

August 27, 2020

Jeh Johnson, Esq.
Paul Weiss
1285 Avenue of the Americas
New York, NY 10019-6064

Re: Equal justice in the courts

Dear Secretary Johnson,

We write concerning your Independent Review of Court System Policies, Practices and Initiatives to address issues of institutional racism in the New York State court system. In your crucial role as Special Adviser on Equal Justice in the Courts, it is imperative that the court address the inequities in the civil justice system where basic human needs are at stake for low income New Yorkers. Your independent review is critically important to our clients—the majority of whom are Black, Indigenous and People of Color ¹ (“BIPOC”) and a significant percentage of whom have limited English proficiency (“LEP”)—and to us.

Legal Aid Society of Northeastern New York (LASNNY), Legal Services of the Hudson Valley (LSHV), Empire Justice Center (EJC), Legal Aid Society of Mid New York (LASMNY), Western New York Law Center (WNYLC) and several of our fellow legal services agencies from across the state provide free civil legal services to low-income New Yorkers in the areas of housing, income maintenance, family law and other civil legal matters. We welcome the opportunity to share our experiences with the civil justice system and respectfully offer some suggestions to address institutional racism and further equal and just treatment for all parties involved with the court system.

Our organizations are acutely aware of the devastating impact institutional racism within the court system has on our clients and our attorneys. It is of utmost importance that the changes and recommendations come from those affected. BIPOC's experiences with the civil justice system and the outcomes they get play a significant role in perpetuating the racial inequities in our society that directly affect our clients and their families, neighborhoods and communities. These negative experiences mean that BIPOCs do not trust the system and do not seek legal help, thus undermining legitimacy of the civil justice system and its commitment to equal and just treatment under the law.

Our clients, pro se litigants from marginalized communities, and leaders of legal services organizations and other community-based organizations, such as tenants' rights organizations, should play a leadership role in your review of institutional racism within the court system. As a

¹ We also think it important to note here that an appreciation of intersectionality is critical in identifying and treating institutional discrimination. Individuals and groups may experience discrimination based on a combination of race, disability, religion, national origin, ethnicity, gender identify, and/or sexual orientation.

start, we welcome the opportunity to speak with you so that we may share more about our experiences and concerns as they relate to equal justice.

Our clients must overcome multiple barriers to access the courts, and once there, face disparate treatment, especially if unrepresented. The lack of a right to counsel in most civil cases, including in those cases in which basic human needs are at stake, is a chief concern. “Analysis has shown that there is a 77% reduction in evictions when tenants are assisted or represented by legal counsel as compared to unrepresented tenants.” *See enclosed* July 9, 2020 COVID-19 Recovery Task Force Housing Working Group Report, p. 4. While many low-income residents of NYC have a right to counsel in housing court, tenants in the rest of the state do not. During normal times, our organizations are underfunded and lack the resources to represent most of the litigants who come to us facing the loss of their housing, their income or assets, and custody of their children. The COVID-19 public health emergency has exacerbated the civil legal services justice gap. The pro bono initiatives of the Unified Court System and New York State Bar Association will not be able to close that gap alone; legal services organizations must be funded so that they can increase internal pro bono infrastructure. *See id.*, p. 5.

The disparate health impact of this public health crisis is well known. As the court system reopens, existing inequities in the courts that disproportionately affect BIPOC have been laid bare and underscored. Before-COVID-19, courts that served more BIPOC litigants, such as family, city, and justice courts, were often poorly resourced. As a result, hallways and courtrooms were cramped with litigants, unlike most of our Supreme and County courts. It was not uncommon for domestic violence victims to file an emergency family offense petition in the morning and then wait at the court for hours to receive a temporary order of protection. Courts over-calendared cases and judges tried to clear their calendars as quickly as possible, often at the expense of justice. Additionally, family courts failed to provide adequate onsite childcare, which itself denies equal access to the courts. If BIPOC are forced to return to crowded courts in person during the pandemic, this will add yet another risk factor to the documented risk factors that disproportionately affect them.

Our city courts which have begun to reopen in the wake of COVID-19 are once again over-calendaring eviction cases. However, the stakes are now higher because the courts are not ordering adequate physical distancing and because court users, judges, and non-judicial personnel are failing to wear masks or face coverings despite the mandate to do so. As BIPOC are overrepresented in these courts, they are at higher risk than other groups in crowded courts where social distancing is impossible.

