



Staff Memorandum

HOUSE OF DELEGATES
January 30, 2009

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Court Structure and Judicial Selection.

In September 2008, the Chief Judge's Special Commission on the Future of New York State Courts released a report entitled *Justice Most Local: The Future of Town and Village Courts in New York State*. That report offered a number of recommendations for reforming New York town and village justice courts. Association President Bernice K. Leber asked the Association's Committee on Court Structure and Judicial Selection to review the Commission's report, and the committee has prepared the attached report.

In a section entitled "Background," the report reviews past Association policy with respect to justice courts as well as the work of other bar associations with respect to this topic. The report then provides a summary of the Special Commission's recommendations and a proposed NYSBA response with respect to each of those recommendations. The following topics are addressed: (1) requiring lawyer justices; (2) minimum standards for all justice courts; (3) county-based panels to bring about combinations and reform; (4) an "opt-out" plan providing a right to transfer a case to an attorney judge; (5) minimum qualifications for justices; (6) increasing the pool of qualified candidates; (7) new training and testing; (8) court clerks; (9) funding and resource reforms; (10) reforming fine and fee collection; (11) increasing and rationalizing judicial salaries; and (12) expanding the Town and Village Court Resource Center.

One member of the committee has submitted a dissent with respect that portion of the report relating to an "opt-out" plan, and the member's dissent is attached to the report.

G. Robert Witmer, Jr., chair of the committee, and committee member Michael J.D. Sweeney will present the report at the January 30 meeting.

**REPORT of
the Committee
on Court Structure
and Judicial Selection**

Re:

*Justice Most Local: The Future of Town and Village Courts in
New York State*

by

The Special Commission on the Future of New York State
Courts

December 16, 2008

NYSBA Special Committee on Court Structure and Judicial Selection

G. Robert Witmer, Jr. – Chair
Daniel G. Barrett
Hon. Richard J. Bartlett
John P. Bracken
June M. Castellano
Renaye B. Cuyler
Matthew T. Dunn
Gregory A. Gates
Norman L. Greene
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Linda S. Kingsley
A. Thomas Levin
Thomas E. Meyers
Prof. Patricia E. Salkin
Deborah S. Schneer
Bertrand C. Sellier
Michael J. D. Sweeney
Ronald F. Kennedy – NYSBA Staff Liaison
Eileen D. Millett – Executive Committee Liaison

**NYSBA Special Committee on Court Structure and Judicial Selection
Sub-Committee on Town & Village Courts**

Michael J. D. Sweeney - Chair
Daniel G. Barrett
Matthew T. Dunn
Gregory A. Gates
Linda S. Kingsley
Prof. Patricia E. Salkin
Deborah S. Schneer
G. Robert Witmer, Jr.
Ronald F. Kennedy – NYSBA Staff Liaison

I. INTRODUCTION

On September 17, 2008, Chief Judge Kaye released *Justice Most Local: The Future of Town and Village Courts in New York State*. In the Report, the Special Commission on the Future of New York State Courts offers recommendations for reforming New York's Town and Village Justice Court system. The Special Commission's Report was the result of a remarkable effort on behalf of the commission members, all of whom served on a pro bono basis. Their tremendous commitment to the issue of Justice Courts is evident from their extensive study, primary research, deliberation and report, all of which is truly impressive. All New Yorkers owe the members a great debt of gratitude.

New York State Bar Association President Bernice Leber asked the Special Committee on Court Structure and Judicial Selection to review the Special Commission's Report and recommendations in light of the Association's established positions. Since the House of Delegates in January 2008 had recently approved the Report of the Association Task Force on Town and Village Justice Courts, the Special Committee Chair G. Robert Witmer, Jr. appointed the members of that Task Force as the Subcommittee on Town and Village Justice Courts to review *Justice Most Local*. All of the other members of the full Special Committee were invited to participate in the meetings and discussions as the Subcommittee drafted its proposed responses to the Report's recommendations. On December 16, 2008, Subcommittee Chair Michael J. D. Sweeney presented the Subcommittee's report to the Special Committee, which voted to approve the report.

II. BACKGROUND

Questions surrounding access to justice at the Justice Court level are not new. Based upon increasing public awareness of allegations of unethical conduct on the part of justices, media accounts of inappropriate conduct by some justices, the substandard condition of many Justice Court physical facilities and the administration of justice in the Justice Courts, a number of entities have studied the current Justice Court system.

A. NYSBA Policies on Justice Courts

The New York State Bar Association has addressed the issue of reforming New York's Justice Court system on several occasions. Beginning in 1979, in a report on court reorganization, NYSBA suggested that future consideration be given to merging local courts into regional tribunals.¹ In 2001, NYSBA issued a lengthy and thorough report asserted that judges in the justice courts ("justices") should be lawyers, stating that "[i]t is unfair for litigants in civil or criminal cases to have matters determined by a person who may be unfamiliar with the law."²

In late 2006 and early 2007, then-President Mark Alcott explained the policy of the Association in testimony before the NYS Assembly Committee on the Judiciary and

¹ Report of Action Unit No. 4 on court reorganization, approved by the NYSBA House of Delegates, September 29, 1979.

² *Enhancing Public Trust and Confidence in the Legal System*, January 2001, p. 48.

Committee on Codes, NYS Senate Judiciary Committee. In his legislative testimony, President Alcott pointed out that for many citizens, the Justice Courts may be the only contact they have with the court system. He reiterated that it is the longstanding position of the NYSBA that all justices who preside over these courts should be lawyers. He called for significant increases in training—noting that many people providing other services in New York State (such as those who give manicures) require greater training and testing than justices.

President Alcott made the point that there have been increased complexities in the law over the past 40 years since the Legislature last affirmed the use of non-lawyers as justices. He noted that the exact same matters that come before these justices, if occurring within a city, would require a lawyer-judge to adjudicate the matter. Due to the increasing complexities in the law, he noted that this archaic position must be re-examined.

