



NEW YORK STATE
BAR ASSOCIATION

Report and recommendations of the New York State Bar Association **Task Force on Modernization of Criminal Practice**

June 2023

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While every member of the task force contributed to the final report a special thanks goes to the Task Force subcommittee co-chairs Kathleen Cassidy, Sandra Doorley, Ronald Hedges, Hon. Barry Kamins, Yung-Mi Lee and Greg Lubow for their expertise and outstanding work in bringing the report to completion. We thank Steven Epstein for his contributions to the recommendations related to the Vehicle and Traffic Law. We also thank the Westchester District Attorney's Office for their assistance in drafting a portion of the Justice Courts section of the final report.

The New York State Bar Association staff have been invaluable in their support of the work of the Task Force and the production of this report. We would like to recognize Thomas Richards, Deputy General Counsel, our liaison, who has supported us in all our efforts as we brought our report to completion.

Catherine A. Christian and Andrew Kossover, Co-Chairs
Task Force on the Modernization of Criminal Practice

INTRODUCTION

The New York State Bar Association’s Task Force on the Modernization of Criminal Practice (“Task Force”) was appointed in the Summer of 2022 by then-President Sherry Levin Wallach to suggest new laws and policies to improve safety, fairness, access to justice and efficiency in the administration of criminal justice. “The criminal justice system has benefited from several reforms in recent years, including more humane bail and parole laws and the Raise the Age Law, but there are opportunities for a more holistic review of criminal practice and the criminal justice system through the post-COVID lens,” said President Levin Wallach.³ A broad range of representatives from the criminal justice system were appointed as members of the Task Force to provide a balance of perspectives on these issues. They include attorneys who practice in rural and other upstate areas of New York State as well as New York City and the greater metropolitan area. Members include criminal defense counsel who are solo practitioners, who practice in large, medium and small firms, current and former prosecutors, current and former public defenders and current and former members of the judiciary. Several members of the task force are active in the NYSBA Criminal Justice Section, Committee on Mandated Representation, and Committee on Technology & the Legal Profession.

In order to achieve its goals, the Task Force created three subcommittees:

- The Subcommittee on Justice Courts
co-chaired by Greg D. Lubow, Esq. and Monroe County District Attorney Sandra J. Doorley
- The Subcommittee on Sentencing Reform
co-chaired by Hon. Barry Kamins and Kathleen E. Cassidy, Esq.
- The Subcommittee on Technology
co-chaired by Yung-Mi Lee, Esq. and Ronald Hedges, Esq.

The Task Force’s Mission Statement is as follows:

The Task Force on the Modernization of Criminal Practice shall seek to modernize criminal law practice in the State of New York to improve safety, fairness, access to justice and efficiency in the administration of criminal justice.

We hope that this Report educates the public and provides a resource to legislators and policymakers as they seek to improve safety, fairness, access to justice and efficiency in the administration of criminal justice.

³ Susan DeSantis, *New York State Bar Association Announces Task Force on Modernization of Criminal Practice*, New York State Bar Association, Aug. 25, 2022, <https://nysba.org/new-york-state-bar-association-announces-task-force-on-modernization-of-criminal-practice>.

EXECUTIVE SUMMARY

JUSTICE COURTS

The Task Force recommends that the current Justice Court system be replaced by a countywide District Court or significantly consolidated in order to meet the demands of due process in an efficient and effective judicial system. Due process demands that all justices be attorneys.

In order to achieve economy of scale appropriate to caseload and demographics, while taking geographic proximity rather than municipal boundaries into account, many courts must be eliminated either through extensive consolidation or replacement by district or regional courts. Such consolidated/district courts would be in session for more than just two to three hours per week, as caseloads demand. They could have both daytime and nighttime hours to accommodate the needs of the local population. A consolidated court justice or a district court judge could even ride a circuit and conduct many court proceedings in various locations throughout the consolidated court or district court jurisdiction, as local needs require.

With increased caseloads for consolidated courts, full-time clerks with more training will be required, especially as more courts adopt “plea by mail” models for handling traffic tickets, which make up approximately 85% of court caseloads.

Recognizing that converting from the current justice court system to a new consolidated court/district court system will require counties to undertake studies to devise the revised system best suited to the needs of its towns and villages, legislation mandating that such studies be undertaken, and completed and new systems proposed by a certain date. Voluntary programs that already exist have not produced the desired consolidation.

Finally, implementation of consolidated/district courts will have to be phased in over time to allow for current non-lawyer justices to complete their duly elected terms of office.

With these ideals in mind the Task Force recommends the following:

1. All justices must be attorneys duly admitted to practice law in the State of New York for a period of no less than five years. The Legislature shall amend the requirements for town or village justices to require the same.
2. During the time that town and village courts are being studied by the comptroller, and court consolidation or district court plans are being developed, no town or village justice who is not an attorney at law may be elected to the office of town or village justice. To address the possibility that there is no attorney qualified or willing to be elected a town or village justice residing in each town or village, Public Officers Law § 3 as well as appropriate sections of the Justice Court Act and Town and Village laws shall be amended to permit, in said event, every town or village to elect a justice who is an attorney at law who does not reside in the town or village provided the attorney resides within the towns in the proposed consolidated courts or district.
3. Traffic tickets account for approximately 85% of court dockets; the Vehicle and Traffic Law should be amended to provide for plea bargaining not just initial appearances by mail, which is the method by which an increasing number of courts are now proceeding.

4. The office of the State Comptroller shall undertake a study of the justice courts detailing caseloads, revenues and projected cost savings from court consolidation / district courts replacing justice courts in reasonable distances of each other.
5. Utilizing such data each county shall, with input from the District Attorney, the primary public defense provider, the Legal Aid Society that provides civil representation in said county, at least one criminal defense attorney who resides in and regularly practices criminal law in the county, the Sheriff, a representative of the justice court justices in said county and of the justice court clerks in said county within six months of the completion of the Comptroller's report, prepare a plan for the consolidation of the town and village courts to achieve economies of scale, or in the alternative, propose a District Court plan.

Such plan shall be submitted to the Office of the State Comptroller, the office of Indigent Legal Services, the Chief Administrative Judge for the courts outside the City of New York the Administrative Judge for the Judicial District in which the county is located, and to each town or village board affected by such plan, for their review and comment. Such "stakeholders" shall provide each county with their input within two months of receiving the proposed plan. Thereupon each county shall have up to two months to revise such a plan if it chooses to do so and to conduct public hearings on such plan to be completed within said two months. Within two months after public hearings are completed, each county shall adopt a plan for the consolidation of courts or the creation of district courts.

6. If the county adopts a plan of consolidation, the same shall become effective immediately upon adoption provided that there is a phase-in period of up to six months to allow the services of the court to be consolidated.
7. Once there is a consolidation of courts, where the town or village justice presiding in any town or village is not an attorney at law, said justice shall only preside over cases that arise in the town or village where the justice was elected until the end of their term. If the current justice is an attorney at law, the justice shall have the right to preside over all cases within the consolidated court's jurisdiction, if the justice chooses to do so until the justice's term expires.

If a district court plan is chosen, the same shall be placed on the next general election ballot and shall become effective no later than three months after such approval. Any justice whose municipality is located within the district shall continue to preside over cases arising in said town or village jointly with the district judge until the expiration of their term. If the electors shall not approve said district court plan, then the county legislature shall adopt a consolidation plan as provided herein.

SENTENCING REFORM

The Task Force proposes that the New York State Legislature enact three pieces of legislation to change current New York law. In addition to this legislation, the Task Force also recommends the creation of a commission to address necessary preconditions to an additional area of reform for the future.

The Task Force's sentencing reform proposals are as follows:

1. Allow defense counsel to be present at presentence Probation Department interviews upon counsel's request by enacting legislation similar to Federal Rule of Criminal Procedure 32(c)(2).

The Task Force anticipates that this reform will enhance the quality of representation for criminal defendants in New York and will make the rules for representation at presentence interviews consistent throughout the state.

2. Permit judicial decision-makers to review and consider modification of the sentence of a defendant who has served at least 10 continuous years of a sentence of imprisonment, subject to principles of eligibility.

The Task Force finds that this type of "second look" resentencing is appropriately limited and will save money, incentivize good behavior and participation in rehabilitative programs, and ultimately reduce the unwarranted and negative consequences of mass incarceration.

3. Allow for the elimination of mandatory minimum sentencing requirements upon consent of the prosecution and court.

The Task Force expects that this type of "safety valve" legislation will provide judges with greater flexibility in sentencing and afford prosecutors greater flexibility in plea negotiations, eliminating wasteful procedures to circumvent the current statutory scheme when all parties agree that a mandatory minimum sentence is not appropriate.

4. Create a commission, appointed by the governor, to engage in an in-depth analysis of New York State's current indeterminate sentences to determine whether they should be transformed into determinate sentences.

The Task Force is of the belief that it would be irresponsible and contrary to the stated purpose of the Penal Law to recommend expanding determinate sentencing without considering a multitude of collateral issues. The Task Force recommends that a commission consider certain preliminary issues to pave the way for appropriate and successful legislation in this area in the future.

TECHNOLOGY

The Task Force studied the current state of discovery, electronic filing and virtual appearances.

The Task Force's technology reform proposals are as follows:

DISCOVERY

On April 1, 2019, New York State passed a new discovery statute (CPL article 245) which provides for timely production of evidence in criminal cases. Indeed, the law, which was part of sweeping criminal justice reform legislation, sets forth specific timeframes for earlier disclosure of evidence to facilitate the defense's ability to prepare a defense and make informed decisions for plea bargaining. Since its enactment, article 245 has made great strides toward better transparency and fairness in the criminal justice system in New York.

However, the law has created challenges for those responsible for its implementation. The benefits and ideals of discovery reform are often lost due to the inadequacy of technology and guidance

for sharing evidentiary materials with defendants who are incarcerated or acting pro se. To ensure these benefits are realized, there should be a uniform methodology for providing access to electronic discovery (“e-discovery”), including to an incarcerated defendant or unrepresented defendant. Finally, discovery reforms require monitoring and oversight for further study and recommendations. There is currently no governing body to set standards and effectuate best practices at the state level.

1. The Task Force recommends that the state allocate necessary funding for prosecution, law enforcement, and defense functions to properly implement and uphold discovery obligations pursuant to this legislation. The recommendation of adequate funding for prosecutors, law enforcement and defense attorneys takes into account the many challenges posed by e-discovery, including the following considerations:
 - (a) Need to contract with a company that provides and supports discovery platforms or develops such platforms independently;
 - (b) Need to provide devices (e.g., laptops, tablets, etc.) to allow attorneys and defendants the means by which to interact with the discoverable material, including adequate programming to support various file types;
 - (c) Need to install or update existing internet access to allow attorneys/defendants to access substantial amounts of electronic information stored via the internet or cloud, with focus placed on rural areas that may have inadequate connectivity (suggestion: break down by county or geographical area and evaluate each region for its needs);
 - (d) Need for prosecutors and defenders’ offices/panels to hire additional staff, attorneys, paralegals, technicians, etc. to account for the increased workload that was the direct result of discovery reforms and to address widespread attrition and recruitment issues;
 - (e) Need to train attorneys and their supportive staff in the use of the discovery platforms and to identify and address technical issues efficiently;
 - (f) Need to obtain virus and data protection services to comply with cybersecurity mandates; and
 - (g) Need to manage voluminous e-discovery files, including hours of body-worn and car camera videos and electronic surveillance, and provide adequate cloud storage systems to meet document and file retention obligations.
2. The Task Force recommends a uniform platform for discovery delivery that would streamline and simplify the prosecutor’s obligations while allowing defense attorneys the ability to access and meaningfully interact with discovery materials and subsequently present and discuss discovery materials with clients. Pro se defendants should have access rights to this platform, with consideration given to having any hard-copy materials mailed to the pro se defendant with the option of viewing electronic discovery by appointment, or – for an incarcerated pro se defendant – the ability to view the materials at the jail.

Security

A universal platform of discovery delivery must include safeguards that protect sensitive information such as witness-identifying information, grand jury material, etc. For example,

information subject to a protective order should be flagged or logged and segregated appropriately.

Supportability

A platform should be able to host and maintain a wide variety of file types, including a myriad of audio/visual files, text files, etc. Use of obsolete or unsupported file types should be discouraged.

Storage

A tremendous challenge posed by the digital age and discovery reform obligations is the sheer volume of e-discovery to be disclosed, especially given that technology and digital devices are now ubiquitous in daily life.

A study of maintenance of e-discovery is recommended as soon as practicable. Innovative, cost-effective and collaborative means for addressing this challenge are encouraged.

Structurability/Searchability

A platform that not only meets increasing storage capacity concerns but also allows attorneys and pro se defendants to structure the data by search terms, bookmarks, flags, etc. is needed.

Uniformity

Study into the use of a uniform platform across New York State is recommended to streamline access to discovery and avoid incongruities arising from the use of different platforms and programs in different jurisdictions. Uniformity will make it easier to resolve technical issues, as opposed to having different technicians for different platforms, by having a centralized support team.

3. The Task Force recommends that the state implement uniform measures to provide incarcerated defendants access to e-discovery.

All defendants have a right to confront the evidence against them and participate in the preparation of their defense. This right should not be contravened if a defendant is in custody. It is necessary for extraordinary measures to be taken to assure these rights and allow access to e-discovery for incarcerated defendants.

The Task Force recommends the promulgation of rules or enactment of legislation to secure this right and simplify and unify the means by which e-discovery is shared/provided to those in custody. Further study is recommended to review potential modalities which would be acceptable and consistent with jail policies and available internet access.

Specific consideration should be given as to how incarcerated pro se defendants may access the discovery platform consistent with jail policies on internet access.

The platform should be compatible with the software used to facilitate confidential attorney-client videoconferences at correctional facilities.

4. The Task Force recommends that the state appoint a permanent commission on discovery.

Currently there is no governing body that exists solely to review and make recommendations and promulgate standards to meet the ideals and intent of discovery reform and practice throughout the state. The federal court system has an oversight agency for this purpose. The permanent commission on discovery should be appointed by the governor and overseen by the chief judge of the State of New York. The composition of this body should be made up of prosecutors, defense attorneys, retired judges, practitioners from civil and criminal bars and technology experts.

E-FILING

1. The state should adopt a universal e-file system.

While the size and scope of New York's vast court system present challenges, the Task Force believes that New York should aim to move, in the near future, to a single, universal system of electronic filing. Universal electronic filing would fundamentally change for the better how courts, lawyers, judges and staff operate and perform their duties. Electronic filing is more efficient than traditional paper filing: it imposes fewer costs on litigants (who often have scarce resources), and it is environmentally sound.

2. The state should use the federal system as a model.

A universal e-filing system is an attainable goal. New York needs to look no further than to the federal system for guidance as to how such a system can, and should, operate. PACER, or "Public Access to Court Electronic Records," was implemented in the late 1990s within the federal court system and has proven to not only simplify the filing procedure for attorneys, but also to ease the burden of court staff while providing a layer of public benefit by offering direct access to public records.

3. Statutory changes are needed to implement universal e-filing.

The legislature should amend the judiciary law and court rules to specifically authorize the creation of a universal e-filing system, with exceptions for those who are unable to participate in e-filing, such as pro se litigants and persons who lack access to the necessary technology. Also, security protocols (and perhaps alternative filing protocols) will be required for confidential or sensitive materials, sealed documents and materials submitted to the court for in-camera review.

4. The state should fund the transition to a universal system.

The Task Force recognizes that changing from a patchwork system of various e-filing systems to one centralized system would create an initial and ongoing financial burden for the court system and stakeholders. The legislature should allocate funding for the creation and implementation of a universal system in the budget process to help defray costs and reduce financial burdens on litigants and courts. Costs will not only include system creation and implementation, ongoing security and IT support to maintain the system, but also training of court staff, attorneys and other system actors and requisite technology upgrades throughout the system to ensure that universal e-filing works as intended.

VIRTUAL PROCEEDINGS

In March 2020, because of the COVID-19 pandemic, New York State courts rapidly shut down their physical locations and in-person visits, and appearances ceased. Virtual meetings and appearances first through Skype and then through Microsoft Teams began to become the norm.

As a result of this rapid shift to virtual court appearances, and as the pandemic gained a long foothold, several studies on the efficacy and the effects of virtual appearances emerged:

1. Arraignments should remain in person. The arraignment is, oftentimes, the first meeting between an attorney and the accused. An attorney should be able to better see the person as a whole, including signs of medical or emotional distress. These signs are often lost during a video proceeding. Additionally, due to the resource inequities, attorneys oftentimes need to utilize physical papers, notices or signed HIPAA forms.
2. Grand jury appearances should remain in person. Any proceeding that requires credibility determinations should occur in person, except in narrow, already-established cases, e.g., the vulnerability of young children and/or hospitalized witnesses.
3. Preliminary hearings should be conducted in person unless another emergency arises.
4. Remote guilty pleas should remain limited to misdemeanors or violations/infractions that do not entail jail sentences.
5. Limit the number of remote appearances even if they are for status conferences only.

VEHICLE AND TRAFFIC LAW

In addition to recommendations regarding sentencing, justice courts and technology, the Task Force recommends modifications to the Vehicle and Traffic Law (VTL) to correct legal and social inequities:

1. Changes to the requirements to enter the Impaired Driver Program.
2. Changes to ignition interlock mandates when a person has no access to vehicle.
3. Changes to VTL § 1192(1) with respect to cannabis.

JUSTICE COURTS

I. Introduction

When the New York State Bar Association formed the 2022 Task Force on Modernization of Criminal Practice, it stated that its purpose was to: “suggest new laws and policies to improve safety, fairness, access to justice and efficiency in the administration of criminal justice.”⁴ In order to achieve those goals, one of the three subcommittees created was specifically charged with looking at New York’s antiquated system of justice courts, made up of more than 1,200 town and village courts spread throughout New York State. These courts are inefficient, outdated, operate without significant direct state oversight, and are presided over by more than 1,800 justices of which more than 1,200 are non-lawyer lay justices. Many of these courts lack technology beyond the basic digital recording computer and security measures essential to the proper operations of a criminal court.

The importance of an effective local court system cannot be overstated. Justice courts, often referred to as “the courts closest to the people,” are often the first contact a person accused of an offense has with the criminal justice system in the State of New York. Justice court is where first-time and low-level offenders often have their cases promptly disposed of. Justice court is where, in appropriate cases, the court can address the issues that bring individuals in contact with the criminal justice system in the first place.

Since the 1950s, several task forces, commissions and committees have looked at the issues regarding the justice courts in an effort to improve the quality of justice in the town and village courts. However, the archaic structure of the justice courts has nonetheless persisted over the years. It is clear that New York’s justice courts need to consolidate in order to begin to make substantial in order to improve the “safety, fairness, access to justice and efficiency”⁵ that a modern criminal justice system requires.

II. Executive Summary

For more than 70 years, *every* entity that has studied the justice court system has come to the same inescapable conclusion: significant and substantial changes are not just warranted but are necessary to provide justice in accordance with the constitutional demands of due process. In order to achieve this goal in a rational, reasonable, efficient and effective way, major structural changes are necessary. Such changes are long overdue. Proposals ranged from consolidation of regional courts to completely abolishing and replacing the current system with district courts.

There are essentially just two problems with the current justice court system. First, in order to provide constitutional due process, every judge must be an attorney. Although a law degree and years of practice are no guarantee of fairness, competence or even common sense, employing lay justices with nominal training is simply not a constitutionally acceptable substitute. Criminal law is complex and becoming more so daily. Arraignments under the new bail laws, suspension of driver’s licenses, orders of protection, pretrial hearings, accepting pleas, sentences, discovery under the new discovery laws, speedy trials, evidence in hearings and trials all require extensive, almost inherent understanding

⁴ *Id.*

⁵ *Id.*

of the applicable law. While there certainly are some lay justices who have extensive knowledge and understanding of the law, most do not. The minimal amount of training provided by OCA is no substitute for years of law school and practice.

Since at least 2001, the State Bar has adopted the policy that all town and village justices must be attorneys at law, admitted to practice in the State of New York.⁶ That Task Force also recommended the consolidation of justice courts. The State Bar considered and adopted additional reports with the same conclusions in 2009⁷, 2018⁸ and 2020.⁹

The second problem is multifaceted. There are just too many justice courts handling too few cases within close proximity to each other. The justice courts are dictated by municipal boundaries without regard to caseloads, often on a part-time basis, with part-time justices and clerks. The result is great inefficiencies, repetitive services and no regard to economy of scale.

In 2008, a report was issued by the Special Commission on the Future of the New York State Courts, entitled *Justice Most Local: The Future of Town and Village Courts in New York State* (commonly known as the Dunne Commission Report).¹⁰ The Dunne Commission Report identified these deficiencies and recommended that the best way to correct them was to replace the current system with county-based district courts, presided over by lawyer-justices. The Dunne Commission, convinced that any substantial changes were not feasible, offered only watered-down band-aids, many of which were ignored.

On February 1, 2008, the House of Delegates adopted a Resolution accepting the Report and Recommendations of the NYSBA Task Force on Town and Village Justice Courts.¹¹ That Task Force considered OCA's 2006 Action Plan and was aware of the Dunne Commission's work. The report reaffirmed the Bar Association's commitment to having all town and village justices be lawyers.

Mandatory court consolidation, regardless of what the court is called, based on caseload and geography not constrained by municipal boundaries is necessary in order to achieve economy of scale and efficiency. These courts must be presided over by lawyer-justices in order to provide all litigants with the constitutional due process to which they are entitled. These changes are necessary to bring the New York State justice court system into the 21st century. Legislative amendments to a relatively few statutes are required to mandate these changes. Such changes would have to be phased in over

6 Report and recommendations of the Special Committee to Promote Public Trust and Confidence in the Legal System.

7 Report and recommendations of the Committee on Court Structure and Judicial Selection, Adopted by the House of Delegates in January 2009, <https://nysba.org/app/uploads/2022/03/January-2009-Court-Structure-Report.pdf>.

8 Report from the Criminal Justice Section on Town and Village Justice Courts, Approved by the House of Delegates on April 14, 2018, <https://nysba.org/app/uploads/2020/02/FINAL-Updated-Report-Recommendations-2018-Edited-post-HOD-6.pdf>.

9 Task Force on Rural Justice, Approved by the House of Delegates on April 4, 2020, <https://nysba.org/app/uploads/2020/04/Report-Task-Force-on-Rural-Justice-April-2020-.pdf>.

10 *Justice Most Local: The Future of Town and Village Courts in New York State*, The Special Commission on the Future of the New York State Courts (2008), http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf.

11 Resolution and report of the Task Force on Town and Village Justice Courts, Approved by the House of Delegates on Feb. 1, 2008, <https://nysba.org/app/uploads/2022/03/Feb.-2008-resolution-and-report-of-the-Task-Force-on-Town-and-Village-Justice-Courts.pdf>.

time to allow for the end of current justices' terms of office and to allow for counties to determine the form and boundaries of the consolidated courts that best suits towns and villages.

Putting into practice the long-held policies of the State Bar is the challenge presented to today's Task Force. How do we "modernize" criminal practice? The conclusions and recommendations in this report represent the unanimous opinion of every prosecutor and defense attorney on the Task Force. The town justice members of the Task Force are essentially satisfied with the status quo, seeing no need to change a 300-year-old system that, in their experience, continues to work well.

III. Brief History of the New York Justice Courts

Justice courts throughout New York State are a significant part of the justice system and play an exceptionally significant role in adjudicating New York State criminal and civil matters. New York's Unified Court System (UCS) and the Office of Court Administration (OCA) oversee and fund city courts, district courts, and county courts. These courts are "courts of record," with standardized data collection. In addition to the courts overseen by the state, there are approximately 1250 justice courts throughout New York State that are situated within towns and villages.¹² Today, almost all towns and approximately half of the villages have justice courts.¹³

The development of justice courts came long before today's Unified Court System. The judicial structure in New York State was set up in the 1600s and was revised in the mid-1800s as the population grew and the needs of the court system changed with the changing landscape of New York.¹⁴ Small localized courts, with criminal and civil jurisdiction, have existed in New York since colonial times.¹⁵ The 1846 New York State Constitution officially established justices of the peace and local judicial officers for the towns and villages of New York.¹⁶ These individual town and village justices provided for local justice, at a time when travel options were limited to travel by horse or on foot. As New York has continued to evolve, with its population growing exponentially from the early days of establishing the judiciary, those same town and village justice courts have continued largely unchanged in over 300 years.¹⁷

IV. Past Reviews and Recommendations to Reform the New York Justice Courts

There is a long history in New York State of missed opportunities at substantial reform of its justice courts, which has left New York with a justice court system established centuries ago and not designed to effectively meet the needs of today's justice system. With the establishment of the 2022

12 Thomas DiNapoli, *Report on the Justice Court Fund*, Office of the State Comptroller, (2010), <https://www.osc.state.ny.us/files/local-government/publications/pdf/justicecourtreport2010.pdf>.

13 Alissa Pollitz Worden & Kaitlin Moloney, *Before Bail Reform: Pretrial Bail Decisions and Outcomes in New York's Justice Courts Report*, Upstate Reform Project in collaboration with the Data Collaborative for Justice, The John F. Finn Institute for Public Safety, Inc., Nov. 13, 2022, <https://finninstitute.com/wp-content/uploads/2022/11/Before-Bail-Reform-New-Yorks-Justice-Courts-Finn-11-14-22-final.pdf>.

14 *The Evolution of the Court*, New York State Unified Court System, https://ww2.nycourts.gov/courts/1jd/supctmanh/A_Brief_history_of_the_Court.shtml.

