVELY USE THEIR TECHNOLOGICAL RESOURCES**

In NYLAG’s experience, technological difficulties can also plague courts and their employees who are responsible for running virtual proceedings. For instance, many of OTDA’s administrative law judges have stated that they are not comfortable using the telephonic hearing system, and as a result, they are unable to conference in relevant parties. Advocates report that some appellants in those hearings have been asked to choose between having an interpreter or their attorney on the line, simply because the judge was unfamiliar with the procedures to include both. The same has been true in proceedings such as citizenship interviews conducted by U.S. Citizenship and Immigration Services (“USCIS”), where applicants are regularly directed that they can have either an advocate join by phone or an interpreter, but not both. NYLAG has also experienced OTDA’s administrative judges refusing to call additional witnesses with relevant facts to disclose because adding them to the hearing was technologically difficult. We have found that judges in New York Supreme Court have not consistently been aware that certain types of legal proceedings could be held virtually and required multiple contacts with the clerk’s office to determine how to hold proceedings.

Sometimes the technology available to adjudicators is simply inadequate to accommodate the number of participants necessary to provide due process. For example, a hearing on the eligibility of a Supplemental Security Income recipient often must include the administrative law judge, a representative of the Social Security Administration, the recipient, the recipient’s advocate, a language interpreter, a medical expert, and a vocational expert. In one recent hearing, after the interpreter was repeatedly dropped from a telephonic hearing, the judge grew so frustrated that he simply adjourned the hearing, unnecessarily delaying an adjudication on

NYLAG’s client’s eligibility.

In some contexts, it is clear that telephonic hearings are inadequate and that videoconference proceedings would be far superior—yet judges are not given access to that technology. For example, removal proceedings for detained immigrants have been conducted via telephone during the pandemic period. In one proceeding, which involved a non-English-speaking detainee, an interpreter, and multiple lawyers, the judge repeatedly expressed that he had no idea who was talking. While the professional world is regularly conducting hours of meetings daily on Zoom or similar platforms, it is unacceptable that such technology is not being used where it would vastly improve the quality of proceedings.

### **RECOMMENDATIONS**

**These deficiencies should be addressed through the following steps:**

- ▶ All court systems should make sure that judges and court staff have access to the technology needed to effectively conduct virtual proceedings, including telephonic systems that can accommodate a sufficient number of individuals and are user-friendly, and videoconferencing systems akin to those being used regularly by professionals across a variety of fields.
- ▶ All court systems should provide mandatory in-depth training and on-demand technological support to judges and court staff, so that they are trained on how to make the most of the features of available technological systems.
- ▶ All court systems should have a dedicated IT support hotline and email address that litigants can access to deal with technological issues, as clerks’ offices are generally not equipped to give IT advice.