President Alcott stated that NYSBA supports OCA's Action Plan (discussed below) with particular endorsement of access to justice for indigents and the disabled. The Association supports the decision of OCA to require real-time recording of Justice Court proceedings and to integrate these courts into the judiciary's technology system, and also supports OCA's plan to increase security in Justice Courts. NYSBA supported OCA's request for \$10 million to implement these plans, and reiterated the need to adequately fund the Commission on Judicial Conduct, which has had its staff cut in half over the past 30 years while its complaints have doubled (an increase in the Commission's funding was approved as part of the NYS FY 2007–2008 Budget). Lastly, President Alcott encouraged the education of the public on the ethical obligations of the judiciary as a means to increase public confidence in the judiciary.

In July 2007, then-NYSBA President Kathryn Grant Madigan appointed a Special Task Force on Town and Village Justice Courts for the purpose of developing a set of recommendations for the Association to consider with respect to appropriate next steps in addressing access to justice in Justice Courts across the State. The Task Force issued a report in January 2008 that offered a set of recommendations, which are discussed in Section III.³ President Madigan presented the Task Force's recommendations in testimony to the Special Commission on the Future of New York State Courts.

B. Office of Court Administration—Action Plan

In June 2006, Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman announced the creation of a comprehensive review by the OCA of New York State's Justice Court system. The OCA released the *Action Plan for Justice Courts* in November 2006.⁴ The Action Plan identifies four primary areas of reform:

1. Justice Court Operation and Administration
2. Auditing and Financial Controls

³ Report of the New York State Bar Association Task Force on Town and Village Justice Courts Albany, NY, January 2008) (hereinafter, "Task Force Report").

⁴ The Action Plan is available at: <http://www.courts.state.ny.us/publications/pdfs/ActionPlan-JusticeCourts.pdf> (cite visited January 2008).

3. Education and Training for Justices and Clerks
4. Facility Security and Public Protection

To achieve these reforms, the Action Plan recommends various legislative actions including:

1. An appropriation of \$10 million in new funds.
2. An increase in the Justice Court Assistance Program (JCAP) grant limit to \$30,000.
3. An increase in penalties for threats and crimes against justices and staff.
4. A statutory amendment to allow Justices to live in the county or adjoining county rather than the town or village where they sit.
5. An amendment to the Uniform Justice Court Act (UJCA) to authorize the Chief Administrative Judge to designate a town justice or a city court judge where a temporary incapacity exists in a justice court
6. Approval in the selection of temporary town/village justices.
7. A requirement that every justice court employ at least one clerk independent of municipal control.

In September 2008, OCA issued a Two Year Update to the Action Plan for the Justice Courts. The Update report noted the progress that had been made which included:

1. An additional \$3.5 million in equipment to Justice Courts.
2. Additional technology staff for Justice Courts.
3. Incorporation of Justice Courts personnel into the State e-mail system.
4. A redesigned Justice Court website.
5. Assistance in providing qualified interpreters for Justice Courts.
6. An increase in training requirements and resources.
7. Expansion of the Town and Village Court Resource Center.
8. Free access to online legal research databases and print materials.
9. A \$10,000 increase in the Justice Court Assistance Program annual grant cap.
10. OCA assistance in developing and implementing security measures.
11. Expansion of Justice Court credit card acceptance.
12. Expansion of OCA auditing of the Justice Courts.
13. Monitoring of public access and review of Justice Court records.
14. Clarification of the ability to temporarily assign Justices between localities.

C. Association of the Bar of the City of New York

The New York City Bar Association appointed a Task Force on Town and Village Courts in 2006. The Task Force formed three subcommittees and issued reports in March, June and October of 2007. They recommend, among other things, working within the existing framework to provide additional support structures for both lawyer and non-lawyer justices, and endorse in large part the OCA Action Plan.⁵ The City Bar emphasizes the need for OCA to provide a sufficient number of attorneys to aid justices

⁵ To review all three of the City Bar's reports on the subject, see <http://www.nycbar.org/Publications/reports/reportsbycom.php?com=132>.

with research and legal analysis “to address substantive, procedural, and judicial-conduct needs.” The City Bar also suggests that qualified individuals should be hired to assist in court and fiscal management, and they recommend increasing funding for the Resource Center so that it is comparable to the service available to state-paid judges through law secretaries.

The City Bar Task Force also addressed the technological shortcomings of the Justice Courts, and made the following six recommendations:

1. Every case should be recorded by a court reporter or by using digital recording.
2. All justices and court clerks should have computer hardware and training to use software that provides assistance for case management, financial management and reporting tasks.
3. Each justice should be given access to computers for legal research and judicial operations.
4. Development of video conferencing capability should be studied.
5. Use of electronic communications should be expanded.
6. Justices and clerks should have access to portable computers.

The October 2007 Report offered the following ten additional recommendations:

1. Amend the Criminal Procedure Law to require that the Justices who preside over pretrial suppression hearings and jury trials in criminal cases are lawyers and, to meet this requirement, that pretrial suppression hearings and jury trials be transferred to justices who are lawyers or to judges. Further, amend the Criminal Procedure Law to require that in all other cases in which the crimes charged are A, B, or unclassified misdemeanors and the presiding town or village justice is not a lawyer, on request of a party the case be transferred to a justice who is a lawyer or to a judge.
2. Apply newly amended Uniform Justice Court Act § 106 (Session Laws 2007 Chapter 321)—and rules promulgated pursuant to that section—to facilitate the transfer of cases from lay Justices to lawyer Justices or judges in order to effectuate Recommendation 1.
3. Issue plain language forms for pleading in summary proceedings for eviction that are comprehensible to the litigants and require disclosure in the eviction petition of special circumstances, including the presence of an immovable mobile home, building code violations, government rent subsidies, and possible violations of the warranty of habitability.
4. Provide Justices with intensive training on procedural and substantive law applicable to summary proceeding eviction cases.

