

LEAVEWORTHY

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on Courts of Appellate Jurisdiction

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Welcome

The second edition of *Leaveworthy* marks its real entry into the world of the New York appellate practitioner. Every publication has its unique voice: *Leaveworthy* stresses the totality of the appellate experience, from the scholarly to the sad, human experience of missing a deadline. It is not surprising then that our articles come from many sources, and this brief editorial is meant to say thank you to our

contributors and to encourage others. The next article could come from you. **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.

— William Stock, Editor

What Law Students Can Teach Lawyers

By Cynthia Feathers, Esq.

Law students can teach attorneys a lot, as I've found from my years as an Albany Law Adjunct Professor of Appellate Practice. Even though my second- and third-year students are still learning the basics, they get many things right.

Their curiosity and enthusiasm are infectious; and they are humble and eager to understand everything they can about the law. As we discuss in class, one of the greatest things about our profession is that, no matter how much experience we have, we can keep on deepening our knowledge and skill.

The students pepper guest lecturers with probing, intelligent questions. They were spellbound one day when two guest lecturers offered competing views of appellate realities. In providing invaluable insights about the appellate process, a senior law clerk discussed how little "wiggle room" the law provided for deciding appeals outcomes. A national death penalty lawyer, however, advised them that generally an appellate panel can find the facts and law to support whatever decision they want to reach, and the appellant must work extremely hard to prevail when facing the "affirmance machine" of the appeals process.

With great diligence, the students digest a record and identify viable issues. They quickly grasp the need to preserve errors for appellate review and the nature of harmless error analysis. The students pace themselves: we develop a timeline for each stage of the appellate process to ensure that they will have the time and energy to do the job well. The difficulties they face in meeting deadlines while juggling classes and part-time jobs are a good preview of the challenges they must master in practice, when what are at stake are not grades and skill building, but the lawyers' reputations and the lives of their clients.

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What Law Students Can Teach Lawyers
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Because Appellate Practice is only a two-credit, single semester class, we keep to the basics of brief writing, focusing intensely on two aspects of the brief. First, the students all strive to shape a Statement of Facts that tells a story through a chronological or thematic recitation of facts needed as background or support for their argument. They amplify favorable facts and honestly confront, but minimize adverse ones.

Second, their Argument points each have five components: introduction, applicable law generally, analogizing of key favorable cases, distinguishing of key adverse cases, and conclusion. Astonishingly, by adhering to such a basic approach, these novices often produce briefs that are as good as ones by seasoned counsel I regularly see in practice.

To prepare for oral arguments, we observe advocates in action in the Appellate Division and Court of Appeals. After an afternoon of arguments, the students have innumerable questions and observations. Is it okay to wave your hands around when you talk? Why did that elderly judge ask so many hypotheticals? Why do some judges occasionally leave during an argument?

Once they were stunned by a District Attorney who, in responding to questions from a clearly disturbed panel, defended his misleading use of prejudicial testimony. The prosecutor had failed to reveal that such testimony had actually been stricken by the trial court. The students extracted a lesson that transcended criminal case issues: there are times when candor and admission of error are the most ethical and effective strategy. Further, they embraced the importance of defendants' procedural rights as fervently as their factual innocence as a necessity to keep the process fair for everyone.

One student was unhappy about her performance in a moot court competition during a prior semester. But she learned to not be haunted by one bad day and to instead turn her chagrin about lapses into a resolve to do better next time – and she aced our class's moot court. It is poignant to see the seriousness of purpose with which the students prepare for their Appellate Practice oral arguments. They craft opening comments that pithily crystallize the heart of their message; studiously review the record, briefs, and seminal cases to prepare to perform; and earnestly answer the moot court judges questions. What a surprise

that some students who write B-level briefs deliver A+ oral arguments and, conversely, others who express themselves superbly in writing are gripped by nerves and are unconvincing in the oral argument forum.

Throughout the course, the courtesy the students show to each other and their respect for their professor are good practice for the civility they should offer opposing counsel and the respect they must show to judges. Finally, their gratitude for any encouragement from a teacher is a reminder of how productive apt, kind praise can be when bestowed by a senior lawyer upon a junior colleague.

Even the things the students get wrong cause reflection and offer lessons. They think that trial proof reflects reality, decisions and verdicts are usually just, and appeals right the few wrongs. But many of us know that often advocates' skills are not evenly matched, honest witnesses can perform badly, and proof may be at best a shadow of reality. Trial outcomes frequently seem unjust, and appeals are inherently limited in what they can achieve.

The students want to demonstrate how conscientious they are in their research by citing dozens of cases. They have an epiphany when convinced that it is rarely appropriate to cite more than a few cases for a well-established proposition. Moreover, they learn that they must use lawyerly judgment and creativity to determine which cases are vital and should be analogized or distinguished.

