

LEAVEWORTHY



The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

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Chair:

Alan J. Pierce

Editorial Staff:

Cynthia F. Feathers, Editor-in-Chief
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A reminder to our readers:

Your contributions regarding cases, articles, interesting events, and the like will all be considered for publication in future issues. Submissions can be sent to appcourts@nysba.org.

The opinions expressed herein are those of the authors or article subjects only and do not reflect the official position of the Committee on Courts of Appellate Jurisdiction or the New York State Bar Association.

Welcome

In this issue of LEAVEWORTHY, we report on standards for appellate representation of indigent litigants who are entitled to assigned counsel; honor Hon. Susan Phillips Read following her recent retirement from the Court of Appeals; and celebrate the successful pilot year of a moot court program offered by the Committee on Courts of Appellate Jurisdiction. LEAVEWORTHY is also pleased to introduce "Appellate Perspectives." This will be a regular column, featuring masters of the appellate art writing about various facets of their practice. We are honored to have the inaugural column authored by the Honorable James Catterson, a long-term former justice of the First Department, and Brian J. Isaac, Esq., a well-known appellate litigator. LEAVEWORTHY dedicates this issue to Jean Nelson, the beloved staff liaison of the Committee, who recently retired from State Bar. We offer our deep thanks for his exemplary service to this publication and to the Committee as a whole.

Editorial Staff

LEAVEWORTHY

Committee on Courts of Appellate Jurisdiction

ILS Adopts Appellate Standards For Indigent Defense in New York

By Malvina Nathanson, Esq.

The culmination of an 18-month effort, Appellate Standards and Best Practices was released January 5, 2015 by the New York State Office of Indigent Legal Services (ILS). Under the guidance of Risa Gerson, Director of Quality Enhancement for Appellate and Post-Conviction Representation, a working group of 17 people, comprised of private practitioners, institutional defenders, and law school professors, began work July 1, 2013.

The working group was divided into four subgroups, covering Qualifications and Training, Scope of Representation/Duties of Appellate Counsel, Special Ethical Consid-

erations, and Family Law Considerations. It reviewed standards adopted by the American Bar Association, the New York State Bar Association, and the New York State Defenders Association, as well as policies promulgated in other states, such as Massachusetts, Michigan, and North Dakota.

The result is a comprehensive set of standards for attorneys in institutional offices or on assigned counsel panels who represent, on appeal, indigent defendants in criminal cases and parents in Family Court, and handle appeals in SORA risk-level assessment cases and Mental Hygiene Law Article

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ILS Adopts Appellate Standards (cont'd)

10 cases. Unlike the relatively bare-boned ILS standards for representation in conflict cases, or the standards adopted by the New York State Bar Association and the New York State Defenders Association for representation at all levels, the ILS Appellate Standards are expansive and include commentary that further refines and explains their requirements.¹

Some Appellate Standards are unremarkable—requiring competence, training, and evaluation; setting forth basic tasks such as collecting the record and preparing a “clear, concise and well-organized” brief; and mandating leave applications to the Court of Appeals. Others have provoked some controversy—appellate attorneys “must” meet with the client; appellate attorneys “should raise all colorable issues the client desires, unless doing so could prejudice the client;” appellate attorneys “should also determine whether the client needs assistance with matters beyond the assignment, such as parole advocacy, re-entry or unacceptable prison conditions;” and appellate attorneys “must” file a post-conviction application if one is warranted.

Ms. Gerson explained to LEAVEWORTHY that the Standards represent the “gold standard,” and they are “aspirational” in the sense that ILS is aware that attorneys cannot fully comply with them until the state adequately funds indigent defense. Some Standards explicitly acknowledge that they can only be achieved with additional resources to compensate attorneys for work not normally considered part of an assignment. The purpose of the Standards, she said, is to “elevate the level of practice,” and ILS has no enforcement or sanction powers.

