NEW YORK STATE BAR ASSOCIATION

RECOMMENDATIONS OF THE

COMMITTEE ON COURTS OF APPELLATE JURISDICTION

REGARDING APPLICATIONS FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS IN CRIMINAL CASES

JUNE 10, 2009

The Committee on Courts of Appellate Jurisdiction is solely responsible for the contents of this report and the recommendations contained therein. Unless and until adopted in whole or in part by the Executive Committee or the House of Delegates of the New York State Bar Association, no part of the report should be attributed to the Association.

The Committee on Courts of Appellate Jurisdiction ("Committee") asked the Subcommittee on Criminal vs. Civil Leave Applications to the Court of Appeals ("Subcommittee") to assemble information concerning New York's application procedures for leave to appeal to the Court of Appeals in criminal cases, and to make recommendations regarding possible changes to conform the criminal leave application procedures to the civil leave application procedures. The Subcommittee issued its Draft Report on May 7, 2009, and, after further discussions with the Committee, a Final Report on May 22, 2009. The Committee adopts the findings and recommendations in the Subcommittee's Final Report, attached, with one exception, discussed below.

The Subcommittee's Report (1) reviewed New York's criminal leave procedures and compared them to civil leave procedures; (2) examined criminal leave procedures in other jurisdictions; (3) examined the prior recommendations of the 1982 MacCrate Commission Report; (4) analyzed criminal leave grants by individual Judges of the Court of Appeals over a ten-year period; (5) studied the caseload and motion burdens on the Court of Appeals in recent years; and (6) reviewed available data on the number of criminal leave applications granted and likely made in the Appellate Division. In addition, the Subcommittee considered Chief Judge Jonathan Lippman's recently reported concerns about perceived

fairness in the criminal leave application process, and has spoken with members of the criminal bar.

Based on this information, the Committee, upon motions duly made and seconded, resolves to adopt in full the Subcommittee's following two recommendations:

> 1. (a) New York conform its criminal leave application procedures in the Court of Appeals to the current civil application procedures in that Court, whereby a motion for civil leave is addressed to and decided by the entire Court; and
>
> (b) The Criminal Procedure Law be amended accordingly;[1] and
>
> 2. New York retain its current criminal leave application procedures at the Appellate Division level, whereby criminal leave applications are addressed to and decided by a single Appellate Division Justice.

To implement these recommendations, the Committee proposes that CPL 460.20 be amended to read as follows:

> **460.20 Certificate granting leave to appeal to court of appeals**
>
> 1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.
>
> 2. Such certificate may be issued by the court of the appeals or by a justice of the appellate division in the indicated situations:

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[1] The Committee does not recommend changes to the Court's Rules regarding the form and content of the application.

(a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

(b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by the court of appeals.

3. An application for such a certificate must be made in the following manner:

(a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent;

(b) An application seeking such a certificate from the court of appeals must be made in writing to the clerk of the court of appeals. The clerk of the court must then notify the respondent of the application.

4. A justice of the appellate division to whom such an application has been made may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.[2]

The Committee was not of one mind concerning the Subcommittee's third recommendation to continue limiting criminal leave applicants to making one application, either to an Appellate Division Justice or to the Court of Appeals. After extended discussion the Committee reached a consensus to adopt a variation

2 A redline version comparing the proposed amended CPL 460.20 with the current language of the statute is attached at the end of this Report.

of this recommendation to allow a second application in the event there is at least one dissent in the Appellate Division, in which case a criminal leave applicant may first seek a certificate from a single Appellate Division Justice and, if denied, then make an application for leave in the Court of Appeals. The Committee is not prepared at this time to propose a statutory amendment to reflect this third recommendation, but may do so after further deliberations.

Redline version comparing current CPL 460.20 with proposed amended version:

CPL 460.20 Certificate granting leave to appeal to court of appeals

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order ~~of a judge~~ granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.

2. Such certificate may be issued by the ~~following judges~~ court of appeals or by a justice of the appellate division in the indicated situations:

(a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) ~~a judge of~~ the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

(b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by ~~a judge of~~ the court of appeals.

3. An application for such a certificate must be made in the following manner:

(a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent;

(b) An application seeking such a certificate from ~~a judge of~~ the court of appeals must be made ~~to the chief judge of such court by submission thereof, either in writing or first orally and then~~ in writing~~,~~ to the clerk of the court of appeals. ~~The chief judge must then designate a judge of such court to determine the application.~~ The clerk must then notify the respondent of the application ~~and must inform both parties of such designation~~.

4. A justice of the appellate division to whom such an application has been made~~, or a judge of the court of appeals designated to determine such an application,~~ may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every ~~judge or~~ justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.

NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON COURTS OF APPELLATE JURISDICTION

May 22, 2009

FINAL REPORT OF THE SUBCOMMITTEE ON CRIMINAL VS. CIVIL LEAVE APPLICATIONS TO THE NEW YORK COURT OF APPEALS

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APPENDIX

I. Introduction

This Subcommittee was asked to assemble information concerning New York's application procedures for leave to appeal to the Court of Appeals in criminal cases, and to make recommendations regarding possible changes to conform the criminal leave application procedures to the civil leave application procedures. The Subcommittee (1) reviewed New York's criminal leave procedures and compared them to civil leave procedures; (2) examined criminal leave procedures in other jurisdictions; (3) examined the prior recommendations of the 1982 MacCrate Commission Report; (4) analyzed criminal leave grants by individual Judges of the Court of Appeals over a ten-year period; (5) studied the caseload and motion burdens on the Court of Appeals in recent years; and (6) reviewed available data on the number of criminal leave applications granted and likely made in the Appellate Division. In addition to these materials, the Subcommittee has considered new Chief Judge Jonathan Lippman's recently reported concerns about perceived fairness in the criminal leave application process, and has spoken with a number of members of the criminal bar.

As discussed in detail in Section IX below, the Subcommittee agrees with the conclusion reached by the MacCrate Commission a quarter of a century ago that the procedures for criminal leave applications in the Court of Appeals should be brought into harmony with the Court's civil leave application process. Thus, we recommend that criminal leave applications should be acted upon and decided by the full Court of Appeals. The Subcommittee further recommends that the current criminal leave application procedure at the Appellate Division level – whereby leave is sought from an individual Appellate Division Justice rather than from a motion panel of the Court –and the statutory provision that applicants may make only one application to either an Appellate Division Justice or to the Court of Appeals, should be retained.

II. Current Civil And Criminal Leave Motion Practice In The Court Of Appeals

In most civil cases, assuming that the jurisdictional prerequisite of "finality" is satisfied, a party who does not have an appeal to the Court of Appeals as of right under CPLR 5601 may seek leave to appeal to the Court of Appeals from either the Appellate Division or the Court of Appeals. *See* CPLR 5602(a).[1] A motion for leave to appeal in the Court of Appeals is addressed to and decided by the entire Court. The motion for leave is assigned to a reporting Judge on a routine rotation basis, and a report, which is prepared by central staff under the supervision of the reporting Judge, is circulated to all the Judges of the Court. Leave is granted if any two Judges vote in favor of granting leave. Similarly, civil leave applications made to the Appellate Division are addressed to a full panel (either four or five Justices) of the Court, usually the same panel that decided the appeal from which leave is sought. Generally, a majority of the Justices comprising the motion panel must vote in favor of the motion in order for it to be granted. This is the rule in the Third Department. *See* 22 NYCRR §800.2(a). In a civil case a party may first seek leave from the Appellate Division first and, if denied, then move for leave in the Court of Appeals. *Id.*

The procedure for making and deciding criminal leave applications is significantly different, and is largely governed by CPL 460.20.[2] In stark contrast to the "two bites" at a motion for leave to appeal in civil cases in both the Appellate Division and in the Court of Appeals, only one criminal leave application may be made in criminal cases. In most criminal

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[1] If the case originated in a "superior" court – Supreme Court, County Court, Surrogate's Court, Family Court or the Court of Claims – or in an administrative agency or in arbitration and the order sought to be appealed is final, then the moving party has the "two bite" option of moving in either or both the Appellate Division and the Court of Appeals under CPLR 5602(a). If the order sought to be appealed is non-final or the case originated in a "lower" court, then only the Appellate Division can grant leave to appeal under CPLR 5602(b).

