REPORT OF THE CRIMINAL JUSTICE OPERATIONS COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNING CRIMINAL LEAVE APPLICATION PROCEDURES IN THE COURT OF APPEALS

Unlike the very vast majority of other states, New York permits appeals to its highest court in criminal cases based on a leave decision made by a single Court of Appeals judge. In contrast, civil leave applications are made by motion to the entire Court and granted by a vote of 2 of the 7 judges. The rates at which individual judges grant leave vary widely, are the subject of comment by various "court watchers," and result in individual judges gaining reputations as "good" or "poor" leave granters. The result is a widespread perception that this "luck of the draw" system treats those seeking leave in criminal cases unfairly. The perception of unfairness is especially troubling since leave in criminal cases is most often sought by the defendant and criminal defendants in New York are overwhelmingly indigent and disproportionately non-Caucasian.

In recent years, the rate at which leave is granted in criminal cases has declined sharply, providing additional cause for concern. Criminal appellate practitioners regularly complain that leave is denied even in particularly leave-worthy cases,

including those as to which different Departments of the Appellate Division are split.

Commendably, Chief Judge Lippman has recognized the need to discern the reason for this decline, and in particular the need to "make sure," in regard to criminal leave applications, "that everyone feels . . . that they've had their day in court." Stashenko, "Chief Judge to Review Why Court Accepts Few Criminal Appeals," N.Y.L.J. 4/22/09, p. 1, col. 3. To that end, he has appointed Judge Robert S. Smith to look into the matter.

This report outlines concerns over the fairness, and perceived fairness, of the current criminal leave application process and makes recommendations the Committee believes would address those concerns without being unduly burdensome for the Court and criminal litigants.

1. Current Civil and Criminal Leave Procedures in New York

Civil and criminal leave applications in New York follow discrete procedural paths. Civil leave applications are made by formal motion, submitted to the full Court of Appeals. If 2 of the 7 judges vote to hear a case, leave is granted.

In contrast, criminal leave applications are submitted in letter form to the Chief Judge. The Clerk of the Court then assigns them, on a rotating basis, to an individual judge of the Court. That judge alone decides whether to grant or deny leave. He or she may do so purely on the papers both sides submit, or may hold an in-person or telephone leave hearing. Notably, leave hearings, which were once virtually routine providing the issue

involved was within the Court's jurisdiction, have become increasingly rare.

The extent to which individual Court of Appeals judges grant leave applications varies considerably, with some granting 7 or more in a typical year, and others as few as 3. Among criminal appellate practitioners, most Court of Appeals judges quickly develop a reputation as "good" or "poor" leave granters, and various people and organizations regularly track their individual leave grant statistics. See Stashenko, "Chief Judge to Review Why Court Accepts Few Criminal Appeals," N.Y.L.J. 4/22/09; http://www.newyorkcourtwatcher.com. The result is, at a minimum, a perception that not all judges treat criminal leave applications equally and that whether an individual case receives leave depends less on its merits than on the "luck of the draw."

Furthermore, the judge designated to decide the application is under no obligation to confer with any other judges about it, and no mechanism exists for alerting other judges to its pendency. A leave application may actually present an issue that one or more judges would be particularly interested in having the Court consider, and yet leave may be denied without such judge(s) ever learning about the application. This exacerbates the "luck of the draw" aspect of the process that makes leave decisions seem unfair.

Notably, most other states do not have New York's dichotomy between civil and criminal leave procedures. New York appears to be one of only 4 states (the others are New Hampshire, Rhode Island, and Virginia) in which a single judge decides criminal

leave applications. In most states, the full Court makes the decision as to what criminal cases it will hear, with the number of votes needed to accept a case varying from state to state.

Civil and criminal leave applications may also be made to the Appellate Division, but again the procedures for doing so differ. In civil cases, one may apply to the Appellate Division, in which case a full panel (usually the one that decided the case) decides whether to grant leave; if it denies leave, one may then apply to the Court of Appeals, effectively getting a "second bite of the apple." In criminal cases, one may apply to an individual justice of the Appellate Division (usually a dissenter), but if that justice denies leave, a second application cannot be made to the Court of Appeals; there is only "one bite of the apple."[1]

2. <u>The Sharp Decline in Criminal Cases Heard by the Court</u>

The criminal caseload of the Court of Appeals has declined dramatically in the last quarter century. Through 1985, the Court decided more than 500 appeals (civil and criminal combined) a year. It typically sat to hear oral argument in 10-day blocks of time, nearly every month, hearing argument in as many as 8 cases on a typical day. Its volume of cases was driven in large part by the fact that civil appeals could be taken to the Court as of right from all Appellate Division reversals, "substantial

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[1] If the appeal was dismissed by the Appellate Division, the application must be made to a Court of Appeals judge. C.P.L. §470.60(3).

modifications," and affirmances that had a single dissent on a question of law.