15 Judith S. Kaye & Jonathan Lippman, *Action Plan for the Justice Courts* (Nov. 2006), <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/ActionPlan-JusticeCourts.pdf>.

16 N.Y. Const. of 1846, art. VI.

17 Kaye & Lippman, *supra* note 15.

New York State Bar Association Task Force on the Modernization of Criminal Practice, there is a renewed opportunity to transform this antiquated court system into a system that works for today's New York. We are now at an inflection point where the structure and purpose of the justice courts must be reconsidered.

Over the years, the justice courts have been criticized for a range of issues, including the use of lay justices with minimal training, the costly inefficient and duplicative use of resources by having so many courts in close proximity to one another each sitting for only a few hours once a week or as needed with small caseloads, the lack of oversight by the state and numerous other concerns that result from such inefficiencies. As a result, since the 1950s, there have been several attempts to review and reform the New York justice court system.

The Temporary Commission on the Courts (Tweed Commission) was established in the 1950s and considered, but eventually rejected, requiring that all justices be lawyers and the establishment of district courts and magistrate courts in lieu of the justice courts.¹⁸ Instead of these more sweeping early ideas, it recommended adding training requirements for the justice court justices.¹⁹ The 1960s saw continued attempts and rejections to legislatively change the structure of the justice courts. Additional calls for change continued into the 1970s, with the 1973 Dominick Commission recommending an end to village courts and limiting the jurisdiction of town courts.²⁰ Neither proposal was adopted by the State. The New York State Bar Association took up the issue in 1979 and recommended looking into consolidating some of the justice courts, but that suggestion also fell flat.²¹

In the 1980s and 1990s, efforts at reforms continued with the Senate Select Task Force on Court Reorganization, which recommended both constitutional and legislative proposals to allow court mergers. During her tenure on the bench of the New York Court of Appeals, Chief Judge Judith Kaye submitted court restructuring proposals to the legislature in 1997²² and again in 2001,²³ but neither was adopted.

Over the past 20 years, there has been a flurry of activity around reforming the justice courts. In 2001, the Special Committee to Promote Public Trust and Confidence in the Legal System of the State Bar issued a report that recommended that all town and village court justices be attorneys. Among its reasons were the following: the court's ability to incarcerate people at arraignment or upon conviction, to set bail and to preside over motion practice and trials. The report noted that these matters, if they had occurred in a city, would come before a city court judge who, by statute, had to not only be an attorney but had to have significant years of practice. The report noted that the 35-hour basic training for town and village justices was significantly less than the training necessary to obtain a license to become a hair removal wax technician. This report also noted that in counties where administrative traffic violation bureaus, instead of courts, were used to handle traffic tickets, all

18 Temporary State Commission on the Courts (Tweed Commission), Subcommittee on Modernization and Simplification of the Court Structure, A Proposed Simplified State-Wide Court System (1955).

19 Temporary State Commission on the Courts (Tweed Commission), Final Report to the Legislature (1958).

20 Temporary State Commission on the State Court System (Dominick Commission), "... And Justice for All" (1973).

21 *Report of Action, Unit Report No. 4: Court Reorganization*, New York State Bar Association (1979).

22 Press Release, New York State Unified Court System, Proposal to Reform New York State Court System Submitted to Legislature (Mar. 19, 1997).

23 Judith Kaye, *The State of the Judiciary* (2001), <https://www.nycourts.gov/ctappS/news/soj2001.pdf>.

administrative judges were attorneys. In 2003, the Office of the State Comptroller called for merging justice courts to increase efficiency and cost savings. One study showed that if just 10% of the village courts were to merge into the town courts surrounding them, the savings, in 2003 dollars, would be \$1.6 million annually.²⁴ In 2006, Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman laid out an extensive plan to support New York's justice courts with a \$10 million appropriation request to support court operations and administration, auditing and financial control, education and training, and facility security and public protection. These funds were intended to address internal court operations but did not address either court consolidation or the need for lawyer justices.²⁵ In 2006 the New York City Bar Association formed the Task Force on Town and Village Courts and issued several reports, the final report listing 10 recommendations for the structuring of the justice courts. Among those applicable to criminal cases, the Task Force recommended that all cases involving misdemeanors, and all hearings and trials, be transferred to justice courts presided over by lawyer-justices.²⁶

Also in 2006, the New York Times published a series of investigative articles critical of the New York's justice court system.²⁷

In 2008, the Special Commission on the Future of the New York State Courts put out a report entitled *Justice Most Local: The Future of Town and Village Courts in New York State*. This report opined that if one were to create a justice court system from scratch it would not look anything like what we have today. The ideal system would be a number of district courts based on caseload and demographics, with only lawyer-justices. However, the Commission determined that creating district courts was not feasible and that it was unrealistic to require all justices to be attorneys.²⁸ Yet it did set forth recommendations for new requirements, such as raising the age and educational qualifications for justices, expanding the pool of justice candidates, improving training and oversight and modernizing court facilities.²⁹ It also recommended giving defendants an "opt-out" right from having certain cases heard by a non-attorney justice. Furthermore, the report called for county-based panels to reform and merge courts.³⁰

In December 2008, the State Bar's Special Committee on Court Structure and Judicial Selection and its subcommittee on Town and Village Courts issued a report analyzing the Dunne Commission report and recommendations. The report restated the State Bar's position that all justices must be attorneys, although, like the Dunne Commission, it recognized that this requirement may not

24 *Opportunities for Town, and Village Justice Court Consolidation*, Office of the N.Y. State Comptroller, Division of Local Government Services and Economic Development (2003).

25 Kaye & Lippman, *supra* note 15.

26 *Recommendations Relating to Structure and Organization*, New York City Bar Task Force on Town, and Village Courts (Oct. 2007), https://www.nycbar.org/pdf/report/Town%20_Village_TF.pdf.

27 William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. Times, Sept. 25, 2006, <https://www.nytimes.com/2006/09/25/nyregion/25courts.html>.

28 *Justice Most Local: The Future of Town and Village Courts in New York State*, The Special Commission on the Future of the New York State Courts (Sept. 2008), http://www.nycourtreform.org/Justice_Most_Local_Part1.pdf.

29 *Id.*

30 *Id.*

be politically feasible “for now.” It recommended that county committees be formed to study and recommend court consolidation.

Another report came out in 2008 by the New York State Commission on Local Government Efficiency & Competitiveness, called *21st Century Local Government*, which recommended legislation to incentivize towns and villages to merge or abolish some of their smaller and less active courts.³¹ Another 2008 report from the Fund for Modern Courts, entitled *Enhancing the Fair Administration of Justice in New York's Towns and Villages Through Court Consolidation*, found that court consolidation would solve many of the issues facing justice courts.³²

In 2016, 22 N.Y.C.R.R. §17.2 was promulgated requiring annual training for town and village Justice Court justices and court clerks for the first time.³³ In 2018, the New York State Bar Association issued a report entitled *Town & Village Justice Courts Report: Update Regarding Counsel at First Appearance, Training & Education, and Centralization*.³⁴ The report laid out a number of recommendations regarding counsel at first appearance and other improvements in training and auditing. In addition, it called for the stripping of town and village courts of criminal jurisdiction and the establishment of misdemeanor courts in each county.³⁵

In 2020, the New York State Bar Association Task Force on Rural Justice published a report that included some important statistics, including that roughly 96% of attorneys practice in metropolitan areas, with the remaining 4% presumably serving New York's mostly rural areas.³⁶ It also reported that nearly 75% of current rural practitioners will be retiring from practice in the next 10 to 30 years, with little to no new attorneys taking their place.³⁷ The report discussed the extremely far distances that rural practitioners must travel to appear in these scattered courts. It also noted the lack of access to high-speed broadband.³⁸ Out of this recommendation, the NYSBA House of Delegates adopted a Resolution on Broadband Access urging the state to prioritize funding high speed broadband to all parts of the state.³⁹

31 *21st Century Local Government*, New York State Commission on Local Government Efficiency & Competitiveness (April 2008), https://www.cgr.org/consensuscnny/docs/NYS_LGEC_Report.pdf.

32 *Enhancing the Fair Administration of Justice In New York's Towns and Villages Through Court Consolidation*, Town, and Village Justice Courts Task Force Report, Feb. 2008, http://moderncourts.org/wp-content/uploads/2013/10/justice_courts_08.pdf.

33 22 N.Y.C.R.R. § 17.2.

34 *Town & Village Justice Courts Report, Update Regarding Counsel at First Appearance, Training & Education, and Centralization*, New York Bar Association (2018), <https://archive.nysba.org/tvcourtsreport>.

35 *Id.*

36 *Report and Recommendation of the Task Force on Rural Justice*, New York State Bar Association (April 2020), <https://nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf>.

37 *Id.*

38 *Id.*

39 New York State Bar Association House of Delegates, Resolution on Broadband Access, June 27, 2020, <https://nysba.org/app/uploads/2022/06/adopted-resolution-on-broadband-access-June-2020.pdf>.

In 2019, and again in 2022, Chief Judge Janet DiFiore recommended changes for the constitutional modernization of courts, but changes to the justice courts were not included in either proposal.⁴⁰

Though there have been incremental changes and minor improvements recently, the most significant recommendations in all of these reports – court consolidation and lawyer-only justices – have not, over the last 70 or so years, been seriously attempted. With such a long history of missed chances to make necessary changes, New York is increasingly seeing the repercussions of an antiquated system and must take this opportunity to consolidate and modernize to meet the needs of today’s New York criminal justice system.

V. The Need for Only Attorney Justices

One of the paramount issues concerning justice courts is that more than 1,000 of the nearly 1,800 town and village justices are not attorneys admitted to practice in New York State. While a defendant has the right to be represented by an attorney, in New York a defendant does not have the right to have his or her matter heard by a justice who is an attorney with a law school education. The Task Force is of the opinion that meaningful due process demands that every justice be an attorney. New York is one of just eight remaining states in the country that still permits non-lawyer justices.⁴¹ The gatekeepers of all the constitutional rights of the accused are the justices who are empowered to apply the rule of law and who are given the enormous responsibility of determining someone’s liberty. In handling misdemeanor cases, justice court justices are able to sentence guilty defendants to up to one year in jail, or possibly two years in consecutive one-year sentences. These justices are also making bail decisions at arraignments on cases, including felony cases, where the stakes can be extremely high. Having justices on the bench who are trained in and have a deep understanding of the law is paramount in ensuring that the rights of defendants and citizenry are protected.

Since at least 2001, the New York State Bar has adopted the position that all justice court justices should be attorneys.⁴² Nonetheless, justice court justices are the only New York State justices who do not have the requirement of being an attorney. According to the Office of Justice Court Support

40 *Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources*, Press Release, New York State Unified Court System, Sept. 25, 2019, https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf; *Chief Judge DiFiore, Senate and Assembly Judiciary Chairs Hoylman and Lavine Announce Introduction of Constitutional Amendment for Court Reform and Simplification*, Press Release, New York State Unified Court System, Mar. 3, 2022, https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR22_03.pdf.

41 Matt Ford, *When Your Judge Isn’t a Lawyer*, The Atlantic, Feb. 5, 2017, <https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/>.

42 *The Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts*, New York State Bar Association Committee on the New York State Constitution, Dec. 12, 2016, <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Report%20on%20Judiciary%20Article.pdf>.

at the New York State Office of Court Administration, as of February 28, 2023, there were 1,036 non-attorney town and village justices and 701 attorney town and village justices.⁴³

All the “band-aids” discussed in various reports to address this issue are attempts to put a square peg into a round hole by transferring certain cases to courts already with attorney-justices. In the 40 years since Judge Kaye’s notable dissent in *People v. Charles F.* (which in a 4-3 decision held that a defendant has no absolute due process right to a trial before a law-trained judge),⁴⁴ the practice of criminal law has only become more technical and complicated. The demands placed on town and village justices and their staff has grown exponentially. Requiring every town and village justice to be an attorney, admitted to practice in New York State, with a minimum number of years of experience, perhaps five years as required of city court judges, will resolve denial of due process issues that generally occur more frequently when lay justices preside. The right to counsel can become meaningless when the justice is not sufficiently knowledgeable in the law to comprehend the arguments or possesses the requisite knowledge of jurisprudence to deliver competent written decisions explaining the rationale in support of their determinations. Basic law school training affords the lawyer who is also a justice the ability to understand, almost inherently, the laws and rules applicable to criminal cases.

This concept dates back to the Magna Carta. At Runnymede in 1215, King John pledged to his barons that he would “not make Justiciaries, Constables, Sheriffs or Bailiffs, excepting of such as know the laws of the land...”⁴⁵

In *North v. Russell*, Justice Stewart, in dissent, wrote:

... the essential presupposition of this basic constitutional right [to counsel] is that the judge conducting the trial will be able to understand what the defendant’s lawyer is talking about. For if the judge himself is ignorant of the law, then he, too, will be incapable of determining whether the charge is “good or bad.” He, too, will be “unfamiliar with the rules of evidence.” And a lawyer for the defendant will be able to do little or nothing to prevent an unjust conviction. In the trial before such a judge, the constitutional right to the assistance of counsel thus becomes a hollow mockery – “a teasing illusion like a munificent bequest in a pauper’s will.”⁴⁶

In her oft-cited dissent in *People v. Charles F.*,⁴⁷ Judge Kaye (joined by Chief Judge Cooke and soon to be Chief Judge Wachtler) wrote: “Appellant, facing the possible deprivation of his liberty, had the right to trial before a law-trained judge (see *North v. Russell*, 427 U.S. 328, *supra*.)” The right to effective assistance of counsel and the right to trial by jury, both so jealously guarded, lose force without a law-trained judge to ensure that motions are disposed of in accordance with the law, that

43 See also New York State Commission on Judicial Conduct, Annual Report 2022, <https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2022Annualreport.pdf>. This report states that, in 2021, there were 1,776 Justice Court justices and roughly 700 of them were lawyers.

44 60 N.Y.2d 474 (1983).

45 Magna Carta, Article 45.

46 427 U.S. 328, 342–43.

47 60 N.Y.2d 474, 480 (1983).

evidentiary objections are properly ruled on, and that the jury is correctly instructed. Lay Judges are an important segment of the judicial system of this State. But “a lay person, regardless of his educational qualifications or experience, is not a constitutionally acceptable substitute for a member of the Bar.”⁴⁸ Because of the technical knowledge required to ensure that defendants facing imprisonment are afforded a full measure of the rights provided to them, the use of non-law-trained judges is a procedure that “involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”⁴⁹ No particular trial error need be shown.

Before they take the bench, newly elected non-lawyer justices are required to take a week-long, 35-hour class covering the basic duties of a town or village justice.⁵⁰ In addition to procedural and substantive law and evidence, the training includes courses in recordkeeping and accounting practices as well as judicial ethics. In the several months after assuming their judicial duties, newly elected non-lawyer justices must participate in two full day sessions (12 hours). After they have completed their first year on the bench, justices – both attorneys and non-attorneys – must complete 12 hours of continuing legal education (CLE) a year provided by OCA. These classes are required to be offered at least three times a year.⁵¹ The continuing legal education classes qualify as CLE credits for attorneys who are also justices. Compare that training to the three years of law school, 24 hours biannual CLE requirements and the five years of experience that is required to be a city court judge, which should be the same standards applied to town and village court justices since town and village justices have essentially the same jurisdiction.

One of the improvements adopted by OCA is the requirement that all proceedings in justice courts are now supposed to be digitally recorded. The primary motivating reason for this was to provide a more reliable transcribed record for review on appeal instead of having to rely on the recollection of the justice and the parties. There is a second potential use for such recordings: to be able to hear if the training being provided to the justices is being successfully utilized in everyday court proceedings. Recordings of arraignments – the most ubiquitous of all justice court functions – can show if the basic rights of the accused are being protected and if the necessary information is being provided by the court. The recordings of pleas of guilty could be reviewed to make certain that the defendant understands the rights being waived by a guilty plea. Unfortunately, there is no program to review on a regular or even an *ad hoc* basis any justice court proceedings.

Many non-attorney justices are competent and have sufficient knowledge of the law. However, despite the added training requirements, there have been far too many miscarriages of justice at the hands of non-attorney justices in New York. A review of the decisions of the New York State Commission on Judicial Conduct reveals decisions for removal, resignation, censure and admonishment, which demonstrate a basic lack of understanding of the law, along with a failure to understand the role and responsibilities of a being a justice.⁵² Of course, these decisions are not solely attributed to non-lawyer justices, but this group stands out as one worth taking a closer look at based

⁴⁸ *People v. Felder*, 47 N.Y.2d 287, 293 (1979) (right to law-trained counsel).

⁴⁹ *Estes v. Texas*, 381 U.S. 532, 542-543.

⁵⁰ 22 N.Y.C.R.R. § 17.2.

⁵¹ *Id.*

⁵² New York State Commission on Judicial Conduct, 2022 Press Releases, <https://cjc.ny.gov/Press.Releases/2022.Releases/2022.Releases.html>.

on the disciplinary decisions of the Commission on Judicial Conduct.⁵³ In 2022, there were 19 published decisions regarding the removal, resignation, censure or admonition of town or village justices.⁵⁴ Of those 19 decisions, 15 of them were non-attorneys and only four were attorneys.⁵⁵

The Commission for Judicial Conduct devoted a section of their Annual Report in 2019 to the need for greater assistance for town and village courts. In that section, the Commission reviewed the trends of disciplinary issues that they have encountered with town and village justices. The report notes that “over the last decade, while only 20% of the complaints received by the Commission were against town and village justices, 59% of the Commission’s investigations and 72% of its public decisions (120 out of 167) involved town and village justices, indicating that ethics complaints against them are more likely to have merit. Of those 120 public decisions rendered against town and village justices, 90 (i.e., 75%) were against lay justices.”⁵⁶

The State Legislature has the authority, pursuant to New York State Constitution Article VI § 20(c) to set the qualifications and restrictions for a person to be a town or village justice. If the Legislature were to impose a requirement that all local court justices had to be attorneys admitted to practice in New York, and have at least five years of experience, the change would, of necessity, have to be phased in over time to allow the four-year terms of the current non-lawyer justices to expire.

One concern that has been raised about the requirement that all town and village justices must be attorneys admitted to practice is that there may be a shortage of qualified and experienced attorneys interested in serving as a town or village justice in each individual town or village. The shortage of attorneys in rural New York State is a real concern.⁵⁷ There is a readily available legislative solution to this obstacle. Public Officers Law § 3 requires a justice (as well as all other municipal officials) to reside in the town in which they are the justice. Village Law § 3-300 has a similar restriction for villages. Both Public Officers Law § 3 and Village Law § 3-300 are replete with dozens and dozens of exceptions to the local residency requirement to meet the practical needs of the town or village. Section 23(1)(g) of the Town Law already provides that justice in a “shared town justice” agreement, as provided for in UJCA § 106(b), can be “an elector” in any town covered by the shared judge agreement. Amending these laws to permit an attorney to be elected as a town or village justice in any town or village within the consolidated courts in which they reside (or within the county if none are available within the towns that make up the consolidated courts) would make more attorneys available to become justices. That decision will be up to the consolidation agreements or plans adopted by each county in accordance with its demographics. If necessary, allowing attorneys to be elected town justices in adjoining towns located in adjoining counties could also be permitted.

53 See, e.g., Brian Lee, *State Courts Watchdog Says Town Judge in NY's Southern Tier Mishandled 7 Cases*, N.Y. Law J., Oct. 12, 2022, <https://www.law.com/newyorklawjournal/2022/10/12/state-courts-watchdog-says-town-judge-in-nys-southern-tier-mishandled-7-cases>.

54 New York State Commission on Judicial Conduct, *supra* note 50.

55 *Id.*

56 New York State Commission on Judicial Conduct, Annual Report 2019, <https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf>.

57 Elizabeth Gerry, *The Rural Representation Crisis*, N.Y. Law J., Jan. 17, 2023, <https://www.law.com/newyorklawjournal/2023/01/17/the-rural-representation-crisis>.

Another argument against requiring all town and village justices to be attorneys is that the salaries paid by towns and villages, especially those where there are very low caseloads, may be insufficient to attract attorneys to be justices. Court consolidation would make more resources available to pay attorney-justices from the various municipalities. This would be in addition to the savings each municipality would realize due to consolidation.

VI. Changes to How Justice Courts Conduct Arraignments: CAFA, CAPS and Bail Reform

Despite the repeated calls for consolidation of the justice courts, it is extremely rare that towns or villages take the steps to voluntarily consolidate. As a result, the due process issues persist. Over the past 10 years, a number of changes in how arraignments are managed in justice courts have been undertaken. As arraignments represent the most universal functions of the justice courts, these changes have made an impact on how the local justice courts operate.

A. Counsel at First Appearance (CAFA)

In defense of the current justice court system, supporters often rally around the willingness of the local justices to wake up at all hours of the night to conduct an arraignment. These so-called “off-hours” arraignments – that is, an arraignment not during the normal business day (not that there are daily “normal” business hours for many, if not most, justice courts) – are supposed to demonstrate the dedication of the local justices. Previously present at these arraignments was the justice, the arresting officer and the defendant. Rarely was a defense attorney present to advocate on behalf of the accused. If the charge involved a felony, the justice was required to obtain a recommendation from the district attorney, often by phone call, on the subject of bail. Not surprisingly, many people found themselves being held in lieu of bail.

Arraignments have long been recognized as a critical stage of a criminal proceeding, requiring counsel to be present on behalf of the accused. In 2013, the Office of Indigent Legal Services (ILS) began funding some 25 counties in order for the counties to provide Counsel at First Appearance (CAFA). This was a system whereby public defense attorneys were paid to be available – on call – to attend the off-hours arraignments in person. When counsel began appearing with a defendant, the likelihood of incarceration following arraignment decreased significantly.

CAFA is an expensive program, since defense attorneys are paid to be on call. It is also an inconvenient program, since justices and defense attorneys still have to appear at court between the hours of 5 PM and 9 AM, Monday through Friday, outside the normal workday and at all times on weekends and holidays. Under CAFA, defense attorneys find themselves traveling long distances to courts that are far from their homes, while the justice, perhaps the ADA, the arresting officer and the defendant wait for them.

B. Centralized Arraignment Parts (CAPs)

In February 2017, Section 212 (w) was added to the Judiciary Law, along with changes to the Criminal Procedure Law and Uniform Justice Court Act. This law authorized ILS, working with various stakeholders in the counties, to establish what are referred to as Centralized Arraignment Parts (CAPs). The purpose of a CAP is to provide a central location in each county where arraignments could occur during daytime business hours that would have otherwise taken place during off hours at

the local criminal court. Off hours are often thought of as nighttime hours but also include daytime and weekend hours when the court is not otherwise in session. As envisioned, a person accused of a crime that required an arraignment would be held until the morning or evening session of the CAP court. The accused would be brought to the central location, often the county jail, and arraigned by the designated local town or village justice who was assigned to preside that day. The duly elected town and village justices were supposed to rotate their assignments to the CAP, thereby relieving each other of the burden of having to be available for off-hour arraignments every day and night.

CAP courts are in session at designated hours, several times a day, including weekends. This allows prosecutors, defense attorneys and some law enforcement to schedule appearances at reasonable times and with reasonable notice. Family members of the accused can attend, and arrangements can be made in advance.

While twenty-eight counties have embraced CAP courts, this voluntary program is currently not in all of the upstate counties. Some of the resistance to CAP courts comes from town and village justices who now have to travel to the central location to conduct arraignments of defendants who may not have been arrested in their town. Some resistance comes from local police departments who likewise have to travel to the central location transporting the person they arrested. This could take the police ‘out of service’ in their town or village.

In practice, a CAP represents a consolidated arraignment court. By ignoring municipal boundaries, this initial critical stage of a criminal proceeding is presided over by any justice designated as the CAP justice for that day. This allows both the prosecution and defense to attend court at reasonable, preset times and allows them time to prepare their respective cases. Prosecutors can confer with witnesses and police; defense attorneys can meet with the accused in advance, begin their investigation and consult with family, friends, and employers to arrange for bail if needed. Unfortunately, most counties have not created CAP courts that would cover either the entire county or certain designated towns within the county.

C. Bail Reform 2020

Perhaps the greatest change concerning the services provided by the local justice court is the 2019 adoption of bail reform, effective January 1, 2020. Under the new bail reform laws, a person arrested for most misdemeanors and a large number of non-violent felonies is no longer subject to having cash bail or another form of nonmonetary release on conditions set by a justice immediately following an arrest. Instead, provided the accused and the charges meet certain criteria, the arresting officer must issue an Appearance Ticket (AT) to the person accused, requiring them to appear in the local court at a later date within 20 days of the arrest. On the return date of the AT, the court arraigns the accused and can release them in their own recognizance (ROR) or, in a proper case, impose certain designated non-monetary release conditions.⁵⁸ Except for certain qualifying misdemeanors and felonies, the court was required to impose the least restrictive conditions designed to assure that the accused returns to court for future proceedings. The Criminal Procedure Law §530.20(1)(a) sets forth 9 criteria the justice is required to consider if the justice is not going to release the accused in their own recognizance without conditions. In addition, the justice is required to set forth, on the record or

⁵⁸ CPL 530.20 (a).

in writing the reason for their decision. The 2023-24 State Budget modified parts of the 2019 Bail Reform Act by removing the ‘least restrictive conditions’ requirement when a justice is considering release of a person accused of a serious offense.

