



The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

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Welcome

The fourth edition of *Leaveworthy* shows the diversity of the appellate world. A clerk of the court, entering retirement, looks back; a legal scholar writes and an experienced appellate practitioner takes us behind the scenes of a significant federal appeal. 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 appcourts@nysba.org.**

Draw near and ye shall be heard.

— The Editorial Staff

Interview with Michael J. Novack, Retired Clerk of the Court, Appellate Division Third Department

By Nicholas E. Tishler, Esq.

To rewrite an old Beatles song, "There are people we remember, some are gone, and some remain." It is a shock when a person we have known for so long retires from the position in which we have always known them, such as a favorite teacher or coach. After nearly 40 years of service with the Appellate Division of the Supreme Court, Third Judicial Department, the departure of Michael J. Novack as Clerk of the Court left many in the legal community in shock.

Michael graduated from Albany Law School in 1971, and as a new lawyer in his first job, he worked on the creation of the Environmental Conservation Law with Albany Law School Professor Bernard Harvith. The next year, Michael started his career with the Appellate Division, Third Department, as an assistant motion clerk. After 11 years of service, serving variously as Chief Motion Clerk, Chief Appellate Court Attorney and Deputy Clerk, Michael was appointed Clerk of the Court in 1983.

The nature and amount of work of the Court have changed dramatically since Michael started his service. For example, in 1972, Michael supervised six or seven law assistants. As the Court's caseload expanded, so did the need for more help. There are now approximately 20 law assistants or "appellate court attorneys" as they are currently known. The nature of the Court's work has also expanded. The Office of the Clerk is responsible for the smooth functioning of all court operations, but those operations now include more than the Court's core appellate work. By the time Michael retired as Clerk, effective November 24, 2010, his office was responsible for an additional five auxiliary operations and agencies including:

- **The Admissions Program**, which investigates the character and fitness of and swears-in more than three thousand new attorneys per year, the most of the four appellate divisions, because any applicant who does not reside in the State of New York and all foreign applicants must come to Albany to be admitted;
- **The Committee on Professional Standards**, which handles attorney discipline matters;
- **The Mental Hygiene Legal Service**, headquartered in Albany but with several field offices throughout the department, whose mission has grown due to the enactment of article 10 of the Mental

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Hygiene Law, which requires the Service to provide counsel to indigent respondents in proceedings involving the civil confinement of sex offenders;

- **The Civil Appeals Settlement Program;** and
- **The Office of Attorneys for Children,** formerly the Law Guardian Program, which supervises and provides training to approximately 800 attorneys serving as child advocates throughout the Third Department's 28 counties.

If you are old enough, think back to 1972 when Michael began working for the Court. Typewriters, carbon paper, white-out, "xerox machines" and telephones characterized office technology. Computers, cellular telephones, scanners and facsimile machines were years away. In addition to leading the Clerk's Office through the Court's expansion into the new areas of responsibility listed above, Michael guided the Court through its transition from typewriter to computer technology.

Many will recall that as recently as the late 80's, the Court's case records were kept in an index card system maintained by Deputy Court Clerk Gordon Wolfe. It was during that period that the Court started to introduce computer technology. Michael recalled Mr. Wolfe's well-intentioned advice that "this computer stuff is a fad – like CB radio." As anyone who has called the Clerk's Office in the last twenty years may tell you, the creation of the court's database, replacing the index card system, and computerization in general, have gone very well, and the Court is looking to improve the database further. The Court now has a computer technology staff of five people responsible for maintaining the computer systems of chambers, the court and all auxiliary agencies.

Like the Clerk's Office itself, Michael nurtured the development of a website for the Court that is user-friendly. In addition to providing calendar information, court decisions and information about the Court, this website will in the future expand public access to provide filing dates, filing deadlines and other important information and will be more compatible with the websites of the other appellate courts and

the trial level courts. Ultimately, Michael said, the Court will add e-filing, become paperless and might even receive records directly from trial courts by email. Michael and his staff have embraced computer technology, which has made obtaining information from and working with the Court efficient and easy.

In trying to arrange a time for us to meet at the Court after he officially retired, it became clear that Michael's appointment calendar was already full. But it is also clear that his professional activities will have to accommodate his desire to spend more time enjoying his role as a spouse, father and grandparent. Happily, Michael will not be idle in this next phase of his professional life.