In 1986, following a report by the McCrate Commission, the law was modified to make most civil appeals to the Court of Appeals discretionary. (The McCrate Commission unsuccessfully recommended that the same motion procedure to the full Court used for civil leave applications be adopted for criminal leave applications as well.)

With the resultant decrease in civil appeals, the Court's overall caseload began a very substantial decline. By the early 1990s, the Court was deciding, on average, fewer than 280 cases a year, and from 2000 through 2008, the average had further declined to only 186 cases a year. For the year 2010, the Court calendar sets aside only 8 blocks of between 3 and 6 days for oral argument (and 3 possible additional 2-day blocks), and it typically schedules only 4 cases for oral argument each day.

While logic would suggest that the limits placed on civil appeals as of right in 1986 would have resulted in a larger percentage of the cases the Court hears being criminal, the opposite is true. The percentage of criminal cases has actually declined over time. Between 1992 and 1996, criminal cases constituted, on average, slightly more than 40% of the Court's caseload. Between 2000 and 2008, it has constituted slightly less than 30%.

This change reflects a marked decline in criminal leave grants over time. The leave grant rate of the early 1990s, which was approximately 4%, has virtually been halved in recent years.

Between 2000 and 2008, the leave grant rate was only between 1.5% and 2.1%. Although the rate has risen again in the last few months, it is not clear whether this represents a change that will continue into the future.

3. Relevant Considerations in Recommending Changes in the Current Criminal Leave Procedure

We believe that, given both the widespread perception of unfairness engendered by the current "luck of the draw" leave process and the marked decline in criminal leave grants in recent years, the current system should be substantially modified. Even if the Court grants a higher percentage of leave applications in the coming years, the fact that the rate at which leave is granted can dip so low for a very substantial period of time remains a cause for serious concern. More important, regardless of the leave grant rate at any given time, the one-judge, "luck of the draw" system creates a widespread perception that similarly situated applicants are not treated fairly. Leave applications that are equally meritorious and present equally important issues should have a roughly equal chance of success, so as to promote both fundamental fairness and the appearance of fundamental fairness.

We also recognize, however, that any recommendation for change should take into consideration what is good, as well as bad, in the current system, and the extent to which possible alternatives may be practical and/or find acceptance within the Court. In particular, we recognize that the volume of criminal leave applications is large and that a significant number of

applications are non-meritorious. The rules of all 4 Departments of the Appellate Division require counsel for a criminal defendant to seek leave, if the client wishes, without regard to whether a leave application has merit, or even whether the Court of Appeals has jurisdiction to entertain the issue the case presents.[2]

For several practical reasons, we do not urge adoption of the civil leave motion model for criminal leave applications. First, doing so would greatly increase the number of leave motions the Court of Appeals would have to consider and decide. The Court currently considers between 1,000 and 1,100 civil leave motions a year and between 2,400 and 2,600 criminal leave applications. Adopting the civil leave system for criminal applications would more than triple the number of leave motions the Court must consider annually. This might require an increase in the Court's staff.

Additionally, a substantial number of the additional leave motions would involve cases in which the Appellate Division rules require counsel to apply for leave but in which the Court actually lacks jurisdiction to entertain and decide the only issue(s) the case presents. There seems no point in requiring a formal motion procedure when the only issue the case presents is, for example, excessiveness of sentence, whether the verdict is against the weight of the evidence, or a clearly unpreserved evidentiary issue.

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[2] See N.Y.C.R.R. §§ 606.5(6) (First Department), 671.4(a) (Second Department), 821.2 (Third Department), and 1022.11 (Fourth Department).

We also believe that one aspect of the current criminal leave system is well worth retaining: that applications may be made by letter, with the argument for why leave should be granted contained, at the leave-seeker's option, either in the initial letter or in a follow-up letter. This allows busy criminal practitioners, including institutional providers who represent exclusively indigent defendants, to make timely leave applications by sending the Court a simple initial letter, thus stopping the clock.[3] Counsel can then take additional time to present a more detailed, polished argument for leave in a follow-up letter, as well as to retrieve or assemble transcript pages or other necessary exhibits to accompany the leave argument. A more polished, focused leave argument benefits the Court as well as the litigants.

4. <u>Our Recommendation</u>

We have considered a variety of potential models in an effort to find one that can ameliorate the problem of unfairness or perceived unfairness in the current criminal leave process without overburdening either the Court or criminal litigators. We believe that the following, multi-part recommendation achieves an appropriate balance.

a) Assign Each Leave Application to a Panel of 3 Judges, With Leave To Be Granted if Any of the 3 Judges Decides It Should.

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[3] Under C.P.L §460.10(5)(a), a leave application must be filed within 30 days from the time the Appellate Division order is served by one's adversary.