[2] A copy of the statute is attached as part of the Appendix to this Report at A1.

cases, that one application can be made in either the Appellate Division or the Court of Appeals.[3] This makes the criminal leave process and the method of decision by the Court more critical in a criminal case. A party filing a criminal leave application in the Court of Appeals addresses it to the Chief Judge, who together with the Clerk of the Court designates a single Judge to review and decide the application, apparently on a regular rotation. Similarly, a criminal leave application to the Appellate Division is reviewed by a single Justice, but the party seeking leave chooses the individual Justice (including any dissenting Justice) to whom the application is made. The application should be made to a Justice who was on the panel that heard the appeal, *see People v. Dorta*, 48 NY2d 818 (1978), and the Fourth Department makes this mandatory by rule. *See* 22 NYCRR § 1000.2(a)(2).

III. The Criminal Leave Application Process In Other Jurisdictions

The United States Supreme Court determines the vast majority of its cases by the grant of a writ of certiorari in both civil and criminal cases, and the full Court hears and determines each application in both types of cases. Thus, there is no distinction made in the Supreme Court between civil and criminal cases in the process and number of Justices who decide whether to accept a civil vs. a criminal appeal. *See* 28 USC § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or

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[3] If the appeal is from an Appellate Division order other than one dismissing the appeal in that court, the motion for leave to appeal may be granted by either a Judge of the Court of Appeals or by a Justice of the Appellate Division. *See* CPL 460.20(2)(a). If the Appellate Division order dismisses the appeal or the appeal is from an order of a lower appellate court, either the Appellate Term or a County Court – each of which can hear appeals from still lower trial courts (New York City Criminal Court, and District, City, Town, and Village courts) – the motion for leave to appeal can only be made to a Judge of the Court of Appeals. *See* CPL 460.20(2)(b); 470.60(3).

decree ***."); § 1257 (writ of certiorari to highest Court of a State). Under the "Rule of Four" the consent of four Justices is required for the grant of a petition for certiorari. *See Agoston v. Com. of Pa.*, 340 US 844, 71 S Ct 9 (1950).[4]

Among the fifty (50) state jurisdictions, New York is one of only four states (with New Hampshire, Rhode Island, and Virginia) that allow a single judge to decide whether to grant or deny leave to appeal in a criminal case. It appears that all other states require that the highest court in the state review criminal leave applications as a full bench.[5] Of the full bench of the state's highest court, the number of judges necessary to grant leave to appeal in criminal cases varies widely, as follows:

- four states require two judges consent to grant leave in a criminal case;
- twenty-two states require three judges consent to grant leave in a criminal case;
- twelve states require four judges consent to grant leave in a criminal case;
- three states require that five judges consent to grant leave in a criminal case; and
- three states have no discretionary review in criminal cases.

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[4] The "Rule of Four" is a practice of the United States Supreme Court that permits four of the nine Justices to grant a writ of certiorari. This is done specifically to prevent a majority of the court from controlling all the cases it agrees to hear. The Rule of Four is not required by the Constitution, any law, or even the Supreme Court's own published Rules. Rather, it is a custom that has been observed since the Court was given discretion over which appeals to hear by the Judiciary Act of 1891 and Judiciary Act of 1925. http://en.wikipedia.org/wiki/Rule_of_four.

According to the Supreme Court's web site and Clerk's Office the Court currently decides approximately 10,000 cert petitions each year.
http://www.supremecourtus.gov/about/about.html

[5] In Maine and Mississippi the number of judges needed to grant leave to appeal apparently varies. No detailed information on the exact number who review criminal leave applications and the number required to grant an application could be determined.

Of the seven largest states by population, only New York gives a single Judge the discretion to grant or deny leave to appeal in a criminal case. The other six largest states require the following number of judges to consent from the highest court's full bench to grant a criminal leave application: California – four of seven; Texas – four of nine; [6] Florida – four of seven; Illinois – four of seven; Pennsylvania – three of seven; and Michigan – four of seven.[7]

IV. Prior Recommendation To Standardize The Civil And Criminal Leave Procedures In The New York Court of Appeals – The 1982 MacCrate Commission Report

The Court of Appeals asked the American Judicature Society to undertake a study to assess the need for change in the appellate jurisdictions of the New York courts. The study, known as the MacCrate Commission Report, was instrumental in reformulating the jurisdiction of the Court of Appeals from one dominated by appeals as of right to one dominated by discretionary leave grants.[8] The Report identified as an area of concern the procedure by which criminal leave applications are reviewed.

In relevant part, the MacCrate Report stated at pp. 79-80:

> With regard to criminal cases, the application is made to the chief judge, who then refers it to one of the associate judges for consideration and a ruling. The associate judge may in his discretion permit oral argument in chambers. This occurs in a small proportion of the applications, with some variation from

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[6] Texas has a separate state's highest court for criminal cases, the Texas Court of Criminal Appeals. The Supreme Court of Texas hears only civil cases.

[7] This information was taken primarily from a Report prepared under the auspices of the National Center for State Courts entitled "APPELLATE COURT PROCEDURES" by Carol R. Flango and David B. Rottman (1998). *See* Section and Table 3.2 (Granting of Discretionary Petitions). The information was confirmed, where possible, from the web sites of the state courts in question.

[8] *See* L.1985, c. 300, § 1, which was effective January 1, 1986, applied to every notice of appeal taken or motion for leave to appeal to the court of appeals made on or after such date, pursuant to section 3. This amendment eliminated appeals as of right in civil cases from Appellate Division orders of reversal or "substantial modification" or containing a single dissent on a question of law.

judge to judge in the perceived need for such hearings. The assigned judge alone then makes the decision whether to permit the appeal.

It has been argued that the applications for leave to appeal to the Court of Appeals, whether in criminal or civil cases, should be handled alike. It is urged that if the Court's civil jurisdiction is made mainly discretionary as we recommend, it would be anomalous to have individual judges exercise this discretionary power in criminal cases while having the entire court responsible for the exercise of discretion in civil cases. On the other side, a majority of the judges of the Court of Appeals is of the opinion that the present procedure should be retained for criminal case applications. Such applications are said to present uncomplicated issues in most cases and to require the expeditious treatment that one judge consideration can assure. Finally, the opportunity for oral argument in chambers is said by some to be salutary and useful.

With each associate judge now passing upon more than 250 criminal leave applications a year, a significant amount of judicial time is being dedicated to the present criminal leave granting procedure. While these applications do appear to be handled expeditiously and fairly, we doubt that adopting the procedure used for civil leave applications, with appropriate central staff support, would require any increase in the judicial time required to pass upon criminal leave applications; it may well be more efficient. Moreover, we have found that there are differences – possibly significant – in how the individual judges process the applications assigned to them. These differences include variations in the instructions provided and the requests made of counsel, as well as the treatment of counsel's request for oral argument. In addition, the convenience or remoteness of the chambers of the judge to whom an application happens to be assigned may directly affect the manner in which the application is heard. Thus, bringing the procedure for criminal leave applications into harmony with other present civil leave procedures could be expected to achieve greater uniformity in processing and results.