The impact of bail reform on the justice courts cannot be overstated. Thousands of persons arrested for what are considered minor, non-violent crimes are not brought in front of a local court justice for immediate arraignment. Regarding serious crimes, which are designated misdemeanors and non-violent felonies and all but two violent felonies, under CPL § 530.20(b), the procedure is virtually the same as it was before bail reform. These crimes are identified as “qualifying [for bail or remand consideration] crimes.” The arresting officer can issue an AT (as before) or bring the accused before a justice for immediate arraignment; the justice must obtain input from the DA before making a release decision and must explain the release decision.

As a result of bail reform, the vast majority of arraignments now take place on the return date of the appearance ticket at a regularly scheduled court date. This allows an accused person time to obtain counsel in advance of their appearance, thereby reducing the need for CAFA attorney appearances at off-hours arraignments. This allows the district attorney and defense counsel time to review their file in advance of the first court appearance, allowing for more informed and timely decision-making.

As the court system becomes more engaged in addressing the reasons a person becomes involved in the criminal justice system rather than simply imposing punishment – fines or incarceration – specialty courts, such as veteran courts, mental health courts, drug treatment courts, and others, have developed. These courts effectively remove the defendant from the justice court jurisdiction.

VII. How to Reduce the Number of Justice Courts: The Legal Options and Impediments to Court Consolidation

The first problem is that there are just too many justice courts. What other business is open for just two or three hours once per week? Across New York State that would be the majority of justice courts. In many of these courts the prosecutor is present in person once a month or only as needed, which is not often in such a court. The hours that a court “sits” reflects the caseload in that court, and the majority of courts complete their business in a matter of a couple of hours.

The Office of the State Comptroller (OSC) administers the Justice Court Fund, where all money from justice courts is deposited and distributed. OSC collects monthly reports from every justice court relating to its activities. In 2010, a Report on the Justice Court Fund analyzed the data obtained from the justice courts. The report graphically depicted caseload and revenue from each justice court. It broke down the dispositions of speeding tickets which represented 41% of all cases – criminal and traffic. The report revealed that there are large swaths of upstate New York where neighboring town courts each had annual caseloads of 200 cases or fewer. Much of the rest of the state only had caseload numbers of 200 to 600 cases per year. An updated report from the OSC analyzing current data is necessary to provide irrefutable evidence regarding the caseloads of various town courts.

In many parts of the state, there are dozens of justice courts within close proximity of each other. In some jurisdictions, a town and village court may even “sit” in the same building but on different days or at different hours or across the street from each other. In some areas, there are a dozen or more town and village courts within 30 minutes of each other. Extend that time to one hour and there will be dozens of justice courts. The level of redundancy with these courts sitting on different days and times, or worse, sitting on the same days at the same time is astounding. Dozens of part-time justices and part-time clerks, minutes apart, separated only by town or village boundary lines doing the exact same work for a few hours a week is an incredibly inefficient and irrational way to do business. The current system creates scheduling difficulties for prosecutors, defense attorneys, law enforcement and jail managers. Required appearances on multiple days in nearby communities or, worse, conflicting appearances on the same date and time, strain the resources of such agencies or private attorneys.

Consolidation of justice courts is an obvious strategy that should be employed to increase efficiency and justice. There are genuine cost savings, and the ability to make improvements would lead to a better-quality administration of justice in New York State. The legal framework exists for consolidation and there are clear benefits to all criminal justice stakeholders in moving in that direction. There currently are resources available through the Office of the State Comptroller to assist justice courts in consolidation efforts.⁵⁹ Nonetheless, there continues to be significant resistance to a larger consolidation effort across the state as evidenced by the lack of consolidated courts in most counties. Additional information on cost savings and benefits to municipalities could help incentivize more jurisdictions to explore the options. There are also additional smaller-scale efforts that can be undertaken in moving towards a better criminal justice system in New York’s justice courts. An updated report from the OSC’s Justice Court Fund analyzing the caseload, revenue generation and efficiency of the current justice courts in each of the 57 counties will be necessary to present to county legislatures (and town and village governments) in support of the justification for adopting a district court or court consolidation plan.

One supposed benefit of having a court in every town is that local people would have easy physical access to the court. While that was undoubtedly true at the inception of local courts in the 1700s through perhaps the mid-1950s, modern transportation now allows a person to travel 50 miles in less than one hour. As we conclude the first quarter of the 21st century, electronic technology has advanced to the point where personal physical presence for most court appearances is no longer necessary. As will be discussed below, traffic tickets make up much of a town or village court’s docket. Again, modern transportation has created a situation where many traffic tickets are issued to persons who are traveling through rather than living in the local towns. As more courts adopt practices to dispose of traffic tickets without the need for personal appearances, having a court in every town is less necessary.

Another supposed benefit of the current system of having a court in every town or village is that the local court would be available at different hours and be able to accommodate people who work

⁵⁹ *Cost-Saving Ideas: A Guide to Justice Court Consolidation in Villages and Towns*, Office of the New York State Comptroller, <https://www.osc.state.ny.us/local-government/publications/cost-saving-ideas-guide-justice-court-consolidation-villages-and-towns>.

during the day. Consolidated court sessions and hours would be determined by the justices, just as they are now. Court days and hours can be flexible as the needs of the community demands, just as they do now. In the past, many if not most justice courts sat at night. Today, many if not most hold court during the day. Regardless, if the needs of the community dictate that people having business before the court are better served by having evening sessions, there is nothing inherent in the formation of district or consolidated courts that would prevent that.

A. *District Courts*

As found by the Dunne Commission, creating county-based district courts would, in a perfect world, be the ideal solution. All justices would be lawyers admitted to practice in the state of New York, with at least five years of experience. The number and location of the districts would be decided by each county and reflect the needs of its communities. The district court would be properly staffed, its hours reflecting the community needs. The court could ride a circuit around the county to afford people who need court services ready access to the court without having to travel to a central location. District courts with criminal jurisdiction have existed in Nassau County and western Suffolk County since the 1960s.

There are, however, certain constitutional hurdles to the formation of district courts. Pursuant to Article VI §16 of the State Constitution, a district court can only be formed at the request of a county legislature to the state legislature to create a district court for the entire county or such towns and cities within a county as are contiguous to each other. Such a law must then be approved by a majority of the voters in the county if the district court is countywide or else in each of the towns cities, and villages that would come under the jurisdiction of the district court.

The establishment of a district court will necessitate a more extensive involvement by the Office of Court Administration in the functioning of the court being a part of the Unified Court System than is their current level of involvement in many of the Justice Courts across the state. Being full-time courts would eliminate the delays in many cases and proceedings currently seen in the justice courts. Another benefit of creating district courts is that the CAPs could easily be eliminated. The CAPs have been initiated in many jurisdictions throughout the state in recent years at great ongoing expense and inconvenience to the system. The creation of District Courts would mean that there would be no need to do off-hour arraignments in CAPs, as those arraignments could be appropriately handled by the district court on a daily basis in a centralized fashion with proper facilities and staffing.

B. *Village Courts*

The New York Constitution lays out the legal authority for the town and village justice courts, regulated by the state legislature.⁶⁰ The Legislature has the power to discontinue any village court.⁶¹ It can also discontinue any town court with the approval of a majority of votes in a general election in each affected town.⁶² Village courts are controlled by Village Law § 3-301 (2)(a), which allows for the dissolution of village courts if the Board of Trustees of the village, by resolution or local law, subject to permissive referendum, move to abolish the village court at the end of the current term of a

⁶⁰ N.Y. Constitution Art. VI §17 (Town, Village, and City Courts).

⁶¹ *Id.*

⁶² *Id.*

village justice.⁶³ Villages are not required to have a justice court. Like town courts, there is little incentive to dissolve the court unless there is a budgetary need to cut back on court costs.

C. Town Courts: Uniform Justice Court Act 106(a) & (b)

Under the current Justice Court Act, there are two ways to effect consolidation in towns. Section 106(a) permits two contiguous towns to reduce the number of justices from two to one in each township, with one town justice elected from each of the participating towns. Each of those elected justices would not only have jurisdiction in their own town but also in the other participating townships. The effect of this means of consolidation is to continue to give towns an elected justice from their town (one instead of two) yet has the backup of justice(s) from the other participating town(s).

In 2008, New York, recognizing the shortcomings of the justice court system due to the redundancy of courts in close proximity to each other, enacted § 106(b) of the Uniform Justice Court Act. Section 106(b) presents an alternative option and permits two or more contiguous townships to share just one town justice. This law authorized, on a voluntary basis, after study and subject to a public hearing, two or more adjoining towns to effectively merge their justice courts into a single court serving both towns. Only a very few communities have taken advantage of this law and consolidated their courts. This voluntary program has not been embraced by the vast majority of towns. The extent of consolidation under this section is potentially far greater than the consolidation under § 106(a). Taken to the extreme, § 106(b) could be employed to reduce the number of justices in an entire county to just one. Obviously, proper investigation and planning at the county level is necessary to ensure that the right balance is achieved. Nothing under the law prevents a combination of consolidation efforts under §§ 106(a) and (b) simultaneously.

Mandating every county to undertake a study regarding the efficient use of local resources for the provision of local criminal justice is the first step. Counties would be free to design their own consolidated local court system – district courts, subject to mandatory referendum, or consolidated courts under the UJCA – to fit their individual needs based on caseload, demographics and location of courts.

Decades of studies, the findings of which have never been empirically challenged but rather simply ignored, have failed to produce the necessary improvement of the justice court system. As a result, the state must mandate that counties undertake the study, develop and implement a court consolidation plan. A reasonable timeline must be established for the adoption of such a plan. It is understood that fully implementing a court consolidation plan would of necessity have to phased in over a period of years as duly elected lay justices come to the end of their terms.

VIII. Structural Issues Facing Today's Justice Court System

A. Traffic Tickets, Fines and Surcharges

It is impossible to look at justice courts without considering the evolving way traffic tickets are disposed of and how fines and surcharges are allocated. According to data collected by OCA's

⁶³ Village Law § 3-301 (2)(a).

Office of the Chief Administrative Judge for Courts, outside the City of New York, traffic tickets accounted for approximately 85% of all cases handled by local courts in 2021 and 2022 (through October 14, 2022). The breakdown is:

- 2021: Total cases 1,069,349; Criminal: 115,333; Civil: 14,147; Traffic: 935,023; and special proceedings: 5,846. Traffic represented 87.24% of all cases.
- 2022 (through 10/14/22): Total cases: 834,771; Criminal: 97,138; Civil: 24,235; Traffic: 697,874; and special proceedings: 15,524. Traffic represented 83.6% of all cases.

While local court justices are not supposed to consider the revenue that fines and surcharges in their courts generate for the town, village, county and state, those amounts cannot be ignored. Some courts generate between \$1 million to more than a \$4 million dollars a year (Village of Freeport in 2022) through mostly traffic enforcement. Other courts in smaller communities still generate hundreds of thousands of dollars annually. Those funds can represent significant savings for local real property taxpayers.

In the past, traffic ticket dispositions required the personal appearance of both police officers and defendants. Police officers prosecuted their own traffic tickets. As with the entire criminal justice system, the vast majority of cases are resolved through plea bargaining. Officers met with defendants or their attorneys on the date set by the court for a trial. Most often a plea bargain would be agreed upon and presented to the justice for consideration. Motorists charged with moving violations were (and still are) looking to avoid the accumulation of points, which would cause insurance premiums to increase. State Police troopers were assured of two hours of overtime for trial appearances. If the court accepted the plea bargain, as often happened, the court would impose a fine and a mandatory surcharge, if allowed by law. Tickets that were reduced to parking tickets carried fines between \$0 and \$150 without any surcharge. More important, the fine money imposed on a parking ticket eventually was paid to the municipality instead of the state or county.

Several years ago, following a new state police contract that increased the overtime allowance for trials to three hours, the state determined that the trooper who issued the traffic ticket was not authorized to prosecute their own tickets. This set in motion a number of changes in how traffic tickets are handled. Initially, state police sergeants were assigned to prosecute and dispose of the traffic tickets issued by troopers. The Legislature later amended the Vehicle and Traffic Law to require a pretrial conference to see if the case could be disposed of without the need for attendance by police officers. In some counties, the district attorney took over the prosecution of traffic tickets from the arresting officers. Some towns and villages engaged municipal attorneys, with authorization from the district attorney, to dispose of traffic tickets.

Recognizing that reduction to parking tickets deprived the state of surcharge revenue, the law was changed to impose a \$25 surcharge on all parking tickets. It should be noted that there is some legislative interest in eliminating all surcharges as a regressive tax.

Traffic ticket disposition continues to evolve. Some local courts, in coordination with district attorneys, recognizing that many traffic tickets are issued to persons who reside far from their jurisdiction, developed a “plea by mail” alternative to personal appearances. If a traffic offender met certain criteria, a reduction would be offered. Some district attorney programs require the alleged

offender to complete a driver improvement class. Some district attorney offices impose a fee paid to the district attorney's office for consideration of this reduction. The Covid-19 pandemic accelerated the conversion of a number of courts from in-person to plea by mail.

As more courts adopt one of the plea by mail models for the disposition of traffic tickets the need for in-person court appearances will become greatly reduced. It is important to note that the Task Force is not recommending that traffic tickets be disposed of through the creation of administrative traffic violation bureaus.

Plea by mail models create more responsibility for courts and clerks in the handling of the plea and the fines and surcharges. In its 2019 Annual Report, the Commission on Judicial Conduct commented on a trend it was seeing of financial mismanagement and recordkeeping issues among town and village courts, which are responsible for collecting and handling their own fines and fees.⁶⁴ Though the Commission noted that much of the mishandling is due to innocuous reasons, such as lack of attention or clerical assistance, the Commission went on to say that they have publicly disciplined approximately 80 town and village justices and cautioned an additional 140 judges for violations of the rules around managing court funds.⁶⁵

B. *Untenable Staffing*

As the current system stands, practitioners from both the defense bar and the prosecutors' offices are stretched extremely thin trying to appear in numerous courts throughout the day and night to meet the demands of so many different justice courts with uncoordinated schedules. Defense attorneys and prosecutors are understaffed and the demands of a system with 1200 justice courts, on top of all of the city, county and district courts (in Nassau and Suffolk Counties), make it impossible to be in every court handling all criminal matters.

The *Hurrell-Harring* case, where NYCLU brought a class action, arguing that New York failed to provide adequate public defense services,⁶⁶ led New York State to prioritize providing for defense counsel at first appearance. Since that case, there has been a large push throughout the state to establish the presence of defense counsel at arraignments so that defendants are represented during the critical first appearance. With so many different justice courts to cover, the defense bar across the state is simply unable to provide representation at every arraignment. Consolidation of justice courts would better protect defendants' rights by promoting counsel at arraignment. With fewer courts to staff, district attorneys and defense attorneys would have the resources to staff arraignments, the crucial first appearance, where discussions of bail and sometimes dispositions occur.

Another benefit of consolidation is that it would support the flexibility to have prosecutors present at arraignment and even perhaps assist local law enforcement with charging decisions. It would allow for prosecutors to offer pre-arraignment diversion programs to eligible offenders and assist those with substance abuse issues with immediate treatment options.

64 New York State Commission on Judicial Conduct, Annual Report 2019, <https://cjc.ny.gov/Publications/AnnualReports/nyscjc.2019Annualreport.pdf>.

65 *Id.*

66 *Hurrell-Harring v. State of New York*, 75 A.D.3d 667, 905 N.Y.S.2d 334 (3d Dep't 2010).

In addition to the staffing issues for defense attorneys, prosecutors are stretched to their staffing limits to try to appear in every justice court across the state. Prosecutors' offices have limited staff who are overwhelmed with their own caseloads, investigations, discovery obligations, motion practice and trial preparation. To also have enough staff to appear in court proceedings across the county at various times is a tremendously difficult lift. Shifting resources away from the round-the-clock staffing needs in the justice courts will allow prosecutors to focus those resources on more serious cases.

Some opponents of consolidation suggest that all that is needed is higher salaries to attract more defense attorneys and prosecutors to staff all the courts. While a raise in salaries might help to some extent, the reality is that many counties do not have an excess of attorneys to attract. Many offices have trouble attracting new talent and compete for attorneys. Staffing shortages in prosecutors' offices are the worst they have been in decades, with many of the DA's offices unable to fill all their budgeted attorney slots. Staffing decisions often come down to choosing between staffing felony bureaus or local court bureaus. The felony bureaus are always prioritized, leaving coverage of local courts short.

In addition to easing many of the staffing burdens facing defense attorneys and prosecutors, consolidation would free up law enforcement resources. Currently, in order to have an in-custody defendant appear in court, it takes law enforcement officers out of traditional law enforcement duties in order to transport the defendant and stay with him or her through the court appearance. If justice courts were consolidated into fewer courts, law enforcement could coordinate better to have fewer officers assigned to transport, allowing for a more efficient use of their time.

It is simply a waste of resources to have numerous justice courts in close proximity. District attorneys, defense counsel and law enforcement all must fund personnel and resources to staff these courts, costing the county taxpayers unnecessarily.

C. Limited State Oversight

Unlike the rest of the judicial system in New York State, there is no direct oversight over the 1,200 justice courts by OCA. Instead, the Administrative Justice in each judicial district through its court attorneys monitors compliance with training hours. Justice courts are required to file monthly case data reports with OCA. On a monthly basis, every justice court is required to file financial reports to the Office of the State Comptroller accounting for the money that has been received and disbursed. In addition, books and records of the justice courts are offered annually to the municipalities for audit. These reviews, however, only involve proper recording keeping and money management.

The New York State Commission on Judicial Conduct can investigate allegations of misconduct and recommend sanctions or even removal from the bench but only upon receipt of a complaint.

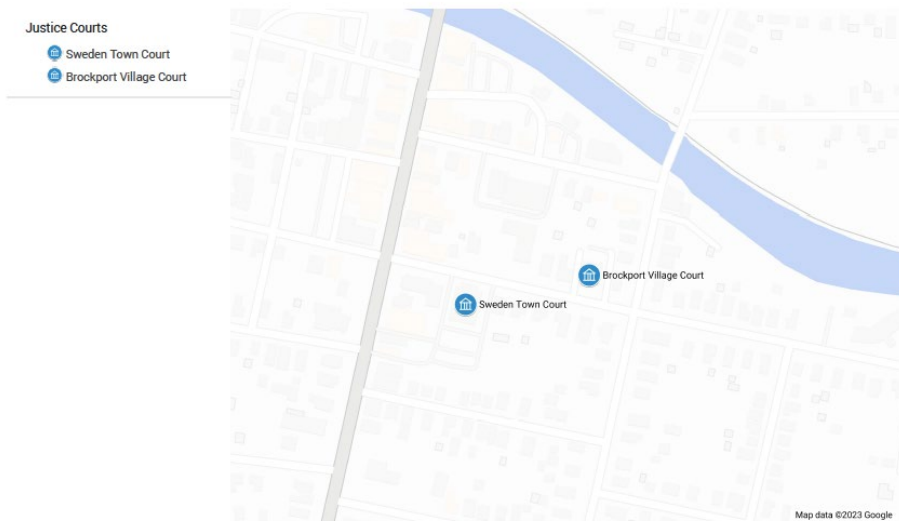
There is no oversight by OCA to see if the training provided, especially to lay justices, is being put into practice. There is no program for the regular or even the occasional review of justice court recordings. Regular reviews of the recordings of arraignments, pleas and sentencings would allow OCA to see if its training programs are being put into practice. Just the possibility of such reviews, even random unscheduled reviews, could go a long way to improving compliance.

D. Inefficient Overuse of Part-Time Courts

Most town and village court justices are part-time, their clerks are part-time and their courts are in session and open to the public on a part-time basis. The court will be in session once per week, or every two weeks, or even less often in some exceptionally low volume towns and villages. While in session, the court will often only be open for two or three hours, if that. It is not unusual for court staff to have limited office hours, making it difficult for defendants and defense attorneys to contact the court with basic inquiries. It should be pointed out that while the court may be in session on a limited basis, the work of the justice can extend beyond those hours. This would include researching and preparing decisions, reviewing, and preparing case files, completing, and filing monthly reports, conducting preliminary and probable cause hearings, eviction proceedings and small claims trials along with myriad other tasks that are necessary to the proper functioning of the court.

Consolidated courts, with staff that work full-time and justices that are on the bench more than a couple of hours a week, will make the court far more available. One example is Monroe County, where the larger justice courts have been trending towards day courts, as opposed to night, which would make it a smoother transition to consolidate there. Monroe County has redundant courts that could be considered for dissolution or combining. One such example is in the town of Sweden, which has a population of approximately 13,000 people. Over half of the population within Sweden is in the village of Brockport. Both the town of Sweden and the village of Brockport have their own justice courts, with a total of four justices. These courts are located on the same block in Brockport, 400 feet from each other. This is not cost effective nor efficient in effectuating justice.

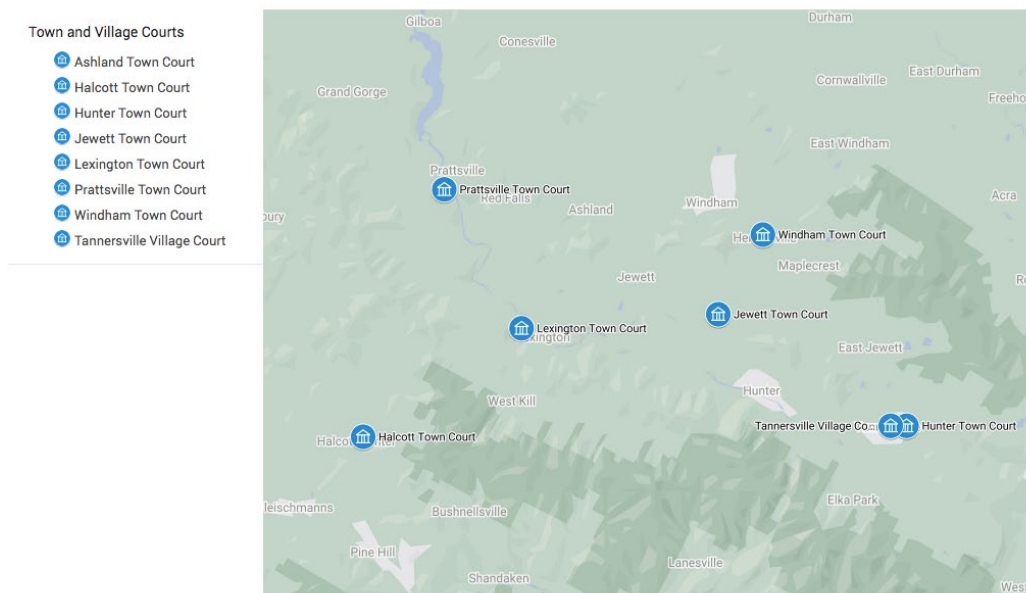
Justice Courts in Town of Sweden, NY



Another similar example in Monroe County is in the town of Mendon, which has a population of approximately 9,220 people. Within the town of Mendon is the village of Honeoye Falls. Both town and village each have their own justice courts, for a total of three justices. These courts are both located within the village of Honeoye Falls and are less than 500 feet from each other.

Another example of this inefficient structure can be seen in the seven mountaintop towns and one village court in Greene County. With the exception of the town of Halcott, the other seven courts are all within 25 minutes of each other. These eight courts each meet once a week or as needed, with the district attorney appearing generally once a month or as needed, sit for only an hour or two, use 13 justices (two attorney justices and 11 non-attorney justices), use five clerks and brought in a combined revenue of approximately \$225,000 in 2022, with Halcott bringing in no revenue in 2021 or 2022. Two part-time justices and several full-time clerks could likely handle all the cases in these eight courts. The consolidated courts could meet once a week for four-plus hours. There could be one day a month that the DA appears for criminal cases instead of having an assistant DA present at least five days a month. This would be a huge efficiency improvement for all parties involved.


























Greene County Town and Village Courts

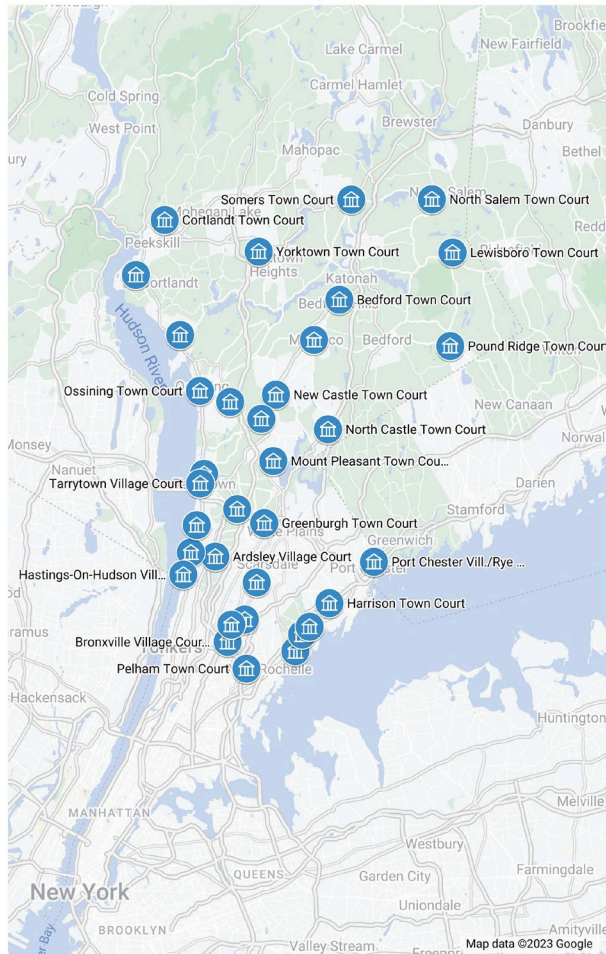


Westchester County currently has 34 town and village courts (two of them – Port Chester Village and Rye Town Court – were recently consolidated) as well as six city courts. Within the southern part of Westchester, there are 24 courts, all within 20 minutes of White Plains. Within the river towns of Westchester (the villages of Sleepy Hollow, Tarrytown, Irvington, Dobbs Ferry and Hastings-on-Hudson), most of the village courts are just minutes from one another. Further south, Eastchester Town Court, Tuckahoe Village Court and Bronxville Village Court are all five minutes from one another. The volumes in these courts are low, and the courts operate infrequently. Many of these courts could conceivably consolidate and still provide locations that are easy to access for defendants. There was recently a case set for trial in one of Westchester’s justice courts where the justice, clerk and all parties had to appear on a day that the court normally does not sit in order to handle the trial. This was yet another example of the inefficiencies created by part-time courts.

