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REPORT ON LEGISLATION

A.5899 **Assembly Member O'Donnell**
S.4091 **Senator Sampson**

AN ACT to amend the uniform justice court act, in relation to the right of defendants in misdemeanor or felony cases to have such matter appear before a judge or justice admitted to practice law in New York

THIS BILL IS APPROVED

Bill Summary

The New York City Bar Association supports Assembly bill 5899/Senate bill 4091. This bill will give defendants in criminal cases in Town and Village Courts the right to elect to appear in front of a judge or justice who is a lawyer. Specifically, by amending the Uniform Justice Court Act, a defendant who has been charged with a misdemeanor or felony, and who is to appear in a Town or Village Court, will have the right to "opt out" of a proceeding before a non-attorney judge. Such an election will have to be made in writing, on a form to be prescribed by the chief administrator of the courts, and only after arraignment and before substantive motions. The bill will thus create an automatic right to have a case assigned to an attorney judge should a defendant so choose. By expressly permitting a non-attorney judge to perform certain functions, and by requiring that the "opt-out" election be made prior to substantive motions, the bill will provide due process protections, prevent forum shopping and needless delay, and allow complex legal issues to be resolved by trained lawyer judges who are familiar with rules governing judicial ethics. The bill is well-balanced and the City Bar urges its passage.

Background Regarding City Bar's Study of the Town and Village Justice System

On October 27, 2006, the City Bar created a Task Force on Town and Village Courts (the "Task Force") to address the well-documented problems facing New York State's Town and Village Courts (also known as the Justice Courts). In total, four reports were issued by the Task Force; the one most relevant to this issue being *Recommendations Relating to Structure and Organization* (October 30, 2007), which analyzed the structure of the courts and rules governing justices. One of the City Bar's recommendations was that a party be allowed to request that a case be transferred to a justice who is a lawyer. It is from the Task Force's report that the City Bar bases its support of A.5899/S.4091.[1]

[1] For full text of the Task Force report *Recommendations Relating to Structure and Organization*, please visit http://www.nycbar.org/pdf/report/Town%20_Village_TF.pdf.

Discussion

1. Divergent Views with Respect to Lay Justices

The issue concerning Town and Village Courts that has most caught the attention of the public, the media, and the Bar is whether non-lawyers should be justices of Town and Village Courts. The debate on this has gone on for many years. *See* generally *Doris Marie Provine Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* (U. of Chicago 1986). The arguments in favor of using lay justices are that they have been used for more than 200 years with success; that the justices bring a local informality to the system; that people like to see "their" judge conducting the proceeding; that the justices can do a good job at their work by applying common sense, knowing the community and having good intentions; that the training given the justices informs them of the principles of law needed to preside despite the absence of law school or other legal training; that the law the justices apply is not so complicated as to require law school training and years of practice; and that the number of lawyers living or practicing in some communities is too small to supply the number of judges needed, a situation aggravated by the ethics rules limiting the legal practices of the lawyers who are the part-time justices.

The arguments in favor of requiring that the justices be lawyers are that lawyers have been trained through law school education, years of practice and continuing legal education programs to know the law and to recognize lurking issues, and to internalize complex principles like evidentiary presumptions, due process, equal protection and burdens of proof; that they understand when they need to conduct research and how to do so; that they can converse with and challenge counsel who are arguing issues before them on a more sophisticated level than can lay judges; that they are taught and engage in following the rules of professional ethics, and that this experience becomes the training ground for following the rules of judicial conduct; that equal protection is denied when some litigants in the Justice Courts appear before lay justices while other Justice Court litigants and litigants in all other courts in New York appear before lawyer judges; that current law, even in courts of limited jurisdiction, is far more complicated now than it was when the Justice Court system was set up or last examined; and that the imposition of incarceration upon a defendant in a criminal case by a judge who lacks the traditional legal training and experience is not in accord with due process or public policy.

It is against this backdrop that the City Bar supports the approach taken by A.5899/S.4091, which responds to all concerns by creating an "opt-out" procedure within certain parameters.

2. The Constitutional Issue in Criminal Cases

In New York's criminal cases the interpretation and application of CPL § 170.25 has been central to the analysis of the right to have a lawyer judge. CPL § 170.25 allows a defendant charged with a misdemeanor pending in a Town or Village Court to make a pretrial motion in a superior court for transfer of the case for presentation to a grand jury and indictment for a felony with consequent removal to a superior court. The defendant must show good cause to believe that the interests of justice require the removal. While the motivation for such a motion is that the Town or Village justice before whom the case is pending is not lawyer, under the case law that circumstance does not constitute good cause. The superior court, in the exercise of its discretion,

may order that the case be presented to the grand jury if the test of good cause is satisfied. If the defendant's invocation of section 170.25 is successful and the defendant is indicted for a felony, the case remains in the superior court for proceedings that will be held before a lawyer judge (because all state-funded judges are lawyers). But if the crime charged in the indictment is a misdemeanor, the superior court can transfer the case back to the Town or Village Court under the State Constitution, Art. 6, § 19(b), where the judge may not be a lawyer. *Clute v. McGill*, 229 A.D.2d 70 (3d Dept.), *lv. denied* 229 N.Y.2d 803 (1997).