The MacCrate Commission recommended that the civil leave mode be adopted for criminal leave applications, but its recommendation was not adopted as part of the changes in the Court of Appeals' jurisdiction that took effect in 1986.

V. Analysis Of Criminal Leave Grants By Individual Judges Of The Court Of Appeals

The number criminal leave applications granted by each Court of Appeals Judge can be gleaned from the motion decision tables in the Court of Appeals' Official Reports. For each

criminal application for leave to appeal, those tables report whether the application was dismissed, denied, withdrawn, or granted. The tables also identify the Judge who decided each application and the date of decision. An analysis of this data for the ten-year period from 1998 through 2007 is summarized in tabular form here.[9]

CRIMINAL LEAVE GRANTS BY INDIVIDUAL JUDGES IN THE COURT OF APPEALS (1999-2007)

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	Aver.
Kaye	7	4	6	8	9	7	4	11	7	4	6.7
Ciparick	7	5	5	5	8	5	5	4	7	7	5.8
Titone	5										5.0
Bellacosa	16	10	3*								10.0
Levine	11	6	7	14	5						8.6
Wesley	9	6	5	3	2	1*					4.3
G.B. Smith	5	8	8	8	13	8	7	7	2*		7.3
Rosenblatt		4	12	1	5	7	10	7	9		6.9
Graffeo			0*	6	3	5	3	4	7	5	4.1
Read						1*	6	0	7	1	3.0
R. Smith							8	5	10	7	7.5
Pigott									1*	7	4.0
Jones										3*	3.0
Total Grant**	60	43	45	45	45	34	43	38	47	34	44
Aver Grant/Jud	8.5	6.1	6.4	6.4	6.4	4.8	6.1	5.4	6.7	4.8	
Crim Lv Apps	2982	2799	2863	2840	2724	2601	2644	2383	2436	2371	2665

* Judge did not serve a full year.

** The numbers in this Chart were obtained by visually counting, by Judge, the decisions granting or denying leave each year as reported in the Memorandum tables in the New York Reports. The totals may differ from the totals reported in the Court of Appeals' Annual Reports because the totals there reflect the date of the leave application, not the date of decision.

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[9] Analysis of figures recently provided by the Court of Appeals Clerk's Office reflecting the total number of leave grants by Judge over the ten-year period from 1999 to 2008 yields similar results. The average annual leave grants for individual Judges ranged from 2.8 to 8.6, with a median of approximately seven criminal leave grants per year.

Analysis of this data shows that many of the current and former Judges of the Court cluster around granting about six or seven criminal leave applications each year. Nevertheless, there is considerable variation from that average among certain current and former Judges of the Court. Certain Judges have averaged approximately nine criminal leave grants each year, while others have averaged approximately three criminal leave grants each year. As a result, the average annual number of criminal leave applications granted by certain Judges can be two to three times the average annual number of criminal leave applications granted by certain other Judges.

Because criminal of leave applications are apparently randomly assigned among all of the Judges of the Court in approximately equal numbers, some may infer that applicants for leave in criminal cases may not have equal opportunities for obtaining leave, depending on the Judge to whom his application is assigned. An applicant may be viewed as having a higher likelihood of success in obtaining leave if his application is randomly assigned to one of the Judges who has shown a higher propensity for granting leave. Conversely, an applicant may be viewed as have a lower likelihood of success in obtaining leave if his application is randomly assigned to a Judge who historically has granted fewer leave applications.

This perception of unfairness, if not actual unfairness, weighs in favor of changing the criminal leave application process to be more like the civil leave application process, where every application is considered by the full Court.

VI. The Caseload And Motion Burdens On The Court – A Comparison Of Civil And Criminal Leave Application Statistics

Over the years significant events have affected the case and motion burdens on the Judges of the Court of Appeals. Prior to the change in the jurisdiction of the Court of Appeals

effective January 1, 1986 making the Court much more of a "certiorari" Court with substantial power to determine its own caseload, the Court of Appeals heard and determined more than 500 appeals per year from 1980 through 1985. The burden of the Court's pre-1986 caseload, together with its abandonment of the earlier practice of deciding appeals with the simple statement "Affirmed. No opinion," caused it to develop the "Sua Sponte Examination of Merits" (SSM) procedure. SSM appeals are selected for determination without oral argument and solely on the Record and Briefs from the Appellate Division, together with "letter briefs" from counsel. Adopted in approximately 1984, this procedure used to be found in Court of Appeals Rule 500.4, and is now found at Rule 500.11 and is referred to as "Alternative Procedure for Selected Appeals."[10]

The re-institution of the death penalty in 1995 and the resulting burden on the Court of Appeals to hear as a matter of right a direct appeal from the trial court where a sentence of death was pronounced and to engage in fact finding in such death penalty appeals caused the Court to increase the staff of the individual Judges' chambers and the central staff.[11] For example, each individual Judge received one additional law clerk (the Chief Judge went from having three to four law clerks; each Associate Judge went from two to three law clerks). *See* Daniel Wise, "*Capital Punishment Proves to Be Expensive*," NYLJ (April 29, 2002) ("[T]he budget for the Court of Appeals has been increased by $533,000 a year to provide each of its seven judges with an additional clerk to handle death-penalty work ***."). The Court's decision in *People v.*

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[10] *See* 22 NYCRR § 500.4 as amended June 4, 1984. The earliest reported decision we could find containing a reference to submissions of counsel and Rule 500.4 is *Matter of Abrams v. Public Serv. Comm'n*, 61 NY2d 718 (1984).

[11] *See* N.Y. Const. Art. VI, § 3; L. 1995, ch. 1; CPL 400.27, 450.70.

LaValle, 3 NY3d 88 (2004), holding the new death penalty law unconstitutional, has eliminated this burden on the Court.

The following chart reflects the total appeals and civil and criminal motion statistics of the Court over the last 25 years.

COURT OF APPEALS – TOTAL APPEALS AND CIVIL VS. CRIMINAL LEAVE APPLICATIONS (1986-2008)

	Total # Appeals Decided	Civil Motions For Leave	Civil Motions Granted	% Civil Motions Granted	Criminal Leave Apps.	Criminal Leave Apps. Granted	% Criminal Leave Granted	Criminal Leave App Per Judge
2008	225	1,093	74	6.8	2,637	53	2.0	376
2007	185	1,100	77	7.0	2,382	36	1.5	349
2006	189	1,021	61	6.0	2,436	52	2.1	348
2005	196	967	61	6.3	2,383	42	1.8	353
2004	185	905	75	8.3	2,644	46	1.8	367
2003	176	1,053	86	8.2	2,601	37	1.4	397
2002	176	1,013	71	7.1	2,724	46	1.7	388
2001	176	1,115	72	6.5	2,840	43	1.5	404
2000	170	1,088	54	**5.0**	2,863*	51	1.8	448
1999	208	1,209	94	7.8	2,799*	44	1.6	402
1998	198	1,202	91	7.6	2,982*	57	1.9	451
1997	260	1,215	96	7.9	2,944*	56**	3.7	438
1996	295	1,309	126	9.6	3,018*	53	1.8	400
1995	340	1,265	124	9.8	3,140	89	2.8	452
1994	249	1,027	109	10.6	2,798	113	**4.0**	423
1993	296	948	113	12.0	3,331	81	2.4	500
1992	306	886	73	8.2	2,822	76	2.7	413
1991	293	1,051	106	10.1	2,841	74	2.6	416
1990	287	967	114	11.8	2,827	78	2.8	438
1989	295	1,069	123	11.5	2,534	91	3.6	408
1988	369	933	82	8.8	2,439	73	3.0	404
1987	369	989	143	14.5	2,490	98	3.9	416
1986	494	NA	NA	NA	2,508	13	.52	405
Aver								

* Includes some applications assigned in previous year.