5. Summary proceedings in eviction cases should be decided by lawyer justices or judges when the respondent is pro se and when, on review of the plain language pleadings, there is disclosed the presence of (1) an immovable mobile home, (2) disrepair of the premises raising a question as to whether there is a violation of the warranty of habitability, (3) pending building code violations, or (4) government rent subsidies.
6. Conduct further study of civil cases within the jurisdiction of Justice Courts to determine whether any additional civil matters present the types of issues that should be heard by lawyer justices or judges, whether there is additional need for plain language forms, and whether intensive training is needed on any specific areas of procedural or substantive law.
7. Each town should examine and determine whether consolidation of Town Courts would be beneficial to the town and the Town Court and, where appropriate, pursue consolidation pursuant to Session Laws of 2007, Chapter 237 (amending Uniform Justice Court Act § 106-a).
8. Each village should examine and determine whether abolition of the office of village justice would benefit the village and the Village Court and, where appropriate, initiate local legislation pursuant to Village Law § 3-301(2)(a), or, if an inconsistent charter provision pre-exists the Village Law, seek state legislation pursuant to Article 17(b) of the New York Constitution.
9. Every Justice Court should have a court clerk who is trained to prepare the records and documents and satisfy the financial reporting and safeguarding of funds requirements of the applicable statutes and regulations. The clerks should be full time employees of the courts and be fairly compensated. Courts may combine resources to retain a shared court clerk if the work of a single court does not warrant a full time clerk. The clerks should be supervised by a State-compensated employee who also is available to provide assistance to the court clerks.
10. In planning for consolidation of Town Courts, the elimination of the position of village justice, or the transfer of misdemeanor cases from the Justice Courts when there is no available lawyer justice, the Office of State Comptroller should reevaluate the allocation of the revenues of the Justice Courts so that legislation can provide to municipalities an appropriate share of the courts' revenues.

D. The Bar Association of Nassau County

In September 2007, the Bar Association of Nassau County issued a Report and Recommendations of its Justice Courts Task Force. As a result of the Report, the County Bar Association endorsed the following six recommendations submitted by the Task Force:

1. Unfunded Mandates from OCA to be imposed upon Village governments regarding the administration and operation of the Justice Courts should be strongly discouraged.
2. Security measures in Village Courts should remain “local,” and a partnership with the State in funding and requiring specific types of security devices will be in the best interests of optimizing the justice function of the Court.
3. Villages should have the option of using live court stenographers, and this should be a permitted alternative to digital recording devices.
4. OCA should enable the Justice Courts to accept credit card payments without incurring any cost to the Village.
5. The method of providing interpreter services for Court proceedings should be uniform, as well as within the discretion of the individual Village
6. The Action Plan proposition to enhance the current two-tiered sequential legal education program consisting of basic and advanced curricula should be supported, and the cost and administration of the programs should continue to be a State function.

While the County Bar Task Force took no position as to whether Justice Court Judges should be lawyers, they recommended that there be no mandate that Village Judges be attorneys. Rather, the Task Force concluded that there should be new minimum qualification standards that would apply in the future to all new non-attorney justice court judges and that a provision be adopted to allow for the removal of a criminal case to a superior court at the defendant’s request where the presiding Justice is not an attorney.

E. Office of the State Comptroller

In his testimony before the Dunne Commission, Comptroller Thomas DiNapoli endorsed the OCA Action Plan and reiterated recommendations made in the past by the Office of the State Comptroller. Specifically the Comptroller recommends the following:

1. Implementation of a uniform state-wide technology system that includes financial management and software training.
2. Ability of the Justice Courts to accept payment via credit card.
3. Increased oversight of Justice Courts.

F. Report of the Special Commission on the Future of New York State Courts (Special Commission)

On September 17, 2008, Chief Judge Kaye released *Justice Most Local: the Future of Town and Village Courts in New York State*, a report by the Special Commission on the Future of New York State Courts.⁶ In the Report, the Special Commission offers recommendations for reforming New York's Justice Court system. The recommendations include the creation of minimum standards for Justice Courts; consolidating Justice Courts through county-based panels; safeguarding due process rights through a right of transfer to an attorney-Justice; and improving the quality of the Justice Court bench through increased training and testing, and improvements in facilities and resources.

Many of the Special Commission's recommendations are consistent with NYSBA positions, including the positions set forth by the NYSBA Task Force on Town and Village Justice Courts in its January 2008 Report, and we recommend that the NYSBA support those recommendations. In some areas, we recommend that the Association go further than the Special Commission did. For instance, we recommend that Justices be at least 30 years old and have a four-year academic degree while the Special Commission advocates a 25 year age requirement and a two-year degree requirement. The only recommendation we recommend the NYSBA not support is the Special Commission recommendation for a right of transfer to a lawyer-judge for criminal defendants.

The Special Commission's recommendations and the subcommittee's proposed responses are set out below.

III. PROPOSED NYSBA RESPONSES TO THE SPECIAL COMMISSION RECOMMENDATIONS

A. Requiring Lawyer Justices

The New York State Bar Association's position is that all judges in Justice Courts ("Justices") should be lawyers. Asserting that position in 2001, the NYSBA stated that "It is unfair for litigants in civil or criminal cases to have matters determined by a person who may be unfamiliar with the law." In testimony before the NYS Assembly Committee on the Judiciary and Committee on Codes, and the NYS Senate Judiciary Committee in late 2006 and early 2007, then NYSBA-President Mark Alcott strongly urged significant reform. In his legislative testimony, President Alcott pointed out that for many citizens, the Justice Courts may be the only contact they have with the court system. He reiterated that it is the longstanding position of the Bar Association that all Justices who preside over these courts should be lawyers.