Westchester County Town & Village Courts

Town & Village Courts

-  Ardsley Village Court
-  Bedford Town Court
-  Briarcliff Manor Village Court
-  Bronxville Village Court
-  Buchanan Village Court
-  Cortlandt Town Court
-  Croton-on-Hudson Village Ct
-  Dobbs Ferry Village Court
-  Eastchester Town Court
-  Elmsford Village Court
-  Greenburgh Town Court
-  Harrison Town Court
-  Hastings-On-Hudson Vill. Ct
-  Irvington Village Court
-  Larchmont Village Court
-  Lewisboro Town Court
-  Mamaroneck Town Court
-  Mamaroneck Village Court
-  Mount Kisco Town Court
-  Mount Pleasant Town Court
-  New Castle Town Court
-  North Castle Town Court
-  North Salem Town Court
-  Ossining Town Court
-  Pelham Town Court
-  Pleasantville Village Court
-  Port Chester Vill./Rye Town
-  Pound Ridge Town Court
-  Scarsdale Village Court
-  Sleepy Hollow Village Court
-  Somers Town Court
-  Tarrytown Village Court
-  Tuckahoe Village Court
-  Yorktown Town Court



These are just a few examples of the inefficient use of redundant justice courts throughout the state. Every county could map out their courts and take a close look at volume and begin to think through consolidation plans that would bring a new level of efficiency of resources to the justice court system.

E. The Pitfalls of Hyper-Local Justice

One consistent argument in favor of keeping the status quo with justice courts has been that in keeping these courts extremely localized, they can better serve the local population. Justice in small municipalities then is not determined by larger, more urban locations that may have different priorities. Despite this argument, the majority of cases that town and village courts adjudicate are Vehicle and Traffic Law offenses, often committed by out-of-town defendants, who experience a vehicle stop on a highway that runs through the municipality.

Justice court justices live in and are a part of the communities they serve. While that gives these justices perspective on the needs of the local community, it also sometimes runs the risk of creating situations where outsiders are treated differently than locals. Having justices embedded in small communities can also create the situation where a local community member with a certain reputation in the community, whether theirs or their family and/or friends, could influence the justice's decision – sometimes in favor of the defendant or sometimes not in the defendant's favor. Furthermore, coming from a very small community runs the risk of creating the appearance that the local elected justices were put into their positions with the help of other local powerful people. Whether there is any truth to it or not, it can create a perception that the justices owe loyalties to individuals within the community.

IX. Opportunities and Benefits Provided by Consolidation

A. Cost Savings from Consolidation of Resources

Consolidation of justice courts could save municipalities significant costs. The current structure creates excessive inefficiencies in requiring the funding for personnel, resources and facilities to run so many justice courts in such close proximity to one another. Many of the courts are redundant and cost the county taxpayers unnecessarily.

Many of the smaller town and village courts have limited funds to invest in their courts and do not have a high enough volume to bring in sufficient revenue to support court costs.⁶⁷ In addition, rising costs and state mandated tax caps have left municipalities with limited options for properly supporting court services.⁶⁸ Thus, consolidation as a cost-saving option has become more appealing to some towns and villages.

Memorandum of understanding or sharing agreements between jurisdictions who are sharing a consolidated court can help share the cost burden. Many counties already have larger renovated courtrooms that are central to the surrounding towns and villages and could serve as a consolidated courthouse.

Town and village courts impose and collect fines, surcharges and fees on the cases over which they have jurisdiction, including civil, criminal and traffic cases.⁶⁹ In the event of consolidation, any incoming revenues would still go back to the town in which the offense took place. Thus, consolidation would not lead to a loss of revenue for towns, only a reduction in costs. The only exception is that villages that dissolve their justice courts and move operations to the town in which the village sits will no longer be entitled to fines from criminal or VTL matters, only local village law violations.⁷⁰ Nonetheless, the significant cost savings in no longer having to run their own justice court would outweigh any minimal lost revenue coming in, in most cases involving the smaller village courts.⁷¹ In

⁶⁷ *Justice Court Consolidation Solutions*, New York State Tug Hill Commission, July 2021, <https://tughill.org/wp-content/uploads/2021/06/Justice-Court-Consolidation-Solutions-2021.pdf>.

⁶⁸ *Id.*

⁶⁹ *Cost-Saving Ideas*, *supra* note 57.

⁷⁰ *Id.*

⁷¹ See *Justice Court Fund: Town and Village Court Revenue Report*, Office of the State Comptroller, <https://www.osc.state.ny.us/local-government/required-reporting/justice-court-fund>.

2003, the Office of the State Comptroller audited 11 town and village courts and found that consolidation would lead to savings of almost 25% of the spending in these justice courts.⁷²

B. *Improved Courtroom Facilities and Better Security*

In taking the steps to consolidate, municipalities would need to review existing courtroom facilities and choose courtrooms that are best equipped to handle the larger volume. With consolidated resources and the associated cost savings, resources could be allocated towards courtroom improvements and updates. In addition, with a larger volume, there would be a need for better security.

Currently, many smaller courts lack the necessary funding to have updated facilities, including accessibility and security measures.⁷³ Courtroom equipment, ranging from technological needs and even basic administrative supplies, are hard to fund with limited budgets.⁷⁴

In recent years, there has unfortunately been an increased need for court security, the cost of which has become a burden to many localities, especially smaller jurisdictions. In its Task Force Report, the Fund for Modern Courts described many of the lapses in security in justice courts.⁷⁵ It noted that some justice courts are housed in places like fire garages, using folding card tables, and simply do not have the infrastructure nor the funding for security measures like magnetometers, security personnel or holding cells.⁷⁶ The report went on to quote a study where the sheriff's department in an upstate county, which was responsible for transporting in-custody defendants, believed that the courts were holding in-custody cases until the end of the calendar, so that the sheriff's department officers could provide security in courtrooms that lacked proper security personnel, while they waited for the in-custody case to be called.⁷⁷ Courtrooms must have the basic necessities in order to operate and protect the people they serve.

OCA has put together a list of best practices for justice court security, which includes a number of recommendations that are simply not feasible under the current justice court system but should be incorporated into planning for better security, given the cost efficiencies and combining of resources under a consolidation plan.⁷⁸ These best practices include: dedicating space exclusively for justice court use; eliminating potential courtroom weapons; creating strategic barriers; eliminating strategic lines of sight; securing courtroom furniture; providing uniformed and armed security presence; providing ingress screening; securing and illuminating parking; arranging armed escort for bank deposits; securing storage of cash and negotiable instruments; and providing duress alarms in strategic places.⁷⁹

⁷² *21st Century Local Government*, *supra* note 31.

⁷³ *Justice Court Consolidation Solutions*, *supra* note 65.

⁷⁴ *Id.*

⁷⁵ *Enhancing the Fair Administration of Justice In New York's Towns and Villages Through Court Consolidation*, *supra* note 32.

⁷⁶ *Id.*

⁷⁷ *Id.*, citing *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, June 2006 ("Spangenberg Report"), p.105.

⁷⁸ Kaye & Lippman, *supra* note 15.

⁷⁹ *Id.*

The savings associated with court consolidation could bring in funds to improve courtroom facilities, including updates to accessibility and technology. Basic administrative supplies and equipment could be obtained with the benefit of cost-sharing. Consolidation could lead to more resources for the appropriate and necessary level of security that all courtrooms should provide.

C. *More Streamlined Docket Management*

Another benefit of consolidation is better docket management. Defendants often have multiple cases in neighboring towns and villages. People tend not to just stay put in one town or village. People committing vehicular crimes may be doing so across multiple jurisdictions. Thus, some defendants end up with multiple cases from different neighboring towns, which are handled by different assistant district attorneys and different justices. This makes adjudication of the cases complicated and often slows down the process as the different parties try to connect and work on a disposition to cover the various cases.

Because consolidation would likely lead to many of these neighboring courts with overlapping defendants combining, a lot of this complicated docket management would be simplified.

Furthermore, consolidation could lead to better electronic recordkeeping and reporting of case statuses and outcomes. With fewer courts, it would be easier to administer a docket management system that all could use. Better reporting would help establish a better understanding of what is happening in the justice courts and how they can continue to improve.

D. *Staggered Court Appearances and Extended Hours*

As currently structured, town and village courts often meet once or twice monthly, some meeting more frequently. In some towns and villages, court is only held at night. As most justice court justices have regular jobs in addition to their positions as justices, having night court often makes it easier for them to work at their other jobs during normal business hours. This does not leave defendants within these towns and villages with any flexibility if the day or time of their local court is difficult to manage due to work, childcare or other reasons.

One benefit of consolidation is that it could provide for regular and more frequent court hours, with the flexibility to have occasional evening hours to accommodate different schedules. Fewer courts would allow for more streamlined and flexible scheduling. Consolidated courts will remove conflicting scheduling.

Court consolidation with longer court sessions will create larger court calendars. This would allow for staggered court appearances with set appearance times, rather than the current practice in many courts of having all interested parties present at the beginning of the court session. It could allow justices to schedule court appearances taking into account the availability of defense counsel as well as the defendant. This would reduce waiting time for all parties. Courts could schedule appearances

based on the tenets of procedural justice and respect for the individuals involved in the criminal justice system. This in turn would promote fairness and improve the public perception of justice.⁸⁰

E. Modernization of Technological Needs

With decades and decades of efforts at reform of the justice courts, the COVID-19 pandemic shed light on the need for modernization in a way that we had never seen before. On March 16, 2020, as the COVID-19 pandemic began, all court nonessential functions came to a halt.⁸¹ Arraignments began again on April 6, but were virtual with all parties in separate locations and defendants often being arraigned from booking facilities or jails.⁸² Other essential court functions were provided virtually beginning on April 13.⁸³ With the move to virtual court operations, there was a new need for basic technology in the justice courts. Equipment as simple as computers for virtual proceedings was not readily available across all justice courts. For those counties with sufficient resources and technology, this shift was doable. However, many counties lacked the necessary equipment or internet access to move to a virtual system.⁸⁴ The COVID-19 pandemic demonstrated the value of and efficiency afforded by virtual proceedings.

If technology needs can be met, there is a lot of opportunity for improving the business of the justice courts. One area that has been explored is using technology for virtual arraignments with appropriate due process safeguards that allow defense counsel to properly represent the accused. Virtual arraignments have been effectively utilized in counties with adequate technology. During the COVID-19 pandemic, Orleans County was one of the municipalities that was able to successfully pivot its Centralized Arraignment Part (CAP) to all virtual arraignments under the governor's Executive Order. With the termination of the Executive Order, Orleans County returned to personal appearances at the court but, due to its success with virtual arraignments, the county is seeking authorization under Criminal Procedure Law § 182 to return to conducting some arraignments virtually.

In addition to virtual appearances for arraignment, traffic offenses and regular criminal appearances not involving hearings or trials could be handled virtually if courts had the equipment and technology to reliably allow for confidential communication between defense counsel and the accused. Virtual appearances have the potential to save tremendous resources and time and create better access to justice for the defendants who otherwise need to take off from work to attend court and wait for substantial amounts of time for their cases to be called and, in many instances, simply adjourned for "further investigation," discovery and/or consideration of a plea offer. In-person appearances could be limited to times when physical presence is necessitated, such as for hearings and trials and other occasional court appearances.

80 Greg Berman & Emily Gold, *Procedural Justice from the Bench: How Judges Can Improve the Effectiveness of Criminal Courts*, *Judges' Journal*, Vol. 51, No. 2 (Spring 2012), https://www.innovatingjustice.org/sites/default/files/documents/JJ_SP12_BermanGold.pdf.

81 Pollitz Worden & Moloney, *supra* note 13.

82 *Id.*

83 *Id.*

84 *Id.*

During the COVID-19 pandemic, some counties began resolving all Vehicle and Traffic citations through the mail to eliminate foot traffic in the courts. Orleans County developed an automated system that, if initiated, would have a tremendous impact on the ease and efficiency with which motorists that have been ticketed will be able to address their citation without ever having to appear in court. This system will significantly reduce court dockets and the workload of prosecutors, court clerks and justices while enhancing traffic safety. The automated system requires giving prosecutor's offices throughout the state access to the data stream of the TraCs system, managed by the NYSP, which is the electronic source for all town and village citations issued throughout the state. Currently, the DA's office does not receive information regarding these citations until they receive them in court from the clerks, often weeks or months after they were issued. Access to this data would permit the automation of resolving traffic matters through the mail or online, significantly reducing the congestion in justice courts and providing motorists with an efficient way of resolving their traffic offenses.

If court resources are consolidated and provide for virtual and automated options, there could be computer kiosks set up in locations where former town and village courts once operated. This would ensure that all defendants had a close-to-home option for a computer and internet access to attend virtual court appearances.

Basic technological equipment, such as computers and courtrooms with internet access, should be the bare minimum requirements in the justice courts. However, in consolidating and subsequently modernizing New York's justice courts, there are myriad options to use technology to increase efficiency and improve justice in the town and village courts.

F. Better Planned Transportation of In-Custody Defendants

In-custody defendants must be transported by law enforcement officers to court. This process removes the officers from regular law enforcement duties and often takes several hours. Coordinating the transportation for in-custody defendants across 1,200 justice courts creates huge inefficiencies for law enforcement, who are pulled from their regular responsibilities to assist in the transport.

If justice courts consolidated, there would be fewer locations to transport in-custody defendants, and law enforcement officers could transport more defendants together to fewer locations. This would save substantial time and allow law enforcement to spend more time focused on their traditional law enforcement roles.

G. Reasonable Travel Distances for all Parties

In developing a consolidated court system, focus must be placed on making sure that defendants are not traveling unnecessarily far distances to appear in court. Highly populated locations with a higher volume of cases should be favored as centralized courts cover more remote locations. Notice should be paid to public transportation options, where available, to aid defendants who do not have access to a vehicle.

It is also important to consider that a high percentage of the cases in justice courts are Vehicle and Traffic law offenses, many of which may involve non-local defendants. For those cases, the concern over defendants having to travel outside of their hometown or village is less persuasive.

However, for the other types of cases, a closer look at individual counties is needed to sort out the opportunities for consolidation within a close distance to one another.

X. Examples of Successful Consolidation

A. *Village of Port Chester (Westchester County)*

Recently, in 2021, the village of Port Chester, in Westchester County, dissolved its court and shifted all court operations to the Town of Rye, in an effort to save money in Port Chester.⁸⁵ The shift happened after the three village justices' terms all ended.⁸⁶ Port Chester was simultaneously pursuing status as a city, which, if approved, would have given over court operation costs to the state.⁸⁷ Port Chester was having serious financial issues and was seeking ways to increase revenue and reduce costs.⁸⁸ It was found that by dissolving its court, Port Chester would save approximately \$600,000.⁸⁹ This one example of consolidation could serve as a model for other villages and towns looking to consolidate.

B. *Orleans County*

In 1992, Orleans County had 20 sitting town justices in its 10 towns and four sitting justices in its two principal villages, Albion and Medina. These courts either meet once a week, once every two weeks or once every month. Justices sometimes had dockets of three or four cases. Courtroom facilities were mostly inadequate and often at their private residences. Over the last 30 years in Orleans County, the number of lawyer justices that have sat on justice court benches can be counted on one hand. Being elected a town justice had nothing to do with qualifications and more to do with popularity. The training for justices, once elected to office, remains minimal. Justices often depend on members of the district attorney's office to properly conduct proceedings in their court. In a county of less than 45,000 people, it was abundantly clear that they would be better served with fewer, more qualified individuals serving as town justices.

In 1992, Joseph Cardone was elected Orleans County district attorney. DA Cardone initiated efforts to make sweeping changes to the Orleans County local court system. He met with the various stakeholders in the criminal justice system including the local bar association, the public defender's office, the sheriff's department and local police chiefs, and he appeared at town and village board meetings. There was an obvious consensus that more efficiency in the court system was needed.

To begin with, Orleans County targeted the towns of Ridgeway and Shelby to study the possibility of consolidating their courts pursuant to the provisions of § 106(a) of the Justice Court Act, which at that time permitted the consolidation of two contiguous townships. They targeted these towns because they both had justices that were contemplating retirement. Also, as two of the larger

85 David Propper, *Port Chester to Dissolve Village Court System to Shed Costs*, Lohud, Oct. 19, 2020, <https://www.lohud.com/story/news/local/westchester/port-chester/2020/10/19/port-chester-dissolves-court-system-seeks-city-status/3662590001>.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

townships, the thinking was that if they could accomplish consolidation there, then there would be no reason other townships in the county could not be consolidated.

Section 106(a) requires a fair amount of coordination and town board action and a specific timeline. The Orleans County district attorney first met with each of the town boards and suggested that consolidation should be something they should look at as a means of making their local court more efficient. Those meetings were then followed by public hearings where the district attorney appeared at town meetings with the public defender, sheriff and probation directors to publicly discuss consolidation. The process also requires that after those hearings, the town boards would pass a resolution to have the proposal for court consolidation placed on the ballot for a referendum. Prior to the election, the only real opposition they received was from a select few magistrates. The proposals passed overwhelmingly in each of the townships with approximately 85% of the vote.

As a result, circa 2006, the towns of Shelby and Ridgeway became one court with a single town justice elected from each jurisdiction that had jurisdiction over both towns. After a slight period of adjustment, it became abundantly clear that two elected justices could easily handle the caseload and that they preferred the arrangement. It was a clear success.

The following year, the State of New York amended § 106(a) to permit “two or more contiguous” townships to consolidate. As a result, the town of Yates, another neighboring township, met with Shelby and Ridgeway and went through the process of consolidating their town court with the two. What were once three separate courts with six separate town justices became technically one town court with just three town justices.

As a further measure, the district attorney had already begun talks with the Village of Medina to dissolve their village court. The Village of Medina, the largest village in the county, is geographically located in the towns of Shelby and Ridgeway. It was determined by the Village in or about 2009, that it would dissolve the Village of Medina justice court and terminate the two positions of village justice and assistant village justice. At that point, the whole west end of Orleans County, which comprised four separate courts with eight separate justices, became one court with just three elected justices.

It was not long until other jurisdictions within Orleans County realized the economy of these consolidations and followed suit. The second largest village, Albion, also dissolved its village court. Since that time, the towns of Gaines, Carlton, Kendall, Murray, Clarendon and Barre have all gone from two town justices down to one. Now, Orleans County, which had 24 town and village justices, is down to nine. Only the town of Albion has continued with two elected positions.

Over the last three years, with the support of the county Legislature, Orleans County has formed a committee to study establishing a centralized district court to exclusively handle all justice court level criminal proceedings. their work on this issue has been extensive. In addition to the district attorney, the committee includes the public defender, a justice from the magistrate’s association, the sheriff, the probation director and a member of the county Legislature. They meet on a regular basis and have developed a District Court Plan. The committee is hoping to have the District Court Plan voted on in the fall of 2023.

Given the evolving complexity of the criminal justice system in this state, the concern for the rights of victims and defendants and the involvement of recent technologies, the time for sweeping reforms in the local court system is well overdue. Orleans County stands as a successful example of consolidation, and other counties should begin to follow suit.

C. *Village and Town of Catskill (Greene County)*

Recently the two busiest courts in Greene County, the town and village courts of Catskill, merged with the dissolution of the village court. This was prompted by the election of the same two lay justices in both jurisdictions. Each justice was holding court twice a week – once in the town and once in the village. They realized that they could handle the caseload of both courts by extending the hours of the town court, and now each justice holds court once each week. This was yet another example of successful consolidation.

XI. Recommendations

The current justice court system must be replaced, or significantly revised, in order to meet the demands of due process in an efficient and effective judicial system. Instead of some 1,200+ courts with 1,800+ justices of whom 1,000+ are not attorneys, many of whom are part-time justices, due process demands that all justices be attorneys.

In order to achieve economy of scale appropriate to caseload and demographics, while taking geographic proximity rather than municipal boundaries into account, many courts must be eliminated either through extensive consolidation or replacement by district or regional courts. Such consolidated/district courts would be in session for more than just two to three hours per week, as caseloads demand. They could have both daytime and nighttime hours to accommodate the needs of the local population. A consolidated court justice or a district court judge could even ride a circuit and conduct many court proceedings in various locations throughout the consolidated court or district court jurisdiction, as local needs require.

With increased caseloads for consolidated courts, full-time clerks with more training will be required, especially as more courts adopt plea by mail models for handling traffic tickets, which make up approximately 85% of court caseloads.

Recognizing that converting from the current justice court system to a new consolidated court/district court system will require counties to undertake studies to devise the revised system best suited to the needs of its towns and villages, legislation mandating that such studies be undertaken, completed and new systems proposed by a date certain is necessary. Voluntary programs that already exist have not produced the desired consolidation.

Finally, implementation of consolidated/district courts will have to be phased in over time to allow for current non-lawyer justices to complete their duly elected terms of office.

With these ideals in mind, the Task Force recommends the following:

1. All justices must be attorneys duly admitted to practice law in the State of New York for a period of not less than five years. The Legislature shall amend the requirements for town or village justices to require the same.

2. During the time that town and village courts are being studied by the comptroller, and court consolidation or district court plans are being developed, no town or village justice who is not an attorney at law may be elected to the office of town or village justice. To address the possibility that there is no attorney qualified or willing to be elected a town or village justice residing in each town or village, Public Officers Law § 3 as well as appropriate sections of the Justice Court Act, town and village laws shall be amended to permit, in said event, every town or village to elect a justice who is an attorney at law who does not reside in the town or village provided the attorney resides within the towns in the proposed consolidated courts or district.
3. Traffic tickets account for approximately 85% of court dockets; the Vehicle and Traffic Law should be amended to provide for plea bargaining not just initial appearances by mail, which is the method by which an increasing number of courts are now proceeding.
4. The office of the State Comptroller shall undertake a study of the justice courts detailing caseloads, revenues and projected cost savings from court consolidation / district courts replacing justice courts in reasonable distances of each other.
5. Utilizing such data each county shall, with input from the District Attorney, the primary public defense provider, the Legal Aid Society that provides civil representation in said county, at least one criminal defense attorney who resides in and regularly practices criminal law in the county, the Sheriff, a representative of the justice court justices in said county and of the justice court clerks in said county within six months of the completion of the Comptroller's report, prepare a plan for the consolidation of the town and village courts to achieve economies of scale, or in the alternative, propose a District Court plan.

Such plan shall be submitted to the Office of the State Comptroller, the Office of Indigent Legal Services, the Chief Administrative Judge for the courts outside the City of New York, the Administrative Judge for the Judicial District in which the county is located and to each town or village board affected by such plan, for their review and comment. Such "stakeholders" shall provide each county with their input within two months of receiving the proposed plan. Thereupon each county shall have up to two months to revise such a plan if it chooses to do so and to conduct public hearings on such plan to be completed within said two months. Within two months after public hearings are completed each county shall adopt a plan for the consolidation of courts or the creation of district courts.

6. If the county adopts a plan of consolidation, the same shall become effective immediately upon adoption provided that there is a phase-in period of up to six months to allow the services of the court to be consolidated.
7. Once there is a consolidation of courts, where the town or village justice presiding in any town or village is not an attorney at law, said justice shall only preside over cases that arise in the town or village where the justice was elected until the end of their term. If the current justice is an attorney at law, the justice shall have the right to preside over all cases within the consolidated court's jurisdiction, if the justice chooses to do so,

until the justice's term expires. If a district court plan is chosen, the same shall be placed on the next general election ballot and shall become effective no later than three months after such approval. Any justice whose municipality is located within the district shall continue to preside over cases arising in said town or village jointly with the district judge until the expiration of their term. If the electors shall not approve said district court plan, then the county legislature shall adopt a consolidation plan as provided herein.

XII. Concluding Remarks

The fair and efficient administration of justice in New York State is dependent on an effective and well-operated local court system. The inescapable conclusion is that the current justice court system must be replaced. Minor changes have not met the requirements of due process in the protection of the rights of the accused as well as the rights of the People. Offering counties, towns and villages the opportunity to voluntarily evaluate and adopt cost-saving changes, economies of scale and efficiencies by consolidating court functions has not produced the desired effect. Mandating such changes is necessary. Since not every county has the same concerns and issues based on caseloads, demographics and geography, allowing counties the flexibility to adopt their own court consolidation plan designed to serve its needs is appropriate.

Consolidated courts presided over by justices who are attorneys duly admitted to practice law in New York will provide many benefits, starting with due process protections of the rights of the accused as well as the rights of the prosecution. The myriad cost-savings and efficiencies consolidation offers will pay for the necessary professional staff – whether full- or part-time – including attorney justices and clerks.

