

LEAVEWORTHY

Vol. II No. 2. Winter 2012

The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

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Welcome

Leaveworthy is growing. In addition to three new articles – an interview with the new Clerk of the Court of Appeals, a practical guide on how to handle your first argument there and a discussion of why appellate counsel should be called in early in any litigation – *Leaveworthy* is proud to announce that it will now be distributed in various appellate courts. Grow with us. 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 Andrew W. Klein, Clerk of the New York Court of Appeals

By Norman W. Kee, Esq.¹

Even though Andy Klein, Clerk of the New York Court of Appeals, started his legal career at that Court, we almost lost him to the Alaska wilderness. In the early 1980s, Andy, then a very successful litigation associate in the New York City office of Whitman & Ransom, found himself spending his late-night commutes home contemplating his future. His wife Sheryl, a paralegal, was doing the same. Both of them had a strong interest in becoming Alaska homesteaders. However, luckily for New Yorkers, Albany and the Court of Appeals were also on their radar. Although it would take some time, Andy's renewal of his connection to Albany led him to back to the Court of Appeals and a career there that has spanned parts of five decades.

In many ways, it was a return home for Andy. After graduating from St. John's University School of Law, Andy was one of the early Central Staff attorneys at the Court of Appeals. In 1977, Andy began a three-year stint as a Central Staff attorney. After his clerkship ended, Andy decided to forego "elbow" clerkship opportunities at the Court, instead heading for New York City.

Andy experienced great success at Whitman & Ransom – in fact, when he told them of his plans to leave, they did everything they could to try to keep him. However, Andy returned to Albany. After learning that there were no openings at the Court of Appeals, he joined a number of other relocated New York City attorneys at Whitman Osterman & Hanna. A year later, after a permanent position opened at the Court, Andy decided that a return to the Court would be "the best thing for [him] at the time." Nearly 30 years later, that remains true!

And so, in late 1983, Andy became the Assistant Consultation Clerk of the Court. He later became the Chief Consultation Clerk, a position he held until becoming Clerk of the Court. Andy described each Consultation Clerk as having one of the most important jobs at the Court, but also as being "one of the most anonymous people in the system." The Consultation Clerks not only play a role in determining cases that

1. Mr. Kee is an associate at Patterson Belknap Webb & Tyler LLP (www.pbwt.com) in New York, and a member of the firm's litigation department. Mr. Kee also serves as Assistant Counsel to the New York State Commission on Judicial Nomination.

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will reach the Court by opining on jurisdiction and reviewability of matters, but they also draft bench notes on each case that serve as an early tool as chambers begin to review a new case.

The Consultation Clerks also play a very important role after cases are decided by the Court. While the Judges focus primarily on the substantive issues of the case, the Consultation Clerks focus on practical issues of the litigation and what affirmative or corrective action must occur – i.e. whether a new trial is needed, counts must be dismissed, etc. In order to effectively draft the decretal paragraph of every case, the Consultation Clerks must have comprehensive knowledge of the cases, and they review every draft of every opinion.

In November 2010, after serving as a Consultation Clerk for more than a quarter of a century – a span that covered four Chief Judges, two acting Chief Judges, and more than 25 Associate Judges – Andy succeeded Stuart M. Cohen as Clerk of the New York Court of Appeals. After a year on the job, Andy says it is fun, but that it was not exactly what he expected. Andy expected a heightened administrative role, including overseeing budgeting, hiring, contracting, and logistical decisions. He has been thankful to find the job has numerous other facets, including many that keep him involved in the Court's legal work. Andy still reads every motion report, and he continues to learn about every case on the Court's docket.

It is also the Clerk's responsibility to answer correspondence from prisoners regarding criminal leave applications, and during his time as Clerk, Andy has witnessed the Court's increased granting of these applications.

Andy's perspective on the culture of the Court, and its evolution over the last 35 years, is very interesting. The Court has always been a compassionate and collegial place, as reflected in the Judges' interactions with each other and communications of the legal and non-legal staff, with each other and the general public. However, Andy also sees two main factors – changes in judicial philosophy and the advent of

electronic communications – as having greatly influenced the Court's culture.