** Includes grants of 54 separate applications handled as a single appeal below and in the Court of Appeals.

These statistics are discussed and shown in graph form on pages 5-8 of the 2008 Annual Report of the Clerk of the Court of Appeals. These pages are attached in the Appendix at A2-5.

The number of total appeals decided by the Court has decreased dramatically since the early and mid-1980's, with the exception of 2008, such that the Court did not decide 200 appeals per year between 1999 and 2007. On average, 182 appeals were decided from 2000 through 2007.[12] The total number of civil leave applications has remained relatively stable, while the total number of criminal leave applications has declined since the high numbers of 1990 through 2001 in the 25 year span. Notably, the highest percentage of leave applications granted in criminal cases was just 4.0% in 1994 – just before the re-introduction of the death penalty – while the lowest percentage of leave applications granted in civil cases was 5.0% in 2000.

VII. Criminal Leave Applications In The Appellate Division

We were only able to obtained limited information regarding the number of criminal leave applications made to an Appellate Division Justice in each of the four Departments

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[12] In comparison, in the 2007 Term (October 1, 2007 through September 30, 2008) the United States Supreme Court decided 73 appeals. According to the Supreme Court's web site, "[f]ormal written opinions are delivered in 80 to 90 cases [per Term]. *See* http://www.supremecourtus.gov/about/about.html.

In 1985, the New York State Constitution was amended to allow the Court of Appeals discretionary jurisdiction to review certified questions of state law from certain federal courts and other courts of last resort. *See* NY Const. art VI, §3(b)(9).

In 1986 the Court first promulgated Rule 500.17, providing that whenever it appears to the Supreme Court of the United States, or a United States Court of Appeals or a court of last resort of any other State that determinative questions of New York law are involved in a cause pending before it for which no controlling precedent from the Court of Appeals exists, that court may certify the dispositive questions of law to the Court of Appeals. In 2005 Rule 500.17 was re-codified as Rule 500.27.

These "certified" appeals accepted and decided by the Court of Appeals under this new procedure are included in the number of total appeals decided each year in the above chart. For example, in 2007, the last year for which such statistics are readily available, Rule 500.27 certification was the jurisdictional predicate for 13% (17 of 135) of the civil appeals decided by the Court of Appeals.

historically. The data we did obtain, however, supports our findings that very few criminal leave applications are made to an Appellate Division Justice and almost exclusively occurs when that Justice dissented from the order sought to be appealed. Thus, we have obtained and report below (1) the number of criminal cases where there was at least one dissent in the Appellate Division over the past seven years, and (2) the number of criminal cases decided by the Court of Appeals over a similar time period where the jurisdictional predicate was the grant of leave by an Appellate Division Justice. We believe that these statistics approximately reflect the number of criminal leave applications to an Appellate Division Justice in each calendar year. *See* New York State Bar Association, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE COURT OF APPEALS OF THE STATE OF NEW YORK at 8-9 (2d Ed. 1991) ("[T]he certificate [granting leave to the Court of Appeals in a criminal case] maybe granted either by a judge of the Court of Appeals or by a justice of the Appellate Division. Where there was no dissent in the Appellate Division, the usual practice is to seek leave from a Court of Appeals judge. *** If there was a dissent in the case it is often the practice to make the application to a dissenting justice. This should not lead to the assumption by counsel that there will be an automatic grant of leave.").

We obtained historic information on the total number of criminal cases in which at least one Justice dissented in each of the Four Departments of the Appellate Division by conducting a Westlaw search. Thus, between 2002 and 2008 there was a least one dissent in the following number of criminal cases in each Department: First Department – 72; Second Department – 35; Third Department – 26; and Fourth Department – 52.

The following chart contains a breakdown by Department for each of the calendar years in question.

CRIMINAL APPEALS IN EACH DEPARTMENT WITH AT LEAST ONE DISSENT

	1st Dept.	2d Dept.	3d Dept.	4th Dept.	Total
2002	2	9	2	8	21
2003	11	7	2	7	26
2004	7	5	1	6	19
2005	12	4	3	6	25
2006	8	2	4	7	21
2007	15	2	5	6	28
2008	17	6	9	12	44
Total/Aver.	72/10	35/5	26/4	52/7	184/26

Notably, the actual number of criminal leave applications in the First Department in 2007 and 2008 are almost identical to the number of criminal cases in each year in which there was at least one dissent. According to the Clerk's Office the First Department decided fourteen criminal leave applications in 2007 (eleven were granted, three were denied or dismissed), and in 2008 it received eighteen applications (ten were granted, eight were denied or dismissed). In addition, according to the Third Department's Clerk's Office, that Court entertained a total of 71 criminal leave applications over the last ten years – or about seven each year – and granted thirteen of them – for an average of only a little more than one per year.

The Annual Reports of the Court of Appeals (Appendix 6) reflect the total number of criminal appeals decided by the Court in each calendar year, and the number and percentage of those criminal appeals in which the jurisdictional predicate was the permission of an Appellate Division Justice. The following chart reflects this information for 2003- 2008:

CRIMINAL APPEALS DECIDED BY THE COURT OF APPEALS WHERE THE JURISDICTIONAL PREDICATE IS THE PERMISSION OF AN APPELLATE DIVISION JUSTICE

Year	2003	2004	2005	2006	2007	2008
Criminal Cases Decided	4 of 46	14 of 49	8 of 59	9 of 62	11 of 50	15 of 53
%	8%	29%	13%	15%	22%	28%

Although there is no direct correlation between the year in which a case was decided in the Appellate Division in which there was at least one dissent, and the year in which the Court of Appeals decides a criminal case where the jurisdictional predicate was the permission of an Appellate Division Justice, these numbers reflect several facts. First, there are very few criminal cases in each calendar year in which at least one Appellate Division Justice dissents. Certainly, the number is far less than the approximately 2,500 criminal leave applications presented to and decided by the Court of Appeals each year for the past 20 years.

Second, assuming that most parties in a criminal case in which there was at least one dissent in the Appellate Division choose to seek leave from the dissenting Appellate Division Justice rather than from the Court of Appeals, it appears that not every dissenting Appellate Division Justice grants leave to appeal to the Court of Appeals. *See* Practitioner's Guide, *supra*.

Third, making the same assumption again, and further assuming that with only few exceptions only losing parties who obtain a dissent opt to seek leave from the Appellate Division dissenter(s) rather than from the Court of Appeals, it appears reasonable to conclude that collectively all four Departments of the Appellate Division in any calendar year in the last seven years would have received between 19 and 44 criminal leave applications per year (there was an average of 26 cases statewide with at least one dissent annually). Again, this number is minimal given the 2,500 criminal leave applications on average decided in the Court of Appeals each year.