With everything Michael achieved during his long and distinguished career with the Court, it is revealing that he expressed great pride and satisfaction in what he modestly characterized as the part he played in continuing the Court's user-friendly culture, characterized by a pleasant and helpful staff who make working with and at the Appellate Division an enjoyable experience. Michael observed that this long tradition can be traced to the influence of the presiding justices of the Court, each of whom has made it a priority to cultivate a humane and positive atmosphere.

This tradition keeps the Appellate Division, Third Department from being viewed as impersonal and thus is best known to many in the legal community by the people who have worked there and whom we will miss, and by the people who continue to work there. So, in addition to saying good-bye, good luck and see you later to Michael J. Novack, who so faithfully and ably held the title of Clerk of the Court for so many years, we say a fond farewell to Jack, Stanley, Roger, Cathy, Kathy, Teresa, Frank, Mark, Michael, Vince, John and Joseph, all of whom also recently retired. We also wish the best of luck to the new Clerk of the Court, Robert D. Mayberger, to the staff who remain in the Clerk's office and to the successors of those who retired with Michael.

Nicholas Tishler has a law office in Niskayuna, NY devoted to appeals.

State Bar Recognizes Importance of Interlocutory Appeals

By *Ellen B. Fishman, Esq.*

In January 2011, NYSBA's Executive Committee adopted a recommendation that New York's broad right to take interlocutory appeals as of right in civil actions should be maintained. The Bar Association as a whole had never before taken a position on whether to preserve this procedural right, which is so important to civil litigants in New York State courts and their counsel. The recommendation to maintain the current procedure, which allows appeals as a matter of right from most non-final or intermediate orders, was set forth in a joint report by NYSBA's Committee on Courts of Appellate Jurisdiction and the Committee on the Civil Practice Law and Rules (CPLR). All other interested committees, sections, and associations that commented on the recommendation prior to the Executive Committee's action supported it.

Over the past year, the NYSBA Appellate Courts and CPLR Committees undertook a thorough study of New York's system of interlocutory appeals. They acted in response to recurring suggestions on the part of some that restricting appeals as of right would cut the Appellate

Divisions' heavy workload and make state practice more like federal practice.

Experienced Committee members—including active practitioners, retired judges, and law professors—therefore analyzed the relevant procedure and practice in New York courts and the federal courts, along with those of the courts of other jurisdictions. Committee members researched prior proposals, multiple statutes, commentaries, and decisions. They collected both anecdotal evidence and hard data before setting forth the recently adopted recommendation concerning maintenance of the current practice and procedure.

New York litigators accustomed to taking an appeal by filing a simple notice of appeal from an order denying summary judgment or most any order in a civil action are often surprised that this state is almost unique in allowing such appeals as of right. In nearly every other state court system and in the federal courts, appeals are to be taken from a final judgment or by permission. Only in very limited cases, such as the grant of a preliminary injunction, can one appeal an intermediate

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order issued by a United States District Judge; otherwise, a non-final federal order can be appealed only if it is certified by that Judge upon motion and the ensuing appeal is accepted by the United States Court of Appeals.

Given the fact that very few certifications allowing permission to appeal are granted by District Judges, the federal model was not found to be a promising one for New York to follow. The periodic proposed legislation to amend the CPLR to require similar leave applications in New York Supreme Court and the Appellate Division were deemed ill-advised on other grounds as well. Such a procedure doubtless would give rise to a major increase to motion practice at the trial and appellate level, which appeared likely to be expensive and time-consuming, but largely futile.

In contrast, the present statutory scheme allows disappointed parties to seek immediate appellate review of a variety of significant non-final orders. Such orders may concern threshold issues such as venue or the statute of limitations, potentially dispositive orders concerning discovery, and critical custody and support orders, for example. Appellate review of orders of this kind should not await the end of what could be lengthy litigation. Nor should it depend on a successful leave application or whether the intermediate order is considered to be one that necessarily affects and thus is brought up for appeal on review from a final judgment.

The suggestion is sometimes heard that an interlocutory appeal slows down or even brings litigation at the trial level to a halt, but this notion was not borne out by the Committees' experience and research. Stays pending appeal are granted only in extraordinary cases and are generally limited in scope and conditioned on the appeal's being expedited. Should the prevailing party consider an interlocutory appeal to have been taken for the purpose of delay, as some have suggested,

that party can ask the Appellate Division to order that the appeal be perfected quickly.

