

LEAVEWORTHY

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The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

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Welcome

The third edition of *Leaveworthy* marks a “hail and farewell” era in our courts. Well-known faces are departing, and new ones will appear. As always, *Leaveworthy* will strive to keep its readers apprised of these changes while at the same time always remembering that the law has a human side.

A reminder to our readers: **your contributions of cases, articles, interesting events and the like will all be considered for publication in future issues. Submissions can be sent to apcourts@nysba.org.**

Draw near and ye shall be heard.

— The Editorial Staff

Retiring Clerk Stuart M. Cohen Reflects On Court of Appeals Tradition and Change

By Cynthia Feathers, Esq.

Stuart M. Cohen’s November 24 retirement as Clerk of the Court of Appeals marks the end of a journey that began 30 years ago. After graduating from law school, Cohen was not sure he wanted to be a lawyer. That changed when he clerked at the Second Department.

“It was an extraordinary place to work. I learned a lot about appellate law: how to read a record, methodically research the law, be skeptical about arguments that were persuasive on the surface, and write bench memos that distilled and analyzed appeals and made recommendations.” Cohen felt lucky that some Judges took an interest in him and let him help draft opinions, and he never forgot the lessons he learned in his first job as a lawyer.

His stint at the Second Department led to “the big league,” a clerkship with Court of Appeals Associate Judge Jacob D. Fuchsberg. It was wonderful, but also “really scary.” Cohen worked harder than he ever had before and began learning about the Court of Appeals. He later clerked for Chief Judge Sol Wachtler, before becoming Deputy Clerk in 1987 and Clerk in 1996.

As Court of Appeals Clerk, Cohen serves two main constituencies: the Judges and the bar. He and his staff try to give the Judges “everything they need to do their job with a minimum of distraction.” One of the things he will miss most about the job is the Judges and the camaraderie at the Court. He has also been “very close” to all of the Appellate Division Clerks and found their ongoing communication and collaboration vital in fulfilling his role.

In dealing with the bar, Cohen and his staff try to be as helpful as possible, to keep procedures comprehensive and transparent, and to effectively respond to all questions. The “unsung heroes of the profession”

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Interview with Retiring Court of Appeals Clerk of the Court, Stuart M. Cohen

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are the institutional appellate litigators, he stated. They do “consistently excellent work and are very professional in their dealings with the Court.” Cohen has also spent a great deal of time communicating with pro se litigants and has felt great satisfaction in helping them understand the process, but frustrated that he could not do more to help them.

While the quality of practitioners is generally high, many lawyers familiar with Appellate Division practice do not fully understand issues of appealability and reviewability distinct to the Court of Appeals, Cohen observed. Some lawyers erroneously view the high court as “just another shot at correcting error,” instead of as a place to “explicate, harmonize, and settle” the law.

The bar has, however, become more savvy about the Rule 500.11 alternate procedure for selected appeals. Many lawyers now realize that it does not signal automatic affirmance or consideration by less than a full Court. Whereas many litigants used to complain when their appeal was selected for expedited review, more now seek such review as an efficient way to resolve an appeal, while saving the client money.

Cohen’s most fervent praise and pride are reserved for the staff at the Court. “We have great staff. They understand what the institution is about and do all that is necessary to get the job done, and more. Many people tell me what a pleasure it is to deal with the people in our office.”

A central part of the culture of the Court is a “hot bench” that expeditiously renders its decisions after oral argument. The Judges do not know who is reporting on the case until there is a random draw after oral argument, and they do not receive a bench memo on the merits, he explained. So each Judge does independent research and “works the case up from scratch.”

Momentous Change in 1985

Cohen has seen many changes in the Court since he began there. One of the biggest came in 1985. Then the CPLR was changed to eliminate large categories of appeals as of right, resulting in the Court having more control over its own docket. That is “preferable for a court of last resort and does not foreclose anyone from coming here; it just means they have to convince the Court that the case is leave worthy,” he noted.

Technology has also changed significantly. Cohen recalled a time, before email, when the Court devised a creative system that allowed Judges to share drafts of decisions electronically. The Court of Appeals was the second state high court in the country to make decisions available online. For many years, the Court has had a user-friendly Web site; and all oral arguments are now available online. Cohen expects that, in the future, the public will have 24/7 access to information about the status of cases.

After five years of development, the Court recently instituted a modern case management system to replace one that was “obsolete, held together with chewing gum and baling wire.” The new system has

helped improve the central aspect of the Clerk’s job. “It’s a multi-task job, with no job too big or too small, but most of it is case management,” Cohen said.

During his tenure, Cohen addressed obsolescence not only in technology, but also in the Court building. Because the Court’s space had become physically and functionally out-of-date, the Court did major renovations in 2002 to 2003, thus allowing Judges to be on the same floor and providing needed extra space. While Judges and staff worked at offices off-site during renovations, the courtroom itself was kept open. There were times that Judges had to lift up and walk beneath a blue tarp in order to reach the courtroom and hear arguments, Cohen recalled. The building renovation was “an adventure, it was fun and interesting, and something I would never have dreamed was part of the job,” he said.