In *North v. Russell*, 427 U.S. 328 (1976), a DWI case tried before a lay judge, the United States Supreme Court was asked to decide whether there was a right to a trial judge who was a lawyer. The Court warned that when "confinement is an available penalty, the process demands scrutiny." 427 U.S. at 334. The Court concluded, however, that it was not necessary to decide whether a lawyer judge was needed in the first instance because under Kentucky law all defendants facing incarceration were afforded an absolute and unconditional opportunity to be tried *de novo* before a lawyer judge as if the first proceeding never occurred. It found that a trial before a lay judge did not violate the due process clause of the Federal Constitution as long as an accused who is initially tried before a lay judge has an effective alternative of a criminal trial before a court with a traditionally law-trained judge. New York courts have held that CPL § 170.25 meets the test of *North* despite the discretionary nature of the decision on the motion for a transfer.[2]

By permitting defendants to opt-out of appearing before a non-attorney judge within certain time limitations, the proposed legislation would do away with the "good cause" requirement of CPL § 170.25 and clearly bring New York law in line with the *North* decision.

3. Increasing Complexity of the Law

The legal issues that come before the courts have increased in complexity. The enhanced sanctions that attach to a conviction, even for a misdemeanor, demand a high level of expertise to prevent miscarriage of justice.

Prime examples of this complexity are factually and legally complex pretrial suppression motions. Literally hundreds of decisions are rendered each year on defendants' motions to suppress physical evidence taken as a result of an illegal stop, detention or arrest, or the fruit of other alleged illegal police conduct; on motions to suppress statements claimed to have been taken in violation of the right to counsel, the right to remain silent, or as the fruit of prior illegal conduct; on motions to suppress identification testimony alleged to be the result of suggestive or otherwise illegal law enforcement practices, or the fruit of some other official illegality. The applicable principles are derived from the Federal Constitution's Fourth, Fifth, and Sixth Amendments and the New York State constitutional analogues, as well as the many appellate and trial court opinions of state and federal courts. There are also legal issues of whether there is standing to raise the claims or whether a particular issue is otherwise properly raised by the

[2] *People v. Skrynski*, 42 N.Y.2d 218 (1977); *Matter of Legal Aid Society v. Scheinman*, 73 A.D.2d 411 (3d Dept.), appeal dismissed, 53 N.Y.2d 12 (1981) (dissent of Judge Fuchsberg); *People v. Charles F.*, 60 N.Y.2d 474 (1983), cert. denied, 467 U.S. 1216 (1984) (C.J. Kaye, dissenting) (in her dissent, Chief Judge Kaye argued that § 120.25 is not an effective alternative to a trial conducted by a lawyer judge unless it is read to *require* removal upon the request of a defendant if incarceration was a possible result of conviction).

motion papers. The judge must be sure there is a proper disclosure to the defense of police records. He or she must recognize shifting burdens of proof. Of course, the judge must hold hearings to elicit information about the events in question through the testimony of witnesses and the introduction of other evidence, must make credibility determinations and findings of fact, and must decide the merits of the legal claims. The decisions in the suppression hearings might involve layers of analysis; they are properly often subjects of written opinions.

The body of law protecting the rights of those accused has emerged over the past several decades. Since the seminal cases, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 364 U.S. 436 (1966), there have been hundreds of decisions adding amazing complexity to the law. The heavily nuanced reasoning involved in these many cases is manifest from even the most cursory examination of the texts used by lawyers and judges to prepare arguments and opinions. *See* Barry Kamins, *New York Search and Seizure*, (Bender/LexisNexis 2007).

The complexity of the rules of evidence, applicable at both pretrial hearings and trials, demonstrates the need for this legislation, which will give defendants the right to elect to appear before law-trained judges in criminal cases. While there are many cases from the New York and federal courts dealing with evidence, a very few will suffice to show the complicated principles of law.[3]

If the current legal landscape is more complicated than ever, the complexity of the law is matched by the consequences faced by a defendant who pleads guilty or receives a guilty verdict. These consequences affect immigration status; right to public benefits including rent supplements and housing; employment; licensing; sex offender registration; and use of a misdemeanor conviction as a predicate offense in other jurisdictions, especially in the federal courts, if there is a later conviction.

The need for justices who are lawyers is apparent. In light of the judge's critical role in the criminal justice system, the defendants in Town and Village Courts should be entitled to opt-out of proceeding before a non-lawyer justice.