VIII. The Current Court And The Timing Of This Report To The Committee

With the recent appointment and confirmation of new Chief Judge Jonathan Lippman, it is evident that certain changes in the administration of New York's courts and the practices of the Court of Appeals will be studied and reviewed and perhaps modified. One of the changes to be reviewed by Chief Judge Lippman is what has caused the number of criminal leave applications granted by the Court of Appeals to decrease to such a small percentage of the applications submitted. A New York Law Journal article on April 22, 2009 entitled "*Chief Judge to Review Why Court Accepts Few Criminal Appeals*" discusses this issue and quotes Chief Judge Lippman as follows:

> New York's new chief judge said he will review why the Court of Appeals agrees to review only one or two of every 100 criminal convictions that reach it.
>
> "I want to make sure that on the criminal leave appeals . . . that everyone feels in this state that they've had their day in court," Chief Judge Jonathan Lippman said in an interview. "That is something that I think we have to take a step back and look at. Not because I know there is something wrong, but it's so important."
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> ***
>
> Judge Lippman said he became more sensitive to the need for the courts to project the image of even-handedness in dealing with all criminal defendants, including indigent ones, as presiding justice of the Appellate Division, First Department, from 2007-09. He said he became more aware of the criminal leave grant percentages at the Court of Appeals while preparing to go through the screening process for chief judge beginning last year.
>
> "Taking a look [at the numbers], I said 'I wonder why that's the case?' I know it's always been relatively low, but I think it's more so," the chief judge said.

The article also states:

> Defense attorneys applauded Judge Lippman for wanting to review leave patterns.
>
> "We've seen a number of denials of leave applications presenting important unsettled questions, including some where there have been a split of

the Appellate Divisions over the years," said Steven Banks, attorney-in-charge for the Legal Aid Society of New York City. "We welcome a fresh perspective from Judge Lippman to examine whether any changes are needed in this area."

Defense attorneys cited *People v. Martinez*, 52 AD3d 68 (2008), as presenting an issue that was seemingly ripe for Court of Appeals review. In it, a First Department panel ruled that an indictment that identified a defendant in a sexual attack case by his DNA markers was sufficient to satisfy his constitutional right to notice (NYLJ, April 18, 2008). Judge Read denied leave to appeal in September 2008, however.

A copy of the article is attached as part of the Appendix to this Report at A6-9.

IX. Recommendations To The Committee

The Subcommittee has considered the following four options:

1. Maintain the existing criminal leave application procedures as codified at CPL 460.20;

2. Conform the criminal leave application procedures to the current civil leave application procedures at both the Court of Appeals and the Appellate Division;

3. Conform the criminal leave application procedures at the Court of Appeals to the current civil leave application procedures at that Court, but maintain the current criminal leave application procedures at the Appellate Division, and continue to permit only one criminal leave application to be made; and

4. Conform the criminal leave application procedures at the Court of Appeals to the current civil leave application procedures at that Court, but maintain the current criminal leave application procedures at the Appellate Division level, and permit the applicant to make a second application to the Court of Appeals when an application to a single Appellate Division Justice has been denied.

Notably, none of these options would require constitutional amendment. Each of the alternatives to maintaining the status quo would require only amendments to the Criminal Procedure Law and changes in the respective courts' internal procedures. The relevant provision of the New York State Constitution is included in the Appendix at A10.

The Subcommittee recommends that: (1) New York conform the criminal leave application procedures in the Court of Appeals to the current civil leave application procedures in that Court; (2) the criminal leave application process in the Appellate Division – allowing the moving party to apply directly to a single Justice of his/her choosing rather than having the application heard by a four or five Justice panel of the Court should be retained; and (3) parties moving for leave to appeal to the Court of Appeals in criminal cases should continue to be limited to one application either to a single Appellate Division Justice or to the full Court of Appeals.

A. Criminal Leave Procedures In The Court of Appeals Should Be Conform To The Civil Leave Process, But The "Single Justice" Rule In The Appellate Division Should Be Retained

The Subcommittee recommends that criminal leave application procedures in the Court of Appeals should be conformed to the civil leave process. We base this recommendation on a number of factors supported by the data and information set forth in detail earlier in this Report.

First, the Subcommittee agrees with Chief Judge Lippman that New York's procedures should ensure that criminal defendants "have their day in court" and believes that the current system allows for at least the perception of unequal treatment. Second, as the MacCrate Commission observed, "bringing the procedure for criminal leave applications into harmony with the other present civil leave procedures could be expected to achieve greater uniformity in processing and results." This is particularly desirable given the different experiences and

propensities that each Judge brings to the Court. Third, New York is one of the very few states that do not allow for consideration of criminal leave applications by the full Court. Fourth, both the number of decided appeals and the number of criminal leave applications has declined in recent years, while the size of the Court of Appeals' legal staff has increased, making it more palatable that the Court has the staff to accommodate the recommended procedures.

At the Committee meeting on May 7, 2009, the Committee voted unanimously to conform the criminal leave application procedure in the Court of Appeals to the current civil leave application process in that Court.

In its draft Report, the Subcommittee was not able to make a specific recommendation on retaining the current criminal leave application process in the Appellate Division, which allows a losing party to seek leave to the Court of Appeals from an individual Justice of the Appellate Division to be selected by the applicant. At the May 7, 2009 meeting, the Committee voted overwhelmingly that this "single Justice" application process at the Appellate Division level be retained. This conclusion is supported by several considerations, including: (1) having the full panel decide the application would increase the workload and administrative burden of each Department and each Appellate Division Justice; (2) the District Attorneys and criminal defense bar like the option of speaking directly to the Justice who dissented in their favor in seeking leave to appeal; and (3) it is far more likely that leave will be granted by the dissenter(s) than by a majority of the panel that decided the appeal at the Appellate Division.

B. Criminal Leave Applicants Should Be Limited To One Application

There was substantial discussion and the Committee was divided on the third issue – whether in a criminal case, like in a civil case, an applicant for leave to appeal should be given

the ability to have "two bites" by applying first to an Appellate Division Justice and then, if unsuccessful, make application to the Court of Appeals. Based on the Subcommittee's further review and evaluation of this issue we recommend that the current procedure in criminal cases, wherein an applicant may only seek leave to appeal **either** from a single Appellate Division Justice **or** from the Court of Appeals, be retained. We believe that there should be no change in this aspect of the current criminal leave application process.

The overriding consideration that leads the Subcommittee to this recommendation is the potential enormous administrative burden that would be placed on the Justices of the Appellate Division if the "two bite" procedure allowed in civil appeals were adopted in criminal cases. Moreover, the empirical evidence we have collected tells us that this burden would not lead to any significant increase in the number of criminal leave applications being granted by the Appellate Division.

All four Departments of the Appellate Division generally require that in the event of an adverse decision on appeal retained and assigned counsel to criminal defendants must advise the defendant in writing of the right to apply for leave to appeal to the Court of Appeals and to request the assignment of counsel on such an appeal and if the client timely requests that such application be made counsel must do so. *See* 22 NYCRR § 606.5(b)(2) [1st Dep't], § 671.4 [2d Dep't], § 821.2(b) [3d Dep't], § 1022.11(b) [4th Dep't].

The chart on page 10 of this Report reflects that between 1986 and 2008 the Court of Appeals has decided approximately 2,500 criminal leave applications on average each year. In addition, the charts and information contained in Part VII, *supra*, reflect that: (1) very few criminal cases each year giver rise to at least one dissent in the Appellate Division; (2) these few cases are the most likely cases – and in reality are almost exclusively the cases – in which a

losing party seeks leave from an individual Appellate Division Justice as opposed to making an application to the Court of Appeals to be randomly assigned to one Judge under the current rule; (3) even when an Appellate Division Justice dissents that is no guarantee that he or she will grant leave; and (4) very few applications for leave to appeal to the Court of Appeals are made to an individual Appellate Division Justice each year in criminal cases. Moreover, this information is not readily available or known to the practicing bar.