Andy related that in the past, the Court placed a premium on speaking with a unified voice. Accordingly, decisions were arrived at and crafted with achieving consensus as a goal. More recently, the Court has become increasingly comfortable with deviations from unanimity, with the result being that views expressed in opinions have been more sharply drawn, both in the majority and dissent. Andy adds that the Judges are still friendly with each other, still dine together during sessions, and still discuss things collegially; they just appear more comfortable with agreeing to disagree.

The second factor influencing the culture of the Court has changed culture everywhere – electronic communications. Prior to the ease of editing and emailing documents, the substance of each decision would be thoroughly hammered out in the conference room. Now, it has become easier for the Judges to instead broadly express their views on a matter, and then work out more specific differences by circulating comments to draft opinions. The electronic method may be easier and more efficient, but Andy feels that personal interactions have become less frequent, with the result that the Judges, clerks, and staff overall do not seem to get to know each other quite as well.

These changes will continue to influence the Court and its relationship with New Yorkers. Electronic communications in particular, Andy explains, will play a prominent part in his role as Clerk. Andy has already overseen the revamping of the Court's website, which has made it easier to use for practitioners and the general public. The Court continues to move forward with e-filing, and the implementation of a dedicated server for the direct uploading of filings is on the horizon. Andy hopes to extend the e-filing process to make filings that are not under seal available to the public. Under Andy's guidance, the Court of Appeals will continue to be responsive to all New Yorkers, attorneys and non-attorneys alike, and continue to be one of the nation's preeminent appellate courts.

Preparing for Your First Court of Appeals Argument

By Stewart G. Milch, Esq.²

In the last *Leaveworthy*, Alan Pierce wrote about lessons learned by a seasoned practitioner on a trip to the Second Circuit Court of Appeals. This article – based on recent first-hand experience – is a general guideline for those making their first trip to New York's highest court. This general outline won't guarantee a positive outcome, but you'll be prepared when you finally step up to the lectern.

Read a good "how to" guide on oral argument. I suggest Scalia & Garner's *Making Your Case*. Everyone will develop his or her own

individual style based on personality, past appellate experience and abilities, but the authors discuss many immutable points that are worth bearing in mind.

Begin preparing as soon as you learn your argument date. One of Scalia & Garner's first points: prepare assiduously. Even if the argument is months away, becoming thoroughly familiar with important case law, the issues and the record early on ensures that important points are ingrained and "at your fingertips" when the time comes. Think about the possible weaknesses in your position and try to envision both the questions that might be asked concerning them, and how you would respond.

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Outline your argument several times. The first time, don't worry about the number of pages in your outline. As you further prepare and hone your argument, pare it down so each point fits on one page. This way, when you make your final outline for argument in one manila folder, your points should fit neatly on the inside covers. This will help ensure that nothing is overlooked and facilitate a final review in case the Court asks if there is anything you would like to add.

Go to the video (Part I). If you don't practice in the Albany area and can't easily get to the Court to observe oral arguments, you should watch them as they're streamed live via the Court of Appeals' website (<http://www.nycourts.gov/ctapps>). You can also review archived arguments on the Court's website. You'll get a feel for who the more active Judges are and their questioning styles, and the courtroom will be somewhat familiar and therefore not quite as intimidating when you're standing at the lectern for the first time. If possible, try to watch the argument of a case involving similar issues.

Go to the video (Part II). If you don't work for a firm that can spend the time and money to do a moot court, a week or two before argument, set up a video camera and record yourself giving your argument. Make as many recordings as necessary to get comfortable delivering the first few lines of your argument. You will be: (i) preparing to deliver your most important points more effectively than by simply reading your outline and cases multiple times; and (ii) able to polish your presentation, so that any idiosyncrasies in your speech or mannerisms can be corrected before you appear in court. But don't be surprised when you're interrupted (possibly as soon as you introduce yourself) and are not permitted to make a speech. Oral arguments are more like question-and-answer sessions with the Court than public speaking. Having direct, responsive answers to the Court's questions will give you a better chance of success and may also create a favorable impression that will be remembered the next time you appear. **Never** make the mistake of not responding to or avoiding a judge's question, even if you do not know the answer!