Whether due to nostalgia and a desire not to change things, benign neglect, simple inertia or political concerns, the justice court system has been allowed to continue in its current form for decades beyond its constitutional useful life. The time is long past to bring 21st century jurisprudence to upstate New York.

The New York State Bar Association must take the lead and urge the Legislature and the governor to make the changes necessary to achieve this goal.

SENTENCING REFORM

The task force presents three legislative proposals intended to modernize sentencing in the State of New York.

The task force proposes that the New York State Legislature enact legislation providing for the following changes to current New York law:

1. Allowing defense counsel to be present at presentence interviews upon counsel's request;
2. Permitting judicial decision-makers to review and consider modifying the sentence of a defendant who has served at least 10 continuous years of a sentence of imprisonment; and
3. Allowing for the elimination of mandatory minimum sentencing requirements upon consent of the prosecution and court.

In reaching these recommendations, the Task Force relied on the extensive experience of its members, existing initiatives, substantial research and meeting with experts in the field. The Task Force believes that the three proposals presented within this report parallel other successful and impactful legislative initiatives to improve the state's criminal justice system.

In addition to these proposals, the Task Force also considered supporting legislation to reform New York State's indeterminate sentencing structure. For reasons discussed herein, the Task Force declines to make a recommendation involving indeterminate sentences at this time and instead recommends that a commission be created to address certain issues that are necessary preconditions to drafting successful legislation in this area.

I. Counsel's Presence at Presentence Interviews

A. Background

In New York State, prior to sentencing in a criminal matter, the probation department is required to prepare a presentence investigation report (PSR or PSI) with sentencing recommendations, on which judges often rely in deciding an appropriate sentence for a defendant. To prepare the PSR, the probation officer conducts an interview of the convicted person. The New York Courts website states that "[t]he pre-sentence interview is a chance for the defendant to try to make a good impression and explain why he or she deserves a lighter punishment."⁹⁰ Currently, the right to counsel's presence at this PSR interview depends on the rules established by the county probation office. As a result, counsel is permitted to be present for the interview in some jurisdictions, while in others, counsel is prohibited. The right to representation at this critical step in the criminal proceedings should not be dependent on where a person is convicted.

New York Criminal Procedure Law § 390.30(1) provides:

⁹⁰ *Pre-Sentence Report*, New York State Unified Court System, <https://nycourts.gov/courthelp/criminal/preSentenceReport.shtml>.

The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such an investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence and must include any matter the court directs to be included.

The resulting PSR continues to impact a person's life even after sentencing. The PSR will accompany the sentenced individual to the correctional facility, where it will be used for a variety of purposes. For example, case managers may use the report to help determine the severity of the offense; counselors may use the report to determine who may visit the person at the prison; educational and program administrators will rely on the probation report to determine whether the individual will be required to participate in programs; and psychologists may use the report to determine what, if any, treatment the persons should receive while incarcerated.

The probation officer's interview of the defendant serves as an extremely important source of information for the report. The defendant's conduct and answers provided during this interview can have a significant impact on the sentence recommendations in the PSR. During the interview, the probation officer may elicit information that can increase or decrease the individual's sentence. Given the importance of the presentence interview to the sentence that will be imposed upon the defendant, excluding defense counsel is not justified.

A defense attorney can play a key role in ensuring fair and accurate fact-gathering by the probation officer at the interview by challenging the prosecution's version of the facts, on which the probation officer may rely heavily in questioning the convicted individual. In addition, the defense attorney can prevent a client from prejudicing him- or herself with the probation officer by preventing the client from providing inaccurate information, revealing prior criminal conduct for which the client was not convicted or charged or providing information inconsistent with the client's guilty plea taken in court. In certain situations, particularly where there was a conviction at trial, an appeal may be taken and the case could be retried, the attorney may not want the client to answer any questions about the instant offense to protect the person at a future trial. The federal courts have recognized the importance of counsel's presence, and New York should do the same.

B. Proposed Legislation

We recommend that the legislature pass a uniform law similar to the language in Federal Rule of Criminal Procedure 32(c)(2), which provides:

The probation officer who interviews a defendant as part of a presentence investigation report must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

People convicted of crimes in New York should have the same right to have an attorney present at the PSR interview – in all counties – to ensure accurate fact-gathering and to prevent their clients from prejudicing themselves with their statements. Adopting a rule such as Rule 32(c)(2) will enhance

the quality of representation for criminal defendants in New York and make the rules for representation at PSR interviews consistent throughout the state.

II. “Second Look” Resentencing

A. *Background*

Today, in the United States, two million individuals are incarcerated or in jail, with over 200,000 individuals serving life sentences.⁹¹ In New York State, the average minimum sentence length is approximately 13 years with almost half of all incarcerated individuals serving minimum sentences of 10 years or more.⁹² These figures reflect the supersized modern sentences imposed beginning in the 1970s at a time when there was strong public demand for increased punishment in response to high crime rates.⁹³ Research has shown, however, that decades-long detention often does not fulfill the goals of sentencing, and 10 years is more than sufficient to deter individuals as they age out of criminal behavior.⁹⁴ In light of this understanding, reexamining lengthy sentences, or taking a “second look,” is warranted, especially as developments in effective treatment and technological advancements in surveillance reduce concerns of recidivism upon release.⁹⁵

The benefits of second look legislation in modifying a sentence in excess of 10 years for a deserving incarcerated individual are not limited to the individual. The country’s mass incarceration rates pose significant social, economic and political issues for society as a whole. At least \$80 billion taxpayer dollars each year are allocated to funding the prison system. In New York State, the average annual cost per incarcerated individual is nearly \$115,000.⁹⁶ In Black communities, the effects of incarceration, especially long sentences, are disproportionately felt. Today, one out of every three Black boys can expect to go to prison during his lifetime, compared to one of every six Latino boys and one of every 17 white boys.⁹⁷ In New York, 74% of incarcerated individuals are Black or Latino, meaning that these communities bear the most negative effects of mass incarceration.⁹⁸

Numerous academics, organizations and states have recognized the importance of and consequently proposed second look legislation and reform. In fact, four states and the District of Columbia have passed such bills.⁹⁹ In 2017, the American Law Institute approved revisions to the

91 Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment*, The Sentencing Project, Feb. 2021, <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

92 *Under Custody Report: Profile of Under Custody Population as of January 1, 2021*, New York State Dep’t of Corrections and Community Supervision, <https://doccs.ny.gov/system/files/documents/2022/04/under-custody-report-for-2021.pdf> (hereinafter “DOCCS”).

93 Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, U. of Chicago Press J., Feb. 13, 2019, <https://www.journals.uchicago.edu/doi/full/10.1086/701796>; see also *Sentences Imposed*, Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp.

94 Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 113, 123 (2018).

95 See Reitz, *supra* note 91.

96 See *Mass Incarceration*, American Civil Liberties Union, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (hereinafter “ACLU”); Jullian Harris-Calvin et al., *The Cost of Incarceration in New York State*, Vera Institute of Justice, Oct. 31, 2022, <https://www.vera.org/the-cost-of-incarceration-in-new-york-state>.

97 See ACLU, *supra* note 94.

98 See DOCCS, *supra* note 90.

99 Barry Kamins, *Sentencing Reform: The Next Criminal Justice Battleground*, N.Y. Law J., April 4, 2022, <https://www.law.com/newyorklawjournal/2022/04/04/sentencing-reform-the-next-criminal-justice-battleground>.

Model Penal Code recommending second look resentencing. Model Penal Code Sentencing § 11.02(1) provides that “[t]he legislature shall authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of imprisonment.” Upon additional research and developments in behavioral psychology, the American Bar Association similarly recommended second look legislation after a person has served a continuous 10 years of a sentence.¹⁰⁰

Despite the national momentum, New York does not currently have a mechanism to permit courts to reconsider a sentence after all appeals have been exhausted. In 2021, New York amended the Criminal Procedure Law to permit an individual initially denied youthful offender treatment and who has not been convicted of a crime in the five years following his sentence to apply to the sentencing court for a new determination.¹⁰¹ Yet, no legislation exists to provide individuals who have been rehabilitated and do not fall into this select category the opportunity to convince a court that their sentence is no longer appropriate. Enacting such legislation will save money, incentivize good behavior and participation in rehabilitative programs and ultimately reduce the unwarranted and negative consequences of mass incarceration.

B. Proposed Legislation

After careful consideration, the Task Force agrees that second look resentencing is warranted and recommends that the Legislature enact legislation in accord with the following principles:

1. Eligibility

An applicant who is incarcerated and serving an indeterminate maximum term of imprisonment of 10 years or more, or a determinate term of imprisonment of 10 years or more and has served at least 10 continuous years of the sentence of imprisonment, is eligible for resentencing under this proposed legislation, provided that the applicant is not serving a sentence of imprisonment for a conviction of a class A, B, or C felony defined in Penal Law art. 130 (Sex Offenses); and the applicant is not serving a sentence of life imprisonment without parole or the alternative authorized maximum sentence of imprisonment for the following crimes:

- murder in the first degree (Penal Law § 125.27);
- aggravated murder (Penal Law § 125.26);
- kidnapping in the first degree (Penal Law § 135.25(3)); or
- a Class A, B, C felony defined in Penal Law art. 490 (Terrorism).

Notwithstanding the foregoing requirements, a prosecutor may apply for the resentence of a defendant serving an indeterminate or determinate sentence of imprisonment when a resentencing of the defendant is in the interest of justice and is consistent with public safety and the rehabilitation of the defendant.

100 American Bar Association, Resolution 502 and Report, Aug. 8-9, 2022, <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/502-annual-2022.pdf>.

101 L. 2021, Ch. 552, eff. 11/2/2021.

For those eligible for resentencing, 10 years is a significant period of imprisonment and a sufficient period in which to judge whether a person deserves to have the sentence modified.

An eligible defendant may not waive his or her right to resentencing at any stage of the criminal proceedings.

2. Application Materials

The application may contain documents or information beyond what was available at the time of the sentence, including, but not limited to, those bearing on the defendant's age, health or culpability or responsibility for the commission of the felony, and those demonstrating that the incarcerated person has made strides in self-development and improvement, has made responsible use of available rehabilitative programs and has addressed identified treatment needs.

3. Procedure

The application shall be served on the district attorney and heard by the judge who sentenced the applicant, or, if that judge is unavailable, a judge assigned by the supervising or administrative judge of the court.

The court shall proceed to consider resentencing the applicant in accord with the pertinent procedures authorized for the imposition of the original sentence (CPL articles 380 and 400), including an updated sentence report; the right of the victim to make a statement; the applicant's right to counsel; and a hearing, if necessary.

If qualified for a court-assigned counsel, the applicant may accordingly apply for assigned counsel prior to filing the formal application for resentencing to assist in the filing of the application.

The Department of Corrections and Community Supervision shall be required to timely notify an eligible applicant of the right to apply for resentencing and the applicable procedures. Upon request of the parties or the court, the Department shall provide whatever documents and information that may be pertinent to a determination to resentence the defendant.

4. Criteria for Resentencing

Resentencing may be granted if the court determines that it is in the interest of justice and resentence is consistent with public safety and the rehabilitation of the applicant. In determining whether to resentence a defendant, a court may consider:

- (a) the history and character of the defendant, the nature and circumstances of the crime for which the defendant is incarcerated and the defendant's role in the commission of that crime, including but not limited to the applicant's age at the time of the commission of the felony and degree of culpability or responsibility for commission of the felony;
- (b) any statement of a victim of the crime;
- (c) current physical or mental health, including, but not limited to, applicant's current age, whether the application is suffering from a terminal illness or has a severe and chronic disability that significantly incapacitates the offender or would be substantially mitigated by release from prison; and

- (d) defendant’s conduct while incarcerated and strides towards rehabilitation, including programs the defendant may have participated in while incarcerated, provided that the applicant’s inability to participate in programs while incarcerated, although willing to do so, shall not be considered a negative factor.

5. Sentence

Upon determining that resentencing is warranted, the court may modify the sentence by resentencing the applicant to any sentence that is authorized upon a conviction for the felony for which the applicant is incarcerated. The court may not, however, increase the sentence of imprisonment originally imposed.

A prosecutor shall not be entitled to have the defendant’s plea of guilty set aside if the resentencing is not in accord with the original plea agreement.

6. Appeal

The prosecutor may appeal an order resentencing the applicant on the grounds authorized for an appeal of the original sentence.

The applicant may appeal an order denying resentencing on the grounds authorized for an appeal of the original sentence.

7. Re-application

The applicant may reapply for resentencing after two years from the date of the order denying sentence, provided, however, that the court may in the order denying sentence authorize the defendant to reapply sooner.

III. Safety Valve for Mandatory Minimums

A. Background

New York’s current sentencing scheme provides for mandatory minimum sentencing laws, which require a judge to impose no less than a stipulated amount of prison time, regardless of the circumstances of the offense or other mitigating factors. Although New York has weakened mandatory minimums through exceptions and nuances implemented since these types of laws first gained traction in the late 1970s and early 1980s, mandatory minimums in New York persist. In fact, over half of all prison sentences currently being served in New York resulted from mandatory minimum sentencing laws.¹⁰²

Mandatory minimum sentences fuel mass incarceration, and the repercussions of these sentences are significant. Longer periods of incarceration cost taxpayers more money and do not necessarily enhance public safety or serve any other useful purpose. Research has shown that when a large number of individuals from a community are imprisoned, crime actually increases as families

102 Fred Butcher, Amanda B. Cissner, and Michael Rempel, *Felony Sentencing in New York City: Mandatory Minimums, Mass Incarceration, and Race*, Center for Court Innovation, Dec. 2022, https://www.innovatingjustice.org/sites/default/files/media/document/2022/Felony_Sentencing_Minimums_Race.pdf.

lose providers, partners and parents, and accused individuals do not have the resources or tools to reintegrate into their communities.¹⁰³ More people, and disproportionately people of color, are incarcerated for longer periods of time than necessary, and those sentences are ineffective in reducing recidivism rates.¹⁰⁴ Mandatory minimums also fail to serve as a deterrent, since most people do not know the penalties they face for certain crimes.¹⁰⁵

In general, minimums apply for most people convicted of a felony (violent or non-violent) if the individual has a prior felony conviction within the past 10 years.¹⁰⁶ These laws lead to unjust sentences because no matter how compelling the mitigating factors of a case may be, prosecutors and judges have no flexibility to go below the statutory floor in plea negotiations or sentencings. Judges are stripped of their usual discretion because they are required to impose minimum prison terms based on the charges brought by prosecutors. Under New York’s Criminal Procedure Law, mandatory minimums also constrain prosecutors post-indictment in making a plea offer.¹⁰⁷ As a result, mandatory minimum laws create coercive plea negotiations and can result in innocent people pleading guilty.¹⁰⁸ When all parties agree that a mandatory minimum sentence is not appropriate under the circumstances, both the prosecution and judges are forced to undergo mental gymnastics to devise a result that circumvents the current statutory scheme, including wasteful procedures such as dismissing one indictment and re-charging the case under a different statute.

In recent years, many states have made efforts to eliminate or weaken the effects of mandatory minimum sentencing and have passed laws that permit courts and prosecutors to recommend and impose sentences below the statutory prescribed minimum in certain appropriate circumstances.¹⁰⁹ This type of legislation is often referred to as a “safety valve.” In the federal system, a safety valve exists for first-time, non-violent, low-level drug offenders if they meet specific conditions.¹¹⁰ Safety valve legislation gives judges greater flexibility in sentencing and prosecutors greater flexibility in plea negotiations. This flexibility and discretion support the goals of sentencing by allowing a sentence to be sufficient but not greater than necessary to address public safety and deterrence.

In addition to safety valve legislation, many legislative efforts exist, including in New York, to completely eliminate mandatory minimums. The Task Force considered adopting such an approach,

103 *New York Should Abolish Mandatory Minimums*, The Vera Institute of Justice, Feb. 2022, https://www.vera.org/downloads/publications/new-york-should-abolish-mandatory-minimums_2022-03-08-160009_smuc.pdf.

104 Senate Bill S5712, 2019–2020 Legislative Session, <https://www.nysenate.gov/legislation/bills/2019/s5712>.

105 *See New York Should Abolish Mandatory Minimums*, *supra* note 104.

106 *See* Butcher, *supra* note 103.

107 Criminal Procedure Law § 220.10(5).

108 Rebecca Brown, *Why Do Innocent People End Up Pleading Guilty?*, N.Y. Daily News, Feb. 10, 2023, <https://www.nydailynews.com/opinion/ny-oped-why-do-innocent-people-end-up-pleading-guilty-20230210-ql5tjpf2ubdl7iufyww4ezcwra-story.html>.

109 Florida (Florida HB 89, Chapter No. 2014-195), Maine (Maine Revised Statutes 17-A:51 §1252:5-A(B) (2003), Maryland (Maryland Chp. 515(2016)), Minnesota (Minnesota § 609.11 (2017)), North Dakota (North Dakota, HB 1030 (2015)), Oklahoma (Oklahoma, HB 2479, (2016)), and Hawaii (Hawaii, SB 68 (2013)) have all passed safety valve legislation.

110 18 U.S.C. § 3553(f).

but ultimately arrived at the below recommendation, which requires the consent of both parties and the Judge, as an initial step to achieve greater flexibility in sentencing.

B. Proposed Legislation

1. Senate Bill 1003-01-3

The Task Force supports the adoption of legislation that would provide a safety valve from application of the current provisions of law which would require application of a mandatory minimum sentence, provided that defendant has the permission of the court and the consent of the people. That effect would be achieved by the Office of Court Administration's proposal in Senate Bill 1003-01-3 to amend subdivision 5 of Section 220.10 of the Criminal Procedure Law and subdivision 3 of Section 220.30 of the Criminal Procedure Law. Bill 1003-01-3 reads as follows:

Section 1. Subdivision 5 of section 220.10 of the criminal procedure law is amended by adding a new paragraph (i) to read as follows:

- (i) A defendant, with both the permission of the court and the consent of the people, may enter a plea of guilty as authorized by this section, notwithstanding the provisions of paragraphs (a), (b), (c), (d), (f), and (h) of this subdivision, when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

Section 2. Paragraph (b) of subdivision 3 of section 220.30 of the criminal law is amended by adding a new subparagraph (x) to read as follows:

- x) A defendant, with both the permission of the court and the consent of the people, may enter a plea of guilty as authorized by this section, notwithstanding the provisions of subparagraphs (i), (ii), (iii), (iv), (v), (vi), (vii) and (ix) of this paragraph, when upon review of the nature and circumstances of the criminal conduct, the available evidence and the history and character of the defendant, the prosecutor and the court are of the opinion that the plea is in the interest of justice. The factors warranting the plea shall be placed on the record; however, the failure to do so shall not entitle the defendant to have the plea of guilty set aside.

Section 3. This act shall take effect immediately.

2. Modification of Senate Bill S5712

The Sentencing Committee also supports an alternative method to provide a safety valve by amending the current Penal Law through Bill S5712, known as the "Justice Safety Valve Act," provided that the language of the legislation is revised to require the prosecutor and court's consent to depart from the mandatory minimum. Bill S5712 amends section 60.01 of the Penal Law, by adding a new subdivision 5, which the Task Force revises to provide:

Notwithstanding any other provision of law to the contrary, when sentencing a person convicted of a felony for which there is a mandatory minimum sentence, the court may depart from any applicable mandatory minimum sentence [*upon consent of the prosecuting attorney*] if, giving due regard to the nature of the crime, history and character of the defendant and his or her chances of successful rehabilitation, the court finds that:

- (a) imposition of the mandatory minimum would result in substantial injustice; and
- (b) the mandatory minimum sentence is not necessary for the protection of the public.

The court shall report any departure from a mandatory minimum sentence on a form developed by the Office of Court Administration which shall be forwarded to the Division of Criminal Justice services.

The Task Force's proposed revised language to the Bill requiring consent of the prosecutor is included in brackets and italics above.

3. Considerations

The Task Force did not come to a unanimous decision on this issue, with some members recommending that only the court's consent should be required. A majority of the Task Force, however, ultimately arrived at the decision to recommend that both the prosecuting attorney's and the court's consent is necessary to depart from mandatory minimum sentences. Several members of the Task Force reached this conclusion based on practical reasons, namely based on the opinion that a bill requiring prosecutor's consent is more likely to be passed by the Legislature.

IV. **Determinate Sentences**

The Task Force evaluated whether to recommend a specific determinate sentencing proposal for class D and E felonies, but ultimately decided against approaching reform in this area through "small bites," or gradual, piecemeal efforts. Rather, the Sentencing Committee recommends the creation of a new Sentencing Commission whose mission will be to engage in an in-depth analysis of New York State's remaining indeterminate sentences and how other provisions of the Penal Law and Correction Law impact those sentences to determine what changes, if any, to propose to those laws.

A. **Background**

The sentencing framework in New York includes both determinate and indeterminate sentencing. Indeterminate sentencing was created in accordance with the belief that all information that needed to be known about the defendant could not possibly be known at the time of sentencing, and indeterminate sentencing would promote rehabilitation and better behavior in prison. Additionally, indeterminate sentencing reflected faith in the expertise of judges and their ability to do the right thing when the time came for sentencing.¹¹¹

111 *The Future of Sentencing in New York State: Recommendations for Reform*, New York State Commission on Sentencing Reform, Jan. 30, 2009, pp. 4–5.

Scholars challenged these beliefs, and determinate sentencing proposals began to take root based on two fundamental principles: (1) to better protect the public and to put an end to gross disparities in sentences, punishment should be proportionate to the seriousness of the instant offense and equitable as compared to other offenders with similar prior conviction records; and (2) the sentence served should match the sentence imposed in court, with a limited exception for “good time.”¹¹²

As a result of a 2014 report by the New York State Permanent Commission on Sentencing, a bill was introduced containing determinate sentencing proposals for class D and E felonies that the Sentencing Commission considered supporting.

Class D felonies tend to be crimes of a serious nature, but without the same sense of malice that the law assigns to higher grade felony cases (i.e., class A, B and C felonies). Class D felonies include larceny, types of fraud, theft, robbery, burglary, or manslaughter. Sentences for first-time, non-violent, non-drug, non-sex class D felonies are typically one to seven years of imprisonment and are frequently pled down to a class E felony, a misdemeanor (with jail time, a probationary sanction or split time) or dismissed outright. For predicate non-violent, non-drug, non-sex class D felony offenses, the prison term can be two to seven years.

Class E felonies are the lowest felony charge available in New York and are usually associated with serious crimes that do not warrant a higher felony charge, such as a DWI that results in harm being done to a person or property. Class E felonies include certain types of theft, assault, forcible touching and aggravated harassment. A class E felony conviction can result in one to four years of imprisonment, a reduction to a misdemeanor (with jail time, a probationary sanction or split time) or an outright dismissal. For predicate non-violent, non-drug, non-sex class E felony offenses, the prison term can be one-and-a-half to four years.

The 2014 legislation makes multiple recommendations, including amending Penal Law § 60.02(2) to clarify the applicable class E felony sentencing options for a youthful offender, amending Penal Law §70.09, which specifies the authorized sentence of imprisonment for first felony offenders, to set forth the range for determinate sentences of imprisonment for class B, C, D and E first felony offenders, and amending Penal Law § 70.06 to eliminate mandatory minimum sentences for class D and E second non-violent felony offenders.

V. Recommendation

After significant research and discussion, including a review of the history of sentencing reform in New York and the present and past appetite of the State Legislature (and various interest groups), as well as the Task Force’s conversations with the Department of Corrections and Community Supervision (DOCCS) Acting Commissioner Anthony Annucci, the Task Force concluded that expanding determinate sentencing, even just limited to class D and E non-violent felonies (including select second felony and other provisions), has been insufficiently studied and may lead to unintended consequences given the myriad interlocking corrections and sentencing schemes at play. The Task Force believes that it would be irresponsible and contrary to the stated purpose of the Penal Law to

¹¹² *Id.* at p. 12.

recommend expansion without considering a multitude of collateral issues that impact sentencing. The data collected indicates that even a recommendation limited to the least serious felonies is too significant of a shift in New York State's current sentencing schemata to propose without consideration of its possible effects, as many of these offenses comprise the gristmill of what the state's criminal justice system deals with on a daily basis.

Prior to any recommendations expanding determinate sentencing, the Task Force recommends that a commission be appointed by the governor must consider and address the following:

- the assertion by many that the original premise underlying the proposed determinate sentencing ranges for all offenses are flawed, and the effect of determinate sentencing on the following:
 - (1) “merit time” and possibly “good time”; (2) limited credit allowance time; (3) the authority of DOCCS’ time allowance committee; (4) post release supervision; (5) shock incarceration and drug treatment programs that offer early release; (6) DOCCS’ designation of residential treatment facilities; and (7) jail time credit as it relates to extinguishing prior post-release supervision terms.

The Task Force is of the opinion that creating a separate commission to address these preliminary issues will pave the way for appropriate and successful legislation in this area. The Task Force believes that with this gradual and thoughtful approach, actual reform can take hold.

VI. Conclusion

The New York State Bar Association’s Task Force on the Modernization of Criminal Practice urges our state leaders to support legislation permitting: (1) defense counsel’s presence at presentence interviews; (2) second look resentencing; (3) a safety valve to mandatory minimums upon consent of the prosecutor and the court; and (4) establishment of a permanent sentencing commission to study and make recommendations regarding expanding determinate sentencing in accordance with the recommendations set forth herein. The Task Force is of the opinion that with these reforms, New York will take important steps towards reducing its prison population, decreasing the negative impacts of incarceration and modernizing the state’s sentencing practice. We are hopeful that these legislative initiatives will improve safety, fairness, access to justice and efficiency in the administration of criminal justice.