ILS Executive Director William Leahy, in an interview published on the ILS website, expressed his understanding that the Standards “build the foundation...then, you just work constantly for the funding to make that vision a reality.” Chief Judge Jonathan Lippman, chair of the ILS Board, acknowledged that “there are a lot of practical issues involved,” but “if we don’t put out there what the gold standard in representation is, then you certainly are not going to get it.” Joel Stashenko, “Standards Issued for Counsel on Indigent Criminal Appeals,” *NY Law Journal*, January 8, 2015. On the other hand, Judge Lippman stated, at an open meeting of the ILS Board, that the term “aspirational” was not a correct description of the Standards; they are meant to be taken seriously. At the same time, he recognized that additional funding was required for some of the Standards.

Members of the bench and bar have been confused over what effect the standards should be given by lawyers and courts. In the only mention thus far of the Appellate Standards in a court opinion, the Third Department cited them in an appeal from a CPL 440.10 denial, as it remanded the matter for a hearing on whether to vacate a guilty plea. In *People v. Hall*, 125 A.D.3d 1095 (3rd Dept. 2015), the People had imposed as a condition of a co-defendant’s plea that the co-defendant not

testify for appellant. There was new evidence that the co-defendant may have been able to provide exculpatory testimony, and the co-defendant expressed a fear that he would lose the benefit of his bargain if he testified for the defendant. The Appellate Division cautioned in a footnote that the appellant’s attorney should counsel the appellant, if he had not already done so, that he risked a longer sentence should he be convicted after a trial. The court cited Appellate Standard 10.

NYSBA’s Committee to Ensure the Quality of Mandated Representation engaged in a lengthy consideration of the Standards in early 2015. Its deliberations resulted in a letter addressed to Chief Judge Lippman on May 26, 2015. While lauding the Standards as aspirational goals, the Mandated Representation Committee pointed out perceived problems. Given that so many of the Standards were “unfunded mandates,” particularly as to panel attorneys who would not receive compensation for many of the required activities, that Committee sought an amendment to the Preamble that would recognize that some standards could not be met without additional funding. The Committee also asked that this recognition be made clearer in particular standards. Relatedly, at a meeting of the ILS Board on September 25, 2015, Director Leahy announced that his current budget proposal included a request for \$3 million to enable providers and counties to implement the appellate and other standards. As he said, the standards “are not self-executing.”

The Mandated Representation Committee also disagreed with certain standards, such as the requirement that an appellate attorney meet with every client; the requirement to assist with issues outside the order of assignment, such as correctional and parole problems; the requirement to file post-conviction motions; and the requirement to argue every issue sought by the client.

A *New York Law Journal* article by Ms. Gerson and Tammy Feman (Deputy Chief of the Nassau County Legal Aid Society’s Appeal Bureau) explained the process for adopting the Standards and the rationale for controversial sections. Risa Gerson and Tammy Feman, “Indigent Representation: Post-Conviction Best Practices,” *NY Law Journal*, August 27, 2015.

For example, although the working group recognized that not all providers are funded to provide post-conviction representation, some are. The working group sought uniformity by requiring all providers to comply with a “best practice.” As to meeting with the client, the working group felt that an attorney-client meeting had many benefits, including the development of a relationship of trust. In both cases, the Standards exhorted funders to provide the necessary funding. The article also adopted what it thought was the majority view concerning issue selection. Requiring an attorney to raise all non-frivolous issues desired by the client would

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further “a client-centered approach to representation” and establish an equivalence, the working group thought, with the representation provided by retained counsel.

At its September 8, 2015 meeting, the Committee on Courts of Appellate Jurisdiction voted to continue its consideration of the Standards. When asked, Risa Gerson, a new member of the committee, assured the committee that any presentation from the committee would be reviewed, and that it was a normal process for standards to undergo revision, although no revision of the Appellate Standards is expected within the next year since they are so new.

- 1 This effort is one of several standards initiatives. Under the direction of Joanne Macri, ILS Director of Regional Initiatives, a working group began formulating Non-Citizen Representation Best Practices in August 2013 and recently issued RFP’s for six regional centers to provide guidance and advice to attorneys whose clients are subject to possible immigration consequences. Angela Olivia Burton, ILS Director of Quality Enhancement for Parental Representation, is supervising a working group developing Parent Representation Standards, an effort that began in June 2013 and may be completed this year.

