

Opinion 20-99

June 18, 2020

Digest: (1) A town or village justice court must not “collaborate” or “work with” the district attorney’s office or the local town/village prosecutor.
(2) The court may nonetheless invite defense bar representatives and the appropriate prosecutorial office to discuss procedures for handling mail-in pleas on traffic infractions.
(3) The court must not promote or favor mail-in pleas and/or plea bargaining over a defendant motorist’s other options, even if this is intended to mitigate the effects of the COVID-19 outbreak. The court may, however, distribute a court-prepared form (such as UCS DCJA Form 1.0) impartially listing all options for a defendant motorist and include a link to the District Attorney’s website and/or email address as a convenience to defendants.

Rules: 22 NYCRR 100.2; 100.2(A); 100.2(C); 100.3(B)(6); Opinions 19-163; 18-101; 18-73; 17-34; 16-09; 13-124/13-125/13-128/13-129; 13-33; 12-68; 09-118; 99-82.

Opinion:

The inquiring judge asks if, during the current public health crisis, he/she may “encourage[]” judges under his/her supervision “to collaborate with prosecutors to develop procedures to process pleas on paper and to establish a mail-in plea bargaining process for defendants charged with VTL infractions.” If permissible, the judge would direct town and village justices under his/her supervision to “work with either [their] ADA or local town/village prosecutor on procedures” that would “allow a defendant charged with a VTL infraction to elect to proceed without a personal appearance in order to mitigate the effects of the COVID-19 outbreak, and to control in-person traffic within town and village courts.” The judge would further advise the justices: “If a plea-bargain is reached between the prosecutor and VTL defendant, the court should review same and promptly inform the parties if it is approved or denied. If approved, the court may impose sentencing. If denied, the parties should be advised of same so that further negotiations may take place. If ultimately no resolution is reached, the court may schedule a bench trial.”¹

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always promote public confidence in the judiciary’s integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must not convey, or permit others to convey, the impression that others are specially positioned to influence him/her (*see*

22 NYCRR 100.2[C]) and must avoid improper *ex parte* communications (see 22 NYCRR 100.3[B][6]).

As noted in Opinion 19-163 (citations omitted):

A judge must act to promote public confidence in the judiciary's integrity and impartiality and to preserve the judiciary's independence. Thus, judges must "maintain their independence from prosecutors and not participate or assist in what are essentially the prosecutor's duties."

Moreover, we have recognized the danger that a judge's impartiality will appear to be compromised when the circumstances of a proposed private meeting with the judge suggest that the meeting is essentially an attempt to promote a particular agenda in connection with the judge's judicial decision-making in certain matters that will come before the judge or otherwise to impermissibly influence the judge's future judicial conduct (see Opinion 13-124/13-125/13-128/13-129). Thus, when a public defender proposed to meet privately with judges to discuss implementation of the counsel-at-arraignment program, we advised (*id.* [citations omitted]):

To the extent that the public defender wishes to work with individual judges to develop policies, procedures or protocols to guide the court with respect to the counsel-at-arraignment program, the Committee believes that "working with representatives of only one side of an issue [to do so] could erode the public's confidence in the impartiality and independence of the judiciary." Moreover, to the extent that there is any *identifiable* pending or impending arraignment before a judge at the time of a private meeting with the public defender, there is also a risk such a meeting would involve, or appear to involve, impermissible *ex parte* communications.

Here too, with respect to apparently procedural matters, such as how the court will handle mail pleas on traffic infractions during the current public health crisis, we believe all stakeholders should be invited to participate. Accordingly, we believe the inquiring judge should not encourage local justices under his/her direction or supervision to "collaborate" or "work with" the district attorney's office or the local town/village prosecutor. The court may nonetheless invite defense bar representatives and the appropriate prosecutorial office to discuss procedures for handling mail-in pleas on traffic infractions.

As described in Opinion 18-101 (citations omitted):

Judges must maintain their independence from prosecutors and not participate or assist in “what is essentially the work of the prosecutor’s office.” Thus, a judge or court clerk “may not simply distribute the prosecutor’s printed materials to defendants” or otherwise act as the prosecution’s “agent or intermediary.” For example, a court may not directly implement the DA’s programs or procedures. Nor may the court simply inform defendants of the prosecuting agency’s procedures for seeking a plea reduction without taking steps to prevent any “appearance of partiality or ... indication that the court is predisposed towards a defendant’s guilt.”

Thus, for example, we have advised the court must not distribute an informational packet the District Attorney has prepared to inform defendants how they may request a reduction of an alleged Vehicle and Traffic Law violation pending in the judge’s court (see Opinion 12-68) and must not simply advise a defendant motorist of a prosecutorial agency’s procedures for seeking a plea reduction on traffic infractions (see Opinion 13-33). Likewise, justice court websites may not include extensive information promoting a DA’s traffic diversion program, where the proposed language explains the program’s goals and purported benefits to participants; provides detailed application instructions; and states that the program is intended to improve prosecutorial efficiency (see Opinion 18-101).

