

## Opinion 16-101

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June 16, 2016

Digest: The effective date of Opinion 15-197(B) is September 1, 2016.

Rules: Opinion 15-197(B); 10-111; 09-173.

Opinion:

In Opinion 15-197(B), the Committee amended Opinion 09-173 by striking the final paragraph and the last twelve words of the digest, to reflect that a justice court should not routinely notify witnesses for the prosecution, even if the court is willing to do the same for defendants and defense attorneys on request.<sup>1</sup> The Committee noted (15-197[B] [citation omitted]):

If the District Attorney's office needs more funds to track cases and notify witnesses in local justice courts, that problem must be addressed through the regular legislative or political process. Absent a legal requirement to do so, the town and village courts must not compensate for any apparent deficiencies in the budgeting process by routinely taking on the non-judicial functions of notifying the District Attorney's witnesses.

In the present inquiry, a town or village justice asks about the effective date of Opinion 15-197(B).

On consideration of all relevant facts and circumstances, the Committee believes Opinion 15-197(B) should go into effect on September 1, 2016. Accordingly, starting on September 1, 2016, a town or village justice court must not assist the District Attorney's office by notifying the District Attorney's witnesses, complainants and officers of their upcoming court appearances at hearings and trials.

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<sup>1</sup> Of course, where the complainant police officer or trooper serves as the prosecution's sole representative, the court may "provide the trial schedule notice to that trooper/officer in his/her prosecutorial capacity" (Opinion 10-111).

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## Opinion 15-197(B)

May 5, 2016

**Digest:** (1) A town or village justice may not assist the District Attorney by contacting each prosecution witness, complainant and police officer concerning their upcoming court appearances. (2) Opinion 09-173 is hereby amended so that justice courts should not notify such witnesses for the District Attorney, even if the court is willing to do the same for defendants and defense attorneys on request.

**Rules:** CPLR 2301; Judiciary Law § 212(2)(l); 22 NYCRR 100.0(S); 100.1; 100.2(A); 100.3(B)(6); 22 NYCRR 101.1; Opinions 15-197(A); 13-183; 10-111; 09-205; 09-173; 02-49; 96-150; *People v Antommarchi*, 80 NY2d 247 (1992).

### **Opinion:**

The local District Attorney routinely asks the inquiring town or village justice to “contact witnesses, complainants and officers” for court appearances (e.g. hearings and trials). On taking office, the judge asked court administrators if the court may comply and received conflicting responses. The judge explains the court’s prior practice to notify witnesses on request has “caused the witnesses, victims and officers to” contact the court with “questions about pending cases.” As the court’s staff works part-time, and thus cannot screen or return all such calls, the judge is particularly concerned about risking exposure to *ex parte* communications. Also, while this judge is currently unaware of any such request by a defense attorney for the court to contact witnesses about court appearances, the judge notes that if the court were to undertake to notify all defense and prosecution witnesses, this would only increase the volume of phone calls to the court, and the substantial risk of *ex parte* communications. Thus, he/she asks if it is proper for the court to contact witnesses, complainants, and law enforcement officers on behalf of the District Attorney’s office.

A judge must act to promote public confidence in the judiciary’s integrity and impartiality (22 NYCRR 100.2[A]) and to preserve its independence (22 NYCRR 100.1; *see also* 22 NYCRR 100.0[S] [“An ‘independent’ judiciary is one free of outside influences or control”]). In particular, the Committee has repeatedly advised judges to maintain their independence from prosecutors and not participate or assist in what is essentially a prosecutor’s responsibility (*see e.g.* Opinion 13-183).

### **Notification of Parties and Their Counsel**

As for this inquiry, the Committee first notes that all those legally entitled to notice and an opportunity to be heard in a case must be notified about upcoming court appearances according to law (*see* 22 NYCRR 100.3[B][6] [“A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”]). Questions about who is entitled to notice, and how, when and by whom they must be notified, are primarily legal questions the Committee cannot address (*see generally* Judiciary Law § 212[2][l]; 22 NYCRR 101.1).

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The Committee assumes a court will typically provide notice to litigants through their counsel where feasible, but other permutations are possible. For example, in Opinion 02-49, a town justice asked if the court may “notify both the defendant and the defendant’s attorney of upcoming appearance dates in the court’s criminal part,” based on “a concern when warrants are issued ordering the arrest of a defendant or when bail is revoked and only the defendant’s attorney, and not the defendant him/herself has received written notice of the date” (Opinion 02-49). The Committee concluded “it would not be improper for a judge to initiate a letter to a represented defendant and the defendant’s attorney for the sole purpose of notifying both the attorney and defendant of an upcoming appearance date” (*id.*). Likewise, Opinion 10-111 recognizes that, in some local courts, the complainant police officer or trooper may also serve as the prosecution’s sole representative. In that case, of necessity, “the court may provide the trial schedule notice to that trooper/officer in his/her prosecutorial capacity” (Opinion 10-111 [noting that otherwise “there would, as a practical matter,” be no notice to the prosecution]).

### Notification of Non-Party Witnesses

The Committee is mindful that “it is the prosecution that must introduce evidence sufficient to persuade the factfinder, beyond a reasonable doubt, of the defendant’s guilt” (*People v Antommarchi*, 80 NY2d 247 [1992]).