The criminal leave application process would work essentially as it does now except that, instead of assigning one Court of Appeals judge to decide a leave application, the clerk's office would randomly assign 3 judges to decide the application. If any one of the 3 designated judges voted to grant leave, it would be granted. This would roughly approximate the 2 out of 7 votes needed for leave in civil cases.

This model would retain what is good about the current system while increasing its fairness and perceived fairness without creating the extreme increase in workload and unnecessary formality that adopting the full civil leave motion model would entail.

The party seeking leave would provide 3 copies of leave letters, any follow-up letters, and relevant transcript pages or exhibits, rather than only one. These would be distributed to the 3 designated judges, who would have the flexibility to decide among themselves whether they wished to conference the matter and exchange ideas or consider the leave issue(s) independently of each other. They could also decide whether they would find a leave hearing helpful and either designate one of their number to conduct such a hearing or arrange a joint telephone leave hearing if more than one of the 3 judges wishes to personally participate in it.

b) Disseminate To All Judges, in Point Heading Form, the Issues on Which Leave is Currently Being Sought, So They May Have Input If They So Desire.

We believe it would be beneficial for all Judges to be made aware of what leave issues are pending. That way, if a judge is

interested in having the Court consider a particular issue, but he or she is not one of the 3 designated leave panel judges, he or she would at least have the opportunity to give one or more of the designated judges input. This would seem to be the only way, short of having the full Court decide all criminal leave applications, that judges with an interest in an issue could be certain of the opportunity to be heard on it.

This could be achieved with minimal effort by having the party who is seeking leave fill out a simple form, like the one attached to this report, identifying the issues on which leave is sought in point-heading form, as is required now for the Jurisdictional Statement once leave has been granted. The form could be made available on the Court's website, and/or included with the Court's letter notifying counsel of the panel of judges designated to decide the leave application. Within 3 weeks of the designation of the leave panel, counsel would be required to forward to the Court 7 copies of the form (as well as the 3 copies of any follow-up letter the attorney wished to send). The form would then be distributed to all the judges, so those who are not on the leave panel will be aware of the pending leave issues and which judges have been designated to decide the leave application.

c) Provide the Automatic Right to File a Reply Leave Letter.

It is currently up to individual Court of Appeals judges whether to accept reply leave letters, and policies may vary from judge to judge. This furthers the perception of unfairness in

the leave process. Just as the Court accepts reply briefs and allows the appellant to reserve time for rebuttal at oral argument, it should adopt a rule that routinely permits the party seeking leave to file a reply leave letter. Routinizing reply leave letters would help promote fairness, especially since a leave denial generally marks the end of the road for litigants, and since the party responding to a leave application may make a new argument as to which rejoinder is appropriate. In particular, leave decisions often turn on questions of preservation and the Court's jurisdiction. Preservation or jurisdictional issues may be raised for the first time in a leave response and end up being dispositive of the application. Allowing a reply as a matter of course would ensure that the Court benefitted by hearing from both sides as to such critical issues.

d) Make Clear to Appellate Division Justices That They Should Grant Leave Applications They Believe Have Merit.

While we do not advocate abandoning the current "one bite of the apple" rule, to be fair, it must work as it was intended to, with an application to an Appellate Division justice having a reasonable chance of success. In recent years, many Appellate Division justices have adopted a blanket policy of denying leave because of their perception that the Court of Appeals wishes to control its own docket. Even an Appellate Division Justice who wrote a ringing dissent may be unwilling to grant leave, and unless a litigant is aware of a particular justice's policy, he or she may apply to that justice. If leave is then denied

because that justice has a general policy against granting leave, the litigant is barred from making a second application to the Court of Appeals. The result is to deny the litigant any genuine chance to obtain leave, a result the system obviously never intended.

Several years ago, Chief Judge Kaye attempted to rid Appellate Division justices of the notion that the Court of Appeals wanted them to deny leave so the Court could control its own docket. But there are many new Appellate Division justices and the notion has surfaced once again. The Court should again take whatever steps are needed to disabuse justices of it.

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In conclusion, we call for a change in the way criminal leave applications are handled in order to promote greater fairness and the perception of fairness in the process. In particular, we make the following recommendations:

Recommendations

a) **Assign Each Leave Application to a Panel of 3 Judges, With Leave To Be Granted if Any of the 3 Judges Decides It Should.**

b) **Disseminate To All Judges, in Point Heading Form, the Issues on Which Leave is Currently Being Sought, So They May Have Input If They So Desire.**

c) **Provide the Automatic Right to File a Reply Leave Letter.**

d) **Make Clear to Appellate Division Justices That They Should Grant Leave Applications They Believe Have Merit.**

December, 2009

CRIMINAL LEAVE APPLICATION ISSUE DESIGNATION FORM

Case Name: _____

Designated Judges: _____
_____
_____

Party seeking leave: _____

Leave is sought on the following issues (in point heading form):