The students believe law is personal. In their briefs, they want to use the names of the parties, as well as the attorneys and the judges, as opposed to indicating such persons' litigation status. They learn to always employ a dignified tone – and to never make ad hominem attacks.

Finally, some students get emotional about the suffering of a complainant when they read a record about a heinous crime. Not losing their humanity, but always advancing the client's interest – with acumen, zeal, and a realistic understanding of case weaknesses – are core aspects of effective advocacy we explore together.

Cynthia Feathers has a law office in Saratoga Springs devoted to civil and criminal appeals and legal research and writing.

The Historical Society of the Courts of the State of New York

As the new century dawned, then-New York State Chief Judge Judith S. Kaye had the vision to create an organization that would collect and preserve this State's legal history. It would showcase the New York connection to our founding fathers and their contributions to the U.S. and New York State constitutions and the nation's developing democracy. It would breathe life into the history of our State's prominent legal figures, its rich legacy of court cases, and its magnificent courthouses. The Society was thus born, nurtured by a terrific partnership with Albert M. Rosenblatt, then an Associate Judge of the New York State Court of Appeals.

Judge Kaye recently reminisced about how, for her, the birth of this idea was linked to the 150th anniversary of the New York State Court of Appeals. She recalled how in 1996, as this important anniversary neared, she gazed at the portraits looking down at her in the courtroom and wanted to know more about each of the judges. She requested a list of her predecessors on the bench, with their dates of service, and was amazed to discover that none existed.

Calling upon Frances Murray, the ever-resourceful Chief Legal Reference Attorney of the Court of Appeals, to look into this matter, Frances confirmed that the list was nonexistent. One day shortly thereafter, Judge Kaye arrived at her office to find a huge stack of photocopies that Frances had made of the inner front pages of each of the New York Official Reports since 1847. Each contained a record of the then-sitting Court of Appeals Judges for the period of that Report. From these photocopies a complete record of the Judges of the Court of Appeals from 1847 to 1997 was meticulously assembled. This newly minted list was included in a publication for the 150th anniversary celebration. From that incident came the realization that New York State's court history needed to be preserved, and the idea was planted for the formation of a Society to do just that.

Here's what's ahead for the Society in 2010:

The Society will be joined by Chief Judge Jonathan Lippman in partnering with the Robert H. Jackson Center, based in Jamestown, New York, and The U.S. Holocaust Memorial Museum in Washington D.C. to present a program to be held at the New York City Bar on May 11th that will explore the breakdown of the rule of law in Nazi Germany and lessons learned. An exciting series of programs is also in the works with the Supreme Court of the United States Historical Society exploring New York's contributions to the United States Supreme Court Bench.

The New York State Museum of Legal History is under construction. The Society is working with the Court of Appeals on an exciting project to design a museum showcasing the legal history of our State. It will be housed in Centennial Hall near the Court of Appeals in Albany.

In its own short life, the Society has produced an impressive list of publications. In 2007, it published an important reference work on our legal history, *The Judges of the New York Court of Appeals: A Biographical History*. This is a comprehensive guide to 160 years of the legacy of the court and features original biographies of 106 Chief and Associate Judges, edited by Judge Rosenblatt. The Society has also published *Historic Courthouses of the State of New York: A Study in Postcards* by Julia and Albert Rosenblatt, featuring rare postcard images of county courthouses throughout the State along with narratives of notable trials, anecdotes, and the history of each county. Currently in production is a book of essays by prominent Dutch and American scholars on the Dutch influence on jurisprudence in this State and the nation, again edited by Julia and Albert Rosenblatt, to be published by SUNY Press, titled *Opening Statements: Law and Jurisprudence in Dutch New York*.

The Society also regularly publishes *Judicial Notice* — a scholarly journal with articles by noted authors as well as gifted amateurs with a love of the subject — on the rich diversity that is our State's legal history. Finally, we publish a calendar each year that is a fun way to spend a moment or two each month of the year glimpsing an aspect of legal history. This year, our theme is *Justice, Courthouses, and Towns Along the Erie Canal*.

Since history can be just as important when spoken as when written, we have embarked on an initiative to record the oral history of legal luminaries in this State. Each of these interviews has proved to be an intimate and informative exploration of our legal history by those who have lived it. To date, we have interviewed Judges Joseph W. Bellacosa, George Bundy Smith, Albert M. Rosenblatt, William Thompson, and Milton Mollen, as well as Hazard Gillespie and Norman Goodman.