Ordinarily, each party is responsible to secure the participation of any desired witnesses and notifying them of upcoming court appearances (*cf.* Opinions 09-173 [“if the prosecutor in a traffic trial requires the complainant officer’s testimony, it is that prosecutor’s responsibility to secure the officer’s attendance at the appropriate time and place”]; 96-150 [“It is the function of the prosecutor to prepare a case for trial, which includes arranging for the appearance of witnesses who would be testifying for the prosecution.”]). Although a party may, under legally appropriate circumstances, invoke the power of the court to subpoena witnesses or documents (*see generally* CPLR 2301 *et seq.*), it is not a court’s traditional role to provide notice to a party’s witnesses to appear in court on a particular date, or to bring with them certain items the party wishes to admit into evidence (*cf.* Opinion 15-197[A]).

Thus, the Committee advised in Opinion 96-150 that a judge may not undertake the role of notifying all complainant police officers, in their capacity as potential prosecution witnesses, of the dates of trials in which the assistant district attorney may call them to testify. Of particular note, the proposal was for the judge to “notify each complainant police officer (via computer email message) as well as the Assistant District Attorney *and the defendant* of the date for trial of a vehicle and traffic offense” (Opinion 96-150 [emphasis added]). Even though the requested notice would be given to both sides simultaneously (*i.e.* prosecutor and defendant), the Committee concluded the judge “would be providing an additional service to the prosecution that is not available to the defense,” by automatically, and as a matter of routine, “notifying potential witnesses for the prosecution, in every instance, whenever a vehicle and traffic trial date has been set” (*id.*). This “additional service would tend to derogate from the independence of the judiciary and could impair public confidence in its integrity and impartiality” (*id.*).

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Over a decade later, when another town justice asked whether he/she could “notify each complainant police officer (via e-mail) as well as the prosecuting assistant district attorney and the defendant of the trial date for a Vehicle and Traffic Law offense” (Opinion 09-173), the Committee again concluded “it would be improper for the inquiring judge to notify all complainant police officers who are potential prosecution witnesses of the dates when they must appear for trial” (*id.*). The Committee’s reasoning was similar to that of Opinion 96-150, in that if the judge undertakes to fulfill the assistant district attorney’s responsibility of securing a complainant police officer’s attendance as a witness, “he/she would act in derogation of his/her responsibility to uphold the integrity, impartiality and independence of the judiciary and impair public confidence in those essential qualities” (Opinion 09-173 [citations omitted]).

On reconsideration in 2011, however, the Committee revised Opinion 09-173 by adding the following exception as an accommodation to certain possible local conditions in some courts:

Nevertheless, the judge may accede to the prosecutor’s request if the judge offers to do the same for the defense, upon request, and takes effective steps to notify defendants and defense attorneys that they may make such a request. Therefore, the judge must ensure that notice advising defendants and defense attorneys that the court will send trial notices to their witnesses... distributed to reach the widest audience possible. For example, the court can arrange for notice to be posted on the court’s website (if any) and/or the town’s website, as well as at the courthouse, the town and/or village halls and the local public library. In addition, the judge may periodically publish a notice in the local newspaper, and he/she should notify the local bar association.

The present inquiry suggests there may be practical problems for judges who attempt to use the exception carved out in Opinion 09-173. For example, it may very well burden limited court resources to take the requisite “*effective* steps to notify defendants and defense attorneys” that they, too, may ask the court to send trial notices to their witnesses (Opinion 09-173 [emphasis added]). In the inquiring judge’s court, the situation is further complicated by the prosecutor’s request that the court go beyond “merely” advising the prosecution’s prospective witnesses of upcoming appearance dates, and actually instruct prospective witnesses that the prosecutor would like to meet with them, or that the prosecutor would like them to bring certain evidence when they appear. Finally, the inquiring judge advises that prior attempts to provide the requested notices resulted in numerous telephone calls from witnesses, victims and officers, increasing the risk of inadvertent *ex parte* communications.

Consequently, the Committee now believes its 2011 amendment to Opinion 09-173, though well-intentioned, puts the local courts in an untenable situation. No matter how widely the local courts attempt to make known their willingness to undertake witness-notification functions for both sides, it appears that only the prosecution is actually in a position to employ this “service.” While it may not be problematic for a court to notify all witnesses in a particular case on an occasion when specific circumstances may warrant it, this inquiry apparently reflects an instance where the prosecutor has come to “expect” the court to so function.

If the District Attorney's office needs more funds to track cases and notify witnesses in local justice courts, that problem must be addressed through the regular legislative or political process (*cf.* Opinion 09-205 [where village justice believes "certain operational charges allocated to the justice court line in the court's budget ... are not proper court expenditures," the justice should advise the village board and his/her administrative judge of these concerns]). Absent a legal requirement to do so, the town and village courts must not compensate for any apparent deficiencies in the budgeting process by routinely taking on the non-judicial functions of notifying the District Attorney's witnesses.

The Committee hereby amends Opinion 09-173 by striking the final paragraph of the opinion and striking the last twelve words of the digest, to reflect that a justice court should not routinely notify witnesses for the prosecution, even if the court is willing to do the same for defendants and defense attorneys on request.<sup>1</sup>

On these facts, the town justice may not assist the District Attorney by contacting "witnesses, complainants and officers" of their upcoming court appearances (*e.g.* hearings and trials).

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<sup>1</sup>Of course, where the complainant police officer or trooper serves as the prosecution's sole representative, the court may still be able "provide the trial schedule notice to that trooper/officer in his/her prosecutorial capacity" (Opinion 10-111).