Get a room. If you're not in or near the Albany area, why take a chance that Amtrak or that I-87 or I-90 will be delay-free? Stay overnight in one of the many area hotels. If you're not at the Crowne Plaza (literally about a block and a half away), or otherwise within walking distance from the Court, a cab costs \$5-\$10. An overnight stay and cab ride are well worth the cost, so you don't add worrying about getting to the Court in time to the already-existing stress of last-minute preparations.

Check your cases. The evening before your argument, cite check your important cases. Make sure they haven't been overruled or interpreted by another court in a way that hurts your argument, and if this has happened, be prepared to distinguish the subsequent case or explain why it is not binding on the Court of Appeals. Likewise, if the cases you are relying on have been followed or otherwise received favorable treatment in a recent decision, make sure to bring that to the Court's attention as well.

Appreciate the Courthouse. Get to the Court as much as two to three hours ahead of time the day of your argument. Arguments are typically scheduled for 2:00 p.m., and the courtroom won't be open until a few minutes before the Court takes the bench. But take some time to look around, read about the Court's history and allow yourself to be impressed with the architecture and the rotunda. Then take a seat at a large table in one of the libraries and make final preparations for your argument.

Finally, enter the Courtroom and be seated. The Courtroom will open approximately 15 minutes before oral arguments begin. After entering, you will approach the counsel tables by passing through a public seating area. A Court Clerk will be positioned at the rail and ask if you are arguing, and if so, as appellant or respondent. He will tell you where to be seated. But remember: you are "on stage" from that moment forward. Listen intently to the arguments before yours – if any – but there should be no discussions with any co-counsel or rustling papers.

Good luck!

Preparing To Win: It's Never Too Early To Add Appellate Counsel To Your Team

By Matthew W. Naparty³

It's late on Friday afternoon. A jury has just rendered its verdict in a case with multiple defendants after a five-week trial. One defendant was found liable and one was exonerated. The verdict, however, was not unanimous. Many points were hotly debated as the days turned into weeks. Several arguments that could have been raised were either overlooked or simply fell by the wayside given the intensity of the trial. Otherwise viable grounds for appeal passed without objection.

Preservation is an important consideration at literally every stage of a litigation, from pre-trial motions, to jury selection through post-trial motions and the entry of judgment. Whether an issue is "preserved" can often make the difference in how an appeal is decided. The failure to make an appropriate offer of proof or request to charge, or the failure to make a timely objection, can result in an otherwise valid issue not being considered by an appellate court. Generally, a party may not stand mute when evidence is admitted at trial and then argue on appeal that it should not have been admitted. Nor may a party claim that a different charge should have been given if no request was made

3. Mr. Naparty is a partner at the firm of Mauro Lilling Naparty LLP, (www.mlnappeals.com) which dedicates its practice exclusively to appellate advocacy and litigation strategy.

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for it at trial. And inconsistent verdicts cannot be addressed if their inconsistency was not raised before the discharge of the jury.

In fact, at the Court of Appeals, preservation is a jurisdictional prerequisite with rare exceptions. Thus, even if an issue is novel, represents a conflict between the Appellate Divisions, or otherwise satisfies the requirements for review by the Court of Appeals, the Court of Appeals will not consider the issue if it was not raised in a timely manner in the first instance in the trial court. While the Appellate Division has a broader "interests of justice" jurisdiction which, in appropriate circumstances, permits it to review unpreserved error that is particularly egregious or "fundamental," this power is rarely invoked. In most cases the failure to preserve an issue means that the Appellate Division will decline to consider it.

Recognizing the intricacies of preservation, clients are increasingly choosing to have appellate lawyers join their trial team and partner with trial lawyers, even well before a trial starts. Having appellate lawyers to provide practical guidance, to anticipate and frame issues as they arise, and to use their sharpened research, writing and oral presentation skills not only helps to shape the outcome of the litigation, but allows the trial lawyer to shine at trial.