1. Summary of the Special Commission Recommendation

The Special Commission's recognizes that requiring all Justices to be lawyers may be desirable, but finds the requirement neither necessary nor feasible. Therefore, the Report

⁶ *Justice Most Local: The Future of Town and Village Courts in New York State*, a report by the Special Commission on the Future of New York State Courts, September 2008, available at <http://www.nycourtreform.org/reports.shtml> (hereinafter, "Special Commission Report").

does not call for a constitutional amendment requiring lawyer-justices, but tries to identify reforms that are feasible and address issues arising from non-lawyer judges.

We believe that, unlike the reform proposals offered in past generations, these proposals are pragmatic and politically realistic enough to be accomplished in the immediate future. This is because, in contrast with most of the recommendations that have come before, ours do not require a complete dismantling of the Justice Court system, amendment of the State Constitution or elimination of non-attorney justices – steps that most members believe may be desirable in an ideal world, but that have politically doomed generations of past reforms. Instead, as discussed below, we believe that the necessary reforms should and can be achieved swiftly and effectively within the general framework of the existing system, thus avoiding many of the obstacles and intransigence that have stymied improvement for so many years.⁷

2. NYSBA Task Force Recommendation

The NYSBA Task Force reiterated the NYSBA position that all Justices should be lawyers.⁸ It also recognized the practical challenges to that goal. Of paramount concern is the availability of lawyers to serve in this role. The Task Force also recognized, as have many other entities who have examined the issue, that the State Legislature may be unwilling to amend the law in the near term to require every local Justice to be an attorney.

As a result, the Task Force offered recommendations designed both to remove barriers for lawyers who would not otherwise run for office and to strengthen the training, education and support for all justices, whether or not attorneys.

3. Recommended NYSBA Response to the Special Commission Report

Although the NYSBA position is that requiring justices to be attorneys is the best path of reform, we recognize that an all-attorney bench is not feasible now. Not wishing to have the perfect be the enemy of the good, we support the Special Commission's recommendations that will improve the training, education, and skills of justices and recommendations that will encourage more attorneys to seek the office of Justice.

B. Minimum Standards For All Justice Courts

1. Summary of the Special Commission Recommendation

The Special Commission recommends setting minimum standards for Justice Court facilities, accessibility, audibility, technology, security, and administrative support. The Report recommends that the state provide financial support as a carrot tied to compliance with the standards.

⁷ Special Commission Report at 10

⁸ Special Commission Report at 9.

The Commission calls for the legislature to set the minimum standards, and OCA would monitor them.⁹ The Commission recommends specific minimum standards in Appendix vii. Because the Courts are constitutionally part of OCA, and subject to its control, OCA would have the authority to enforce the minimum standards, including closing down non-complying courts.

Although the Report does not provide an estimate for achieving the minimum standards overall, it includes an estimate in Appendix viii of more than \$132,000,000 for the necessary security upgrades alone.

2. NYSBA Task Force Recommendation

The Task Force recommended that the NYSBA support recommendations in the OCA Action Plan that call for upgrades and access to technology for the Justice Courts, as well as critically needed upgrades to the physical facilities housing these courts.¹⁰ The Task Force further recommended support for the OCA Action Plan calling for enhanced security of these court facilities.

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA supports the concept of minimum standards for Justice Courts, but only if the necessary funding is made available to localities. We are concerned that requiring minimum standards without providing the funding necessary to achieve them is counterproductive. Not only will unfunded mandates create frustration, but they could lead to pressure on localities to generate the funds through manipulating fines for Vehicle and Traffic violations. Accordingly, we recommend that minimum standards should be contingent upon the state or OCA providing the locality with the funding necessary to achieve the standards.

We also agree with the Special Commission that it is important that minimum standards take into account the practical issues, such as the diversity of needs across the more than 1,250 Justice Courts, and the need for personnel training to implement the standards. Therefore, we recommend that the NYSBA, local bar associations, and other local stakeholders should be consulted in setting minimum standards.

C. County-Based Panels to Bring about Combinations and Reform

1. Summary of the Special Commission Recommendation

The keystone of the Special Commission's recommendations is a consolidation of Justice Courts to reduce the number of physical Justice Courts by 30% to 50%. Under the proposal, the Legislature would establish nine-member panels in each county.¹¹ The panels would be representative and politically balanced groups of local stakeholders, including

- the county executive,
- minority and majority leaders of the county legislature,
- representative town supervisors (chosen through the Association of Towns),

⁹ Special Commission Report at 86.

¹⁰ Task Force Report at 13.

¹¹ Special Commission Report at 85.

- village mayors (chosen through the Association of Mayors),
- Justices (chosen through the County and/or State Magistrates Association), and
- members of the public (chosen through bar associations).¹²

The panels would have additional advisory members, including the OCA.

Each panel would be charged with developing a plan for consolidating Justice Courts in the county.¹³ Panels would be provided with broad guidelines and specific minimum standards, and a presumed range of combinations.¹⁴

Panel plans within the presumed ranges would become law unless the county legislature issued an alternative plan approved by two-thirds of its members.¹⁵ Panel plans outside the presumed range would require approval by two-thirds of the county legislature. If a panel does not present a plan within the presumed range and the county legislature does not present an alternative plan approved by two-thirds of the county legislature, OCA would present a plan. The OCA plan would become law unless the county legislature issued an alternative plan approved by two-thirds of its members.

The panels would address only consolidation of courts, not the number of judgeships.¹⁶ Nevertheless, court consolidation could occur on a multi-court facility basis—sharing facilities only or on a multi-locality plan—merging jurisdictions.

2. *NYSBA Task Force Recommendation*

Task Force recommended that the NYSBA support legislative changes to allow consolidation of Justice Courts.¹⁷

3. *Recommended NYSBA Response to the Special Commission Report*

The NYSBA supports consolidation on a local level, and commends the Special Commission's recommendation. We believe that the local nature of the consolidation decisions is particularly important and we encourage participation by local bar associations. While we recognize that such a plan will create administrative burdens, such burdens are always a part of significant reform. We also recognize that any such process is political—with a small “p”—and we strongly encourage measures that will avoid factionalism.