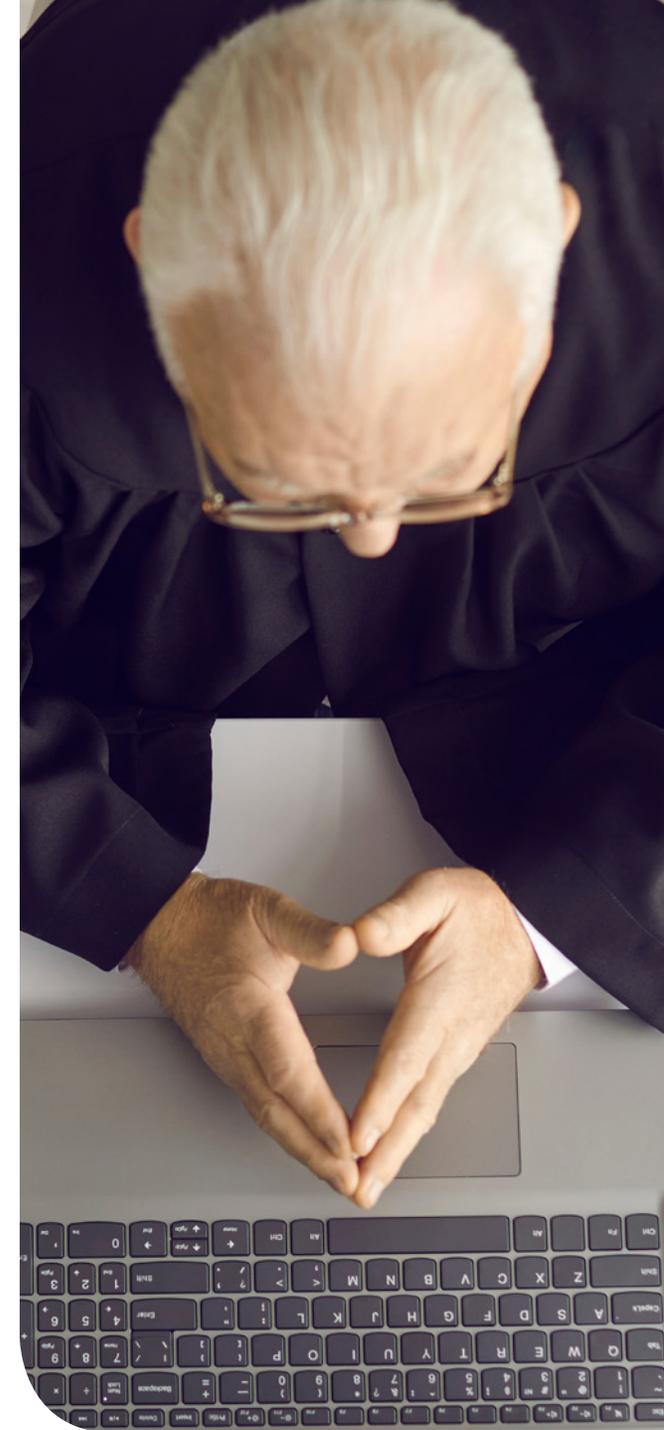
## 2: NEED FOR TRANSPARENT, CLEAR, AND CONSISTENT PROCEDURES

Early in the pandemic, when courts were forced to shut abruptly, procedures for virtual court attendance were necessarily assembled on the fly. They were frequently changed, sporadically posted, and varied from court to court and from judge to judge. Given the urgency and the complexity, an astonishing amount was accomplished in those early times. But over a year into the pandemic, courts, litigants, and their advocates have gained critical experience, and it is time to take a step back. Courts are now positioned to develop “best practices,” and, critically, to make them consistent and transparent.

Procedures for virtual practice have varied wildly—not only between court systems, but also within the same court systems, often varying borough-by-borough, judge-by-judge, or even clerk-by-clerk. For example:

- New York City Family Court judges have been advised to be creative in determining effective means of providing virtual court proceedings, resulting in a patchwork of inconsistent rules and procedures that vary widely among judges, and creating an uncertain and unfair situation for litigants. Due to the lack of consistency, attorneys and litigants often do not know in advance of trial how to admit or exchange evidence, what technology will be required, and how testimony will be taken.
- Procedures in New York City Civil Court have varied by week and by borough. Litigants have been at times directed to use various different methods (mail, email, in-person, etc.) to submit time-sensitive filings, and the court’s own procedures for handling these filings have also varied. For example, NYLAG advocates were initially told that attorneys, but not pro se litigants, could file documents by email, but the court later changed its position to allow no email submissions at all.

Offering consistent procedures is absolutely critical for ensuring access to justice and protection of due process rights. Litigants and attorneys need to understand what rules the court is operating under when conducting virtual proceedings in order to make informed decisions about their cases.



Problems caused by inconsistent procedures are compounded by the fact that little information about the operation of the courts is disseminated publicly, so that even those procedures that do exist are often not accessible to litigants or attorneys. NYLAG clients and attorneys, across numerous different court systems, have had difficulty accessing information about the courts by phone or online.

The Courts must ensure that all litigants are timely and appropriately informed of all relevant aspects of their virtual proceedings. Many litigants and attorneys, across many court systems, have reported that they have not been notified of virtual court appearances at all. For example, in New York City Family Court, litigants and counsel are often not informed of upcoming court dates when pre-pandemic matters have been rescheduled. The Housing Courts have been notifying litigants of upcoming appearances via email, but several *pro se* tenants have informed NYLAG that the Court used incorrect email addresses due to typographical errors. In New York City Civil Courts, many litigants do not receive, or do not understand, instructions on how to join their court appearances virtually.

## RECOMMENDATIONS

**These deficiencies should be addressed through the following steps:**

- ▶ A clear, informative website and a publicly available phone line (with adequate staff to answer calls) are critical, so that litigants and attorneys can have their questions answered in real time.
- ▶ Additionally, as courthouses are reopening, litigants with virtual proceedings should be permitted to ask questions and seek help in person at the courthouse.
- ▶ Appropriate notice must be provided to litigants in advance of all appearances and, for virtual appearances, must contain enough information for the litigant to actually be able to attend.

# 3: MEANINGFUL ACCESS TO FILING, COURT FILES, AND COUNSEL

## ISSUE: INADEQUATE FILING SYSTEMS

Many courts have struggled to provide a process for handling filing for remote proceedings, as the pandemic removed traditional avenues of hard-copy filing. In New York City Civil Court, litigants have been given inconsistent instructions about what methods to file answers are permitted. Similarly, in New York City Housing Court, tenants have been told they can file an answer by calling the court to dictate an oral answer, filing in person, or e-filing on the New York State Courts Electronic Filing system (“NYSCEF”). However, many tenants have been unable to answer via telephone, and some have been unable to get through to the courthouse at all. Others have gotten through, only to be told that they should find a lawyer rather than file an answer. Additionally, some tenants who attempted to file answers in person have been turned away from the courthouse. For instance, one tenant in the Bronx called the courthouse to ask if he could answer in person; he was told that he could not come in person under any circumstances, and was also not given an opportunity to dictate an answer during that phone call.