However, the court may distribute a form listing *all* of the defendant’s options, including the right to plead not guilty and proceed to trial (see *id.*; Opinion 99-82). We note that DCJA Form 1.0 (attached to this opinion as an appendix) has been developed and vetted for this very purpose.

When communicating with a defendant motorist who has entered a guilty plea by mail to a Vehicle & Traffic Law charge, “[a] judge should not be in the position of advocating a negotiated plea or in any way indicating a predisposition in the matter” (Opinion 17-34). We noted in Opinion 16-09 that the inquiring judge’s proposed letter “appears to compromise the impartiality of the judiciary because, rather than advising a defendant of *all* options available to him/her..., it rejects the option the defendant has already chosen and demonstrates a bias against accepting mail-in pleas.” These risks, too, are minimized by use of the standard form advising the defendant motorist of all options available to him/her.

We have recognized that it is ethically permissible for a town justice to add the District Attorney’s website address to the Office of Court Administration-approved information form (see Appendix) for defendants charged with Vehicle and Traffic Law violations (see Opinion 09-118 [noting the judge “should obtain approval from his/her administrative judge” before doing so]). Moreover, a justice court website may include a link to the DA’s website as a convenience to defendant

motorists (*see* Opinion 18-101). Here, too, particularly in light of current public health concerns, we can again see no ethical impropriety in supplementing the current UCS DCJA Form 1.0 with the email address and/or a link to the website of the appropriate prosecutorial office.

As before, the Committee cannot determine whether judges have the legal authority to introduce new steps or procedures for defendants who plead guilty by mail under Vehicle and Traffic Law 1805, as this presents a strictly legal question (*see* Opinion 18-73).

¹ The Committee notes that the inquiring judge's question came in before certain clarifications were issued; we do not comment on those clarifications, which are not before us.

THIS FORM IS FOR INFORMATIONAL PURPOSES ONLY

STATE OF NEW YORK UNIFIED COURT SYSTEM

TOWN/VILLAGE COURT
TOWN/VILLAGE OF _____
(address)

To: Individuals Charged with Traffic Infractions Pending in the _____ Town/Village Court

This court has received an accusatory instrument alleging that you have committed an offense. You are presumed innocent until proven guilty and you have the right to retain an attorney to represent you now, or at any stage in these proceedings.

You have various procedural options in the course of bringing this matter to a just disposition. You may choose to proceed in any of the following manners, or any other legally authorized manner. You may want to consult an attorney for guidance or representation before determining which course of action you will pursue. The court may not provide you with a recommendation as to how you should proceed, or as to which of these or any other options you should choose.

YOU MAY:

Plead Not Guilty.

By pleading "Not Guilty" you exercise your right to a public trial at which the People of the State of New York, represented by the prosecution, must prove, beyond a reasonable doubt, that you have committed the offense alleged in the accusatory instrument. At the trial you will have the right to hear, see and challenge the evidence submitted to prove your guilt, including, confronting, by cross-examination, the Police Officer, Peace Officer or other witness or witnesses who testify against you. You have the right to have witnesses testify on your behalf and you may, but you are not required to, testify on your own behalf. The court will determine, after hearing all the evidence submitted at the trial, whether or not the People have proven guilt beyond a reasonable doubt, and will render an appropriate verdict.

Plead Guilty as Charged.

By pleading "Guilty" you waive your right to a trial at which the People of the State of New York, represented by the prosecution, must prove beyond a reasonable doubt that you committed the offense alleged in the accusatory instrument. A Plea of Guilty will subject you to sentencing, by the judge presiding, to any legally authorized sentence. You may withdraw, with the court's permission, your plea of guilty at any time prior to sentencing and exercise your right to a trial.

Communicate with the Appropriate Prosecutorial Office Concerning an Alternative

Disposition.

You may contact the Prosecutor or other official who is responsible for proving the charge or charges against you and negotiate an agreement to plead guilty to a legally authorized alternate offense, including a lesser included offense, or a less severe offense or offenses. Any proposed agreement is subject to approval by the court. Upon a plea of guilty to the agreed-upon offense, you will be subject to sentencing, by the judge presiding, to any sentence legally authorized to be imposed for the offense to which you plead guilty.

The prosecutorial office responsible to prove the charge or charges against you alleged in the accusatory instrument is the _____ (District Attorney or Assistant District Attorney, Town Attorney, Village Attorney, etc.). The address and telephone number for that office is:

Prosecutor
Address
City, New York (zip code)
Telephone Number

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