The evidentiary advantages to having appellate counsel at trial are substantial. Appellate counsel contemplates what documents are important for building a favorable record and ensures that they are marked as exhibits. This is especially true of court exhibits: it is not unthinkable for trial attorneys to fail to introduce into the record memoranda of law and letters. Whether it is a memo of law, a request to charge or a proposed verdict sheet, marking these as exhibits removes any question as to whether the trial court was put on notice of arguments.

Beyond documentary evidence, proper presentation of issues may also mean making offers of proof concerning excluded testimony. Far too often this valuable procedure is overlooked. Certainly, not all excluded testimony is important for appeal, and understandably trial counsel's more pressing concern is persuading the fact finder on the admitted evidence and testimony. Naturally, when a judge closes one avenue of examination, the trial lawyer is well advised to move on or risk that judge's disfavor. When an appellate lawyer steps in, however, he or she can serve as a reminder that a trial lawyer is entitled to make a record outside the presence of the jury concerning trial rulings in an effort to protect their arguments on a potential appeal.

Appellate lawyers provide support to trial counsel by identifying the need for and drafting and arguing trial motions; preserving and enhancing the record; and participating in discussions with the judge in an effort to guide and shape the outcome of the litigation. Appellate counsel is also able to quickly and efficiently draft post-trial motions, which are often the last opportunity for a client to develop the necessary foundation to appeal and always are the last opportunity to present the case to a judge who has observed the witnesses. Trial counsel's primary focus while engaged in trial – and rightfully so – is reviewing testimony in anticipation of cross-examination, preparing witnesses,

culling through exhibits and thinking about summation. And, assuming that trial counsel has identified the need for a memorandum of law on a particular issue, a telephone call to an associate at the trial firm requesting a memo is a poor substitute for the advocacy of skilled appellate counsel who has been present at the trial on a daily basis.

Moreover, outside appellate counsel is able to provide his or her client with daily trial reports containing an ongoing commentary and analysis of the case from an objective appellate perspective. These reports can contain not only a summary of the day's events, but a legal analysis of the potential appellate issues as they arise, in addition to an opinion of the sustainable value of the case based upon the impact of the evidence as it is introduced at trial.

From a cost perspective, because appellate attorneys often work hand-in-hand with trial attorneys, they can often eliminate the need for a second-seat associate. In addition to providing the support of a second-seater, appellate counsel can offer their clients the additional benefit of a seasoned appellate advocate who acts as a sounding board for trial attorneys often forced to make important decisions quickly.

Finally, having appellate counsel on the litigation team serves to change the landscape in an effort to create opportunities and to position clients for settlement. In this difficult economy, clients often appreciate when appellate counsel is able to resolve a case without the need for prolonged litigation, including the cost of an appeal. Often times, the mere presence of appellate counsel at any stage of the litigation leads to a more favorable settlement. Trial judges listen to appellate counsel's perspective (as no court likes to be reversed), and adversaries take note (because they do not want to be faced with the prospect of an appeal). Cases are often best resolved by virtue of the threat of a meritorious appeal taken from a well-made record, as well as the uncertainty of the outcome. As articulated by many great sport coaches, "the will to win is not nearly as important as the will to prepare to win."

And preparing to win an appeal should always begin long before the notice of appeal is filed. Case in point: A prominent trial firm filed a summary judgment motion. The motion was lengthy, contained multiple exhibits and raised a number of legal arguments. After the motion was filed, the client decided to have appellate counsel review it in anticipation of a potential appeal. Appellate counsel reviewed the motion papers and after some preliminary legal research, was able to explain to the client why the motion was a dead loser. The reason was simple: the trial firm had overlooked and failed to raise the one winning argument. Fortunately, in this particular instance, appellate counsel was able to withdraw the pending summary judgment motion and remake it, this time with the winning argument. Although the motion was lost in the trial court, it was reversed on appeal and the complaint was dismissed, based solely on the argument that appellate counsel had identified and preserved. This is a story told time and again by experienced appellate practitioners – except the story usually ends very differently, because appellate counsel was either never called, or called too late to make a difference.