Consolidation of Justice Courts can save money. Localities that want to consolidate should be encouraged to do so even before the Legislature adopts the Special Commission's consolidation plan, particularly in the current economic environment. Therefore, we recommend that the Legislature, in consultation with OCA, amend existing legislation as soon as possible to eliminate barriers to consolidation in the current law.

¹² Special Commission Report at 86.

¹³ Special Commission Report at 85.

¹⁴ The Special Commission offers a methodology for determining the presumptive ranges in Appendix iii.

¹⁵ Special Commission Report at 88.

¹⁶ Special Commission Report at 85.

¹⁷ Task Force Report at 12.

D. Opt-Out Plan

1. Summary of the Special Commission Recommendation

The Special Commission recommends that defendants facing the possibility of a criminal conviction have an automatic right to transfer the case to an attorney judge.¹⁸ The procedure would be an “opt-out” procedure, one that places the burden of exercising the right on the defendant after arraignment but before any substantive motions are made. Defendants would be advised of the right by the judge and in writing at the arraignment.

The Report includes a spirited concurrence that disagrees with, among other things, the opt-out procedure.¹⁹ Commissioner Burton argues that the right to opt out is “illusory” and would encourage coercion and awkward incentives, effectively stripping the defendants of the ability to opt out. She calls instead for either an all-lawyer bench, or at least making the right an “opt in” right—i.e., defendants facing criminal charges would appear before an attorney justice, but could waive the right to a lawyer-judge.

Other bodies have advocated for discriminating between lawyer and non-lawyer judges. For example, the Nassau County Bar advocated an opt out process similar to the Special Commissions; and the New York City Bar Association advocated limiting the jurisdiction of non-lawyer judges.

2. NYSBA Task Force Recommendation

The NYSBA Task Force report did not address the issue of whether defendants facing criminal charges have a right to appear before a lawyer-justice. During the deliberations, however, the Task Force considered the issue of limiting non-lawyer Justice jurisdiction, including an opt-out procedure like the one recommended in the Special Commission Report. The consensus was that an opt-out procedure would encounter practical difficulties and would send a message that non-lawyer justices were less competent. Instead, the Task Force advocated the existing NYSBA position that all justices be lawyers.²⁰ Its recommendations were aimed both at easing a transition to an all-lawyer bench and improving the quality of a mixed bench in the meantime.

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA does not support a right to opt out of the jurisdiction of non-lawyer Justices. Rather than create a procedure to avoid unqualified Justices, all Justices should be qualified to exercise the jurisdiction of the court.

The opt-out procedure is fraught with difficulties from a practical perspective. It is likely to result in judge shopping based on the best perceived result rather than competency. It will result in procedural delays as matters must be transferred to another Justice, and perhaps even to another jurisdiction. In many cases requiring the opt-out at the arraignment stage will be too early in the process to make an informed decision, when many defendants have not consulted with their attorney yet.

¹⁸ Special Commission Report at 93.

¹⁹ Special Commission Report at 111.

²⁰ Task Force Report at 11.

The right of criminal defendants to transfer a case away from a non-lawyer Justice ignores the need for due process in other contexts. For example, litigants facing summary eviction or seeking an order of protection may have as much and perhaps more reason to seek a qualified Justice as a criminal defendant. Indeed, everyone appearing in a Justice Court should have the right to a qualified Justice.

At its core, the opt-out procedure addresses the competence of non-lawyer justices. The NYSBA believes that this issue is best addressed by requiring all Justices to be lawyers. Until that happens, every effort should be made to bring all Justices, lawyer and non-lawyer, to a level of competency equal to the court's jurisdiction.

E. Minimum Qualifications

1. Summary of the Special Commission Recommendation

The Special Commission recommends that minimum qualifications be established for justices.²¹ Specifically, the Commission recommends that all justices be required to be at least 25 years old and have at least a two-year undergraduate degree from an accredited college. The requirements would not be retroactive and would not apply to current justices even in re-election.

2. NYSBA Task Force Recommendation

The Task Force did not address the issue of minimal qualifications. Instead, it focused on increasing the training requirements for justices.²²

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA supports the Special Commission's recommendation for minimum qualifications for Justices and advocates for more stringent requirements. We believe that requiring a four-year degree and at least 30 years of age are reasonable requirements.

A four-year degree ensures that the pool of candidates have participated in a course of intellectual training. Such training makes it more likely that candidates will understand and apply theoretical concepts like due process and separation of powers to the broad spectrum of issues raised in Justice Courts.

Thirty years of life experience is equivalent to the requirement for courts of similar jurisdiction. City courts, which carry substantially the same jurisdiction as Justice Courts, require judges to have practiced law for five years. In practical terms the requirement means candidates for city court have earned a four-year undergraduate degree and a three-year law degree, gone through the year-long process of being admitted to the bar, and spent five years in the practice of law. These candidates are at least 30 years old, and it is reasonable to require equivalent experience for an equivalent court.

F. Increasing the Pool of Qualified Candidates

1. Summary of the Special Commission Recommendation

²¹ Special Commission Report at 95.

²² Task Force Report at 13.

The Special Commission recommended that geographic restrictions on who can serve as Justice be eased.²³ Specifically, it called for allowing people from anywhere within the county where the court sits or an adjoining county to serve as Justice.

The Special Commission did not make a recommendation about easing the ethical constraints that discourage attorneys from becoming Justices. Instead, it called for the state's ethics authorities to consider the issue.

2. NYSBA Task Force Recommendation

The Task Force made three recommendations for removing barriers for lawyer-justices. First, it recommended easing residency restrictions so that people from within the county where the court sits are able to serve as justice.²⁴ Second, it recommended a “comprehensive review of all limitations on the legal practice of lawyer-justices that should be conducted for the purpose of assessing how best to maintain the highest principles of judicial conduct while encouraging more attorneys to serve as justices.”²⁵ Third, it recommended that NYSBA urge “OCA to develop a mechanism that enables municipalities to achieve a level of adequate compensation for justices.”²⁶ It also urged NYSBA to recognize “that there should be some level of support from the state to accomplish this increase in compensation.” In conjunction with the third recommendation, the Task Force also recommended an increase in court clerk compensation and a study to better understand how local court revenues are used.

