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The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

The opinions expressed herein are those of the author(s) only and do not reflect the official position of the Committee on Courts of Appellate Jurisdiction or the New York State Bar Association.

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Welcome

Our committee is dynamic, pursuing appeals across New York State and beyond. To meet the many needs of our active, far-flung membership, we commence our committee's newsletter, *Leaveworthy*. *Leaveworthy* can serve many needs: it will enable our members to exchange ideas and experiences; we will be able to share developments in law and technology; and the newsletter itself will serve as a platform for our committee to express its ideas to the greater New York bar.

The success of *Leaveworthy* will depend largely on you, the reader. Your contributions of cases, articles, interesting events and the like will all be considered for publication in future issues. Submissions can be sent to appcourts@nysba.org.

Draw near and ye shall be heard.

— The Editorial Staff

Status Report on Criminal Leave Applications to the Court of Appeals

On July 9, 2009 Chief Judge Jonathan Lippman announced an initiative to review the process by which applications for leave to appeal in criminal cases are determined. The Chief Judge said in April he wanted to review why criminal leave grants, typically running at three percent or more in the 1980s and 1990s, have fallen to roughly half that amount. He designated Court of Appeals Judge Robert Smith to spearhead the effort to address questions about the leave process, including the criteria weighed by the Court and the limits on its jurisdiction. Judge Smith will act as a liaison to receive input from the public and the bar and will share with his Court colleagues the comments and the concerns he receives. See <http://www.courts.state.ny.us/ctapps/crt.htm>.

In a New York Law Journal article on April 22, 2009 entitled "*Chief Judge to Review Why Court Accepts Few Criminal Appeals*," Chief Judge Lippman expressed concern that the Court accepts for review only one or two of every hundred criminal convictions in the State. He said he became more sensitive to the need for the courts to project the image of even-handedness in dealing with all criminal defendants, including indigent ones, as Presiding Justice of the Appellate Division, First Department, from 2007-2009. The article reported that defense attorneys applauded the Chief Judge for wanting to review leave patterns and procedures.

The procedure for making and deciding criminal leave applications in New York is largely governed by CPL 460.20. Only one criminal leave application may be made in criminal cases, either in the Appellate Division or in the Court of Appeals. A party filing a criminal leave application in the Court of Appeals addresses it to the Chief Judge, who together with the Clerk of the Court designates a single Judge to review and decide the application, apparently on a regular rotation. The Court granted only 46 of 2,637 criminal leave applications last year. Similarly, a criminal leave application to the Appellate Division is reviewed by a single

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Justice, but the party seeking leave chooses the individual Justice (including any dissenting Justice) to whom the application is made.

In contrast, civil litigants who do not have an appeal to the Court of Appeals as of right under CPLR 5601 may generally seek leave to appeal to the Court of Appeals from both the Appellate Division and the Court of Appeals. See CPLR 5602(a). In addition, a civil motion for leave to appeal is addressed to and decided by the entire Court of Appeals. The motion is assigned to a reporting Judge on a routine rotation basis, and a report, which is prepared by central staff under the supervision of the reporting Judge, is circulated to all seven Judges. Leave is granted upon the vote of any two Judges. Similarly, a civil motion for leave to appeal made to the Appellate Division is addressed to a full panel (either four or five Justices) of the Court, usually the same panel that decided the appeal. Generally, a majority of the Justices comprising the motion panel must vote in favor of the motion in order for it to be granted, although in at least one department, leave may be granted upon the affirmative votes of two Justices.