The pandemic prompted many courts and similar bodies to switch to electronic filing. In general, NYLAG applauds these efforts; electronic filing is almost always the most efficient for attorneys. But it is often inappropriate for *pro se* litigants. For example, online filing systems such as NYSCEF are simply not a reasonable alternative for many New Yorkers, given the technology that they require.

Even litigants who are able to submit paper filings to the court often encounter problems. Many courts have a backlog of mail that is not being sorted, opened, or filed, meaning that many timely-filed documents are not being processed. This causes all sorts of problems for litigants. For example, one NYLAG client who was a New York City Civil Court defendant timely filed an answer that was not processed by the clerk’s office, so the plaintiff took steps to seek a default judgment against her. As another example, in the immigration context, NYLAG clients and attorneys have filed motions electronically in lieu of sending tangible mail because the immigration court has inconsistently opened and acted upon hard-copy mail; indeed, NYLAG’s understanding is that, during the pandemic period, a large amount of mail has been left stacked and unopened in boxes.



## RECOMMENDATIONS

Some of these problems can be mitigated with appropriate court procedures, such as the following:

- ▶ Courts must have a filing system that is accessible to all litigants. If a virtual filing system is offered, it must be user-friendly to those inexperienced with technology, but courts must always continue to offer a physical filing system for users unable to access virtual systems.
- ▶ Any court with ongoing proceedings must have the ability to accept, sort, and file the mail. Until the backlog of unopened mail has been eliminated, courts must not take any steps that would prejudice individual litigants, such as entering default judgments or, in the immigration context, orders of removal.

## ISSUE: INADEQUATE ACCESS TO COURT FILES

Access to court files is absolutely critical for zealous and effective advocacy. Often the court files contain vital information regarding, for example, the effectiveness of service, prior cases between the parties, and earlier rulings in the case. Without access to the full file, litigants and their attorneys cannot adequately identify or prepare viable claims and defenses. Moreover, access to these files is required by law.<sup>10</sup> But many litigants and attorneys have had difficulty accessing hard-copy files during the time of virtual proceedings.

For example, attorneys appointed to represent previously *pro se* tenants in New York City Housing Court are often not provided with access to the pre-existing case file; instead, they are advised to consult the case files available on NYSCEF. However, many NYSCEF files contain merely a case history noting prior appearances and lack critical information. Similarly, in New York City Civil Court, litigants often are unable to obtain a copy of the court file. In both forums, procedures for requesting and obtaining files vary widely borough-by-borough, clerk-by-clerk, and day-by-day, and, in some courts, even attorneys are only able to access files in-person at



the physical courthouse. For example, when one NYLAG advocate contacted a clerk to obtain a document from a client's case file, the clerk said that no case file had even been created, could not say when the file would be created, and stated that the document could not be located. In Housing Court, this problem has unfortunately gotten worse even as the COVID-19 crisis in the area has improved—as more housing matters move forward, the courts have fewer resources per case to put toward scanning files.

## RECOMMENDATIONS

These deficiencies should be addressed through the following steps:

- ▶ All courts must make sure that, even when proceedings are held virtually, all physical court files and records are made available to litigants and attorneys.
- ▶ Additionally, where methods of online file access already exist, access to those systems should be extended as widely as possible—for example, the Universal Case Management System in Family Court should be extended to legal services counsel.
- ▶ Any court with ongoing proceedings must have the staffing capability to make files available to litigants. Until this is possible, courts must not take any steps that would prejudice individual litigants, such as entering default judgments.

## ISSUE: INCONSISTENT MEANS OF INTRODUCING EVIDENCE

During the COVID-19 crisis, *pro se* litigants and attorneys have experienced significant difficulties in introducing evidence in a timely and consistent manner. As with filing answers and obtaining copies of files, the procedures for introducing evidence have varied courtroom-to-courtroom. Even with the procedures that are in place, additional challenges abound. For example:

