

# Indigent Defense in NY-Part III OCA Offers an Action Plan

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*(This is the third of a series of articles on the condition of New York's system for providing counsel to indigent defendants.)*

Constrained by the Constitutional, legislative, administrative and budgetary imperatives which make OCA's efforts to govern New York's Justice Courts so overwhelming, Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman have announced a bold and ambitious Action Plan which they call "A Blueprint for Reform." The Plan was prepared with the help of an Advisory Group composed of several Town and Village Justices, representatives of the OCA, the President of the NY State Magistrates Court Clerks Association, and others.

The Action Plan is divided into four sections, each of which describes an area in which "OCA can and will support Justice Court operations." The four areas are:

- Justice Court Operations and Administration;
- Auditing and Financial Control;
- Education and Training; and
- Facility Security and Public Protection.

Because our focus in this series of articles has been on the current state of indigent defense, we will limit ourselves here to those sections of the Action Plan which are likely to have the greatest impact on the improvement of the indigent defense system.

New York's Justice Courts have survived since New York's early colonial history and predate its first Constitution in 1777. They total 1,277 separate town and village courts requiring the services of 2,200 judges. Their jurisdiction is both civil and criminal. In criminal matters, their jurisdiction is as broad as the jurisdiction of the Criminal Court of New York City, the City Courts in other cities, and the District Courts of Nassau and Suffolk Counties. They have the power to arraign all crimes (including felonies) committed within their jurisdiction, and to adjudicate misdemeanors, traffic violations and other infractions. Together, they handle two million cases each year.

As they relate to indigent defendants, the Justice Courts are empowered to: commit defendants to local and county jails; coordinate prisoner transport with local police officials; assign defense counsel as provided in each county's representation plan; report the disposition of cases to such agencies as the DMV, the Comptroller's Office, and the Division of Criminal Justice Services; and manage the funds resulting from the fines, fees and surcharges they collect.

## Problems Identified by Action Plan

The OCA's Action Plan identified seven major problems facing the Justice Courts:

1. The Justice Courts are the only courts which permit non-lawyers to act as judges. This is partly because many upstate areas have a very small pool of lawyers, many of whom are unwilling to sit as judges, and because the areas are so large as to make travel by lawyers to the courthouse difficult and time-consuming. Seventy-two percent of all Justice Court judges are non-lawyers.
2. The Justice Courts are not required to be "courts of record." In many town and village courts there is no verbatim transcript of the proceedings. Instead, the judges keep their own handwritten notes. These require reconstruction hearings when a formal record becomes necessary. When an appeal is involved, the reconstructed record is often inadequate and raises "serious concerns about Justice Court enforcement of litigant rights and compliance with other constitutional, statutory and regulatory directives."
3. The operating costs of each Justice Court are paid by the Court's locality, not by the State. This makes for wide disparities in resources among the courts and, in some cases, results in severe under-funding. To meet some of the courts' needs, the OCA has established the Justice Court Assistance Program (JCAP). Backed by the state legislature, this Program enables the OCA to provide computers and other technical equipment to the Justice Courts to help them report case dispositions, make financial reports to the State Comptroller's Office, and obtain case histories.
4. Auditing and financial controls are uncoordinated and left essentially to the local authorities instead of the State. The courts' financial records are subject to audit by the Comptroller's Office, but, as a practical matter, they are rarely audited. The local authorities do not impose best-practice controls, such as the segregation of collections from the management of funds. Further, many Justice Courts operate only part-time and their staffs are not trained in "financial control protocols."
5. The dictates of local funding and control place the Justice Courts generally outside the OCA's "day-to-day operational oversight." Each locality fixes its own hours, personnel practices, security measures and facilities, and general operations, all without guidance or consultation with the OCA. As a result, each Court is its own administrative entity, bears little resemblance to any other Court, and provides litigants with an experience which may or may not be salutary.
6. Although the legislature has ordered the Justice Courts to report case dispositions to various agencies (DMV, the State Comptroller's Office), there is no requirement that they report their case-management records to the OCA. As a result, the OCA cannot determine how many cases they handle, how long it takes them to dispose of a case, or what benchmarks to impose upon them. Instead, each Justice Court meets its reporting requirements as it wishes, with the result that the Courts apply "varying degrees of sophistication, speed and reliability."
7. The Justice Courts regularly hold proceedings during evenings and weekends and are often required to arraign defendants, and release or remand them, when other courts are not in session.