Reverence for an Institution

Another unexpected challenge was presented by the logistics of the road trips the Court took during the tenure of Chief Judge Judith S. Kaye. The Court heard oral arguments in the Bronx, Brooklyn, Buffalo, Suffolk County, and Syracuse. One challenging past program is not part of the Court’s mission, at least for now: death penalty appeals. For such appeals, the Court had to implement a parallel administrative structure and deal with complex issues and records with tens of thousands of pages.

Cohen’s respect and affection for the Court of Appeals are manifest. While he speaks with élan and ease about arcane and technical aspects of Court practice and procedure, he strives to focus attention on the institution he served, rather than his own achievements. If not for the attractive retirement package offered by the State, Cohen would likely not have left. Now on the brink of change, he is considering various options. One possibility is a return to private practice and/or teaching.

Early in his career, between the clerkships for Judges Fuchsberg and Wachtler, Cohen was an instructor at Touro Law School and a solo appellate lawyer in Brooklyn. In one noteworthy case, *People v. Moses*, 63 NY2d 299 (1984), he achieved a reversal for the defendant. The Court found that accomplice testimony had not been sufficiently corroborated by a false alibi and dismissed the indictment. Even though he knew the Court well, he found it daunting to argue there and rewarding to win an appeal he viewed as meritorious.

While pondering whether other appeals will be part of his professional future, Cohen will enjoy at least a brief retirement – resting, visiting family around the country, and pursuing his many interests. Those interests include skiing, bicycling, and flying a plane to places where appealability and reviewability are not at issue.

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

Interview with James Edward Pelzer, Retiring Clerk of the Court, Appellate Division Second Department

By William B. Stock, Esq.

WBS: What attracted you to a career in the court system?

JEP: I graduated from St. John's Law School and was looking for a job. Judge Bellacosa, who was then an assistant dean at the law school and who had previously worked at the Appellate Division, found out about an opening at the court and told the school's placement director, who called and informed me about the position. I responded and was hired as a court attorney. I found that I liked public service and participating in the process of reaching a just result in the cases that came before the court.

WBS: When you started as a court attorney what were some of the duties?

JEP: The court attorneys here read the records and the briefs on appeals that are submitted to the court and prepare a confidential report for the judges, so that is what I did for about seven years. I wrote confidential reports for the judges to help them prepare their cases for argument.

WBS: What was the state of technology when you started?

JEP: We wrote out our reports by hand and the ladies who were the typists typed up our reports on onion skin paper with carbon paper in between. I came here in 1971 so technology was a lot different then.

WBS: The First Department is about to require attorneys to submit their briefs in PDF format. Do you see the Second Department going down that path?

JEP: While there are definite advantages to acquiring briefs in electronic format, I don't see the Second Department doing that in the very near future. It is important not to rush into such a project. The reason you would want to have electronic copies of briefs is so that the judges could read them electronically. To do that the judges would need a convenient, hand-held device on which to read them. At the moment electronic book technology is developing and existing devices don't appear to meet all the court's needs. Electronic readers like the Kindle are getting better and better but at the moment they do not have the capacity to hold the records, briefs, and confidential reports for an entire court sitting. So that is one aspect of the problem of using electronic briefs. Others are that the court would need to establish a gateway to enable counsel and litigants to file by e-mail, and it would need to modify its case management database to link to the filed electronic documents. It would then be necessary to program the case management database to compile all the records and briefs for the cases on the calendar for a particular day and distribute them to the judges electronically. Establishing that background framework will take some time. The court is working its way through that and I have hopes that electronic filing will

come in the not too distant future. Even when electronic filing does arrive it will probably be as a companion to existing filing in paper.

WBS: How has the style of appellate advocacy changed, if at all, in your time in the court?

JEP: I don't think appellate advocacy has changed all that much. I do recollect that in my early years I was very impressed with the well-known members of the bar that did appellate work exclusively. Today we also have a good number of attorneys who concentrate on appeals and do a great job. Basically lawyers deal with human problems. Cases go to trial, motions are made and won or lost, orders and judgments are entered, and appeals are taken. Lawyers are needed to set forth the positions of the opposing parties for the judges. The members of the bar who specialize in appellate work, by dint of their experience, are often able comply with the court's rules and procedures and produce persuasive briefs with greater facility than those who concentrate in others areas of the law. So although much has changed, much is the same. The court is a little bigger, it has a lot larger caseload, but the process of appellate work is pretty much the same as it was when I first came here.

WBS: I was told there was once a time when the court was short of judges and as a result took a great deal of time to render decisions. Could you share your recollections?

JEP: Yes, that is true. During the 1980's the amount of work the court received substantially increased and the number of judges and staff available to do it didn't keep pace. When I first came here there were 10 judges on the court and that number slowly increased through the 1980's to about 15. In the early 1990's we had almost 5,000 appeals perfected and awaiting oral argument. It took almost two years after an appeal was perfected for it to reach the calendar. Martin Brownstein, who was then the clerk, Alan Chevat, who is now our chief court attorney, and I wrote a report called "Justice Delayed" that detailed some of the court's problems. As a result of that report, which was issued by then Presiding Justice Mangano, Governor Cuomo designated five additional justices to the court, bringing its judicial complement to 20. In the course of about five years during the 1990s the court's backlog of cases was eliminated and it is now current in its work.