Independently, the Committee on Courts of Appellate Jurisdiction has been studying the different application procedures for leave to appeal to the Court of Appeals with an eye toward making recommendations regarding possible changes to conform the criminal leave application procedures to the civil leave application procedures. The Committee formed a Subcommittee last year to study the matter because of concerns about the fairness and efficacy of the criminal leave process in comparison to civil motions. After examining the prior recommendations of the 1982 MacCrate Commission that the procedures for criminal leave applications in the Court of Appeals should be brought into harmony with the Court's civil leave application process, the Subcommittee analyzed criminal leave grants by individual Judges of the Court of Appeals over the last ten years and found that some judges have granted criminal leave applications at two or three times the rate of other judges, and studied the caseload and motion burdens on the

Court of Appeals in recent years. The Subcommittee also compared New York's procedures with criminal leave procedures in other jurisdictions and found that New York is one of only four states where criminal leave applications are decided by a single judge.

Based on the Subcommittee's findings the Committee considered several options, including: (1) conforming the criminal leave application procedures to the current civil leave application procedures at both the Court of Appeals and the Appellate Division; (2) conforming the criminal leave application procedures at the Court of Appeals to the current civil leave application procedures at that Court, but maintaining the current criminal leave application procedures at the Appellate Division; and (3) whether to continue permitting only one criminal leave application or allowing the applicant to make a second application to the Court of Appeals when an application to the Appellate Division has been denied. None of these options would require constitutional amendment; each of the alternatives would require only amendments to the Criminal Procedure Law and changes in the respective courts' internal procedures.

In June the Committee on Courts of Appellate Jurisdiction issued a Report and Recommendation to the State Bar's Executive Committee for possible adoption by that Committee and the State Bar. The Report remains confidential until acted upon by the Executive Committee. It is hoped that the Executive Committee will take action early this Fall to coincide with Chief Judge Lippman's desire to address this issue and his appointment of Judge Smith to serve as the Court's liaison in this process.

Denise A. Hartman is an assistant solicitor general in the New York Attorney General's Office, having specialized in state and federal appellate practice for many years. The views expressed in this article are her own and not necessarily the views of her Office.

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Ties that Bind: In Support Of Limiting Controlling Precedent To Trial Courts Within Individual Appellate Divisions

This fall the New York Law Journal published an article addressing the type of precedential value that appellate division decisions should have over trial courts. Michael Gordon, *Which Appellate Division Rulings Bind Which Trial Courts?* N.Y.L.J., Sept. 8, 2009. The author supported the rule that any appellate division ruling should bind any trial court absent a contrary ruling from the appellate division in which that trial court resides. The author cites stare decisis, predictability and uniformity among reasons to adopt this view. The principal authority cited for this position was *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984).

This article takes a closer look at the authorities relied upon by the Second Department in *Mountain View* and considers additional factors that contribute to the creation of the development of law through judi-

cial precedent. It supports a contrary position, that trial courts should not be bound by decisions of appellate divisions outside the appellate division in which they reside.

Stare decisis is a salutary doctrine that courts follow in which a court follows earlier judicial decisions when the same points arise again in litigation. But as a threshold matter whether a prior decision is controlling or merely persuasive precedent determines whether the subsequent court must apply that earlier law.

In *Mountain View*, the Second Department in dicta stated that "if the Third Department cases were, in fact, the only New York authorities on point, the trial court followed the correct procedural course in holding those cases to be binding authority at the nisi prius level." 102

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“On This Record”

The trial had gone very well; my firm had obtained a seven-figure judgment in a personal injury case where New York City was the defendant. An inevitable appeal followed. I was confident that the Appellate Division would not be swayed by the City's attack on the issue of liability but I was concerned by the City's attack of the verdict as excessive. At first reading their brief seemed unassailable on this issue.

The brief cited scores of cases with similar injuries that had drawn nearly identical verdicts from juries only to have them substantially reduced by the Appellate Division. When I copied the cases and read them (this was before on-line research) I saw the decisions didn't go into much detail about the injury or how it happened. There weren't many facts to assist in finding a basis for the court's decision to reduce these verdicts.