TECHNOLOGY

I. Discovery

A. Background

On April 1, 2019, New York State passed a new discovery statute (CPL article 245), which provides for timely production of evidence in criminal cases. Indeed, the law, which was part of sweeping criminal justice reform legislation, sets forth specific timeframes for earlier disclosure of evidence to facilitate the defenses' ability to prepare a defense and make informed decisions for plea bargaining. Since its enactment, article 245 has made great strides toward better transparency and fairness in the criminal justice system in New York.

However, the law has created challenges for those responsible for its implementation. During the months preceding the effective date of January 1, 2020, prosecutors and defense counsel agreed to shift to electronic platforms to both send and receive discovery. Prosecutors and defense counsel have withstood the worst of increased workloads due to the new timeframes for evidence production and navigation of sometimes voluminous and digitally challenging discovery material.

Because the reforms were initially enacted without the benefit of appropriate funding, localities across the state developed systems specific to their jurisdictions, available resources and capabilities. Defense counsel likewise modified existing systems to receive discovery from prosecutor platforms. The result is a hodgepodge of discovery delivery modalities statewide, with different technology requirements from county to county and jurisdiction to jurisdiction. Furthermore, the lack of technology uniformity exacerbates practical issues such as confidentiality of sensitive information, management of protective orders, security of work product, assurance of ample storage capabilities and maintenance of metadata.

The benefits and ideals of discovery reform are often lost due to the inadequacy of technology and guidance for sharing evidentiary materials with defendants who are incarcerated or acting *pro se*. To ensure these benefits are realized, there should be a uniform methodology for providing access to electronic discovery ("e-discovery"), including to an incarcerated defendant or unrepresented defendant.

Finally, discovery reforms require monitoring and oversight for further study and recommendations. There is currently no governing body to set standards and effectuate best practices at the state level.

The following recommendations will address these issues and suggest further study and potential State action.

B. Recommendations

1. The State Should Allocate Appropriate Funding for Prosecutors, Police Agencies and Defense Counsel to Adequately Meet Discovery Obligations

The Task Force recommends that the state allocate necessary funding for both prosecution, including police agencies, and defense functions to properly implement and uphold discovery obligations pursuant to this legislation.

The recommendation of adequate funding for all parties takes into account the many challenges posed by e-discovery including the following considerations:

- (a) Need to contract with a company that provides and supports discovery platforms or develops such platforms independently;
- (b) Need to provide devices (e.g., laptops, tablets, etc.) to allow attorneys and defendants the means by which to interact with the discoverable material, including adequate programming to support various file types;
- (c) Need to install or update existing internet access to allow attorneys/defendants to access substantial amounts of electronic information stored via the internet or cloud, with focus placed on rural areas that may have inadequate connectivity (**suggestion**: break down by county or geographical area and evaluate each region for its needs);
- (d) Need for prosecutors, police and defenders' offices/panels to hire additional staff, attorneys, paralegals, technicians, etc. to account for the increased workload that was the direct result of discovery reforms and to address widespread attrition and recruitment issues;
- (e) Need to train attorneys and their supportive staff in the use of the discovery platforms and to identify and address technical issues efficiently;
- (f) Need to obtain virus and data protection services to comply with cybersecurity mandates; and
- (g) Need to manage voluminous e-discovery files, including hours of body-worn and car camera videos and electronic surveillance, and provide adequate cloud storage systems to meet document and file retention obligations.

The State had allocated additional funding for prosecutors to meet discovery demands but had yet to address similar funding for defense providers. The Fiscal Year 2023 Budget allocated \$90 million to prosecutors for discovery reform and pretrial services.¹¹³

In past budget years, the State allocated appropriate funding for prosecutors to meet these discovery challenges but failed to allocate any funding specific to discovery needs of defenders.

¹¹³ See Governor Hochul Announces FY 2023 Budget Investments to Create a Safer and More Just New York State, New York State Governor, April 9, 2022, <https://www.governor.ny.gov/news/governor-hochul-announces-fy-2023-budget-investments-create-safer-and-more-just-new-york-state>.

Governor Kathy Hochul proposed similar inequitable discovery funding in her FY 2023-24 Executive Budget, with \$40 million specifically for prosecutors to support discovery reform, but with no funding for discovery needs of criminal defense.¹¹⁴

Specifically, the Governor proposed \$40 million to “support discovery reform implementation.”¹¹⁵ Moreover, the Governor proposed \$40 million “in additional funding to hire hundreds of new prosecutors, across the State, to support District Attorneys develop crime strategy plans and reduce case backlogs.”¹¹⁶

Defenders made clear the inequity and sought comparable funding for discovery challenges and the concomitant need for additional services.¹¹⁷ Lisa Schreibersdorf, executive director of Brooklyn Defender Services, testified that “the lack of technology and support staff to manage the influx of electronic and digital evidence in criminal cases” has been a major contributing factor to attrition of attorneys in the criminal court system.¹¹⁸

On May 2, 2023, the State Legislature passed the FY 2023-24 budget and the final budget bills were signed into law by Governor Hochul. In keeping with the Task Force recommendation herein, the final enacted budget includes funding for prosecutors, law enforcement and defense providers to help meet discovery obligations. The final budget bill for Aid to Localities [S.4003-D/A.3003-D] includes \$80 million for discovery funding for prosecutors and law enforcement (p. 109-110), \$47 million for prosecutorial services (p. 110), \$40 million for criminal defense discovery (p. 110-111) and \$40 million for criminal defense services (p. 111).

Further study into the allocation and potential sources of funding is recommended as part of implementing the goals described herein.¹¹⁹ Funding is needed to correct the disparity and asymmetry in resources between prosecutor’s offices and public defenders and to ensure that the needs of prosecutorial and defender offices are adequately resourced. In this context, the term “defender” includes not only institutional providers but also attorneys assigned to conflict-panels (e.g., 18b panel attorneys) who are to represent an indigent defendant.

¹¹⁴ See “Governor Hochul Announces FY 2023 Budget Investments to Create a Safer and More Just New York State,” New York State Governor (online), pub. 9 April 2022. Available at: <https://www.governor.ny.gov/news/governor-hochul-announces-fy-2023-budget-investments-create-safer-and-more-just-new-york-state>.

¹¹⁵ See “Governor Hochul Announces Highlights of FY 2024 Executive Budget,” New York State Governor (online), pub. 01 Feb. 2023. Available at: <https://www.governor.ny.gov/news/governor-hochul-announces-highlights-fy-2024-executive-budget>.

¹¹⁶ See NYS FY 2024 Executive Budget Briefing Book (online), “Public Safety,” at 121 (emphasis added). Available at: <https://www.budget.ny.gov/pubs/archive/fy24/ex/book/publicsafety.pdf> or <https://www.budget.ny.gov/pubs/archive/fy24/ex/book/briefingbook.pdf>.

¹¹⁷ See Testimony of Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services, Feb. 07, 2023, before NY Senate Finance Committee and Assembly Ways and Means Committee, at 6. Available at: https://www.nysenate.gov/sites/default/files/brooklyn_defender_services_bds_testimony_joint_leg_budget_hearing_public_protection_2.7.23.pdf.

¹¹⁸ Id. at 2.

¹¹⁹ See *Criminal E-Discovery: A Pocket Guide for Judges*, Federal Judicial Center (2015) at 5, https://www.fd.org/sites/default/files/litigation_support/pocket-guide_criminal-e-discovery.pdf (noting that lack of funding, personnel, and training “often overshadows” other problems with electronic criminal discovery).

2. The State Should Adopt a Centralized Repository for e-Discovery

The Task Force recommends a uniform platform for discovery delivery that would streamline and simplify the prosecutor's obligations while allowing defense attorneys the ability to access and meaningfully interact with discovery materials and subsequently present and discuss discovery materials with clients. Pro se defendants should have access rights to this platform, with consideration given to having any hard-copy materials mailed to the pro se defendant with the option of viewing electronic discovery by appointment or, for an incarcerated pro se defendant, the ability to view the materials at the jail.

The platform should act like a repository for e-discovery, complete with protections to limit accessibility to authorized users and the ability to allow analysis, cataloguing and queries. It should also include an audit log and audit trail to accommodate multiple users and supplemental information.

Currently, most district attorney offices in New York State utilize the Digital Evidence Management System (DEMS) to assist in complying with discovery mandates. DEMS connects prosecutors and law enforcement agencies to manage documents, review body worn camera footage, surveillance videos and other digital evidence. Law enforcement agencies can upload files and digital evidence to DEMS to be accessed by district attorneys and then, eventually, to be shared with defense counsel. However, in practice, there are inconsistencies in how e-discovery is provided to the defense bar. Indeed, even in the City of New York, district attorneys in different boroughs deliver discovery differently.

Defense attorneys have also experienced inconsistencies in access expiration dates that are often arbitrary. And while the spirit of discovery reform is openness, there is a potential for breach of confidentiality the longer a link remains open. A means of averting this is for defense attorneys to exercise immediacy in downloading discovery, which is compounded, however, by issues of storage capabilities to be discussed *infra*.

Inconsistencies in discovery delivery, and consequently in receipt of digital evidence, frustrate the intent of discovery reform. The ideal discovery platform is a centralized repository with safeguards that should account for security, supportability, storage, searchability and uniformity.

Security

The Task force recommends the creation of a common platform for uploading and reviewing discovery by defense counsel and pro se defendants. Of course, development and implementation of that common platform must provide for secure access and use, including satisfactory means by which access rights can be verified and those rights be limited to specific data for defendants.¹²⁰

Special consideration should be given to the provision of access rights and electronic discovery material to defendants who are proceeding without legal counsel. Any platform should be accessible

120 *Recommendations for Electronically Stored Informed (ESI) Discovery Production in Federal Criminal Cases*, Dept. of Justice, Admin. Office of the U.S. Courts (Feb. 2012), at Recommendation # 10, p. 5, <https://www.justice.gov/archives/dag/page/file/913236/download> (recommending that “parties . . . limit dissemination of ESI discovery to members of their litigation team who need and are approved for access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.”).

and user-friendly to pro se litigants. Concerning indigent defendants in particular who may not possess electronic devices independently, consideration might be given to developing portals where out-of-custody individuals can access the technology needed to review their discovery materials.

A universal platform of discovery delivery must include safeguards that protect sensitive information like witness identifying information, grand jury material, etc. For example, information subject to a protective order should be flagged or logged and segregated appropriately.

Supportability

A platform should be able to host and maintain a wide variety of file types, including myriad audio/visual files, text files, etc. Use of obsolete or unsupported file types should be discouraged.¹²¹

Certain files cannot be opened using conventional software, and study should be made into how public defenders may be given access to software needed to interact with more complicated or unconventional file types:

When [electronically stored information] is in a proprietary format (for example, a Google Mail file), it cannot be reviewed with industry-standard tools; instead, review requires specialized hardware, software, an expertise to convert the data into a form that can be reviewed with standard tools. Even if the discovery is produced in an optimal way, defense counsel may still need expert assistance, such as litigation support personnel, paralegals, or database vendors, to convert e-discovery into a format they can use and to decide what processing, software, and expertise is needed to assess the ESI. In voluminous e-discovery cases, parties must be able to rely on document-review software, which can be costly. Nonetheless, it saves money because it speeds up the review process and improves counsel's ability to find information. Such software affords counsel a variety of search strategies, including word searches, document searches, date searches, sender/recipient searches, concept searches, and predictive coding searches.¹²²

One suggestion contained in the aforementioned source indicates that prosecutors may provide “e-discovery on disks that contain software for viewing, searching, and tagging documents.”¹²³ New Jersey requires the party providing discovery to include a “self-extracting computer program that will enable the recipient to access and view the files that have been provided” for any files “not provided in a PDF or open, publicly available format.”¹²⁴

¹²¹ See generally *Recommendations for Electronically Stored Informed (“ESI”) Discovery Production in Federal Criminal Cases*, Dept. of Justice, Admin. Office of the U.S. Courts (Feb. 2012), at Recommendation # 6, p. 3, <https://www.justice.gov/archives/dag/page/file/913236/download> (general recommendation that electronically stored information “should be produced in the format[s] it was received or in a reasonably usable format[s]” and encouraging discussions between the parties concerning “what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standard for the format.”).

¹²² *Criminal E-Discovery*, *supra* note 119, at 12–13.

¹²³ *Id.* at 15.

¹²⁴ NJ Ct. R. 3:13-3(b)(3).

When considering this factor, it must be kept in mind that attorneys may have need to obtain the files in their native, or original, format in order to view underlying metadata.¹²⁵

Metadata, frequently referred to as ‘data about data’ is electronically stored information (“ESI”) that describes the “history, tracking, or management of an electronic document” and includes the “hidden text, formatting, codes, formulae, and other information associated” with an electronic documents including “all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records.”¹²⁶

Storage

A tremendous challenge posed by the digital age and discovery reform obligations is the sheer volume of e-discovery to be disclosed, especially given that technology and digital devices are now ubiquitous in daily life. With exponentially increasing amounts of data and discovery materials being generated, so too has the storage needs grown, with the gathering, processing and reviewing of gigabytes and even terabytes of information now commonplace. This is especially cumbersome on the defense bar, with solo practitioners struggling with the demand, and under-resourced public defender offices scrambling to meet the need.

A study of maintenance of e-discovery is recommended as soon as practicable. Innovative, cost-effective, and collaborative means for addressing this challenge are encouraged. Indeed, the Office of the Federal Public Defender in Dallas, Texas invested into a “server of its own and storing [*sic*] ESI in both its own cases and those of appointed defense attorneys. Defense attorneys who have relied on this server estimate that it has saved the federal government millions of dollars.”¹²⁷

Structurability/Searchability

Unstructured data is data that is “not in a formal, searchable database and not organized in a predefined manner.”¹²⁸ The committee may want to consider a platform that not only meets increasing storage capacity concerns, but also allows attorneys and pro se defendants to structure the data by

¹²⁵ See Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. Crim. L. & Criminology 237, 253 (Spring 2019), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7651&context=jclc>.

¹²⁶ *Mazarakis v. Caremount Med. P.C.*, 2020 N.Y. Slip Op. 34934(U) (Sup. Ct., Westchester Co. Mar. 16, 2020) at **4 (quoting *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 354 (S.D.N.Y. Nov. 20, 2008) (internal citations omitted)).

¹²⁷ Jenia I. Turner, *supra* note 125.

¹²⁸ Andrew Ferguson, *Big Data Prosecution and Brady*, 67 UCLA L. Rev. 180, 209 (Apr. 2020).

search terms, bookmarks, flags, etc.¹²⁹ Such measures might also assist attorneys and defendants in more efficiently scouring voluminous materials.¹³⁰

Uniformity

Study into the use of a uniform platform across New York State is recommended to streamline access to discovery and avoid incongruities arising from the use of different platforms and programs in different jurisdictions. Currently, certain defense practitioners have reported having to maneuver different discovery platforms in different counties in which they practice. In addition to learning curve issues that may arise when practitioners must familiarize themselves with multiple different platforms, accessibility issues must also be considered (e.g., could various types of programs or platforms function differently depending on the type of device or operating system used by the user?).

Uniformity will make it easier to resolve technical issues by having a centralized support team as opposed to having different technicians for different platforms. By having all discoverable materials centralized on a single platform, materials will be more accessible, easier to find and may be easier to protect against potential viruses and other digital threats.¹³¹

3. The State Should Implement Uniform Measures to Provide Incarcerated Defendants Access to e-Discovery

All defendants have a right to confront the evidence against them and participate in the preparation of their defense. This right should not be contravened if a defendant is in custody. It is necessary for extraordinary measures to be taken to assure these rights and allow access to e-discovery for incarcerated defendants.

The Task Force recommends the promulgation of rules or enactment of legislation to secure this right and simplify and unify the means by which e-discovery is shared/provided to those in custody. Further study is recommended to review potential modalities which would be acceptable and consistent with jail policies and available internet access.

¹²⁹ See, e.g., *id.*, 217 and 250–55 (discussing how the use of technology, including the type of programming found in social media networks, may assist prosecutors in flagging discovery material for *Brady* material). See also Douglass Mitchell and Sean Broderick, *Recommended E-Discovery Practices for FDO/CJA Attorneys*, Defender Services Office Training Division, at 8-9, <https://www.fd.org/sites/default/files/Litigation%20Support/recommended-e-discovery-practices.pdf> (recommending the use of concept-based analytical search programs to assist attorneys in sorting through voluminous discovery; such tools generally permit the attorney to “review the evidence by a concept, issue or key document as opposed to simply using keywords.”).

¹³⁰ See generally *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009), *aff’d in part and vacated in part sub nom. Skilling v. United States*, 561 U.S. 358 (2010) (noting *in dicta* that “the government may not hide *Brady* material of which it is actually aware in a huge open file in the hope that the defendant will never find it”).

¹³¹ See Samuel Greengard, *What to Know About Body-Worn Camera Video Data Storage and Management*, StateTech, July 31, 2018, <https://statetechmagazine.com/article/2018/07/what-know-about-body-worn-camera-video-data-storage-and-management-perfcon> (discussing that “a single, searchable repository that integrates and simplifies video storage” is better than using multiple products on a “scattershot” basis; using multiple programs and tools to manage data that are not integrated can make it “difficult or impossible to retrieve digital evidence when and where it’s needed” and can “lead to security risks”) (internal quotation marks omitted)).

Specific consideration should be given as to how incarcerated pro se defendants may access the discovery platform consistent with jail policies on internet access.¹³² The platform should ultimately be compatible with the software used to facilitate confidential attorney-client videoconferences at correctional facilities.

4. The State Should Appoint a Permanent Commission on Discovery

The Task Force respectfully submits the foregoing recommendations but recognizes the ongoing and evolving challenges posed by discovery reform in New York State. Currently there is no governing body that solely exists to review and make recommendations and promulgate standards to meet the ideals and intent of discovery reform and practice throughout the state.

The federal court system has an oversight agency for this purpose. The U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) was created by the Department of Justice in 1998. JETWG oversees best practices in the delivery of e-discovery between the government and defendants and works to promote efficiency and cost-effective management of ESI Discovery.

Therefore, it is the final recommendation of this Task Force that a permanent Commission on Discovery be appointed by the governor and overseen by the chief judge of the State of New York. The composition of this body should be made up of prosecutors, defense attorneys, retired judges, practitioners from civil and criminal bars and technology experts. The Commission should exist to affect the studies recommended herein and to authorize and oversee the implementation of best practices.

II. E-Filing

A. Background

Over the past several years, New York courts have made many needed technological advances. During the pandemic, courts conducted virtual operations on an unprecedented scale, including the adoption of electronic filing. Electronic filing in New York courts, however, remains a work in progress.

Currently, different jurisdictions across the state utilize various methods of e-filing and service. For instance, the New York State Courts Electronic Filing system (NYSCEF) permits a degree of e-filing in many courts, including the Appellate Division, First Department. The Electronic Document Delivery System (EDDS) allows papers to be delivered electronically to a number of courts. And Court-PASS allows electronic delivery of documents to the Court of Appeals.

¹³² See *Criminal E-Discovery*, *supra* note 119, at 18 (while providing in-custody defendants with access to e-discovery “reduces attorney time and costs” and allows defendants to assist in the preparation their defense, “[j]ails have a legitimate security and staffing interests in preventing inmates from having unfettered access to computers. . . . [C]onsultation between the government, the defense, and the particular facility is most likely to result in an acceptable solution.”).

Other courts around the state have adopted their own electronic filing systems and protocols. In some places, motions and briefs may be emailed to chambers with a carbon copy sent to opposing counsel's email. In other locations, a hard copy must be mailed to the clerk and to all other attorneys. And in locations that require e-filing, different platforms are used in various parts of the state. The Court of Appeals, too, has its own, unique system, which is not a true e-filing system, as paper documents must still be filed. By contrast, the United States Court of Appeals for the Second Circuit utilizes universal e-filing through Public Access to Court Electronic Records (PACER).

These electronic filing and document delivery systems vary in scope and sophistication. In some courts, certain types of documents can be filed entirely electronically. But in other circumstances, paper filing is still required. Some systems (such as NYSCEF) give opposing parties notice that a document has been filed and allow electronic access to the documents. Other systems do not give such notice or provide access. And under many of New York's various electronic filing protocols, e-filing does not affect the service of a document; traditional service is still required.

B. Recommendations

1. The State Should Adopt a Universal E-File System

While the size and scope of New York's vast court system present challenges, the Task Force believes that New York should aim to move, in the near future, to a single, universal system of electronic filing. Universal electronic filing would fundamentally change for the better how courts, lawyers, judges and staff operate and perform their duties. Electronic filing is more efficient than traditional paper filing; it imposes fewer costs on litigants (who often have scarce resources), and it is environmentally sound. Also, if electronic filing of a document qualifies as service of the document on the opposing party – as we believe it should, except perhaps with respect to pro se litigants – another substantial cost will be eliminated from the system. E-filing also resolves any concerns about document retention, as an online record of all court filings will be permanently retained. There will never be a lost court file, a lost document or a warehouse fire that destroys critical court records. Electronic filing will thus bring many efficiencies and will help bring the court system into the modern era.

A critical benefit from a single, universal e-filing system would be a statewide standardization of the rules governing e-filing and the service of papers. Many New York lawyers practice in more than one location within the state. Currently, those lawyers must learn to navigate many different e-filing systems, none of which are interrelated. Even lawyers who practice in a single jurisdiction (for instance, Manhattan) must still learn to navigate numerous e-filing systems if they have cases in different courts, for instance: Supreme Court, Criminal Court, Family Court, the Appellate Division, the Appellate Term, and the Court of Appeals. Each individual court has its unique e-filing rules. Even within New York City, the First and Second Departments (and the lower courts within those Departments) have varying rules. This presents lawyers with a confusing maze of differing rules, which are extremely challenging to master.

2. The Federal System as a Model

A universal e-filing system is an attainable goal. New York need look no further than to the federal system for guidance as to how such a system can, and should, operate. PACER was implemented in the late 1990s within the federal court system and has proven to not only simplify the

filing procedure for attorneys, but also to ease the burden of court staff while providing a layer of public benefit by offering direct access to public records. PACER offers anyone with an account quick access to the entire case docket, including all filings, court appearances and court decisions. Simply put, it functions as a concise repository of all relevant materials for a criminal or civil case. Filing a document on PACER also constitutes service of the document on an opposing party, so long as the party has a PACER account (as all attorneys who practice in federal court must). Additionally, the uniformity and centrality of the PACER platform allows for better management of large caseloads, organization and time management overall for all parties involved. There is no question that implementing a similar system would have an instantaneous and significant benefit to all New York practitioners.

3. Statutory Changes Needed to Implement Universal E-Filing

However, before New York State courts can even entertain the idea of implementing a centralized/electronic filing system, putting aside any financial concerns, the current laws concerning filing and service of documents must be amended. The legislature should amend the Judiciary Law and court rules to specifically authorize the creation of a universal e-filing system, with exceptions for those who are unable to participate in e-filing, such as pro se litigants and persons who lack access to the necessary technology. Also, security protocols (and perhaps alternative filing protocols) will be required for confidential or sensitive materials, sealed documents and materials submitted to the court for in-camera review.

4. The State Should Fund the Transition to a Universal System

The Task Force recognizes that changing from a patchwork system of various e-filing systems to one centralized system would create an initial and ongoing financial burden for the court system and stakeholders. The Legislature should allocate funding for the creation and implementation of a universal system in the budget process to help defray costs and reduce financial burdens on litigants and courts. Costs will not only include system creation and implementation, ongoing security and IT support to maintain the system, but also training of court staff, attorneys and other system actors and requisite technology upgrades throughout the system to ensure that universal e-filing works as intended.

While funding would facilitate a smooth and swift transition to a universal system, limits on initial investments should not be seen as a barrier to implementation. Utah moved to a completely paperless civil court system in 2013 without any funding in the state budget. Their experience, and the experiences of other jurisdictions, show that transitioning to a universal e-filing system both modernizes and promotes the efficiency of a court system, saving costs in the long term. A 2009 study in Manatee County, Florida, for example, found that transitioning to an e-file system saved nearly \$1 million per year. Other jurisdictions have found that transitioning to a fully electronic system has created other cost savings. Courts in Utah have been able to convert file storage rooms to new courtrooms, expanding the court's ability to handle high caseloads. Transitioning to a universal e-file system ensures that all cases, which are public records, are fully accessible to the public without forcing interested parties to travel to a clerk's office and request a specific hard copy file, perhaps at great expense.

Simply put, instituting a centralized electronic filing system would have immeasurable benefits to litigants, court personnel tasked with maintaining dockets and managing cases, and the public at large. The time has come for reform. The Legislature should work with the court system and all stakeholders, including lawyers and bar associations, to create a universal e-filing system and to appropriate the resources necessary for its facilitation.

III. Virtual Proceedings

In March 2020, due to the COVID-19 pandemic, New York State courts rapidly shut down their physical locations and in-person visits and appearances ceased. Virtual meetings and appearances first through Skype and then through Microsoft Teams began to become the norm.

As a result of this rapid shift to virtual court appearances, and as the pandemic gained a long foothold, several studies on the efficacy and the effects of virtual appearances emerged. Most recently, the New York Pandemic Practices Working Group, chaired by the Hon. Craig Doran, issued its findings in January 2023: *New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations*.¹³³ This working group conducted public hearings in three different parts of the state – New York City, Buffalo and Albany – and invited both written and oral testimony from a diverse group of stakeholders. The 123-page comprehensive report covers all types of courts in the state, including courts handling criminal cases.