Moreover, the Committees that reviewed this matter determined that interlocutory appeals serve a critical purpose. Although appeals from intermediate orders are not the largest portion of the Appellate Divisions' dockets, a very substantial number of such appeals result in reversals or modifications of those orders. The importance of this error-correcting function and the potential that such review may have at the trial level cannot be minimized.

Contrary to what some observers believe, interlocutory appeals actually can save time and money by avoiding protracted litigation. They do so by allowing the appellate court to decide a dispositive issue on a relatively slim record on appeal. For instance, summary judgment is not infrequently granted on appeal in whole or part, thus saving the parties and the court system from a wholly unnecessary trial on some or all of the issues in the case. Likewise, if an order compelling disclosure of a key piece of evidence is upheld on appeal, that may well encourage the parties to reach a settlement disposing of the matter entirely.

Finally, experienced appellate judges advised Committee members that they considered interlocutory appeals to be a key part of the Appellate Divisions' caseload, but not one that overburdened them. These judges stated that they are there to decide such cases and they did not believe any modification of the present system of appeals as of right to be warranted.

This well-supported view that the present right to interlocutory appeals should not be restricted is now the position of NYSBA as a whole.

Ellen Fishman is an experienced appellate advocate based in Manhattan.

Even Seasoned Appellate Counsel Can Have New Experiences

By Alan J. Pierce, Esq.

In *Papelino v. Albany College of Pharmacy of Union Univ.*, 633 F.3d 81 (2d Cir. 2011), the Second Circuit reversed the dismissal of a hostile education environment claim and the grant of summary judgment to the defendants of Title IX sexual harassment, retaliation, and state law breach of contract and negligent supervision claims by male students against a female professor and the college. This was a very satisfactory conclusion to a somewhat "new" appellate experience for me.

A year earlier an appellate lawyer friend referred the lead plaintiff to me despite the fact that I had absolutely no experience with the area of law in question. In 25 years as an appellate attorney I have handled well over 100 appeals in various appellate courts in New York and elsewhere, and enjoyed the variety of subject matters in those appeals. While the Second Circuit was familiar territory for me, all but the negligent supervision claim was not. I reviewed the District Court decisions and had extensive discussions with my prospective lead client, Mr. Papelino, regarding the case and agreed with him that the decisions appeared in error.

The issues on appeal were straightforward and largely addressed the application of established law to the unique and disputed facts in the case. We did not seek to establish any new law on any of the claims, although this case will certainly add greatly to the body of law in New York on a breach of an implied contract claim against an educational institution.

The facts were critical to the reversal, but I will not belabor them here because they are set forth in detail in the decision and are not generally necessary to this article. Papelino alleged that one of his female professors, Nowak, began sexually harassing him in the Fall of 1997. In April 1998 Papelino told Nowak he was going to report her persistent and increasing sexual harassment to the Dean of Student Affairs, and she said "that would be a big mistake, go ahead and see what happens." He did report her harassment to the Dean, who later told Papelino that he spoke to Nowak and it was "taken care of." In reality, the Dean admitted in his deposition that he "never spoke to anybody" about the harassment report because he "didn't want to let it out." One month after Papelino reported the harassment to the Dean, Nowak charged Papelino and his two roommates and study partners, Plaintiffs Yu and Basile, of cheating on exams. Although the Dean to whom Papelino

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reported Nowak's sexual harassment was responsible for overseeing the Student Honor Committee hearing the charges and could have stopped the proceedings, he failed to take any action.

At the Honor Code hearing Nowak presented the evidence against the students, which consisted primarily of "statistical" charts that she had prepared based on her review of exams taken by the students in various courses – she had solicited and obtained exam results from other professors. During a break in the hearing Nowak allegedly exposed her bare breasts to the plaintiffs. The Student Honor Committee found Papelino guilty of cheating in three classes, Basile guilty of cheating in six classes, and Yu guilty of cheating in one class.

The three students appealed the decision to the Honor Code Appellate Board by filing the appeal with the Dean, but the Board declined to hear the appeal. The students received failing grades in the classes in which they were found to have cheated, and in August 1998 Papelino and Basile were expelled, and Yu was required to retake the one class.