- In New York City Family Court, evidence is required to be uploaded to EDDS in pdf form. Litigants have reported challenges in introducing non-pdf evidence, including physical evidence and audio or video files in support of their claims. Additionally, there is limited ability to examine or check the authenticity of evidence introduced by an opposing party.
- In New York City Civil Court, defendants in consumer debt actions (96% of whom are *pro se*) are required to submit evidence by certified mail at the outset of the action and are warned that the Court may not consider evidence that is submitted outside of this procedure—even though, as defendants, they of course are not required to provide any evidence at all, as they do not bear any burden of proof.
- In New York City Housing Court, attorneys have successfully emailed evidence to the court attorney in advance, and then the court attorney has shared his or her screen during trial while the evidence was discussed. This procedure worked well for attorneys, but has not been attempted in *pro se* cases, which the housing courts have simply adjourned during this period. Even in situations where this model was effective, the court provided no instruction in advance of trial regarding this procedure; instead, individual attorneys contacted the court in advance of trial to suggest a workable plan.
- OTDA has asked that appellants submit evidence in advance via a fax number. However, *pro se* litigants are often unaware of this requirement, and accessing fax service has been especially challenging during the pandemic. As a result, these appellants are subject to lengthy adjournments because they are not provided with instructions for submission until their hearing begins. In NYLAG’s experience, these adjournments can add many months to the total time an appellant awaits a decision. Even more troubling, administrative law judges have sometimes asserted that they are not sure whether an appellant’s evidence has been added to the file and urged the appellant to continue with their hearing regardless.

- Pre-pandemic, Supplemental Security Income recipients whose eligibility was challenged could arrive at live hearing proceedings with documentary evidence in support of their cases. Now that hearings are being conducted only over the phone, these recipients—many of whom have disabilities and have exceedingly low incomes—have no reasonable means of providing evidence.

There are also significant issues with the limited opportunities for direct and cross-examination offered by many courts during virtual proceedings. For example, in Family Courts, certain judges are allowing no (or extremely limited) direct examination in trials. Others are requiring direct examination to be in the form of affidavit or declaration, and permitting only limited cross-examination by opposing counsel. Many cases in Family Court turn on a witness’s perceived credibility. By not giving witnesses the proper platform to tell their story, or not giving opposing counsel the ability to perform meaningful cross, the Court is making determinations on credibility without fully developed testimony. Critically, narrative testimony can be especially difficult for trauma victims, as it can be a retraumatizing experience.<sup>12</sup> For example, in one NYLAG case, the court ordered that all testimony at trial would be received only in narrative form, that counsel would only be allowed limited follow-up questions, and that cross-examination could be conducted solely on limited issues and on limited disputed facts. While NYLAG successfully challenged these restrictions by filing a motion, many other litigants’ rights are not protected.

Finally, it bears noting that virtual testimony is simply not as probative as live testimony for assessing credibility. Accordingly, high-stakes proceedings in which judicial findings turn on credibility determinations should be among the very first that are again offered in an in-person format. Being seen and heard by a judge in person can make a critical difference in circumstances where a judge controls the course of a litigant’s life. For example, one study found that asylum applicants were less likely to have their petitions granted when their hearings occurred over video conference rather than in person.<sup>13</sup>

## RECOMMENDATIONS

### These issues can be addressed by the following:

- ▶ Courts should allow the introduction of documentary or physical evidence in a variety of forms, including via mail, email, or in-person filing.
- ▶ Instructions describing the permitted procedures for introducing evidence in advance of virtual proceedings should be posted clearly on court websites and also mailed to litigants when the proceedings are scheduled.
- ▶ During a hearing or trial at which evidence is discussed, the court should ensure that the evidence in question is accessible to all participants.
- ▶ Ample time should be provided during the proceedings for direct and cross-examination, just as it is for in-person proceedings, and the courts should consult the numerous resources available on understanding the effect of virtual proceedings on credibility determinations.<sup>14</sup>

## ISSUE: CONSTRAINTS ON ACCESS TO COUNSEL

Access to an attorney is vital for New Yorkers experiencing poverty seeking to navigate the courts and exercise their rights. For instance, since a right to counsel was initiated in New York City’s eviction matters, the city has seen a 41.1% reduction in the number of evictions by marshal—“a key indicator of housing stability.”<sup>15</sup> Likewise, immigrants who have counsel in their immigration court proceedings “fare better at every stage of the court process,” including that they are more likely to apply for immigration relief and have that relief be granted.<sup>16</sup>

The pandemic’s push to virtual proceedings has interfered with meaningful access to counsel in at least three respects. First, converting from live to virtual proceedings has had the effect of depriving *pro se* litigants who have a right to counsel from accessing counsel with whom they can actually confer in a timely matter. Second, the virtual platform has frequently deprived attorneys of the ability to join all virtual appearances. Finally, virtual proceedings make it difficult for clients to seek timely, confidential advice from their advocates, including before and during virtual court proceedings.

In Family Courts, low-income *pro se* litigants used to be assigned counsel at their first court appearance; they then walked into the hall to confer with their new attorneys. During the pandemic, *pro se* litigants who go through all of the correct procedures (properly file remote petitions, go to the judge or court referee and ask for immediate relief, and request an attorney) are often effectively denied representation at their first hearing, as they are told that the appearance will proceed without an attorney, and that they will only receive representation at their subsequent court date.

Then, because litigants are unable to find out the name or contact information of their assigned attorney between the first and second court date, they often show up at the second court date only to meet their attorney for the first time during the proceeding itself, which further impedes their right to effectively consult with



counsel. In the interim between these court dates, courts are making determinations with lasting impacts, including on temporary visitation rights.