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA supports the Special Commission's recommendation to ease geographic restrictions on who can serve as a justice. We also reiterate our call for a comprehensive review of restrictions on the practice of lawyer-Justices and for a mechanism and state support to ensure that Justice compensation is commensurate with the duties of the office.

G. New Training and Testing

1. Summary of the Special Commission Recommendation

The Special Commission recommends implementing all the initiatives in OCA's Action Plan, including advanced training, augmented technology abilities, and adding resources to Justice Courts.²⁷ It also recommends enhancing the testing regime for non-attorney justices that would include essay questions, and enhancing monitoring of the system.²⁸ The Commission recommends increased and varied training for both new and experienced justices.²⁹

2. NYSBA Task Force Recommendation

The Task Force made the following recommendations:

²³ Special Commission Report at 96.

²⁴ Task Force Report at 9.

²⁵ Task Force Report at 11.

²⁶ Task Force Report at 11.

²⁷ Special Commission Report at 96.

²⁸ Special Commission Report at 97.

²⁹ Special Commission Report at 97.

NYSBA support OCA's request for increased funding to support the development and implementation of enhanced training and educational programs, specifically for Justices.³⁰

NYSBA consider what resources the Association and its members have that could be used for a variety of programs including, by way of example, mentoring/ training programs for justices that could use the pro bono talents of retired judges and retired attorneys.³¹

NYSBA consider how retired attorneys could best be utilized to complement the efforts of the Town and Village Justice Court Resource Center in the provision of legal advice for justices.³²

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA supports the Special Commission's recommendations for increased training and testing and reiterates its suggestion to explore using the experience of our members to help train and support Justices and the Town and Village Justice Court Resource Center.

In the past, the NYSBA has worked with the Office of Court Administration in support of Justice Courts and Justices. We recommend that the NYSBA institutionalize its efforts through periodic consultation with the Office of Court Administration to consider ways in which the NYSBA can continue and expand its support. The consultations should take place between representatives of both organizations that have institutional authority and responsibility to understand the needs of the Justice Courts and Justices and the NYSBA's ability to assist.

H. Court Clerks

1. Summary of the Special Commission Recommendation

The Special Commission recommends requiring at least a part-time clerk for every court.³³ It also recommends that clerks should report to the court, not the executive or legislature.³⁴

2. NYSBA Task Force Recommendation

The Task Force made the following recommendations:

The Task Force also recommended that NYSBA support an increase in compensation for court clerks.³⁵

3. Recommended NYSBA Response to the Special Commission Report

³⁰ Task Force Report at 13.

³¹ Task Force Report at 13.

³² Task Force Report at 14.

³³ Special Commission Report at 99.

³⁴ Special Commission Report at 99.

³⁵ Task Force Report at 11.

The NYSBA supports the Special Commission's recommendations that every Justice court have at least a part-time clerk and that clerks report to the court rather than another branch of government. We recommend that Justice Courts be encouraged to take advantage of the expertise and efficiencies of sharing clerks between courts, especially where Courts use part-time clerks or share facilities. We also recommend that funding be made available to localities that incur additional expense as a result of the requirement.

I. Funding and Resource Reforms

1. Summary of the Special Commission Recommendation

Recognizing that the current Justice Court Assistance Program ("JCAP") is insufficient, the Commission calls for state funding. State funding to Justice Courts would come from two sources. The first would be funding for operating expenses through the current JCAP.³⁶ The Commission recommends that the JCAP funding limit be increased \$30,000 to the greater of \$30,000 or 30% of a court's annual budget.³⁷ This funding would be tied to compliance with the minimum standards. The second funding source would be a new program called Aid to Localities. This funding would be for capital expenditures. The program would be administered by the executive branch in consultation with OCA.³⁸

2. NYSBA Task Force Recommendation

The Task Force made the following recommendations:

The Task Force recommends NYSBA continue to support the recommendations in the OCA Action Plan that call for upgrades and access to technology for the Justice Courts, as well as critically needed upgrades to the physical facilities housing these courts. The Task Force further recommends support for the OCA Action Plan calling for enhanced security of these court facilities.³⁹

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA supports the Special Commission's recommendation to increase the JCAP funding limit to the greater of \$30,000 or 30% of a court's annual budget and to tie JCAP funding to compliance with minimum standards. We recommend that the JCAP funding should be available for personnel and training necessary to implement the minimum standards.

We also support the Special Commission's recommendation to create a new program administered by the executive branch for Justice Court capital expenditures. The OCA should have an important advisory role in the new program to lend its vast expertise regarding court facilities.

J. Reforming Fine and Fee Collection

1. Summary of the Special Commission Recommendation

³⁶ Special Commission Report at 100.

³⁷ Special Commission Report at 101.

³⁸ Special Commission Report at 102.

³⁹ Task Force Report at 13.

The Special Commission recognizes that the current revenue distribution is an impediment to judicial independence.⁴⁰ Local judges can and do suffer pressure to decide cases in a way that drives revenue to the locality. For instance, the state gets revenue from speeding violations while the locality gets revenue from non-moving violations. Not surprisingly, judges are pressured to change charges so that money flows to the locality that elected the judge.