Thus, despite the futility of seeking leave in a criminal case from an individual Appellate Division Justice when there has been no dissent, there is the substantial possibility that adoption of the "two bite" aspect of the civil leave process to criminal leave applications would result in duplicate criminal leave applications in both the Appellate Division and the Court of Appeals. This is especially true given the substantial liberty interests at stake in comparison with the financial interests that predominate in civil matters. Thus, adoption of the "two bite" rule in criminal cases will certainly increase the total number of criminal leave applications in the Appellate Division, and could expediential increase the number from approximately 30 to as many as 2,000 or more per year in the Appellate Division.

From this information, this Subcommittee believes that it is reasonable to conclude that if the losing party in a criminal case were given the option of seeking leave to appeal from a single Appellate Division Justice and, if unsuccessful, could then seek leave from the Court of Appeals most counsel would take advantage of this and seek leave from both. While this would likely not significantly increase the total number of criminal leave applications handled by the Court of Appeals, it would almost certainly inundate each of the four Departments of the Appellate Division with hundreds if not thousands of additional criminal leave applications that currently are not being handled by the Appellate Division Justices.

In addition to these administrative burdens, retaining the current system for obtaining leave in criminal cases from a single Justice of the Appellate Division, but limiting criminal leave applicants to one leave application, may be justified as a trade-off. Civil leave applicants seemingly have a higher hurdle to get their case before the Court of Appeals based on Appellate Division action – requiring either a two-Justice dissent for an appeal as of right, *see* CPLR 5601(a), or permission of a majority of the Court, *see* CPLR 5602(b).

In conclusion, this Subcommittee shares the sentiment of many members of the Committee expressed during the May 7, 2009 meeting that ideally there should be complete harmony between the civil and criminal leave application procedures in both the Appellate Division and the Court of Appeals. We cannot overlook or ignore, however, the presumably enormous administrative burden that would be placed on the Justices of the Appellate Division if the "two bite" approach of the civil leave application process were applied to criminal leave applications. Accordingly, this Subcommittee recommends that CPL 460.20 should not be modified to allow a criminal leave application to be made first to a single Justice of the Appellate Division and then, if unsuccessful, to the Court of Appeals.

Dated: May 22, 2009

Respectfully Submitted:

Subcommittee on Criminal vs. Civil Leave Applications to The New York Court Of Appeals

Denise A. Hartman
Alan J. Pierce
Prof. Michael J. Hutter

APPENDIX

CPL 460.20 – Certificate granting leave to appeal to court of appeals

1. A certificate granting leave to appeal to the court of appeals from an order of an intermediate appellate court is an order of a judge granting such permission and certifying that the case involves a question of law which ought to be reviewed by the court of appeals.

2. Such certificate may be issued by the following judges in the indicated situations:

   (a) Where the appeal sought is from an order of the appellate division, the certificate may be issued by (i) a judge of the court of appeals or (ii) a justice of the appellate division of the department which entered the order sought to be appealed.

   (b) Where the appeal sought is from an order of an intermediate appellate court other than the appellate division, the certificate may be issued only by a judge of the court of appeals.

3. An application for such a certificate must be made in the following manner:

   (a) An application to a justice of the appellate division must be made upon reasonable notice to the respondent;

   (b) An application seeking such a certificate from a judge of the court of appeals must be made to the chief judge of such court by submission thereof, either in writing or first orally and then in writing, to the clerk of the court of appeals. The chief judge must then designate a judge of such court to determine the application. The clerk must then notify the respondent of the application and must inform both parties of such designation.

4. A justice of the appellate division to whom such an application has been made, or a judge of the court of appeals designated to determine such an application, may in his discretion determine it upon such papers as he may request the parties to submit, or upon oral argument, or upon both.

5. Every judge or justice acting pursuant to this section shall file with the clerk of the court of appeals, immediately upon issuance, a copy of every certificate granting or denying leave to appeal.

Court of Appeals of the State of New York

Annual Report of the Clerk of the Court 2008

A2

in 2008 (including SSM appeals tracked to normal course) was 255 days. For all appeals, including those decided pursuant to the Rule 500.11 SSM procedure, those dismissed pursuant to Rule 500.10 SSD inquiries, and those dismissed pursuant to Rule 500.16(a) for failure to perfect, the average was 160 days. Thus, by every measure, in 2008 the Court maintained its long tradition of exceptional currency in calendaring and deciding appeals.

B. The Court's 2008 Docket

1. Filings

Three hundred and twenty-eight (328) notices of appeal and orders granting leave to appeal were filed in 2008 (340 were filed in 2007). Two hundred and fifty-one (251) filings were civil matters (compared to 279 in 2007), and 77 were criminal matters (compared to 61 in 2007). The Appellate Division Departments issued 54 of the orders granting leave to appeal filed in 2008 (36 were civil, 18 were criminal). Of these, the First Department issued 34 (24 civil and 10 criminal).

Motion filings decreased in 2008. During the year, 1421 motion numbers were used, a decrease of 4.05% from the 1481 motion numbers used in 2007. Criminal leave applications increased in 2008. Two thousand six hundred and eighty-seven (2,687) applications for leave to appeal in criminal cases were assigned to individual Judges of the Court during the year, 305 more than in 2007. On average, each Judge was assigned 400 such applications during the year.

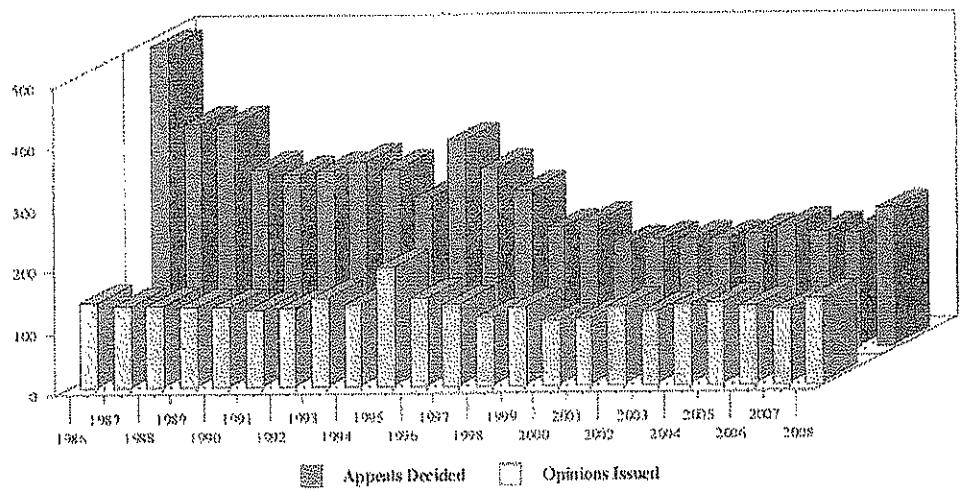
2. Dispositions

(a) Appeals and Writings

In 2008, the Court decided 225 appeals (172 civil and 53 criminal, compared to 135 civil and 50 criminal in 2007). Of these appeals, 186 were decided without dissent. The Court issued 132 signed opinions, 4 per curiam opinions, 34 dissenting opinions, 6 concurring opinions, 62 memoranda and 27 decision list entries. The chart on the next page tracks appeals decided and full opinions (signed and per curiam) issued since Laws of 1985, chapter 300 narrowed the available predicates for appeals as of right and expanded the civil *certiorari* jurisdiction of the Court.