I put the brief aside for a while and came back to it later with a fresh perspective. Upon rereading defendant's cases I noted that every decision included the phrase “On this record we find. . . .” Suddenly the court's choice of words in beginning its analysis in each of these cases took on new meaning. The fact that a court reduced an award in one case with a particular injury didn't mean it would always do so, not when it said “on this record.” And if the cases in the City's brief had virtually no facts, they could not be used to refute my brief when I went into undisputed details as to the severity of my client's injuries.

The point I eventually stressed as a respondent, both in my brief and at oral argument, was that on the record before *this* Court the award was justified. I was extremely pleased when the Court adopted my reasoning in affirming the verdict on appeal.

If I may offer a moral, it would be that if a defendant argues excessiveness citing cases with purportedly similar injuries, review your record carefully and stress that every case is unique. And by the way, never give your adversary too much credit based on only one read of his brief.

By Anonymous as told to Editorial Staff Member

Second Circuit Requires Renewal of Admission

Under a new interim rule (Local Rule 46.1[a]), all attorneys admitted to the Second Circuit must renew their admission every five years. Attorneys admitted on or after July 1, 2004, must submit a renewal application “no later than five years from the original date of admission.” Attorneys admitted earlier than July 1, 2004, must submit a renewal application “no later than the anniversary date of the original admission” during the period July 2009 through June 2010. In other words, an attorney admitted on October 1, 1991, must submit the application no later than October 2009. It will come as no surprise to learn that each renewal application must be accompanied by a fee, at present \$25.00.

The renewal application form can be found on the Second Circuit's website: www.ca2.uscourts.gov under the link to “Attorney Admissions.” That link can also be used to determine your admission date.

The new rule includes the requirement that the Second Circuit Clerk be notified of any changes in contact information and a new requirement for admission pro hac vice – that the attorney “demonstrate exceptional circumstances justifying admission for the particular proceeding.”

The Second Circuit also adopted new Interim Local Rule 12.1, requiring the filing of an “Acknowledgment and Notice of Appearance” (available on the website) in all appeals within 14 calendar days of receiving the appellate docket sheet from the clerk's office.

Malvina Nathanson, Esq.

The Supreme Court of the United States Historical Society

An attorney of this writer's acquaintance once observed that, “Whenever you're at the Supreme Court in Washington, you're on sacred ground.”

Only a few hundred attorneys in each generation get to argue before the Supreme Court of the United States, but everyone interested in the Court can participate in it through the Supreme Court Historical Society.

The non-profit Society serves many functions. The Society spearheads the acquisition of antiques and artifacts relating to the Supreme Court. It sponsors lectures and teaching seminars pertaining to the Supreme Court; The Society publishes a wide range of material about the Court and constitutional law, ranging from children's books to the most scholarly volumes. The Society sells its publications, and other interest-

ing memorabilia, in its gift shop in the Supreme Court building and through its web site.

This past spring, in honor of the Lincoln Bicentennial, the Society sponsored a series of lectures at the Supreme Court on ‘President Abraham Lincoln, The Constitution And the Supreme Court.’ All were given by leading scholars. Also, in December, 2008, the Society sponsored a re-enactment of *Muller v. Oregon*, the 100th anniversary of the famous ‘Brandeis brief.’ The Honorable Ruth Bader Ginsburg presided.

Future offerings promise to be rich and varied. More information can be obtained at the Society's website, www.supremecourthistory.org or by calling 202.543.0400. The Society's initial membership fee is \$50.

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A.D.2d at 664. The court reasoned that “[t]he Appellate Division is a single statewide court divided into departments for administrative convenience . . . and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.” *Id.* (citations omitted). The court went on to state that this proposition “is a general principle of appellate procedure” and cited to appellate authorities in other states. *Id.*

There are several problems with the court’s approach. First, it is an incorrect statement of law to say that “the Appellate Division is a single statewide court.” The reference that the court cited in support, *Waldo v. Schmidt*, 200 N.Y. 199, 202 (1910), actually stated that “[t]here is but one Supreme Court” of which the Appellate Division “forms another and distinct part of the same court.” The operative constitutional language, now superseded, enabling the appellate divisions referred to them in the singular. N.Y. Const. of 1894, art. VI, § 2 (“There shall be an appellate division of the supreme court . . .”). But even at the time *Waldo* was decided there were signs undermining that terminology. For example, in 1910, all four appellate divisions were operating. And other provisions in the 1894 Constitution alluded to the divisions as plural. *Id.* § V (“appeals . . . shall be heard . . . as the appellate divisions in the respective departments . . . shall direct”).