Even after a client/attorney relationship has formed, some litigants have found that their attorneys were excluded from proceedings. Appellants in administrative hearings through OTDA have repeatedly complained that their attorneys were not included in their telephonic hearings. Often, the appellants are not told who is on the call, and are therefore unaware that their attorney was not included well into the hearing.

Once litigants and their attorneys have connected and are both present in virtual proceedings, technological constraints are depriving litigants of the practical ability to communicate with their attorneys during proceedings. This communication is critical to effective representation. For example, before the pandemic, a client could tell her attorney if she did not understand an interpreter, but now she would have difficulty doing so. The solution offered by the Courts has been to have attorneys ask for breaks, and for clients to call their counsel on their cell phone during the break.

This unrealistically assumes all litigants have access to multiple devices during a trial to be able to do so. And Office of Court Administration guidance suggests that clients and attorneys should

not be in the same room while virtual proceedings are going on, cutting off a reasonable solution that would allow attorneys and clients to easily confer.

Notably, the availability of remote access to proceedings, if handled correctly and offered as a complement to live attendance, has the ability to increase access to counsel going forward in some circumstances. For example, many immigrants were previously unable to have the assistance of counsel during interviews with USCIS, such as those related to citizenship or asylum applications, because of the excessive burden placed on advocates to attend in person.

## RECOMMENDATIONS

### Courts can protect the right to counsel by taking the following steps:

- ▶ Courts must create specific procedures for appointing counsel to *pro se* litigants with a right to counsel, and communicate those procedures effectively to both litigants and counsel. Ideally, the Court should provide assigned attorneys at the first appearance, and provide litigants with the name and contact information of their assigned attorney before or during that first court appearance to facilitate communication. New York City Housing Courts have been able to effectively assign counsel to *pro se* litigants through the use of several specialized “parts”—that is, discrete divisions of the Housing Courts—for this purpose. This method should be used in other New York courts as necessary.
- ▶ Once counsel is appointed or retained, they must be included in all virtual proceedings. In telephonic hearings in the federal courts, judges have been able to send litigants and their attorneys into separate “break-out rooms” for private discussions. This, or similar, technology should be used through the courts to ensure that litigants have meaningful access to the advice of counsel. If Microsoft Teams or other technology currently used by Courts is incapable of similar functionality, the Courts should consider the use of a different video conferencing technology.
- ▶ Where feasible and appropriate, advocates should be allowed to call into court proceedings and attend by speaker phone, at the sole option of the individual and their advocate.

## 4: ACCESSIBILITY OF COURTS

### ISSUE: LIMITED LANGUAGE ACCESS FOR NON-ENGLISH SPEAKERS

New York is a quintessential melting pot, with residents originating from all around the world and speaking more than 150 languages.<sup>17</sup> More than 5 million New Yorkers speak a language other than English at home, and more than 2 million New Yorkers are not fluent in English.<sup>18</sup> In New York City alone, approximately 1.8 million residents are not English language proficient.<sup>19</sup> Moreover, the courts have a clear mandate to provide adequate interpretation for any litigant that “is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceeding.”<sup>20</sup> Our justice system must be able to adequately account for and serve this segment of the population.

Effective, consistent interpretation services were difficult to provide even when the courts were functioning smoothly and in person.<sup>21</sup> The challenges have been multiplied many times over by the pandemic and the introduction of virtual proceedings. Simultaneous translation is almost impossible during virtual proceedings, and litigants have a more difficult time expressing dissatisfaction with interpretation. Moreover, the hectic and impersonal nature of virtual court appearances makes it harder for non-English speakers to navigate.

In Family Court, litigants are expected to log in to a “calendar call,” but many litigants cannot tell when their name has been called and cannot effectively communicate with the clerk managing this process. Because of the format of virtual proceedings, many non-English speakers miss their opportunity to ask for an interpreter during this initial calendar call. And, where litigants have properly requested an interpreter, they often do not receive one in a timely fashion, resulting in delays in their cases. We are aware of litigants who have requested a court interpreter, but at their next court date, the court was still unprepared, resulting in additional adjournments, or worse—proceeding without an interpreter.

Non-English speaking litigants have also faced interpretation problems trying to get information about their upcoming proceedings or filing documents. One Russian-speaking tenant attempted to call housing court for assistance in filing an answer; she was told that there were no interpreters available and the call was disconnected. In other forums, technology does not always permit interpreters, litigants, counsel, adversaries, and decision makers all to be online or on a call at once. As described above, multiple clients have reported having to choose between having a lawyer or an interpreter on a call, but could not have both; and the court may struggle to determine whether the person speaking at any particular time is the client or the interpreter.