The annual David A. Garfinkel Essay Contest invites SUNY and CUNY community college students from across the State to write an original essay on specified topics of legal history. In 2009, awards totaled \$1,500. The 2010 topic is *The Evolution of Justice Along the Erie Canal*.

Also as part of our educational outreach, we are exploring with the faculty of Bard High School Early College Program the development of classroom programs on civics, justice, and the courts.

The Society hopes that many of you will wish to become members. More information is available at the Society's website, www.nycourts.gov/history or by calling 914.824.5717. The Society's annual membership starts at \$50 with a special rate of \$25 for students, people in public service, and retirees.

Marilyn Marcus, Executive Director
The Historical Society of the Courts of the State of New York

What Happens After “The Last Minute”

By Stuart M. Cohen, Chief Clerk of the Court of Appeals

We all make mistakes and, if we are smart, we learn from them. It's less painful, however, to learn from the mistakes of others. Here's a story that could have had a worse ending. It contains at least two lessons for the appellate practitioner.

Not too long ago, a law firm in the Albany area finished up a brief intended for the Court of Appeals on the afternoon it was due. The firm dispatched its messenger to file the appeal with the Court.

For reasons unknown, the messenger delivered the appeal papers to the courthouse of the Appellate Division, Third Department. The papers arrived shortly before five. A member of the Clerk's staff stamped them in and put them on a shelf to be processed the following day.

The next day, appellant's counsel, having been notified by the Appellate Division of the misfiling, called my office and was told that an order dismissing the appeal -- an order the Court's rules require me to enter when the deadline passes and appellant's papers have not been filed -- was being prepared.

To further complicate matters, this was a criminal appeal and the appellant was out on bail. The dismissal of the appeal would expose appellant to the risk of incarceration. The only advice we could give the attorney was to prepare an order to show cause asking the Court to vacate the

dismissal order and to ask the prosecutor to allow the appellant to remain at liberty until the matter could be resolved.

As it turned out, the Court granted the motion to vacate the dismissal, though it didn't have to. The People graciously had agreed not to scoop up the appellant in the interim (this story takes place upstate, remember). Aside from possibly losing some sleep, counsel suffered no horrible consequences.

What lessons can be learned from this little story? First, don't wait until just before the deadline to file. Things always go wrong, especially when you are rushed. Set an artificial deadline for yourself, well in advance of the real one. That way, when Murphy's law rears its ugly head, all is not lost. You'll have time to fix the problem.

Second, know the procedure of the court in which your case is filed. For example, in the Court of Appeals, the rules allow the Clerk to grant a filing extension before the due date; after the due date passes, however, the appeal is dismissed and only the Court can reinstate it. It's much easier to make a phone call to my office than to prepare a motion to the Court, so if you have any inkling that a deadline will be a problem, call and ask for an extension when it's no big deal. In other courts, the rules will vary, but there's almost always some moment or event after which the process changes and your options become less attractive. If you anticipate any problems, it's cheap insurance to deal with them preemptively.

An Appellate Advocacy Book with a Difference

Most books on appellate advocacy discuss how to do an appeal -- brief writing, oral advocacy -- or whether there is a right to appeal -- finality, standing. Steven Wisotsky's *Professional Judgment on Appeal: Bringing and Opposing Appeals* (Carolina Academic Press 2d Ed. 2009), also discusses whether one should take an appeal from a cost-effectiveness perspective.

The author, an appellate attorney and appellate practice professor at Nova Southeastern University Law Center, begins by describing the “playing field” of appeals in the federal system. He points out the limited purposes of appellate review (to correct serious error), the boundaries of review (harmless error, trial court discretion) and the large and growing caseloads, all of which lead to fewer reversals than ever. In 2006, there were 12.9% reversals in civil cases, 6.8% in criminal cases, 7.8% in administrative appeals and 15.1% in bankruptcy matters, for an overall reversal rate of 8.9%. And many of these reversals provided only partial relief or a remand. The lesson to be learned from these numbers: think twice (or maybe three or four times) before pursuing an appeal.

Wisotsky discusses how to answer a client's three most important questions: how long will an appeal take, how much will it cost, and what are the chances of success. He devotes a chapter to “Predicting Outcomes.” He also deals with more traditional subjects (how to write the “issues presented,” the importance of succinctness, etc.) and “technical” concerns, with chapters on finality and appealability, preservation of error, standards of review, harmless error, rehearings and en banc review. Part II of the book covers frivolous appeals, sanctions for violations of rules and court orders, appellate malpractice, and “Ethical Dimensions of Appellate Practice.”

Wisotsky's style is simple and clear. Although much of what he says is well-known to experienced practitioners, his focus on the realities of appellate practice provides a useful framework for that initial discussion with the potential client concerning why retaining you would not be a waste of money.

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