WBS: What advice would you give a newly fledged attorney who says I want to specialize in appellate practice?

JEP: That's a good question. I think lawyers have two functions. One is the legal function; they have to know the law. The other is that they have to be good storytellers. Most law schools don't tell prospective students this in advance. Appellate lawyers have to be especially good storytellers because they must condense the facts contained in the record into a clear and simple account and link those facts to rel-

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Interview with James Edward Pelzer, Retiring Clerk of the Court, Appellate Division Second Department

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evant law that supports the position of their clients. So I would say that new attorneys who have an interest in the law and writing and don't want to practice in the trial courts should develop their writing skills as well as their knowledge of the law. They should practice writing. They should become good storytellers because, if they can't write concisely and clearly, they can't be good appellate practitioners.

WBS: Do you think there is a need for a Fifth Department?

JEP: The census of 2000 revealed that more than half the population of the state resides in the Second Department and it seems probable that this year's census will show that the court's portion of the population will have continued to increase. The large number of residents of the department has led to a very heavy caseload. While the court once had a huge backlog, it was eliminated with great effort. Under the leadership of Presiding Justice Prudenti the court has remained current in its work, there is a wonderful collegial relationship among the justices, and it has a terrific, hard-working non-judicial staff. Whether under these circumstances the adoption of a constitutional amendment to establish a fifth department is needed is a question for the Legislature and the people. However, if the court's caseload substantially increases,

it is hard to see how more justices and staff could be accommodated in its present facilities and how collegiality and efficiency could be maintained. In that case, a fifth department would become a necessity.

WBS: After so many years, what are your plans after 45 Monroe Place?

JEP: My work at the court has required most of my attention and time and as a result there are many places I've not seen, many books I have not read, and many projects and things that I want to do that I haven't done. It's time to concentrate for a while on some of my personal interests, such as music, photography, hiking, canoeing, and family genealogy. The court remains one of my great interests and after my retirement I hope to work for it in some capacity to continue improvements to its web site and to assist with long-needed revisions to various parts of its rules. I expect that I'll find plenty to occupy my time.

WBS: I'm sure the court will be very grateful for your expertise.

William B. Stock is with the New York City firm of Cheven Keely & Hatzis.

Beyond Brief-Writing – Practice in the Second Circuit

By Malvina Nathanson, Esq.

On May 17, 2010, the Committee on Courts of Appellate Jurisdiction (with the Association's CLE Department) presented a program covering non-customary topics. The Second Circuit's new rules (and their history) were presented by the Clerk of the Court, Catherine O'Hagan Wolfe; and Hon. Richard C. Wesley (who has been a judge of the Appellate Division, the New York Court of Appeals and the Second Circuit) talked about the differences between state court and federal appeals. In addition, a panel of experienced appellate practitioners – Denise Hartman (with the Attorney General's Office), Sarah Normand (Chief of Civil Appeals for the Southern District's United States Attorney's Office), and Alan Pierce (with Hancock & Estabrook) – and Judges Wesley and Reena Raggi discussed a range of technical subjects: collateral orders, interlocutory appeals, certification, standards of review, new pleading requirements, rehearing and en banc review. The panel was moderated by J.D. Barnea, Assistant United States Attorney.

The full house (105 attendees) learned a lot. Highlights included (not an inclusive list and not in order of importance):

- It is very important to include the standard of review, either as a point heading or within the argument. Both judges stressed that the standard of review is often outcome determinative and a misstatement of the standard will lose credibility.
- En banc review has been granted only 55 times in the last 50 years. En banc review is not useful if the original opinion is unanimously affirmed and creates confusion if the decision includes mul-

multiple opinions. Many judges feel that the Supreme Court will grant review of significant cases so the en banc review is superfluous.

- Instead of en banc review, the Second Circuit has been using what is termed a "mini-en banc" procedure, where the panel will circulate a decision to all active judges, particularly if the panelists are doing something dramatic, such as overruling a prior decision, and then include a statement in the opinion that all active judges were polled and none believe formal en banc review is necessary.
- Clerk Wolfe is more than happy to answer individual questions. Her direct line is 212-857-8585. Interestingly enough, her voice mail message includes her cell phone number.
- Many judges make extensive use of the test-searchable feature of PDFs so if your technology does not have that capability, you need to upgrade. (Clerk Wolfe stated that 85% of the filed briefs are not text-searchable.)
- Second Circuit judges are "generalists." Especially when dealing with issues of New York state law, attorneys should not assume the judges will be familiar with the legal concepts. (Only Judges Wesley and Straub were state court judges; Judge Miner was a state legislator.)

Because of the favorable reaction of those who attended the program, the Committee has decided to make a Second Circuit CLE a biannual event.

Malvina Nathanson handles civil and criminal appeals in the state and federal courts.