## RECOMMENDATIONS

**The following changes would make courts more accessible to non-English speakers:**

- ▶ Courts should have interpreters who can communicate in New York’s most commonly-spoken languages for any calendar call or other standard proceeding of that nature.
- ▶ Litigants should be able to request an interpreter at a court appearance, but also by phone or email in advance.
- ▶ When interpreters are required, proceedings should be held by videoconference, rather than telephonically, where possible, so that all parties can clearly see who is speaking.
- ▶ Interpreters should clearly introduce themselves at the beginning of a hearing or trial, and ensure that the individuals for whom they are interpreting are able to hear them.
- ▶ Interpretation during virtual proceedings should be consecutive, rather than simultaneous, to minimize confusion about who is speaking.
- ▶ If a proceeding must occur telephonically, all speakers should be instructed to state their name and role every time they speak to avoid confusion.
- ▶ Courts must have a process in place for a litigant to express dissatisfaction with interpretation in real time, and have that process explained to the litigant at the outset of the proceeding.
- ▶ Courts should allot additional time for proceedings that require interpretation to account for these additional procedures.
- ▶ Court systems should make sure that their policies and procedures, and their websites, are available in multiple languages, and that access to the clerks’ offices and other court staff is available via interpreters.

## ISSUE: INSUFFICIENT DISABILITY ACCOMMODATIONS

Similarly, access to the courts for individuals with disabilities was challenging even before the pandemic. In some circumstances, virtual proceedings can pose even greater obstacles than pre-pandemic access—but in others, they can represent a significant improvement.

The courts have a legal obligation to include people with disabilities in the justice system. The Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act both establish mandates for the elimination of discrimination against individuals with disabilities in access to public services.<sup>22</sup> This mandate extends to the justice system.



For individuals with mobility impairments, or for whom illness prevents them from entering a crowd safely even in normal circumstances, virtual proceedings can provide an important point of access to the New York courts. Prior to the COVID-19 pandemic, NYLAG met with the leaders of New York City Civil Court to discuss how *pro se* litigants could request telephonic hearings as an accommodation due to a disability, because litigants had previously encountered difficulties doing so. Article 81 guardianship hearings, which often involve individuals with severe disabilities, are another type of proceeding that have occurred virtually during the pandemic. Now that the courts have become accustomed to virtual proceedings, New York courts must ensure that they are offered to those who require an accommodation because they cannot safely travel to or enter a courtroom due to a disability.

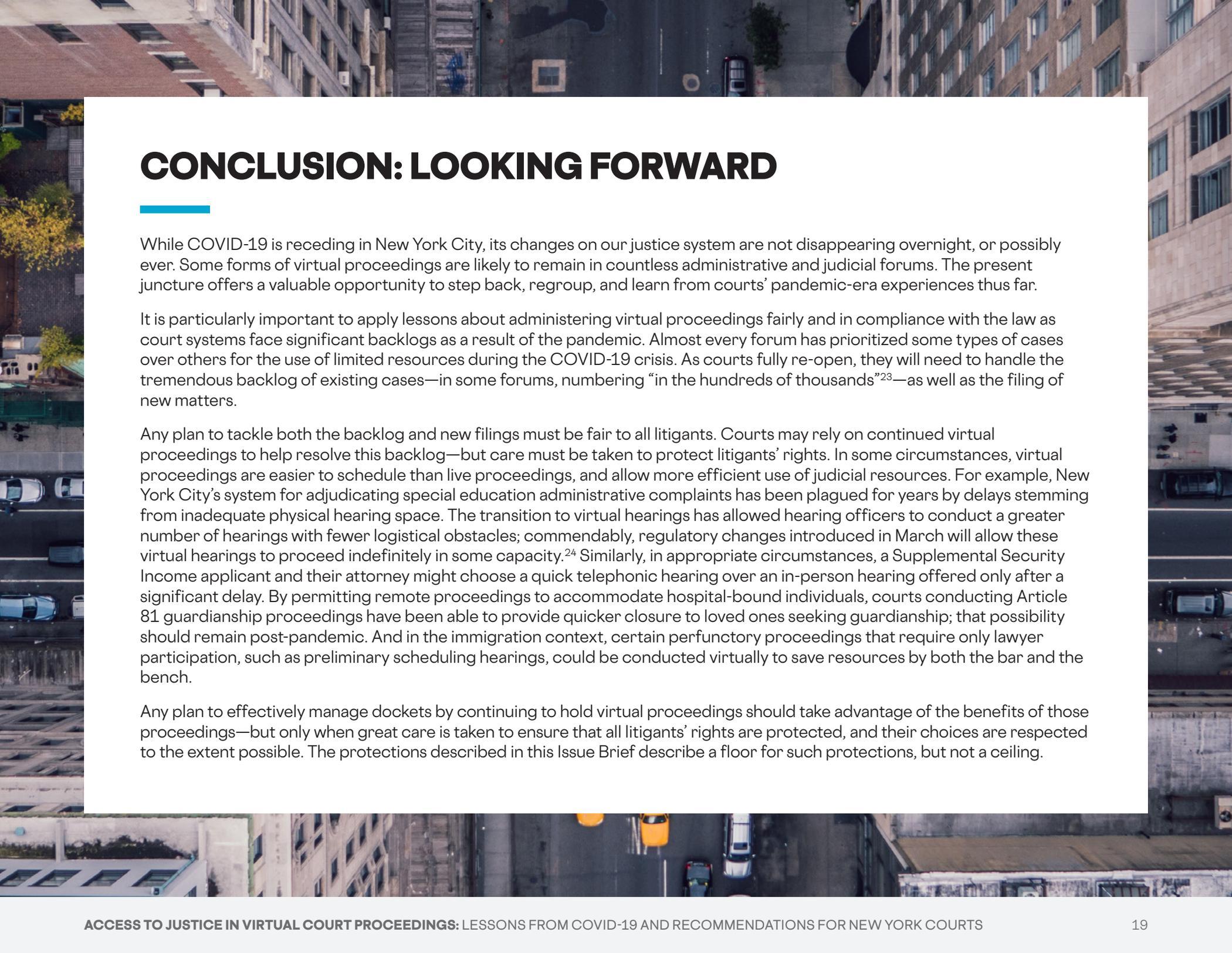
Nonetheless, virtual proceedings may pose particular problems for other individuals with disabilities, such as individuals who are hard of hearing or have difficulty speaking clearly. For individuals like this, it is an in-person proceeding that provides the best accommodation.