The modern nomenclature of the enabling constitutional provision, adopted in 1961 and now codified at article VI, § 4, recognizes the multiplicity of appellate divisions (“[t]he appellate divisions of the supreme court are continued . . .”). See also N.Y. Const., art. VI § 1 (“there shall be a unified court system for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, . . .”).

The other authority cited by the *Mountain View* court in support of the statement that there is one Appellate Division also relied on the superseded language of the 1894 Constitution. 102 A.D.2d at 664 (citing *Project, The Appellate Division of the Supreme Court of New York: An Empirical Study of Its Powers and Functions as an Intermediate State Court*, 47 Ford. L. Rev. 929, 941 (1979)). The pinpoint citation to that law review article shows that the authors were relying on the New York Constitution of 1894, article VI, § 2, the predecessor to New York Constitution article VI, § 4, for that proposition. The article failed to address the superseding language of the current constitution, which had been adopted in the interim.¹

The *Mountain View* court’s improper reliance on superseded constitutional authority makes its views not just technically incorrect. By

failing to acknowledge the distinct existence of each of the appellate divisions, the court denies their autonomy for decision-making. Making other appellate divisions’ rulings binding on trial courts of other appellate divisions undermines the freedom of each appellate division to develop law. To the extent a trial court disagrees with another appellate division’s reasoning, that court would be stifled by being compelled to apply the other appellate division’s law rather than considering cases within its own division. Nor does New York have an en banc mechanism to test the soundness of any single panel’s view. Multiple appellate divisions afford this state the opportunity to test legal theories in the laboratory of ideas. By considering decisions of other appellate divisions as persuasive precedent, trial courts can test those legal theories as well as others advanced by the litigants before the court. To the extent conflicts arise among trial judges each appellate division remains available to litigants to test further the soundness of their legal result, and on appeal the appellate division can consider its sister division’s analysis in adopting law for its division as a whole. The Court of Appeals may resolve inter-division conflicts.

The *Mountain View* approach is further flawed in overstating any “general principle of appellate procedure.” The states’ decisions relied on in *Mountain View*, see 102 A.D.2d at 664, have different court structures. For example the California case involved a court of “inferior jurisdiction” that failed to follow decisions of courts exercising “superior jurisdiction.” *Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara County*, 369 P.2d 937, 940 (Cal. 1962). It is a misnomer to apply such law here in New York, where the Supreme Court’s trial courts and appellate divisions are one court. The *Mountain View* court’s reliance on other states’ authorities is similarly flawed. *Chapman v. Pinellas County*, 423 So.2d 578, 580 (Fla. 2d Dist. Ct. App. 1982) (circuit courts must follow decisions of the district courts of appeal); *People v. Foote*, 432 N.E.2d 1254, 1257 (Ill. App. Ct. 1982) (circuit courts must follow decisions of the appellate districts).

As a matter of logic there is little compelling one to follow the *Mountain View* dicta. Its support of binding all trial courts through a decision by one trial justice as affirmed by a single panel of justices is based on superseded constitutional language and fails to give proper deference to the vitality of the multiple appellate divisions within the Supreme Court as independent laboratories for the testing and advancement of the rule of law.

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1. The article does later cite to the current provision of the constitution in a different context, 47 Fordham Law Review at 1000, note 507, but that section of the article was drafted by a different author than the one who relied on the superseded constitutional language to declaim there is but one Appellate Division. See *Id.* at 1011, n.584.