The judges have emergency powers to issue temporary orders until defendants are taken to State-paid courts. This imposes upon these judges the need to make themselves available to local police authorities at odd hours, a burden that is not generally required of State-paid judges.

### **OCA's Suggestions for Indigent Defense**

The OCA's Action Plan contains several measures designed specifically to improve the indigent defense system. In addition to such general measures as providing the Justice Courts with computer and other hardware (desktops, printers, Internet access, credit card and fax machines, courtroom speaker phone, etc), case management software, and access to the OCA's electronic mail system, the OCA Plan proposes to make the following changes:

- OCA will buy and distribute modern digital recording devices to the Justice Courts. These will enable the Courts to maintain a verbatim record of all proceedings. The OCA will train judges and staff in the use and maintenance of the recording devices.
- Once a Court is provided with a recorder and its judges are trained, the OCA will require that all proceedings be recorded. This will allow the Appellate Courts to conduct meaningful review of a proceeding.
- OCA will begin preparing a comprehensive court manual for all Justice Courts. These will include a complete set of forms and record-keeping protocols. In collaboration with the Magistrates Association, OCA will create a task force to draft and update the court manual.
- Because New York has a unique concentration of residents who are not fluent in English, the Justice Courts - in the same way as the State-paid courts - are "challenged to meet legal responsibilities to provide effective interpreters." Because, also, the number and diversity of other languages is so great, the Justice Courts cannot justify hiring full-time interpreters in any one language. The result is that interpreters are hired on a per diem basis. This makes it difficult to find interpreters, especially in the less common languages. In turn, this results in special disadvantage to indigent defendants, "thus raising vexing questions about the fairness of ...proceedings." To protect the constitutional rights of Justice Court litigants, OCA will undertake four new initiatives.
- OCA will give the Justice Courts access to its own register of qualified interpreters cleared by OCA to interpret in one or more of over 30 languages. This will put the courts on a par with State-paid courts.
- To facilitate adequate interpretation in short-term proceedings such as arraignments, OCA will encourage access to interpreters via teleconference or video conference.
- OCA's Justice Court manual will require judges to certify either that every criminal defendant is fluent in English or "that the judge supplied an OCA-qualified interpreter to provide translation services in the defendant's language."
- An outdated state statute limits the pay of per diem interpreters in the Justice Courts to \$25 per

day, which must be paid by the county. This results in a "nobody wins, and only the defendant loses" three-sided tussle among the interpreters, the judges, and the county, which has to break the law to provide payment at the rate the interpreter will accept. To remedy this situation, OCA will first survey the demand for court interpreters and then compute the overall cost of meeting the demand. Armed with this data, OCA will propose new legislation to amend the outdated statute.

In the section entitled "Indigent Defense," the Action Plan cited the recommendations of the Commission on the Future of Indigent Defense Services (see NYPRR, October & November, 2006). Though "the weight" of the Commission's recommendations asked the state legislature "to restructure the system and reallocate funding," several recommendations were directed at OCA. Specifically, these asked OCA "to identify eligible defendants, connect them with qualified service providers, and generally structure court operations to make provision of defense services as cost-efficient as possible."

Because the majority of Justice Court judges are not lawyers, they need to be trained in such matters as when the right to counsel attaches; when and how to conduct indigency determinations; when and how to authorize retention and payment of defense experts; "how to avoid impeding the independence of the defense function;" and "myriad other complexities of ensuring the constitutional rights of indigent defendants." Many judges are ignorant of the 2005 rule instructing them "with precision, how Justice Courts must proceed in cases where a defendant is unrepresented."

In an effort to improve the performance of the judges, the Action Plan provides for the following three steps:

- Each justice will be required to submit a list of every case in which the justice issued a securing order
- Remanding an unrepresented defendant or the defendant was unable to post bail.
- OCA will institute OCA-certified training in indigent defense for all judges as part of its biennial continuing judicial education requirements.
- In recognition of the problems created by conflicting court schedules, the Chief Administrative Judge will exercise his right to eliminate scheduling conflicts. OCA will canvass the hours of the Justice Courts and work with all affected parties to resolve scheduling conflicts by voluntary agreement.

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