In March 2020, federal courts across the United States found themselves challenged with the restrictions imposed by the global pandemic. While the federal court system traditionally has centered around parties appearing in open court as is prescribed under the Sixth Amendment of the U.S. Constitution,¹³⁴ the federal court system adapted to the circumstances quickly by shutting the courthouses to the public and, in many cases, shifting to remote video or audio participation. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law to aid the nation in adjusting to the pandemic.

Notably, the CARES Act allocated approximately \$7.5 million to the federal judiciary to expand remote work capabilities and maintain federal court operations. It also authorized the Judicial Conference of the United States, which is the administrative policy-making body for the federal courts, to provide chief district judges with authority to permit certain criminal proceedings to be conducted by “the use of video conferencing or telephone conferencing if video teleconferencing is not reasonably available.” The criminal proceedings listed in the Act include:

- Initial appearance,
- Preliminary hearing,
- Waiver of indictment,
- Arraignment,
- Detention hearing,
- Probation,
- Supervised release revocation,
- Pretrial release revocation,

133 <https://www.nycourts.gov/LegacyPDFS/press/pdfs/NYCourtsPandemicPracticesReport.pdf>

134 *Court Orders Updates During the Covid-19 Pandemic*, United States Courts, (Mar. 7, 2023),

<https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>.

- Appearance under Rule 40 of the Federal Rules of Criminal Procedure,
- Misdemeanor plea and sentencing,
- Certain proceedings under the Federal Juvenile Delinquency Act, and
- Felony plea and felony sentencing hearings if a federal court finds that such proceeding “cannot be conducted in person without seriously jeopardizing public health and safety” and that any further delay “would seriously harm the interests of justice.”

It is worth noting that video conferencing or telephone conferencing authorized under the Act may only take place with the consent of the defendant, or the juvenile, after consultation with counsel.

As such, on March 29, 2022, the Judicial Conference found that “emergency conditions due to the national emergency . . . with respect to COVID-19 will materially affect the functioning of the federal courts generally,” and effectively granted chief district judges with the necessary authority to implement virtual criminal proceedings. This authority will end when whichever of the following two events occurs first: (1) 30 days after the national emergency ends; or (2) when the Judicial Conference finds the federal courts are no longer materially affected. The national emergency expired on May 11, 2023.

The Task Force focused on the impact of virtual proceedings in criminal cases in state courts, as well as the federal courts, namely, the Southern and Eastern Districts of New York. It will highlight the benefits and drawbacks of virtual proceedings and provide recommendations.

A. *State Background*

A series of administrative orders from the chief administrative judge, as well as a series of executive orders, were necessary to effectuate remote proceedings.

On March 15, 2020, the Office of Court Administration (OCA) authorized virtual arraignments.¹³⁵ In New York City, virtual arraignments began on March 25, 2020. All the parties appeared from separate locations. In-person arraignments did not resume until more than a year later: in Manhattan, June 28, 2021; in Brooklyn on July 6, 2021; and Bronx, Queens and Staten Island on July 10, 2021.

Soon after the suspension of in person arraignments, grand jury proceedings were suspended through a series of administrative orders. AO/126/2020, dated June 13, 2020, continued the suspension of grand juries but allowed prosecutors to apply to extend existing GJ terms.

Without grand juries, prosecutors were unable to meet strict deadlines to protect incarcerated individuals who were held in jail without a finding of probable cause by grand juries. Accordingly, EO 202.28, dated May 7, 2020, allowed for virtual preliminary hearings.

But preliminary hearings also contained time limitations for those incarcerated. Prosecutors still needed to obtain indictments by grand juries. Outside New York City, all in person grand juries

¹³⁵ See Generally OCA’s “Updated Protocols” memo, <https://www.nycourts.gov/covid-new.shtml>.

resumed on July 13, 2020.¹³⁶ New York City, grand juries resumed on August 10, 2020. To accommodate safety concerns, EO 202.48, dated July 6, 2020, allowed for virtual testimony by incarcerated individuals before grand juries.

Virtual guilty pleas were authorized through Executive Order (EO) 202.28 on May 7, 2020, which suspended CPL 182.20 so that remote guilty pleas even on felonies could occur. This suspension continued with EO 202.76 (November 19, 2020) and lasted more than a year, eventually expiring on May 27, 2021, while courts reopened and returned to in-person appearances. The data does not show how many remote guilty pleas occurred. DCJS data shows that in 2020, there were 10,410 felony convictions (or 14.9%), compared to 23,397 felony convictions (18.8%) in 2019. Of those, in 2020, 4,846 (6.9%) received prison sentences vs. 2019 where 12,073 (9.7%) received prison sentences.

On Sept. 28, 2021, through EO 5, due to the ongoing crisis at Rikers Island, the governor suspended article 182 to allow for virtual guilty pleas. This suspension continued to occur until March 2023.

B. Federal Background

Both the Southern District of New York (SDNY) and the Eastern District of NY (EDNY) provided a series of executive orders to facilitate virtual proceedings.

1. EDNY Timeline¹³⁷

§ March 16, 2020, Administrative Order No. 2020-06: All criminal and civil jury trials in the EDNY scheduled to begin before April 27, 2020, are continued pending further order of EDNY. Initial appearances and arraignments shall continue to take place in the ordinary course, or where practicable or necessary, be conducted remotely pursuant to procedures established by EDNY. Individual judges are strongly encouraged to conduct court proceedings by telephone or video conferencing in civil matters.

§ March 30, 2020, Administrative Order 2020-13: Chief Judge Roslynn R. Mauskopf of EDNY, pursuant to the CARES Act and authority granted by the Judicial Conference, orders that the criminal proceedings enumerated in the Act will be held via video or telephone conferencing with the consent of the defendant or juvenile. The authorization is effective for 90 days unless the Chief Judge determines that an extension is necessary. (EDNY extends this order multiple times through December 31, 2022.)

§ September 29, 2020, Administrative Order No. 2020-24: Members of the public are permitted to access public civil and criminal hearings conducted by teleconference or videoconference.

§ November 24, 2020, Administrative Order No. 2020-26 and 2020-26-1: All civil and criminal and civil jury selections and all in-person bench trials are postponed and

¹³⁶ Another spike in infections led to more orders: AO/276/2020, dated November 23, 2020, continued the postponement of GJ's but allowed ADAs to apply to impanel a new GJ, and AO/304/202, dated December 11, 2020.

¹³⁷ *Administrative Orders*, U.S. District Court, Eastern District of N.Y., <https://www.nyed.uscourts.gov/administrative-orders>.

continued. All new grand juries and replacement grand jurors are suspended. The criminal proceedings enumerated in the CARES Act will continue to be held virtually unless the defendant declines to consent.

§ **February 27, 2021, Administrative Order No. 2021-4:** Selection of grand juries and replacement grand jurors may be held in person. Criminal proceedings enumerated by the CARES Act should be held remotely to the extent possible. Proceedings of non-incarcerated defendants may be held in person.

§ **March 20, 2021, Administrative Order No. 2021-4-1:** Criminal and civil jury selections and trials are no longer postponed. Criminal proceedings enumerated by the CARES Act should be held remotely to the extent possible. (Note: The Court continued to make approximately 21 amendments extending this order, encouraging virtual proceedings while allowing for jury selection to be held in person. The last order on the matter of virtual conferences was made on August 31, 2022 (Administrative Order No. 2022-19), stating that, to the maximum extent possible, criminal hearings, conferences, sentencing and change of plea hearings should be conducted in person through September 30, 2022. However, such proceedings could be held remotely pursuant to the CARES Act.)

§ **December 12, 2022, Administrative Order No. 2022-26:** Order extending the authorization to conduct proceedings remotely through December 31, 2022, in accordance with the provisions of the CARES Act. The court did not renew this order in 2023.

2. SDNY Timeline¹³⁸

§ **March 27, 2020, Standing Order 20MC173:** SDNY converts to a remote arraignment system, whereby the participants, including the presiding magistrate judge, will be present via teleconference.

§ **March 30, 2020, Order No. M10-46:**¹³⁹ Chief Judge Colleen McMahon enters an order concluding that it was necessary for the judges in SDNY to conduct proceedings remotely in accordance with the CARES Act. The Court extended this order several times until at least through September 20, 2021.

SDNY suspended in-person jury trials in March 2020. They were subsequently resumed in the fall of 2020 but suspended again in December 2020 due to rising COVID-19 rates. SDNY resumed jury trials again in March 2021.

IV. Weighing in On the Pros and Cons of Virtual Proceedings

The widespread adoption of virtual proceedings became a necessity during the COVID-19 pandemic to protect the health and safety of all those involved, but as the world opens back up, their place in the federal court system is not yet set in stone. As noted above, the CARES Act allowed

138 *The Southern District of New York Response to COVID-19 (Coronavirus)*, U.S. District Court, Southern District of N.Y., <https://nysd.uscourts.gov/covid-19-coronavirus>.

139 *SDNY – Video Teleconferencing and Telephone Conferencing for Criminal Proceedings on March 30, 2020*, Federal Defenders of N.Y., <https://www.federaldefendersny.org/news/sdny-video-teleconferencing-and-telephone-conferencing-for-criminal-proceedings-on-march-30-2020>.

videoconferencing for court proceedings, and on March 31, 2020, the Judicial Conference gave temporary authorization for the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency. These provisions are drafted to expire 30 days after the date on which the national emergency ends, or the date when the Judicial Conference makes a finding that the federal courts are not materially impacted. The national emergency expired May 11, 2023, leaving the fate of videoconferencing in the balance. While it is hard to imagine that videoconferencing will not play any role in our justice system moving forward, the Judicial Conference should consider the pros and cons that have become known while using the technology over the past several years in deciding its role moving forward.

A. *Pros of Videoconferencing*

Promotion of Health and Safety. The impetus for the widespread adoption of videoconferencing was to protect the health and safety of all involved in the criminal process. As the world adapts to its new normal, we would be remiss if we did not acknowledge that remote hearings allow participants to confer without risking exposure to COVID-19 or other illnesses.

Accessibility (To Those with Internet Near and Far). While federal courtrooms are open to the public with few exceptions, the cost and time associated with traveling to the physical courthouse may serve as a barrier to those hoping to sit in on a portion of a case. However, through the use of video conferencing, anyone that has access to the internet has been afforded access to certain proceedings in federal courthouses. Indeed, Senior U.S. District Judge Nora Barry Fischer (W.D. Pa.) stated at the 2021 Relativity Fest Judicial Panel that in her experience criminal defendants have liked utilizing video, in large part because family and friends may participate by way of video.

Efficiency. Throughout the pendency of a criminal case, there are many brief appearances before the court (i.e., status conferences, updates) that take a significant amount of time and resources for the attorneys and criminal defendant to attend in person. These brief interactions with the court – that are not evidentiary proceedings – were often found to be much more efficient in the context of videoconferencing. Indeed, New York even went as far as to enact legislation, adopted by a number of counties, which allows the court to dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action. Lawyers and their clients would also be present in the “online waiting rooms,” obviating the time required to bring a defendant in and out of the court room. U.S. District Judge Indira Talwani, of the District of Massachusetts, who conducted two non-jury trials with witnesses from multiple counties stated that, “[t]he convenience of not having to travel here was enormous. Absolutely it was an effective way to deliver justice.”¹⁴⁰

B. *Cons of Videoconferencing*

Sixth Amendment Concerns – The Confrontation Clause. The Sixth Amendment gives a person accused of a crime the right to confront a witness against him or her in a criminal

¹⁴⁰ *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. Courts, Feb. 18, 2021, <https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology>.

action, which notably includes the right to be present at the trial, guaranteed by the Federal Rules of Criminal Procedure Rule 43, and the right to cross-examine the prosecution's witnesses. The New York Constitution echoes this right in Article 1, Section 6. While the Supreme Court has allowed for a limited exception to this rule in *Maryland v. Craig*, finding that the right "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured,"¹⁴¹ the right to confront one's accusers is clearly hindered in the context of videoconferencing. New York has also allowed for a limited exception to the right to confront one's accuser in the context of vulnerable child witnesses, who may testify via live closed-circuit television if the court finds it prudent after conducting a hearing on the issue.¹⁴² These limited exceptions stress the importance of this constitutional right. And ensuring that criminal defendants are not deprived of their rights under the Constitution is imperative, making these Sixth Amendment concerns particularly important.

Barriers to Communication with Counsel: The Sixth Amendment gives defendants the right to counsel in federal prosecutions, which refers to the right of a criminal defendant to have an attorney assist the defendant in their defense, even if they cannot afford one. The attorney-client relationship has arguably suffered because of the move to videoconferencing. Any attorney that has tried to communicate with a defendant through virtual conferencing knows that it comes with a series of challenges, as scheduling is an onerous process and conversations are oftentimes cancelled or backlogged. However, perhaps the bigger issue presented is the barrier to communication at the proceedings themselves. While in person, defendants and attorneys often confer in real time to address questions or make clarifications as the proceeding unfolds, but the ability to confer in this way is not available during video conferencing. While you may use "breakout rooms" to confer privately, this does not solve the problem of allowing an attorney to clarify issues to their client in real time.

Technological & Security Issues. The use of technology inevitably comes with its own vulnerabilities. Virtual proceedings are not immune to human error and technological failure. For example, U.S. District Judge Marsha J. Pechman had at least one trial where the proceedings had to be suspended due to a windstorm cutting out jurors' internet connections, and there was one other instance where a telephone outage interrupted audience audio in an election law case before U.S. District Judge Matthew W. Brann.¹⁴³ Vulnerabilities associated with virtual proceedings have also been exploited, with reports of "videobombing," where unwanted or nefarious persons have accessed and disrupted virtual court proceedings.¹⁴⁴ In at least one instance, hackers even went so far as to interrupt a hearing with pornographic and obscene language.¹⁴⁵ While the government attempted to address some of these concerns through the advent of platforms that had more security

¹⁴¹ *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

¹⁴² CPL § 65.20.

¹⁴³ *As Pandemic Lingers, Courts Lean into Virtual Technology*, *supra* note 140.

¹⁴⁴ Paul McNally, *How to Safely and Securely Use Zoom for Government Meetings*, Arc 3 Communications, July 14, 2020, <https://arc3communications.com/how-to-safely-and-securely-use-zoom-for-government-meetings>.

¹⁴⁵ Carlie Porterfield, *Twitter Hacking Court Hearing Gets "Zoombombed" with Porn*, Forbes, Aug. 5, 2020, <https://www.forbes.com/sites/carlieporterfield/2020/08/05/twitter-hacking-court-hearing-gets-zoombombed-with-porn>.

features, such as zoomgov.com and Cisco Webex, cyber incidents in the modern age have proven unavoidable.

Lack of Humanity. Technology provided us with a much-needed lifeline to communicate throughout the COVID-19 pandemic, but as the world finds its new normal, most would agree that there are often times no substitute for in-person communication. The need for humanity throughout the pendency of a criminal case is apparent given the deeply sensitive and very personal nature of what is at stake in criminal proceedings.

However, the use of technology puts up barriers to human connection and may disadvantage a criminal defendants' ability to connect with a judge or jury. In fact, one Cook County study by Northwestern University Law School professors found "a sharp increase in the average amount of bail set in cases subject to the [closed circuit television], but no change in cases that continued to have live hearings."¹⁴⁶ This is particularly concerning in the context of a University of Chicago Law School's Federal Criminal Justice Clinic report on pretrial detentions, which found that "in 1983, less than 24% of arrestees were jailed pretrial," and "by 2019, nearly 75% of them were," which resulted from "a poorly-written, war-on-drugs-era statute known as the Bail Reform Act of 1984, an over reliance on prosecutorial discretion, and risk-averse magistrate judges and federal defenders."¹⁴⁷ We can hypothesize from these results that the impersonal nature of video hearings may further exacerbate a judge's risk-averse nature given that video proceedings negatively impact a judge's ability to connect with and assess the defendant before him or her. The inability to connect is further aggravated by tech glitches and issues, which frustrate the cadence of a hearing and may sometimes bar it from occurring all together.

Equity Concerns. While we discussed accessibility afforded using virtual proceedings as a feature of the change, not a bug, the use of virtual proceedings has also proven to serve as a bar to accessibility for those that do not have access to the internet or the necessary technology to access the virtual format, raising serious equity concerns. There also may be limited access to non-English speakers, which is of particular concern in New York where more than two million New Yorkers are not fluent in English. While the courts are mandated to provide adequate interpretation for litigants, securing good translators and conducting real time translation in a virtual setting poses many challenges.

C. *Recommendations*

1. Arraignments should remain in person.

Rationale: The only known long-term study, which spanned a total of 16 years, shows that remote bail decisions had a significant and negative impact on bail decisions. A 2010 Cook County Study by Northwestern University Law School professors found that remote arraignment involving

146 Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 *Journal of Criminal Law and Criminology* 3, Summer 2010,

<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>.

147 Tami Abdollah, *Study: Federal magistrates, prosecutors misunderstand bail law, jailing people who should go free*, USA Today, Dec. 7, 2022, <https://www.usatoday.com/story/news/politics/2022/12/07/federal-judges-misapply-bail-law-illegally-jail-arrestees-study-says/10798949002>.

bail hearings or decisions resulted in “a sharp increase in the average amount of bail set in cases subject to the [closed circuit television], but no change in cases that continued to have live hearings.” This report consisted of a total of sixteen years of data: comparing data from eight years prior to the use of closed-circuit television and eight years after.¹⁴⁸

Additionally, more recently, in December 2022, the Data Collaborative for Justice issued a report, *Two Years In: 2020 Bail Reforms in Action in New York State*, and found that “bail-setting significantly increased in the second half of 2020—during a period of time when virtual arraignments were in place.” The authors, however, note that there may not be a causal connection due to the pandemic.¹⁴⁹

Finally, as discussed above, the arraignment is oftentimes the first meeting between an attorney and the accused. An attorney should be able to better see the person as a whole, including signs of medical or emotional distress. These signs are often lost during a video proceeding. Additionally, due to the resource inequities, attorneys oftentimes need to utilize physical papers, notices or signed HIPAA forms.

2. Grand jury appearances should remain in person.

Rationale: Any proceeding that requires credibility determinations should occur in person, except in narrow, already established cases, e.g., the vulnerability of young children and/or hospitalized witnesses. Many fact finders rely on eye contact, body language and non-verbal cues when making credibility determinations. With video testimony, these are all missing or, at best, difficult to assess. When an accused testifies, again, concerns about the dehumanizing aspects of virtual testimony arise.

3. Preliminary hearings should be conducted in person unless another emergency situation arises. Preliminary hearings, at a minimum, provide the additional safeguard of requiring a judge to determine that probable cause exists when the length of incarceration extends beyond the 180.80 time.

Rationale: Again, the same concerns regarding the ability to assess credibility arise.

4. Remote guilty pleas should remain limited to misdemeanors or violations/infractions that do not entail jail sentences. New York’s CPL § 182.20 should be amended to include every county in New York State.

Rationale: When the governor suspended the limitations of CPL §§ 182.20 and 182.30, every county in the state developed the technology to conduct virtual appearances. However, the impact of virtual guilty pleas to felonies is unknown. There is not enough data to show how many people pled guilty to felonies by virtual appearance. It is also too early to ascertain whether any ineffective assistance of counsel claims may arise as a result of the wholesale suspension of the CPL’s article 182. While the existing statute requires consent of both parties, courts should be aware that obtaining consent can be extracted through coercive methods, e.g., court officers refusing to call a case that is in

148 Sheila Seidman Diamond, et al., *supra* note 146.

149 https://datacollaborativeforjustice.org/wp-content/uploads/2022/12/Two_Years_In_Bail_Reforms_New_York.pdf.

person just because the litigant refused to consent. Courts must also be aware that many litigants represented by assigned counsel or public defender offices do not have the resources to purchase equipment or software to appear remotely. Many litigants may not have the physical space to appear remotely where privacy is ensured. Spontaneous private conversations – even simply whispering with one’s attorney – are more difficult.

5. Limit the number of remote appearances even if they are for status conferences only.

Rationale: Overreliance on virtual appearances dehumanizes the accused such that plea bargaining may be affected. Such appearances may limit the attorney’s ability to make ad hoc legal arguments that often occur when in person appearances. Finally, virtual appearances have the potential to erode the attorney/client relationship implicating the right to counsel. Attorneys and clients often lose the ability to adequately discuss or even have spontaneous private discussions; the ability to whisper to each other is eliminated. Such shortcomings increase the risk of ineffective assistance of counsel claims.

V. Conclusion

The adoption of videoconferencing allowed for our criminal justice system to continue on during a tumultuous period, and we would be hard pressed to say that it is not here to stay in any capacity as we move in to our new normal. In the context of routine and quick hearings that do not constitute evidentiary hearings, the benefits of video proceedings likely outweigh the risks for defendants as they are efficient and cost effective. Thus, the judiciary should continue to utilize this tool when all parties agree to its use and the interaction with the court at issue will have a relatively low bearing on the defendant’s situation or the outcome of the case. To continue to enhance the success of these virtual proceedings, New York should continue to promulgate clear and consistent guidance on how these proceedings should be conducted. That said, the risks that videoconferencing may pose to a criminal defendant’s due process rights, especially in the context of grand jury proceedings, arraignments and jury trials, suggest that certain criminal proceedings are best carried out in the courthouse, especially given our limited research to date on the impact of virtual proceedings over the past several years.

VEHICLE AND TRAFFIC LAW

In addition to our recommendations on justice courts, sentencing and technology, the following recommendations are made for modifications to the Vehicle and Traffic Law (VTL) to correct legal and social inequities. The proposed amendments are in APPENDIX A.

I. Changes to the requirements to enter the Impaired Driver Program.

As currently written, the VTL only permits a person *who is found guilty* of an alcohol or drug related driving offense to participate in New York's impaired driver program (IDP). IDP was created for the purpose of providing alcohol and/or drug rehabilitation. It is axiomatic that the state should supply alcohol and/or drug rehabilitation services to any individual charged with an alcohol- or drug-related driving offense and should not treat the innocent worse than the guilty.

A conditional license is a limited-use license that permits an individual whose license or privilege to operate a motor vehicle has been suspended or revoked to drive in limited situations. It is critical in that it allows travel to and from work, school, necessary medical treatment and other vital activities.

To be eligible for a conditional license, as the law is currently written, a person must have been found guilty of an alcohol- or drug-related driving offense. If an individual has been charged with an alcohol-related offense but not found guilty, that person is not eligible for IID and accordingly cannot obtain a conditional license. It is quite common for a person's license or privilege to operate a vehicle to be suspended or revoked for a refusal to submit to a chemical test but not convicted of any offense. In that situation the individual is not currently permitted to take the IDP program and, in turn, is not able to secure a conditional license in the ways currently allowed for those found guilty of an offense. This creates an injustice and has no rational basis in that the innocent are treated worse than the guilty.

The solution is a simple one: the VTL should be amended to allow individuals whose license or privilege to operate a vehicle was suspended or revoked for a refusal to submit to a chemical test to be eligible for IDP. The suggested changes are found in APPENDIX A.

II. Changes to ignition interlock mandates when a person has no access to vehicle.

The law currently requires those found guilty of certain alcohol-related driving offenses to install an ignition interlock device into any car they own or operate. This strict requirement does not allow for the court to relieve an individual from such requirements when that person has no access to or ability to drive a vehicle owned by them. For example, a person whose car is totaled in an accident but not yet surrendered to an insurance company or whose car is being held by law enforcement for evidence and/or forfeiture must still install an IID. The court should have the discretion not to require an IID when the court determines it would be in the interests of justice to do so.

III. Changes to VTL § 1192(1) with respect to cannabis.

The law allows alcohol-related driving offenses to be resolved with a non-criminal infraction rather than a conviction for a misdemeanor – “impaired” rather than “intoxicated.” So, between the

extremes of denying all guilt and the other side insisting upon a criminal record, VTL § 1192(1) is a middle ground that allows parties to agree and for many cases to get resolved efficiently with a plea. However, VTL § 1192(1) suffers a shortcoming that renders it anachronistic. As presently written, VTL § 1192(1) only pertains to people who drive while impaired “by the consumption of alcohol.” For those charged with being impaired by marijuana, a legal substance removed from Public Health Law § 3306, the courts throughout the state permit the parties to engage in the legal fiction of allowing defendants who are placed under oath to admit to driving while their ability to drive is impaired by alcohol, even when such conduct did not occur and is not charged. This is illogical and unseemly.

The solution to this problem is simple. The Legislature should amend the Vehicle and Traffic Law to add two words to the end of Section 1192(1): “or cannabis and concentrated cannabis.” This will streamline the justice system by eliminating cases that all parties agree do not warrant criminal records. Punishing marijuana intoxication worse than alcohol intoxication lacks any bearing in the science. Research and studies done by the National Highway Traffic Safety Administration has revealed that, unlike alcohol, the presence of THC in an individual’s bloodstream does not equate to impairment. This amendment is also compelled by social justice. Despite an equal rate of marijuana use, Black and Hispanic people get prosecuted in marijuana-related cases at much higher rates than White people. They are also more likely to be pulled over in a traffic stop in the first place. So, a regime that unduly elevates the minimum penalties for driving while impaired by marijuana builds an injustice into our state’s criminal justice system shouldered disproportionately by racial minorities.