## RECOMMENDATIONS

**Courts should take the following steps to improve disability access:**

- ▶ To avoid undue hardships in both virtual and in-person proceedings, the courts must have clear ADA policies available through their websites and at the clerk's office.
- ▶ These ADA policies must include instructions for requesting an accommodation.
- ▶ Clerks, judges, and other relevant courthouse staff must be trained on the range of accommodations available and their duty to affirmatively offer accommodations, even in the absence of a request.
- ▶ Wherever litigants with disabilities struggle with either in-person or virtual proceedings, the court must consider whether a switch to the other format would serve as an appropriate accommodation.

An aerial photograph of a city street, showing buildings on either side, a road with cars, and a yellow taxi. The image is used as a background for the page.

# CONCLUSION: LOOKING FORWARD

While COVID-19 is receding in New York City, its changes on our justice system are not disappearing overnight, or possibly ever. Some forms of virtual proceedings are likely to remain in countless administrative and judicial forums. The present juncture offers a valuable opportunity to step back, regroup, and learn from courts' pandemic-era experiences thus far.

It is particularly important to apply lessons about administering virtual proceedings fairly and in compliance with the law as court systems face significant backlogs as a result of the pandemic. Almost every forum has prioritized some types of cases over others for the use of limited resources during the COVID-19 crisis. As courts fully re-open, they will need to handle the tremendous backlog of existing cases—in some forums, numbering “in the hundreds of thousands”<sup>23</sup>—as well as the filing of new matters.

Any plan to tackle both the backlog and new filings must be fair to all litigants. Courts may rely on continued virtual proceedings to help resolve this backlog—but care must be taken to protect litigants' rights. In some circumstances, virtual proceedings are easier to schedule than live proceedings, and allow more efficient use of judicial resources. For example, New York City's system for adjudicating special education administrative complaints has been plagued for years by delays stemming from inadequate physical hearing space. The transition to virtual hearings has allowed hearing officers to conduct a greater number of hearings with fewer logistical obstacles; commendably, regulatory changes introduced in March will allow these virtual hearings to proceed indefinitely in some capacity.<sup>24</sup> Similarly, in appropriate circumstances, a Supplemental Security Income applicant and their attorney might choose a quick telephonic hearing over an in-person hearing offered only after a significant delay. By permitting remote proceedings to accommodate hospital-bound individuals, courts conducting Article 81 guardianship proceedings have been able to provide quicker closure to loved ones seeking guardianship; that possibility should remain post-pandemic. And in the immigration context, certain perfunctory proceedings that require only lawyer participation, such as preliminary scheduling hearings, could be conducted virtually to save resources by both the bar and the bench.

Any plan to effectively manage dockets by continuing to hold virtual proceedings should take advantage of the benefits of those proceedings—but only when great care is taken to ensure that all litigants' rights are protected, and their choices are respected to the extent possible. The protections described in this Issue Brief describe a floor for such protections, but not a ceiling.