[3] For instance, *Crawford v. Washington*, 541 U.S. 36 (2004), has mandated a rethinking of the federal constitutional principles relevant to the right of confrontation and hearsay reliability. Hearsay issues, almost always complicated, take on new dimensions after *Crawford*. New York decisions regarding these issues include *People v. Hardy*, 4 N.Y.3d 192 (2005) (error to use accomplice plea allocution to incriminate defendant); and *People v. Davis*, 23 A.D. 3d 833 (3d Dept. 2005), lv. denied 6 N.Y.3d 811 (2006) (non-hearsay use of statements about the defendant). Other recent evidence decisions are *People v. Wlasiuk*, 32 A.D.3d 674 (3d Dept. 2006), lv. denied 7 N.Y. 3d 871 (2006) (the scope of evidence of prior abuse in domestic violence cases); *Read v. Ellenville National Bank*, 20 A.D. 3d 408 (2d Dept. 2005) (the authentication of a surveillance video tape of a bank); and *People v. Resek*, 3. N.Y. 3d 385 (2004) (uncharged crimes as evidence). As for trial issues, *Batson v. Kentucky*, 476 U.S. 79 (1986), has revolutionized the procedures used to select jurors and the protection of the jurors' rights to serve. Careful and tactful questioning about highly sensitive issues, such as membership in a racial, ethnic or religious group, are part of the process needed to determine if there is a *prima facie* case of improper use of peremptory challenges to potential jurors.

4. Resolving Legal Issues and Judicial Ethics

The Task Force's work demonstrated that lawyers with broad and lengthy experience in criminal cases before the Justice Courts largely reflect concern that the lay justices do not have a grasp of the legal issues raised by the cases and have difficulty understanding and applying the legal rules, especially the rules of evidence, at both non-jury and jury trials (which are authorized for all misdemeanors outside of New York City. CPL § 340.40(2)). Decisions of the Commission on Judicial Conduct support the experiences articulated by the lawyers.[4] In the recent past alone, by way of example, the Commission issued the following decisions:

- *In Matter of Ray* (lay justice convicted and fined the defendants in a code violation case without a trial or guilty plea based on *ex parte* information) (3/1/09);

- *In Matter of Dunlo* (lay justice accepted a guilty plea from a defendant whom he sentenced to serve 90 days in jail when the defendant was not represented by an attorney and was incapable of understanding the proceedings) (3/1/09);

- *In Matter of Roller* (lay justice failed to deposit or did not require her court staff to deposit thousands of dollars in court funds in a timely manner, in violation of court system rules) (3/1/09);

- *In Matter of Minogue* (lay justice failed to report official monies in a timely manner as required by law, and dismissed a seat belt charge against her sister-in-law) (3/1/09);

- *In Matter of Edwards* (lay justice, sitting since 1964, awarded specific performance of a contract in a small claims case when the jurisdiction of the court extended only to granting damages) (7/19/07);

- *In Matter of Hewlett* (lay justice granted default judgments without documentation of default) (5/1/06);

- In *Matter of Greaney* (justice failed to effectuate a defendant's right to an attorney; attempted to elicit incriminating statements from the defendant; retained the defendant in jail for 12 days without counsel) (12/18/06); and

- *In Matter of VanSlyke* (lay justice failed to understand and apply the law applicable to contempt proceeding) (12/18/06).

Prosecutors have also noted the high frequency of ex parte communications by the justices, and that decisions were made based on such communications. Many decisions of the Commission on Judicial Conduct illustrate the frequency and significance of *ex parte* communications involving lay Town and Village justices. As the Commission also recognized in its decisions, these *ex*

[4] The decisions and opinions can be found in printable form at the Commission's website, www.scjc.state.ny.us.

parte communications affect the decision making process when litigants are not given notice of or an opportunity to respond to the undisclosed information before the justice.[5]

These legal and ethical mishaps only further underscore the need for this bill.

Conclusion

For all of the foregoing reasons, the New York City Bar Association supports A.5899/S.4091 and urges its enactment.

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[5] *See, e.g., In Matter of Marshall* (July 19, 2007) (justice, sitting since 1999, had ex parte communications with the defendants in four building code violations cases and then dismissed the cases in advance of the adjournment date without informing the town attorney or codes inspector.); *In Matter of Merrill* (May 14, 2007) (justice, sitting since 1989, had improperly engaged in ex parte calls with the complainant's attorney and the sheriff's office proposing an interim settlement in a case between the complainant and the justice's neighbor); *In Matter of Edwards* (July 19, 2007) (justice who was involved in ex parte communications refused to allow a response from the adverse party or permit cross-examination); *In Matter of Valcich* (August 27, 2007) (*ex parte* communications with witness; justice knew litigants, but did not disclose that); *In Matter of LaLonde* (Feb. 14, 2006) (justice dismissed VTL charge without notice to prosecutor); *In Matter of Hewlett* (May 1, 2006) (justice granted default judgments after *ex parte* conversations with the defendants and without the opportunity for the plaintiff to be heard); *In Matter of Greaney* (Dec. 18, 2006) (justice spoke ex parte to lawyers and witnesses); *In Matter of Kristoffersen* (Feb. 14, 2006) (justice dismissed cases without notice or consent of the prosecution).