CONCLUSION

The New York State Bar Association Task Force on the Modernization of Criminal Practice has recommended a number of measures in this Report regarding technology, sentencing, the current justice courts system and the Vehicle and Traffic Law. Most of the recommendations require our state leaders to support legislation, provide adequate funding and to work with the court system and all stakeholders, including lawyers and bar associations. The Task Force believes that these recommendations, if implemented, will contribute to making public policy and law that will improve safety, fairness, access to justice and efficiency in the administration of criminal justice in New York.

APPENDIX A

VTL § 1194 – Arrest and Testing

2. Chemical tests.

(b) Report of refusal.

(1) If: (A) such person having been placed under arrest; or (B) after a breath test indicates the presence of alcohol in the person's system; or (C) with regard to a person under the age of twenty-one, there are reasonable grounds to believe that such person has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article; and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked, or, for operators under the age of twenty-one for whom there are reasonable grounds to believe that such operator has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article, shall be revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested or detained, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to subdivision three of this section, the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made. Such report may be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law and such form notice together with the subscription of the deponent shall constitute a verification of the report.

(2) The report of the police officer shall set forth reasonable grounds to believe such arrested person or such detained person under the age of twenty-one had been driving in violation of any subdivision of section eleven hundred ninety-two or eleven hundred ninety-two-a of this article, that said person had refused to submit to such chemical test, and that no chemical test was administered pursuant to the requirements of subdivision three of this section. The report shall be presented to the court upon arraignment of an arrested person, provided, however, in the case of a person under the age of twenty-one, for whom a test was authorized pursuant to the provisions of subparagraph two or three of paragraph (a) of this subdivision, and who has not been placed under arrest for a violation of any of the provisions of section eleven hundred ninety-two of this article, such report shall be forwarded to the commissioner within forty-eight hours in a manner to be prescribed by the commissioner, and all subsequent proceedings with regard to refusal to submit to such chemical test by such person shall be as set forth in subdivision three of section eleven hundred ninety-four-a of this article.

(3) For persons placed under arrest for a violation of any subdivision of section eleven hundred ninety-two of this article, the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended by the court

without notice pending the determination of a hearing as provided in paragraph (c) of this subdivision. Copies of such report must be transmitted by the court to the commissioner and such transmittal may not be waived even with the consent of all the parties. Such report shall be forwarded to the commissioner within forty-eight hours of such arraignment.

(4) The court or the police officer, in the case of a person under the age of twenty-one alleged to be driving after having consumed alcohol, shall provide such person with a scheduled hearing date, a waiver form, and such other information as may be required by the commissioner. If a hearing, as provided for in paragraph (c) of this subdivision, or subdivision three of section eleven hundred ninety-four-a of this article, is waived by such person, the commissioner shall immediately revoke the license, permit, or non-resident operating privilege, as of the date of receipt of such waiver in accordance with the provisions of paragraph (d) of this subdivision.

(c) Hearings. Any person whose license or permit to drive or any non-resident driving privilege has been suspended pursuant to paragraph (b) of this subdivision is entitled to a hearing in accordance with a hearing schedule to be promulgated by the commissioner. If the department fails to provide for such hearing fifteen days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section. The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of section eleven hundred ninety-two of this article; (2) did the police officer make a lawful arrest of such person; (3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made; and (4) did such person refuse to submit to such chemical test or any portion thereof. If, after such a hearing, the hearing officer, acting on behalf of the commissioner, finds any one of the said issues in the negative, the hearing officer shall immediately terminate any suspension arising from such refusal. If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with the provisions of paragraph (d) of this subdivision. A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to this subdivision may appeal the findings of the hearing officer in accordance with the provisions of article three-A of this chapter. Any person may waive the right to a hearing under this section. Failure by such person to appear for the scheduled hearing shall constitute a waiver of such hearing, provided, however, that such person may petition the commissioner for a new hearing which shall be held as soon as practicable.

(d) Sanctions.

(1) Revocations.

a. Any license which has been revoked pursuant to paragraph (c) of this subdivision shall not be restored for at least one year after such revocation, nor thereafter, except in the discretion of the commissioner. However, no such license shall be restored for at least eighteen months after such revocation, nor thereafter except in the discretion of the commissioner, in any case where the person has had a prior revocation resulting from refusal to submit to a chemical test, or has been convicted of or found to be in violation of any subdivision of section eleven hundred ninety-two or section eleven hundred ninety-two-a of this article not arising out of the same incident, within the five years immediately preceding the date of such revocation; provided, however, a prior finding that a person under the age of twenty-one has refused to submit to a chemical test pursuant to subdivision three of section eleven hundred ninety-four-a of this article shall have the same effect as a prior finding of a refusal pursuant to this subdivision solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of this article, provided that the subsequent offense or refusal is committed or occurred prior to the expiration of the retention period for such prior refusal as set forth in paragraph (k) of subdivision one of section two hundred one of this chapter.

b. Any license which has been revoked pursuant to paragraph (c) of this subdivision or pursuant to subdivision three of section eleven hundred ninety-four-a of this article, where the holder was under the age of twenty-one years at the time of such refusal, shall not be restored for at least one year, nor thereafter, except in the discretion of the commissioner. Where such person under the age of twenty-one years has a prior finding, conviction or youthful offender adjudication resulting from a violation of section eleven hundred ninety-two or section eleven hundred ninety-two-a of this article, not arising from the same incident, such license shall not be restored for at least one year or until such person reaches the age of twenty-one years, whichever is the greater period of time, nor thereafter, except in the discretion of the commissioner.

c. Any commercial driver's license which has been revoked pursuant to paragraph (c) of this subdivision based upon a finding of refusal to submit to a chemical test, where such finding occurs within or outside of this state, shall not be restored for at least eighteen months after such revocation, nor thereafter, except in the discretion of the commissioner, but shall not be restored for at least three years after such revocation, nor thereafter, except in the discretion of the commissioner, if the holder of such license was operating a commercial motor vehicle transporting hazardous materials at the time of such refusal. However, such person shall be permanently disqualified from operating a commercial motor vehicle in any case where the holder has a prior finding of refusal to submit to a chemical test pursuant to this section or has a prior conviction of any of the following offenses: any violation of section eleven hundred ninety-two of this article; any violation of subdivision one or two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred

ten-a of this chapter. Provided that the commissioner may waive such permanent revocation after a period of ten years has expired from such revocation provided:

(i) that during such ten year period such person has not been found to have refused a chemical test pursuant to this section and has not been convicted of any one of the following offenses: any violation of section eleven hundred ninety-two of this article; refusal to submit to a chemical test pursuant to this section; any violation of subdivision one or two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter;

(ii) that such person provides acceptable documentation to the commissioner that such person is not in need of alcohol or drug treatment or has satisfactorily completed a prescribed course of such treatment; and

(iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities or a certificate of good conduct pursuant to article twenty-three of the correction law by the court in which such person was last penalized.

d. Upon a third finding of refusal and/or conviction of any of the offenses which require a permanent commercial driver's license revocation, such permanent revocation may not be waived by the commissioner under any circumstances.

(2) Civil penalties. Except as otherwise provided, any person whose license, permit to drive, or any non-resident operating privilege is revoked pursuant to the provisions of this section shall also be liable for a civil penalty in the amount of five hundred dollars except that if such revocation is a second or subsequent revocation pursuant to this section issued within a five year period, or such person has been convicted of a violation of any subdivision of section eleven hundred ninety-two of this article within the past five years not arising out of the same incident, the civil penalty shall be in the amount of seven hundred fifty dollars. Any person whose license is revoked pursuant to the provisions of this section based upon a finding of refusal to submit to a chemical test while operating a commercial motor vehicle shall also be liable for a civil penalty of five hundred fifty dollars except that if such person has previously been found to have refused a chemical test pursuant to this section while operating a commercial motor vehicle or has a prior conviction of any of the following offenses while operating a commercial motor vehicle: any violation of section eleven hundred ninety-two of this article; any violation of subdivision two of section six hundred of this chapter; or has a prior conviction of any felony involving the use of a commercial motor vehicle pursuant to paragraph (a) of subdivision one of section five hundred ten-a of this chapter, then the civil penalty shall be seven hundred fifty dollars. No new driver's license or permit shall be issued, or non-resident operating privilege restored to such person unless such penalty has been paid. All penalties collected by the department

pursuant to the provisions of this section shall be the property of the state and shall be paid into the general fund of the state treasury.

(3) Effect of rehabilitation program. No period of revocation arising out of this section may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article.

(e) Regulations. The commissioner shall promulgate such rules and regulations as may be necessary to effectuate the provisions of subdivisions one and two of this section.

(f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section eleven hundred ninety-two of this article but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.

VTL § 1196 – Alcohol and Drug Rehabilitation Programming

4. Eligibility. Participation in the program shall be limited to those persons convicted of alcohol or drug-related traffic offenses, or persons charged with alcohol or drug-related traffic offenses whose cases resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses, or persons found to have been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article, who choose to participate and who satisfy the criteria and meet the requirements for participation as established by this section and the regulations promulgated thereunder; provided, however, in the exercise of discretion, the judge imposing sentence may prohibit the defendant from enrolling in such program. The commissioner or deputy may exercise discretion to reject any person from participation referred to such program and nothing herein contained shall be construed as creating a right to be included in any course or program established under this section. In addition, no person shall be permitted to take part in such program if, during the five years immediately preceding commission of an alcohol or drug-related traffic offense or a finding of a violation of section eleven hundred ninety-two-a of this article, such person has participated in a program established pursuant to this article or been convicted of a violation of any subdivision of section eleven hundred ninety-two of this article other than a violation committed prior to November first, nineteen hundred eighty-eight, for which such person did not participate in such program. In the exercise of discretion, the commissioner or a deputy shall have the right to expel any participant from the program who fails to satisfy the requirements for participation in such program or who fails to satisfactorily participate in or attend any aspect of such program. Notwithstanding any contrary provisions of this chapter, satisfactory participation in and completion of a course in such program shall result in the termination of any sentence of imprisonment that may have been imposed by reason of a conviction therefor; provided, however, that nothing contained in this section shall delay the commencement of such sentence.

5. Effect of completion. Except as provided in subparagraph nine of paragraph (b) of subdivision two of section eleven hundred ninety-three or in subparagraph three of paragraph (d) of subdivision two

of section eleven hundred ninety-four of this article, upon successful completion of a course in such program as certified by its administrator, a participant may apply to the commissioner on a form provided for that purpose, for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course. In the exercise of discretion, upon receipt of such application, and upon payment of any civil penalties for which the applicant may be liable, the commissioner is authorized to terminate such order or orders and return the participant's license or reinstate the privilege of operating a motor vehicle in this state. However, the commissioner shall not issue any new license nor restore any license if said issuance of restoral is prohibited by subdivision two of section eleven hundred ninety-three of this article.

15 NYCRR 134.1 – Introduction

(a) Intent. Article 21 of the Vehicle and Traffic Law as added by chapter 291 of the Laws of 1975, and recodified in article 31 by chapter 47 of the Laws of 1988, provides for the establishment of an alcohol and drug rehabilitation program for the purpose of providing rehabilitation to drivers convicted of alcohol or drug-related driving offenses, or persons charged with alcohol or drug-related traffic offenses whose cases resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses or persons found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of the Vehicle and Traffic Law to alleviate the threat to the lives and well-being of the citizens of this State posed by alcohol and drug-related driving. Although this article provides for the issuance of conditional licenses to persons enrolled in such a program, this provision is incidental to the primary purpose of the legislation, highway safety. This Part is intended to implement the legislative intent by establishing criteria for eligibility of persons for entrance into such programs, issuance and use of conditional licenses, procedures to be followed by the courts, the Department of Motor Vehicles and motorists in conjunction with such programs, as well as the curricula to be used in such programs and the qualifications of persons who will be conducting such programs.

(b) Definitions.

(1) Program. As hereinafter used in this Part, the terms program, alcohol and drug rehabilitation program, rehabilitation program, or course shall mean a specific curriculum which must include training in a classroom setting, and may include instruction, discussion, testing, interviewing, counseling, referral for extended alcohol or drug rehabilitative activities and such rehabilitative activities, all of which have been approved by the commissioner and are administered by program administrators designated as such by the commissioner. Any extended alcohol or drug rehabilitative activities which occur after eight months following enrollment in the program must be recommended licensed providers of such services.

(2) Full period of suspension or revocation effectively served. A person will be deemed to have effectively served the full period of a suspension if he has received a suspension order, has surrendered his driver's license in response to such suspension order, has not been issued an unconditional license and has not operated a motor vehicle for the period of time for which his license has been suspended. A person will be deemed to have effectively served the full period of a revocation if he has received a

revocation order, has surrendered his driver's license in response to such revocation order, has not been issued an unconditional license and has not operated a motor vehicle for a period of at least six months.

15 NYCRR 134.2 – Persons Eligible for Program

Any person who is convicted of a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, or is charged with an alcohol or drug-related traffic offense whose case resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or is found to have been operating a motor vehicle after having consumed alcohol in violation of section 1192-a of this article, or of an alcohol or drug-related traffic offense in another state, shall be eligible for enrollment in an alcohol and drug rehabilitation program unless: such person has participated in a program established pursuant to article 31 of the Vehicle and Traffic Law within the five years immediately preceding the date of commission of the alcohol or drug-related offense or such person has been convicted of a violation of any subdivision of section 1192 of such law during the five years immediately preceding commission of an alcohol or drug-related offense; with respect to persons convicted of a violation of section 1192 of the Vehicle and Traffic Law, is prohibited from enrolling in a program by the judge who imposes sentence upon the conviction; or the commissioner is prohibited from issuing such new license to a person because of two convictions of a violation of section 1192 of the Vehicle and Traffic Law where physical injury, as defined in section 10 of the Penal Law, has resulted in both instances. Notwithstanding the provisions of this section, a person shall be eligible for enrollment in the alcohol and drug rehabilitation program if such person is sentenced pursuant to the plea-bargaining provisions set forth in Vehicle and Traffic Law, section 1192(10)(a)(ii) and (10)(d).

15 NYCRR 134.4 – Section 134.4. Initial procedures by the Department of Motor Vehicles upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law

(a) Certificate of conviction indicates prohibition from enrollment by the judge. Upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law when such certificate or an accompanying letter indicates that the convicting judge has prohibited the defendant from entering a rehabilitation program, the department will issue a confirming revocation or suspension order when a revocation or suspension has been imposed by the court, or, will issue an appropriate suspension or revocation order when such action has not been taken by the court. No further action with respect to rehabilitation programs will be taken by the department.

(b) Certificate of conviction does not indicate prohibition from enrollment by the judge. Upon receipt of a certificate of conviction for a violation of section 1192 of the Vehicle and Traffic Law when such certificate or an accompanying letter does not indicate a prohibition from enrollment by the judge, the department will make a review of the defendant's driving record.

(1) Unless such review indicates that the defendant is ineligible to enroll in a rehabilitation program based upon criteria set forth in section 134.2 of this Part, the department will issue the appropriate suspension or revocation order against the defendant's driver's license, if the court has not already done so and will notify the defendant that he is eligible for enrollment in a rehabilitation program. Such notification will include instructions for enrollment in a rehabilitation program. The suspension or revocation order will indicate the effective date of the order. Unless such review indicates that the defendant is ineligible to enroll in a

rehabilitation program in accordance with the provisions set forth in section 134.2 of this Part, the department will also apply the criteria established in section 134.7 of this Part to determine whether the defendant is eligible for the issuance of a conditional license. Unless such review indicates that the defendant is ineligible for the issuance of a conditional license, the department will also notify the defendant that he may be eligible for such license. Such notification will include instructions for making application for the conditional license.

(2) If a review of the defendant's driving record indicates that the defendant is ineligible for enrollment in a rehabilitation program as set forth in section 134.2 of this Part, only the appropriate revocation or suspension order will be issued to the defendant. No further action with respect to rehabilitation programs will be taken by the department.

(c) Certificate of disposition. Upon receipt of a certificate of disposition for a charge of section 1192 of the Vehicle and Traffic Law, where the disposition indicates that the charge resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, the department will make a review of the defendant's driving record in a manner consistent with subdivision (b)(1) of this paragraph.

15 NYCRR 134.7 – Criteria for Issuance of a Conditional License

(a) The issuance of a conditional license shall be denied to any person who enrolls in a program if a review of such person's driving record, or additional information secured by the department, indicates that any of the following conditions apply.

(1) The person has been convicted of homicide, assault, criminal negligence, or criminally negligent homicide arising out of operation of a motor vehicle.

(2) The conviction, adjudication or finding upon which eligibility for a rehabilitation program is based involved a fatal accident.

(3) The person does not have a currently valid New York State driver's license. This paragraph shall not apply to a person whose New York State driver's license has expired, but is still renewable, nor to a person who would have a currently valid New York State driver's license except for the revocation or suspension which resulted from the charges, conviction, adjudication or finding upon which his eligibility for the rehabilitation program is based, nor to a person who would have a currently valid New York State driver's license except for a suspension or revocation which resulted from a chemical test refusal arising out of the same incident as such conviction, adjudication or finding of a violation of section 1192-a of the Vehicle and Traffic Law section.

(4) The person has been convicted of an offense arising from the same event which resulted in the current alcohol-related conviction, adjudication or finding which conviction would, aside from the alcohol-related conviction, adjudication or finding result in mandatory revocation or suspension of the person's driver's license.

(5) The person has had two or more revocations and/or suspensions of his driver's license, other than the revocation or suspension upon which his eligibility for the rehabilitation program is based within the last three years. This subdivision shall not apply to suspensions which have been terminated by

performance of an act by the person, nor to a suspension or revocation resulting from a chemical test refusal, if the person had been convicted of a violation of section 1192 of the Vehicle and Traffic Law or found to be in violation of section 1192-a of such law arising out of the same incident.

(6) The person has been convicted more than once of reckless driving within the last three years.

(7) The person has had a series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of the commissioner or his designated agent tends to establish that the person would be an unusual and immediate risk upon the highway.

(8) The person has been penalized under section 1193(1)(d) of the Vehicle and Traffic Law for any violation of subdivision 2, 2-a, 3, 4, or 4-a of section 1192 of such law.

(9) The person is reentering the rehabilitation program, as provided in section 134.10(c) of this Part, for a second or subsequent time.

(10) [Repealed]

(11)

(i) The person has had three or more alcohol- or drug-related driving convictions or incidents within the last 25 years. For the purposes of this paragraph, a conviction for a violation of section 1192 of the Vehicle and Traffic Law, and/or a finding of a violation of section 1192-a of such law and/or a finding of refusal to submit to a chemical test under section 1194 of such law arising out of the same incident shall only be counted as one conviction or incident. The date of the violation or incident resulting in a conviction, or a finding as described herein shall be used to determine whether three or more convictions or incidents occurred within a 25-year period.

(ii) For the purposes of this paragraph, when determining eligibility for a conditional license issued pending prosecution pursuant to section 134.18 of this Part, the term “incident” shall include the arrest that resulted in the issuance of the suspension pending prosecution.

(12) The person was the holder of a limited DJ or limited MJ license at the time of the violation which resulted in the suspension or revocation.

(13) The person, during the five years preceding the commission of the alcohol or drug-related offense or a finding of a violation of section 1192-a of the Vehicle and Traffic Law, participated in the alcohol and drug rehabilitation program or has been convicted of a violation of any subdivision of section 1192 of such law.

(b) If after a person is enrolled in a rehabilitation program and has been issued a conditional license, but, prior to the reissuance of an unconditional license, information is received by the department which indicates that such person was not eligible for a conditional license his conditional license will be revoked.

15 NYCRR 134.9 – Conditional License

A conditional license will be issued only by the department which will establish the conditions applicable to each individual license based upon information submitted by the applicant.

(a) Form of conditional license. The conditional license will be a two-part form. One part shall be computer generated and will bear a notation indicating that it is a conditional license. The other part will be manually generated and will contain the specific conditions applicable to that particular conditional license. The holder of a conditional license, when required to display such license, must display both parts of such license.

(b) Establishment of conditions. Each conditional license shall contain the condition that such license shall be subject to revocation for operation outside of the limitations appearing on such license. Each conditional license will contain the limitations or use of such license as prescribed by the department, and as accepted by the holder. Such conditions shall be limited to operation: to and from the holder's place of employment; during the course of employment, when required; to and from a class or an activity which is an authorized part of the rehabilitation program and at which the holder's attendance is required; enroute to and from a class or course at an accredited school or approved institute of vocational or technical training; enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of his household, as evidenced by a written statement to that effect from a licensed medical practitioner; during a three-hour consecutive daytime period as specified by the department on a day during which the holder is not engaged in his usual employment or vocation; to and from court-ordered probation activities; to and from a motor vehicle office for the transaction of business relating to such license or program; or enroute to and from a place, including a school, at which a child or children of the holder are cared for on a regular basis and which is necessary for the holder to maintain such holder's employment or enrollment at an accredited school, college or university or at a State-approved institution of vocational or technical training;

(c) A conditional license issued to a person charged with alcohol or drug-related traffic offenses whose case resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or to a person convicted of, or adjudicated a youthful offender for, a violation of any subdivision of section 1192 of the Vehicle and Traffic Law or found to have violated section 1192-a of such law shall not be valid for the operation of commercial motor vehicles as defined in section 501-a of such law or taxicabs as defined in section 148-a of such law.

(d) Revocation of conditional license.

(1) A conditional license which has been issued shall be revoked upon: the holder's conviction of any traffic violation, other than parking, stopping, standing, equipment, inspection or other nonmoving violations where such violation occurred during the period of validity of the conditional license; or for the holder's failure to attend any portion or portions of the rehabilitation program in accordance with attendance rules established for the program. A revocation for any of the above reasons shall be issued without a hearing based upon receipt of a certificate of conviction, or in the case of failure to attend any portion or portions of the rehabilitation program upon certification of the person administering such program. In addition, the commissioner may revoke a conditional license after a hearing, based upon a finding that the holder has not satisfactorily participated in the rehabilitation program, or that the holder is not attempting in good faith to accept rehabilitation, or upon a complaint that the holder is operating or has operated a motor vehicle in violation of the conditions imposed on his conditional license. The commissioner may also revoke a conditional license without a hearing upon receipt of a

certificate of conviction which indicates that the applicant has driven in violation of the conditions of such license.

(2) Persons under 21 years of age. The provisions of this subdivision shall apply to any person under the age of 21 who enters a rehabilitation program and is issued a conditional license as a result of an alcohol or drug-related traffic charge which resolved, by dismissal, trial, or plea bargain, without an alcohol or drug-related traffic conviction, or a conviction for a violation of any subdivision of section 1192 of the Vehicle and Traffic Law, committed when such person was under the age of 21. Notwithstanding any other provisions of this Part, if any such person's conditional license is revoked and such person has completed a rehabilitation program as provided for in section 134.10 of this Part, time served shall be credited toward the remaining portion of the revocation period, calculated from the effective date of the order of revocation which resulted in the issuance of the conditional license, to the date of the violation which resulted in the revocation of the conditional license.

(e) Extra-territorial effect of conditional license. Whether a conditional license will be honored by other states will be dependent upon the laws of each such other state. This state will honor a similar type of license issued by another state to a resident of the issuing state to the extent of the conditions imposed. The holder of a conditional license issued pursuant to article 31 should check with the appropriate motor vehicle authorities of any other state in such other state.

(f) Period of validity of conditional license. Unless otherwise revoked by the commissioner, a conditional license will be valid from the date of its issuance until the expiration date contained thereon or until the holder's unconditional license is returned to him, whichever occurs first.

15 NYCRR 134.10 – Completion of a Rehabilitation Program

(a) Requirements for satisfactory completion of a rehabilitation program. In order for a person to satisfactorily complete a rehabilitation program, he must have paid all necessary fees and have attended and actively participated in all segments of such rehabilitation program as required by the department, including completion of extended participation upon the recommendation of the appropriate officials.

(b) Results of satisfactory completion of a rehabilitation program. Upon satisfactory completion of a program, any unexpired suspension or revocation which was issued as a result of the conviction for which the person was eligible for enrollment in the program may be terminated by the commissioner unless the termination is prohibited under section 1193 of the Vehicle and Traffic Law or this Subchapter, or if the termination is based upon enrollment in the program pursuant to the plea bargaining provisions of Vehicle and Traffic Law, section 1192(10)(a)(ii) and 1192(10)(d), or if such person would not otherwise be eligible for enrollment in the program pursuant to section 1196(4) of such law, or if the person has two or more alcohol- or drug-related driving convictions or incidents within the 25 year look back period from the date of the violation which resulted in enrollment in the program. For the purposes of this subdivision, the 25 years look back period means the period commencing upon the date that is 25 years before the date of the violation that resulted in enrollment in the program and ending on and including the date of such violation.

(c) Failure to satisfactorily complete a rehabilitation program. If a person fails to satisfactorily complete a rehabilitation program, in addition to revocation of any conditional license which may be held by such person, the suspension or revocation of such person's unconditional driver's license will be reinstated for the full period of such suspension or revocation, unless such full period has already been effectively served. Such a person may apply for reentry into the rehabilitation program. A conditional license may only be issued upon the first such reentry. Although second and subsequent reentries may be permitted, a conditional license will not be reissued in such cases.

(d) Appeals. Appeals from decisions of treatment or program personnel regarding an individual's participation or treatment shall be directed to the program director. If the said director is unable to resolve the matter, such appeals shall be directed to the Division of Driver Licensing. If the said division is unable to resolve the matter, such appeals shall be sent to the commissioner who shall make a determination. Prior to making a determination the commissioner may consult with experts in the field of alcoholism and rehabilitation and any other appropriate agencies.