However, the Special Commission does not make specific recommendations with respect to reallocating fines because such recommendations would depend on the make-up of the post-consolidation Justice Court system. The Special Commission commends the issue to the Legislature and OCA for study and reformation, with the recommendation that any reform should be to strengthen the Justice Courts and eliminate inappropriate incentives to manipulate plea bargaining.⁴¹

2. NYSBA Task Force Recommendation

The Task Force made the following recommendations:

The Task Force recommends that NYSBA urge the State Comptroller to conduct additional comprehensive fiscal studies with respect to the allocation of revenues derived from Justice Courts to better understand how court revenues are used.⁴²

3. Recommended NYSBA Response to the Special Commission Report.

The NYSBA supports the Special Commission's recommendation that Justice Court fine and fee collection should be reformed in a way that strengthens Justice Courts and removes incentives to manipulate charges. We also recommend that the State Comptroller conduct comprehensive fiscal studies with respect to the allocation of revenues derived from Justice Courts to provide greater transparency on how court revenues are used.

K. Increasing and Rationalizing Judicial Salaries

1. Summary of the Special Commission Recommendation

While recognizing that "many town and village justices are badly under-compensated for their efforts", the Special Commission leaves to town and village boards to examine the issue and ensure that justices are compensated in an amount commensurate with the responsibilities and duties of the office.⁴³

2. NYSBA Task Force Recommendation

The Task Force made the following recommendation:

The Task Force recommends NYSBA urge OCA to develop a mechanism that enables municipalities to achieve a level of adequate compensation for justices.

⁴⁰ Special Commission Report at 102.

⁴¹ Special Commission Report at 103.

⁴² Task Force Report at 11.

⁴³ Special Commission Report at 103.

Furthermore, the Task Force urges NYSBA to recognize that there should be some level of support from the state to accomplish this increase in compensation.⁴⁴

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA recommends that OCA and the state government be involved in assuring that Justices are adequately compensated for their work. Beyond being fundamentally fair, adequate compensation will increase the pool of qualified candidates who can afford to serve as Justice. Leaving this issue to cash-strapped localities ensures low pay and preserves the inequalities among jurisdictions.

L. Expanding the Town and Village Court Resource Center

1. Summary of the Special Commission Recommendation

Recognizing the value of the Town and Village Justice Court Resource Center, especially to non-lawyer justices, the Special Commission recommends a specific funding line for the Center in the OCA budget, additional funding and personnel, and greater publicity of the resource.⁴⁵

2. NYSBA Task Force Recommendation

The Task Force made the following recommendation:

The Task Force recommends NYSBA continue to support the recommendations in the OCA Action Plan that call for upgrades and access to technology for the Justice Courts, as well as critically needed upgrades to the physical facilities housing these courts.⁴⁶ The Task Force further recommends support for the OCA Action Plan calling for enhanced security of these court facilities.

3. Recommended NYSBA Response to the Special Commission Report

The NYSBA supports the Special Commission's recommendation for a specific funding line, additional funding and personnel, and greater publicity. Indeed, if we are to have qualified Justices, it is critical that we provide them with all the support and training needed to perform their jobs.

IV. CONCLUSION

As then-President Madigan noted in her remarks to the Special Commission, Justice Courts are "the courts closest to the people." It is critical that they operate in a manner that promotes public confidence in the legal process. Although we recognize the good work of many lay Justices serving our Justice Courts, we believe that the best course for promoting public confidence is to require that Justices be members of the bar. Until that happens, we believe the recommendations contained in this Report will help ensure that justice is served to all the hundreds of thousands of people who appear in New York's Justice Courts.

⁴⁴ Task Force Report at 11.

⁴⁵ Special Commission Report at 103.

⁴⁶ Task Force Report at 13.

DISSENT IN PART (MINORITY REPORT) ON REPORT OF
SPECIAL COMMITTEE ON COURT STRUCTURE
AND JUDICIAL SELECTION ON *JUSTICE MOST LOCAL*, A
REPORT OF THE SPECIAL COMMISSION ON THE FUTURE
OF THE NEW YORK STATE COURTS

The Special Committee on Court Structure and Judicial Selection (the "Committee") issued a report (the "Committee report") approved December 16, 2008 on *Justice Most Local: The Future of Town and Village Courts in New York State* by the Special Commission on the Future of New York State Courts (the "Special Commission report" or "*Justice Most Local*"). The Special Commission report followed a long study, and Chief Judge Kaye has accepted the Special Commission report.¹

Nonetheless, the Committee objects to the Special Commission report in part. While not agreeing with all the language in the Committee report, I specifically dissent from the Committee report only to the extent of the Committee's rejection of the opt-out procedure recommended by the Special Commission. In brief, that procedure would enable a defendant criminally charged in a Town and Village Court to request an attorney-judge as opposed to a non-attorney judge to hear his or her criminal case.

This procedure would, among other things, spare us the unfortunate circumstance of having a non-attorney judge sending someone to jail for a year or more, let alone trying a criminal case. It is one considered response to the problem of criminal defendants being deprived of due process by non-attorney justice; the Committee report does not suggest another in its place to deal with the immediate need of criminal defendants for such relief.

The Committee report objects to the opt-out procedure on the grounds that it may lead to judge-shopping, that it will lead to unspecified procedural delays, that the time to exercise the choice to opt-out is too early, and that other cases besides criminal cases would merit the opt-out procedure (if one were in place).

Although the opt-out procedure may result in rejecting one type of judge for another, this is not the type of judge-shopping commonly used in a pejorative sense. Rather, it involves opting for an attorney-judge as opposed to a non-attorney judge, not selecting among attorney judges. Judge-shopping is typically applied to selecting one attorney-judge over another attorney-judge in the same court – *e.g.*, seeking to be heard by one federal judge over another in the hope that one may give more lenient sentences. There is nothing pejorative – systemically or individually -- about wanting one's criminal case heard before an attorney-judge.² Indeed, rather than this being called judge-shopping, it

¹ New York State Unified Court System, Press Release, Special Commission Charged with Scrutinizing New York's Justice Court System Releases Landmark Report, dated September 17, 2008, available at http://www.courts.state.ny.us/press/pr2008_6.shtml

² The use of the phrase "judge-shopping") for the process of selecting between an attorney-judge and a non-attorney judge does not come up in other contexts for good

should be regarded as a “flight to quality.” There is nothing unseemly about this process, any more than in a situation in which a lawyer seeks to have his commercial case heard before a commercial division judge, rather than a non-specialized judge.