Then, there is the insurmountable barrier that some of our clients face in getting to court due to lack of private transportation, paucity or complete lack of public transportation, and geographical isolation in more rural areas. Our cash-strapped organizations have at times had to pay for cab fare to ensure that our clients can make it to court. Scheduling is also a concern as our client population overlaps greatly with the essential worker population which is overwhelmingly BIPOC. Even before COVID-19, clients had limited control over their schedules and had to risk their jobs to appear in court. As the courts re-open while we are still fighting this pandemic, our clients’ work schedules are even more restricted as they are considered essential. Consolidating

eviction hearings arising in towns and villages would enable attorneys to represent many more tenants and would allow their cases to be heard by attorney judges.

We recognize the difficult task of addressing the issue of access to the courts and commend the court's efforts to expand virtual appearances in a wide array of cases. However, we respectfully highlight that there is a "digital divide" resulting from the economic inequality suffered by our clients. Barriers such as access to reliable internet connection, access to a computer and printer should be kept in mind when making recommendations.

For BIPOC litigants who are also LEP, the barriers to accessing justice are even greater. The very few forms available on the UCS website for our clients are made available in only six languages other than English through LawHelpNY Interactive, <http://nycourts.gov/courthelp/DIY/index.shtml>, and as mentioned, the requisite literacy and access to the internet, a computer, and/or a printer are often lacking. After Legal Services of the Hudson Valley ("LSHV") observed some justice courts flouting the requirement to provide interpreters, LSHV conducted a phone survey of justice court clerks in the 3rd and 9th Judicial Districts. Concerningly, some courts said that no interpretation services are available; others imposed unlawful requirements which denied interpretation services to many LEP litigants. . . When in-person interpretation is provided, LEP litigants are often forced to wait hours in court for an interpreter.

Moreover, many of our BIPOC clients and some of our BIPOC attorneys and legal professionals, have experienced overt and covert discrimination by judges and other court personnel. Our clients and our staff fear retaliation if they complain about judicial misconduct. No wonder there is widespread disbelief in the fairness of our judicial system and in the rule of law. In a family court clerk's office in the Hudson Valley, one of our attorneys observed two clients of Southeast Asian ancestry ask, in perfect English, for assistance in notarizing their documents. The court employees refused their request, loudly stating that they "don't speak Spanish." The clients were so upset that they did not want to discuss what happened with the attorney, left the courthouse, and went to another part of town to find a notary. In Queens, a disturbing report of racist and sexist behavior by a white female Court attorney toward both a Mexican female domestic worker and her legal services female attorney led to a discovery order requiring that the plaintiff/domestic worker produce her social media photos. The Court attorney implied that the plaintiff might have published nude photos of herself on social media and required that the document production by the legal services attorney be supervised by the attorney for the adverse party. In Westchester County, a BIPOC attorney was surrounded by court officers threatening arrest until a white LSHV supervisor intervened. A complaint led to a promise of training; there was no follow up with the LSHV attorney, and no report of training given.

BIPOC legal services attorneys who are women have received the same message for forty years from judicial and non judicial personnel – our only role in a courtroom is that of a low-income client or an interpreter. Among many other complaints about bias and incivility in the Bronx Housing Court reported in 2018, a landlord's attorney cutting the line turned to the first person in line, a black woman, and said "really? You're an attorney?" One Native American attorney was told he could not use his Tribal ID to obtain his Attorney Secure Pass. He also recounts

inequities in bail, access to mandated representation and representation in jury pools as well as twenty years of half-truths, epithets, and slips of the tongue that start, “you Indians.” LGBT BIPOC advocates complain of the binary, heteronormative language of Family Court forms. We know that you have already received copies of the many complaints of racist and sexist behavior by the landlords’ bar and Housing Court judges and personnel.

In the absence of a right to counsel, the court system fails to provide even basic support to unrepresented litigants. The court system has very few forms available for such litigants, and even if they are available on the court system website, courts often fail to carry paper copies of the forms in any case. For example, in the context of evictions, the Unified Court System’s (“UCS”) website provides several form petitions for small property owners and yet fails to provide a form answer for tenants outside NYC and motion to dismiss for tenants. *See* <http://nycourts.gov/CourtHelp/DIY/index.shtml>. No forms are available for tenants to file a petition by Order to Show Cause where they have been illegally locked out or constructively evicted. *See id.* Many courts outside of NYC do not carry the one UCS form available for tenants which is related to moving to vacate a default judgment. Even if more forms for litigants are available on the UCS website, our clients often lack the requisite literacy and access to a computer, the internet, and/or a printer.