Plaintiffs then brought an ultimately successful Article 78 proceeding in State court. In 2001 the Third Department held that the College's determinations to expel Basile and Papelino and to award Yu a failing grade were "arbitrary and capricious" and lacked a "rational basis." *Basile v. Albany Coll. of Pharmacy of Union Univ.*, 279 A.D.2d 770, 771 (3d Dep't), *lv denied* 96 N.Y.2d 708 (2001). Although the College was free to recommence the charges, it did not and granted Papelino and Basile their diplomas in 2001. The College certified Papelino's degree to the licensing Board in New York in June 2001, and the plaintiffs then commenced the Federal Court suit in July. When Papelino subsequently asked the College to certify his degree to the licensing authorities in Florida, the College officials refused unless they qualified it by providing information about the cheating charges and litigation and that it might be established in the Federal Court suit that Papelino had cheated.

In the course of working on this appeal in a new subject area, I rediscovered some old lessons and encountered several new ones.

First, the issues and particular facts of an appeal may lead to some difficult research. In researching the issue whether the professor's baring of her breasts to the plaintiffs was "harassment" (yes, the College actually argued it was not), it was extremely difficult to find cases from any jurisdiction discussing this. I found no cases discussing bodily part exposure in a male vs. female harassment case. The best I came up with were cases holding that a man's exposure of a woman's bare breasts or his own body parts are considered "objectively or subjectively offensive" and substantial evidence of a hostile environment.

Second, you should be prepared for much more oral argument than established by the Court. We all have argued appeals where we are given 15 minutes "on paper" and after only five minutes the judges are saying "we have your argument," essentially saying to sit down. This case was last on the calendar of five appeals, and my opponent and I were each given 10 minutes by the Court, and I reserved two minutes for rebuttal. This went out the window – happily on my part – right away. The total argument, including my rebuttal, lasted approximately

one hour. I frankly do not recall how long my main argument was, but it was probably 25 minutes at least. Judges Cabranes and Chin asked many probing questions, but I do not recall Judge Winter, who was participating by video conference, asking me much at all.

Third, beware the up-to-now "quiet" judge. Judge Winter did not ask a single question during the four arguments that preceded this case. At the start of his argument Appellee's counsel immediately challenged me, asserting that there was no proof of a critical statement by the Dean in the Appendix. Within minutes Judge Winter responded by reading the disputed Dean's testimony from a specific numbered page in the three volume Appendix (over 2400 pages) and quoting it back to Appellee's counsel – since it said exactly what I had stated that the Dean said in his testimony. Appellee's counsel was trapped and had nowhere to go.

Fourth, be very careful what you say to the judges. There was considerable argument about the Third Department's decision in the Article 78, as I had made it a centerpiece of my arguments. Judge Chin was making a point to my opponent about the decision when he stated to Judge Chin "when you read the decision you will see..." at which point Judge Chin interrupted him to say with some force "I have read the decision counselor."

Fifth, always have your Record or Appendix (no matter how large) at your side during argument. Appellee's counsel took the court through several pages of the Appendix, and the judges returned the favor of both of us. They went through the three volumes and asked detailed questions about various documents and testimony, even on some of the statistical evidence submitted by Nowak in the Honor Code hearing. I have frankly never had an appellate court conduct such a thorough review of the Record or Appendix at oral argument.

Sixth, always reserve time for rebuttal. I especially like to argue in appellate courts where as Appellant you can reserve time for rebuttal. I want the final word and believe as the Appellant I should have it. Here, as I stated above, I reserved two minutes out of my total of 10. My rebuttal, however, lasted 10-15 minutes due to questions from the bench. I knew we were about done, however, when Judge Cabranes started a question to me with these words: "I would like you to assume for purposes of argument that this case is going back to the District Court in some fashion *** ." Sweet words indeed for an Appellant, even if it is only an "assumption."

In summary, this case was a challenge from the beginning because I was not familiar with the subject matter and substantive law. I like to challenge myself, however, by taking appeals in new areas of the law and this appeal proved to me why I do. I learned a great deal and was reminded of many old lessons I have learned from 25 years of appellate practice. It was also probably the single best oral argument experience I have ever had – so far – no offense to the many other appellate courts in which I have argued.

Alan Pierce, of Hancock Estabrook LLP, has more than 20 years of litigation experience, concentrating on appellate practice, insurance coverage, defamation and civil and commercial litigation.