The Committee report refers to “procedural delays” if the opt-out procedure is in place. But it is unspecific on what the delays will be, whether the delays will matter in any real sense, and whether any such delays should trump the defendant’s rights to due process. The problems of non-attorney judges handling criminal cases have been well-documented in the Special Commission report: namely, the Special Commission fears that with non-attorney judges, rights may well be lost.³ Under those circumstances, the generic reference to unspecified delays falls short as a reason for rejecting the proposed remedy specified by the Special Commission report.

The Committee report suggests that requiring opt-out at the arraignment stage is too early for the defendants to make an informed decision on whether or not to opt-out. To the contrary, this would not suggest removing the opt-out procedure, only allowing it to be exercised later.

The Committee report also notes that “the right of criminal defendants to transfer a case away from a non-lawyer Justice ignores the need for due process in other contexts,”

reason. Judges in every other court in the State of New York are attorneys so one cannot have that sort of “judge-shopping” in other courts.

³ Thus *Justice Most Local* states:

a defendant facing the possibility of a criminal conviction should be afforded the option to have his or her case heard by a judge who is an attorney. We believe this “opt-out” approach is a logical extension of rights already recognized under the law, and that it ensures that due process rights are properly safeguarded. We believe this measure is necessary because we have seen considerable evidence to suggest that many non-attorney justices face difficulties handling complex motions and misdemeanor jury trials. As described in Section Four, time and again in our discussions with non-attorney justices (particularly those relatively new to the bench), we heard expressions of frustration and concern with the amount of knowledge and experience that is required to handle motions and jury trials. We have heard reports of justices leaving the bench repeatedly to call the Resource Center for guidance in the middle of a proceeding; justices who described “panic” when confronted with the prospect of a jury trial (which they seek to avoid); and prosecutors and public defenders who will routinely agree to plea agreements for the express purpose of avoiding the possibility of proceeding with a trial before a non-attorney justice. In addition, as noted above, we have encountered a number of non-attorney justices who are unsophisticated and may lack the sensitivity and training necessary to handle criminal proceedings.

Id. at 93.

such as in eviction cases. See Committee report p. 11. However, that does not militate against the opt-out procedure as set forth by the Special Commission regarding criminal cases, but rather suggests expanding it to other cases.

The Committee report alludes to the possibility that that somehow allowing the opt-out procedure will make the town and village justices look bad or inferior to attorney justices in the eyes of the public. See subcommittee report, p. 11 (referring to the NYSBA task force consideration to the effect that “an opt-out procedure would...send a message that non-lawyer justices were less competent.”) To begin with, the public record is replete with such reports to the same effect already, regardless of the opt-out procedure.⁴

Also, the full Committee did not have a record of those task force considerations or the points raised for and against any position, and they do not appear in the Task Force’s report.⁵ A State bar report should not be based on such unavailable “information.”

⁴ See, e.g., William Glaberson, *Broken Bench: In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006; William Glaberson, *Broken Bench: Small-Town Justice, With Trial and Error*, N.Y. TIMES, Sept. 26, 2006; and William Glaberson, *Broken Bench: How a Reviled Court System Has Outlasted Critics*, N.Y. TIMES, Sept. 27, 2006.

See also *People v. Charles F.*, 60 N.Y.2d 478, 470 N.Y.S.2d 342, 344-5 (1983) (Kaye, dissenting), *cert. denied sub nom. Charles F. v. New York*, 467 U.S. 1216 (1984). where Judge Kaye noted:

Appellant, facing the possible deprivation of his liberty, had the right to trial before a law-trained Judge [citation omitted]. 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 insure that motions are disposed of in accordance with the law, that evidentiary objections are properly ruled on, and that the jury is correctly instructed....Because of the technical knowledge required to insure that defendants facing imprisonment are afforded a full measure of the rights provided to them, 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.”

Id. at 470 N.Y.S.2d at 344-5 (Kaye, dissenting, quoting from *Estes v. Texas*, 381 U.S. 532 (1965)). (citation omitted.)

⁵ See Report of the New York State Bar Association Task Force on Town and Village Justice Courts, January 2008.

Furthermore, the State Bar Task Force evidently did not have access to all the records of the authors of *Justice Most Local*, let alone the benefit of that report's reasoning; it issued its report about 12 months before the publication of *Justice Most Local*, and it is unfair to assume that the Task Force, if reconvened, would necessarily reject the opt-out procedure in light of the new information available from the Special Commission, and if so, on what basis.

In addition, these "appearances" of inferiority are the consequence of the situation in which non-attorneys are permitted to do the work of judging which should be done by attorneys. If non-attorney justices are made to appear to be lesser judges, this is not the consequence of the opt-out procedure but of the fact of their limited education. To say otherwise is to confuse the condition with the remedy. Moreover, even without an opt-out provision, few would realistically believe that the non-attorney justices are as qualified as attorney justices to handle criminal cases and potentially sentence someone to a year or more in jail.⁶

Accordingly, and in the meantime, the State Bar should endorse the opt-out procedure set forth in the Special Commission report as a first step forward. In addition, or alternatively, consideration should be given to expanding it to include cases other than criminal cases and varying the time at which it may be exercised; and further consideration should be given to the opt-in procedure set forth in the Special Commission concurrence, which provides further safeguards.⁷

Norman L. Greene
Member, New York State Bar Association,
Special Committee on Court Structure and Judicial Selection
New York, N.Y., December 23, 2008

⁷ This dissent does not address the arguments of the concurrence in *Justice Most Local* by Eve Burton in favor of an "opt-in" rather than an "opt-out" procedure. However, that plan, which would require assignment to an attorney-justice unless an affirmative decision is made by the defendant to have a non-attorney justice, also merits State Bar consideration.