The lack of adequate representation of BIPOC on the bench and at bar is another barrier to justice. It is axiomatic that such diversity is necessary to ensure the equal and impartial administration of justice. The court system should use research and outcomes from other states’ court systems, from bar associations, and from private industry to encourage children and young adults of diverse backgrounds to pursue the study and practice of law, the success of BIPOC in law school, and finally, the cultivation and mentorship of diverse talent for judgeships.

Some judges—lay and attorney—lack a fundamental understanding of systemic racism as it intersects with socioeconomic class and as related to the legal matters they are adjudicating. They demonstrate a lack of empathy and sometimes hostility for our clients, much less adherence to the law. Judges routinely find BIPOC less credible than white litigants and do not afford them the same opportunity to assert their legal claims.² Pro se litigants in overtaxed courts that hear housing, family, and consumer cases face intense pressure to settle their cases that would be unthinkable in other courts. Due to over calendaring of such cases, many judges only afford a few minutes for each appearance and routinely defer to the side represented by counsel, thereby depriving unrepresented litigants of the opportunity to explain their side of the case. Judges in non-payment housing court cases routinely ignore meritorious defenses, even when lodged in an answer or motion to dismiss; their bias becomes clear when, at routine appearances, they require tenants to state whether they paid the rent demanded. Holdover eviction cases are often more complicated, and yet still the case is reduced to, “Do you think you can live there for free?”

We have particularly observed this non-adherence to procedural rules and law and hostility to our clients in justice and town courts. Outside of New York City, court users are most likely to interact with the justice courts than any other court, yet the justice courts operate outside of the oversight of the New York State Judiciary and Office of Court Administration. There are

² Jeffrey J. Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame Law Review 1195, (2009).

numerous ways in which this impedes the fair administration of justice including the existence of lay judges and a lack of centralized and consistent data collection and reporting. Anyone can get data from OCA about the courts it oversees through a simple FOIL request, but there is no state agency which collects data from the justice courts. BIPOC litigants fail to experience just and equitable outcomes in courts that are subject to at least some oversight and monitoring by OCA. Their experiences in justice courts that fall outside of that system are even more compromised.

We understand that the intention is for your report to be released by October 1st. We urge that this deadline be extended to allow for a public hearing and a thorough evaluation by you of the issues outlined in this letter to ensure meaningful review.

As for recommended actions in response to institutional racism, we submit the following as starting points:

1. Required annual implicit bias training by recognized experts in the field for all employees of the unified court system; and
2. Creation of a new position(s) within the court system to be charged with, *inter alia*, creating, promulgating, and overseeing implementation of a transparent policy and procedures for reporting and addressing complaints of discrimination, including adequate follow-up with complainants about post-investigation findings; where discrimination has occurred, what redress will occur; and reporting to complainants after redress has occurred, such as receipt of implicit bias training.

We appreciate the complex and difficult but important task you have undertaken, particularly during these uncertain times, and hope these suggestions are helpful to open the path to dismantle racism in the civil justice system. Thank you for your careful consideration of our recommendations and concerns. We hope to hear from you soon.

Respectfully yours,



Lauren Breen
Executive Director
Neighborhood Legal Services, Inc.

Kristin Brown
President & CEO
Empire Justice Center

Sally Fisher Curran
Executive Director
The Volunteer Lawyers Project of Onondaga County, Inc.



Barbara Finkelstein
CEO
Legal Services of the Hudson Valley
bfinkelstein@lshv.org

Tina M. Foster
Executive Director
Volunteer Legal Service Project of Monroe County Inc.

Dennis A. Kaufman, Esq
Executive Director
Legal Services of Central New York

Joe Kelemen
Executive Director
Western New York Law Center

Marcia Levy
Executive Director
Volunteers of Legal Service (VOLS)



Paul J. Lupia
Executive Director
Legal Aid Society of Mid-New York, Inc.



Lillian M. Moy
Executive Director
Legal Aid Society of Northeastern New York



Karen L. Nicolson
CEO
Center for Elder Law & Justice

C. Kenneth Perri
Executive Director
Legal Assistance of Western New York, Inc.



Rodrigo Sanchez-Camus
Director of Legal, Organizing & Advocacy
NMIC



McGregor Smyth
Executive Director
New York Lawyers for the Public Interest

Doug Lasdon
Executive Director
Urban Justice Center

Paul Curtin
Deputy Executive Director
The Legal Aid Bureau of Buffalo, Inc

Enclosure

Cc: Hon. Janet DiFiore, Hon. Shirley Troutman, Hon. Troy K. Webber