- <sup>1</sup> This number fails to capture the likely increase in the poverty rate due to COVID-19. See Community Service Society of New York, Poverty Declined in New York City for Fifth Straight Year But Census Data Fails to Capture Devastating Economic Impact of COVID-19, <https://www.cssny.org/news/entry/statement-poverty-declined-in-new-york-city-for-fifth-straight-year-but-cen>.
- <sup>2</sup> Chief Judge Janet DiFiore, New York State Unified Court System, “State of Our Judiciary 2021” 4-5 (March 2, 2021), [https://www.nycourts.gov/whatsnew/pdf/21\\_SOJ-Speech.pdf](https://www.nycourts.gov/whatsnew/pdf/21_SOJ-Speech.pdf).
- <sup>3</sup> Future Trials Working Group of the Commission to Reimagine the Future of New York’s Courts, “Report and Recommendations of the Future Trials Working Group” 8 (April 2021), <http://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf>.
- <sup>4</sup> See New York City Mayor’s Office of the Chief Technology Officer, “The New York City Internet Master Plan” ii, 12, (January 2020), [https://www1.nyc.gov/assets/cto/downloads/internet-master-plan/NYC\\_IMP1.7.20\\_FINAL-2.pdf](https://www1.nyc.gov/assets/cto/downloads/internet-master-plan/NYC_IMP1.7.20_FINAL-2.pdf).
- <sup>5</sup> *Id.* at ii.
- <sup>6</sup> *E.g.*, *Martinez v. Cuomo*, 459 F. Supp. 3d 517, 524 n.4 (S.D.N.Y. 2020).
- <sup>7</sup> “Report and Recommendations of the Future Trials Working Group” 8, <http://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf>.
- <sup>8</sup> *Id.*
- <sup>9</sup> New York State Unified Court System, *Microsoft Teams: On a Computer or Laptop*, <https://portal.nycourts.gov/knowledgebase/article/KA-01073/en-us>.
- <sup>10</sup> See, e.g., N.Y. Fam. Ct. Law § 205.5 (providing litigants in Family Court access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders); 18 N.Y.C.R.R. § 358-3.7 (requiring that “[a]t any reasonable time before the date of your fair hearing and also at the fair hearing, you or your authorized representative have the right to examine the contents of your case record and all documents and records to be used by the social services agency at your fair hearing.”).
- <sup>11</sup> New York City Civil Court, Directives and Procedures 216 (April 5, 2021), <https://www.nycourts.gov/COURTS/nyc/SSI/directives/DRP/DRP216.pdf>.
- <sup>12</sup> *E.g.*, *Negar Katirai, Retraumatized in Court*, 62 ARIZ. L. REV. 81, 107 (2020).
- <sup>13</sup> Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259, 271-72 (2008).
- <sup>14</sup> See, e.g., Susan A. Bandes, Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 Buff. L. Rev. 1275 (2020).
- <sup>15</sup> NYC Office of Civil Justice 2019 Annual Report 25, [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_Annual\\_Report\\_2019.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf).
- <sup>16</sup> American Immigration Council, *Access to Counsel in Immigration Court 2* (September 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.
- <sup>17</sup> See New York State Unified Court System, “Ensuring Language Access: A Strategic Plan for the New York Courts” 1 (March 2017), <http://www2.nycourts.gov/sites/default/files/document/files/2018-06/language-access-report2017.pdf> (citing U.S. Census Bureau, Language Statistics (2013), [www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html](http://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html)).
- <sup>18</sup> *Id.*
- <sup>19</sup> New York City Department of City Planning, *Language Access*, <https://www1.nyc.gov/site/planning/about/language-access.page>.
- <sup>20</sup> 22 N.Y.C.R.R. § 217.1(a).
- <sup>21</sup> See New York State Unified Court System, “Ensuring Language Access: A Strategic Plan for the New York Courts” 1 (March 2017), <http://www2.nycourts.gov/sites/default/files/document/files/2018-06/language-access-report2017.pdf>.
- <sup>22</sup> See 42 U.S.C. § 12101(b); 42 U.S.C. § 12132; 29 U.S.C. § 794(a).
- <sup>23</sup> “Report and Recommendations of the Future Trials Working Group” 6, <http://www.nycourts.gov/whatsnew/pdf/future-trials-working-grp-april2021.pdf>.

## ABOUT NYLAG

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Founded in 1990, New York Legal Assistance Group (NYLAG) is a leading civil legal services organization combatting economic, racial, and social injustice by advocating for people experiencing poverty or in crisis. Our services include comprehensive, free civil legal services, financial empowerment, impact litigation, policy advocacy, and community partnerships. NYLAG exists because wealth should not determine who has access to justice. We aim to disrupt systemic racism by serving individuals and families whose legal and financial crises are often rooted in racial inequality.

**NYLAG GOES TO WHERE THE NEED IS, PROVIDING SERVICES IN MORE THAN 150 COMMUNITY SITES (E.G. COURTS, HOSPITALS, LIBRARIES) AND ON OUR MOBILE LEGAL HELP CENTER. NYLAG'S STAFF OF 300 IMPACTED THE LIVES OF NEARLY 90,000 PEOPLE LAST YEAR.**