A3

Appeals Decided and Opinions Issued
1986-2008

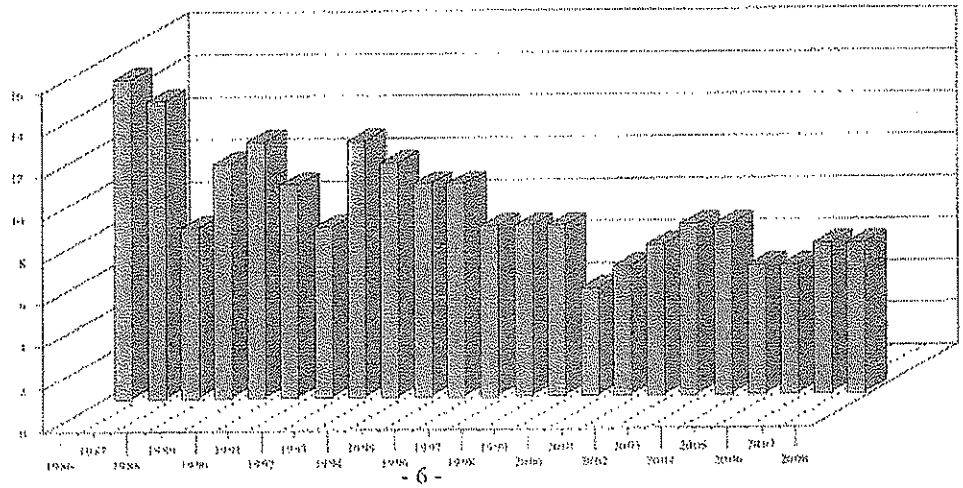


(b) Motions

The Court decided 1,459 motions in 2008—19 more than in 2007. Each motion was decided upon submitted papers and an individual Judge's written report, reviewed and voted upon by the full Court. The average period of time from return date to disposition for civil motions for leave to appeal was 60 days, while the average period of time from return date to disposition for all motions was 55 days.

The Court decided 1,093 motions for leave to appeal in civil cases during the year—the same as in 2007. Of these, the Court granted 6.8% (down from 7% in 2007), denied 75.9% (up from 75.4% in 2007) and dismissed for jurisdictional defects 17.3% (down from 17.6% in 2007). The chart below shows the percentage of civil motions for leave to appeal granted since the expansion of the Court's certiorari jurisdiction in 1986.

Motions for Leave to Appeal Granted by Year
1986-2008



A4

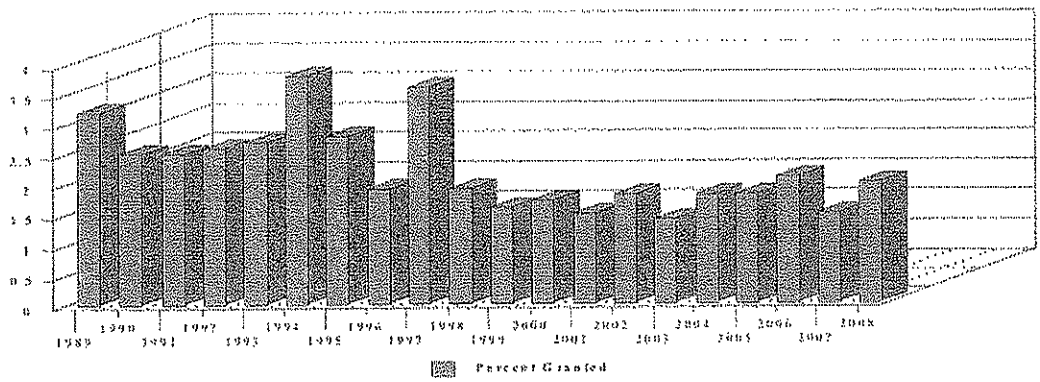
Seventy-four motions for leave to appeal were granted in 2008. The Court's leave grants covered a wide range of subjects. In the matrimonial and family court context, the Court granted leave to address the proper date of valuation of assets where a prior action for divorce was voluntarily discontinued, the vacatur of a judgment under Uniform Rule 202.48, whether a minor was a "consent" or "notice" father, the enforceability of a French prenuptial agreement, and whether a husband may receive credit for maintenance payments to a former wife that were paid with marital funds. The Court granted leave in election matters to address whether a losing candidate may challenge an election determination before the Board of Elections certifies the winner of the election and whether the Public Officers Law requires a general election for an unexpired term. The Court granted leave in several proceedings commenced under the Sex Offender Registration Act (SORA) to address the appropriate interpretation of one of the categories of the Risk Assessment Instrument, whether a defendant is subject to SORA's requirements where his aggregate maximum term extended beyond the statute's 1996 effective date, whether a defendant had a "relationship" with individuals pornographically depicted on his computer, whether documents generated by the District Attorney's office constitute reliable hearsay, whether applying the act to individuals whose kidnapping offenses do not involve a sexual component is constitutional, and whether a criminal complaint constitutes reliable hearsay.

Other matters covered an exemption for water and sewer charges where a building was used for worship space and contained residential apartments, a dispute between a diocese and a local church over church property, federal preemption of an action seeking to restrain loud drumming to publicize a union's handbilling activities, notice of a street defect based on a "Big Apple" map, the sealing of records upon termination of a criminal action in favor of the accused, whether parishioners may maintain a civil action to enjoin demolition of a parish church, the appropriate interpretation of the statutory scheme relating to payments that off-track betting corporations must make to harness tracks, the enforceability of a stipulation granting a tenant an unregulated lease to a rent stabilized apartment in exchange for an agreement to pay an allegedly unlawful rent, imposition of a civil penalty under the lifetime bar provision of the Public Officers Law, interpretation of a lawyer's approval clause in a contract for the sale of real property, the subrogation rights of an insurer, the ability of aid recipients to challenge the adequacy of shelter allowances, the validity of a durational employment contract in the education context, and the prohibition against members of the State Police consulting with counsel or a union representative during a critical incident inquiry.

(c) CPL 460.20 Applications

Individual Judges of the Court granted 53 of the 2,637 applications for leave to appeal in criminal cases decided in 2008—up from 36 in 2007. Two hundred and twenty applications were dismissed for lack of jurisdiction, and nine were withdrawn. Seven of 60 applications filed by the People were granted. The chart on the next page reflects the percentage of applications for leave to appeal granted in criminal cases over the past 20 years.

Criminal Leave Applications Granted by Year
1989-2008



Laws of 2002, chapter 498 amended the criminal jurisdiction of the Court of Appeals to allow appeals by permission from intermediate appellate court orders determining applications for writs of error coram nobis. In 2008, 229 applications for leave to appeal from such orders were assigned to Judges of the Court, down from 241 in 2007. Two such applications were withdrawn, and two were granted.

Review and determination of applications for leave to appeal in criminal cases constitute a substantial amount of work for the individual Judges of the Court during home chambers sessions. The period during which such applications are pending usually includes several weeks for the parties to prepare and file their written arguments. In 2008, on average, 65 days elapsed from assignment to Judges to disposition of applications for leave to appeal in criminal cases.

(d) Review of Determinations of the State Commission on Judicial Conduct

By Constitution and statute, the Court of Appeals has exclusive jurisdiction to review determinations of the State Commission on Judicial Conduct and to suspend a judge, with or without pay, when the Commission has determined that removal is the appropriate sanction, or while the judge is charged in this state with a crime punishable as a felony. In 2008, the Court reviewed three determinations of the State Commission on Judicial Conduct, accepting the recommended sanction of removal in each case. Pursuant to Judiciary Law § 44(8), the Court ordered the removal of one judge, and the suspension of three judges with pay.

(e) Rule 500.27 Certifications and the State-Federal Judicial Council

In 1985, to promote comity and judicial efficiency among court systems, New York voters passed an amendment to the State Constitution granting the New York Court of Appeals discretionary jurisdiction to review certified questions from certain federal courts and

New York Law Journal

Chief Judge to Review Why Court Accepts Few Criminal Appeals

Joel Stashenko
04-22-2009

ALBANY - New York's new chief judge said he will review why the Court of Appeals agrees to review only one or two of every 100 criminal convictions that reach it.

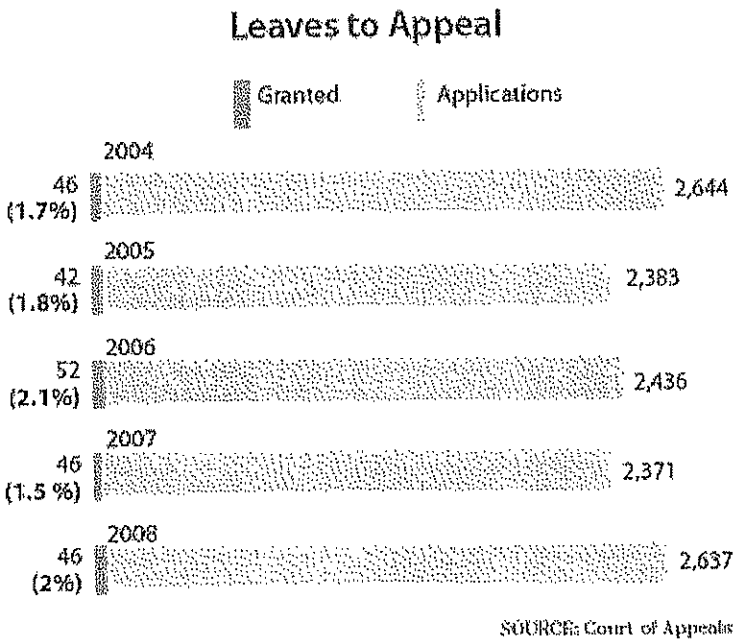
"I want to make sure that on the criminal leave appeals . . . that everyone feels in this state that they've had their day in court," Chief Judge Jonathan Lippman said in an interview. "That is something that I think we have to take a step back and look at. Not because I know there is something wrong, but it's so important."

Where the Court routinely accepted more than 3 percent of the leave applications annually in criminal cases in the 1980s and early 1990s, the percentage dropped beginning in the mid-1990s and has not exceeded 2.1 percent since 2006, according to statistics kept by the Court.

Judge Lippman said he became more sensitive to the need for the courts to project the image of even-handedness in dealing with all criminal defendants, including indigent ones, as presiding justice of the Appellate Division, First Department, from 2007-09. He said he became more aware of the criminal leave grant percentages at the Court of Appeals while preparing to go through the screening process for chief judge beginning last year.

"Taking a look [at the numbers], I said 'I wonder why that's the case?' I know it's always been relatively low, but I think it's more so," the chief judge said.

Court observers attribute the drop in leaves to appeal in the 1990s to the relatively conservative judges installed by then-Governor George E. Pataki, beginning with Richard Wesley in January 1997. They also point to the possible effects of Mr. Pataki's criticism of the judicial rulings as too liberal and too pro-defendant in some criminal cases.



"These things don't happen accidentally," said Vincent Bonventre, an Albany Law School professor and former clerk at the Court who follows its decisions carefully. "It happened almost immediately after Pataki was condemning the Court for being too liberal and it has continued ever since."

Judge Lippman was peppered with questions about diversity in the courts and about the fairness of the system to minority criminal defendants during his confirmation hearing before the Senate Judiciary Committee in February (NYLJ, Feb. 13).

Applications for leaves to appeal in criminal cases are assigned to Court of Appeals judges on a rotating basis and decided individually.

Judge Lippman said some judges hold conferences with attorneys when deciding on criminal leave applications while others are comfortable ruling off the papers. For his part, the chief judge said he favors holding conferences by telephone when there is a "potentially colorable argument you might want to flesh out," though he acknowledged that would not be feasible in all of the approximately 400 criminal leave applications each judge decides each year.

Mr. Bonventre and other court watchers said Judges Eugene F. Pigott Jr. and Robert S. Smith are most apt to accept leaves to appeal in criminal cases and Judge Susan Phillips Read the least likely. All were nominated by Mr. Pataki.

The granting of leave does not necessarily break down along ideological lines, however.

One defense attorney who asked not to be identified said former Judge Joseph Bellacosa, a moderate-to-conservative while on the Court from 1987 to 2000, frequently granted leave to appeal, only to ultimately rule against the defendant.

Today, conservative Judge Victoria A. Graffeo and liberal Judge Carmen Beauchamp Ciparick are both "miserly" in granting leaves to hear appeals in criminal cases, said the defense attorney, who called assignment of consideration of a leave application to Judge Read the "kiss of death" for a defendant's chances of having a case heard by the full

Court.

Mr. Bonventre said that over the last three years, Judge Read has denied 1,062 criminal leaves to appeal and granted nine, or 0.08 percent.

Changing Climate

Mr. Bonventre said that the current political climate in Albany is far different than when Mr. Pataki, who was first elected on a law-and-order platform in 1994, was appointing a four-judge majority to the Court between 1997 and 2003 and taking potshots at the judiciary for liberal rulings in criminal cases.

"David Paterson is not going to be ripping the Court for vigorously defending the rights of the accused," Mr. Bonventre said. "This is not going to happen, unless they [the judges] release some serial killer for some ridiculous technicality."

Defense attorneys applauded Judge Lippman for wanting to review leave patterns.

"We've seen a number of denials of leave applications presenting important unsettled questions, including some where there have been a split of the Appellate Divisions over the years," said Steven Banks, attorney-in-charge for the Legal Aid Society of New York City. "We welcome a fresh perspective from Judge Lippman to examine whether any changes are needed in this area."

Defense attorneys cited *People v. Martinez*, 52 AD3d 68 (2008), as presenting an issue that was seemingly ripe for Court of Appeals review. In it, a First Department panel ruled that an indictment that identified a defendant in a sexual attack case by his DNA markers was sufficient to satisfy his constitutional right to notice (NYLJ, April 18, 2008). Judge Read denied leave to appeal in September 2008, however.

Robert S. Dean of the Center for Appellate Litigation said the low percentage of criminal appeals taken by the Courts is somewhat deceptive because defense attorneys typically seek review whenever a defendant requests it. But most of the cases are so solid for the prosecution that they have no chance of being accepted by the Court, he said.

Still, Mr. Dean said he welcomed Judge Lippman's willingness to look at the numbers.

"The rates at which judges grant leave is a cause for concern," he said yesterday.

The president of the District Attorneys Association, Daniel Donovan of Staten Island, said he does not think the Court shows a particularly pro-defendant or pro-prosecution bias in its leave decisions.

"All the judges try to set their tones," Mr. Donovan said. "With the Supreme Court you had the Rehnquist Court, the Warren Court. This is going to be the Lippman Court."

Mark Dwyer, appeals chief for Manhattan District Attorney Robert M. Morgenthau, said the judges seem to make their leave decisions based on individual interest in the cases before them.

"It is really a question of individual application, that that judge is either interested in the case and thinks it may present an issue of statewide import or not," Mr. Dwyer said. "If it's an issue that needs clarification, the judge grants. If it's an issue that seems pretty much in granite, the judge does not grant."

Joel.Stashenko@incisivemedia.com

N.Y. Const. Art. 6, § 3 – **Jurisdiction of court of appeals**

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him or her.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

(9) The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

CREDIT(S)

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