Appellate Perspectives

Changing Winds: The First Department Jurisprudence on Securities Fraud

By the Honorable James Catterson and Brian J. Isaac, Esq.



Honorable James Catterson

When Eugene O’Neill wrote in *A Moon For The Misbegotten* that, “there is no present or future, only the past, happening over and over again, now,” he surely never contemplated practicing law before New York’s Appellate Divisions. The famous futurist, Alvin Toffler, also no New York lawyer, would have been stymied by the Appellate Divisions had he reviewed a series of recent First Department decisions involving fraud

success, the outcome of his own actions. To do this, he must be able to predict how the environment will respond to his acts. Sanity, itself, thus hinges on man’s ability to predict his immediate, personal future on the basis of information fed him by the environment.

The following cases demonstrate that, in the absence of en banc review, predicting the “immediate, personal future,” is a task not for the faint of heart when the stakes in the litigation are very high. It is not necessary to analyze the complex legal and factual scenarios that the cases present in order to take a few snapshots of the changing decisional landscape. Rather, the cautious appellate practitioner should find that a carefully constructed and easily understandable narrative may ultimately be the single most important factor in complex commercial cases dealing with securities.

All of the following cases involve litigation over fraud claims in the institutional sale of residential mortgage-backed securities (RMBS). All of the cases were commenced in the Commercial Division of New York County Supreme Court, after the financial crisis of 2007, where investors lost billions as the assets were rendered worthless. Since Wall Street is in New York County, which in turn is under the jurisdiction of the First Department, it is only to be expected that that appellate court would see a vast swath of securities cases.

In *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185 (1st Dept.

in residential mortgage-backed securities transactions. Toffler wrote in *Future Shock*:

Rational behavior ... depends upon a ceaseless flow of data from the environment. It depends upon the power of the individual to predict, with at least a fair

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Changing Winds on Securities Fraud (cont'd)

2012) (Friedman, J.),¹ the First Department was confronted with fraud claims premised on the rating guides for the securities utilized by defendant UBS. Plaintiff claimed that the rating guides were not reliable, that UBS knew that the guides were not reliable, and that it engaged in "ratings arbitrage" to defraud plaintiff as to the value of the securities. The Court, in an opinion authored by Justice David Friedman, dismissed the claims on the ground that plaintiff, a sophisticated investor, having disclaimed reliance on any representations by defendant, was barred from making any claim for fraud.



Brian Isaac, Esq.

Later, in *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 106 A.D.3d 494 (1st Dept. 2013), *appeal dismissed*, 22 N.Y.3d 909 (2013), the First Department began to signal that all may not be unanimous in opinion. The majority of the Court (Justices Friedman, Renwick, and Roman) held that the non-reliance clauses again barred a sophisticated entity

from making a claim for fraud where that party failed to insert into the offering memorandum "an appropriate prophylactic provision" to ensure against the possibility of misrepresentation. The dissent (Justices Clark, Manzanet-Daniels) argued that the defendant actively concealed certain information concerning the transactions at issue, and that defendant had "peculiar knowledge" that should allow the fraud claim to go forward.

The tide turned the following year in *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128 (1st Dept. 2014). *Basis Yield* is the second of the Goldman Sachs cases to reach the First Department. Even though the non-reliance clauses or disclaimers were substantially the same as those described by the Court in *HSH* and *ACA*, the factual allegations of *Basis Yield* complaint were different in one very significant and material respect, and it is this difference that seems to have been the tipping point for the Court.

Justice Renwick, writing for a unanimous Court,² held that "this is a case of a Wall Street firm (Goldman Sachs) being accused of selling mortgage-backed securities it knew to be 'junk' and then betting against the same securities as the 2007 financial crisis unfolded." 115 A.D.2d at 131. Justice Renwick quoted plaintiff's complaint at length, wherein plaintiff described Goldman's scheme to construct the transactions (CDOs) from assets likely to fail and included many from its

own inventory. Plaintiff alleged that Goldman then shorted those assets to its clients' detriment. 115 A.D.3d at 136.

Despite the fact that the First Department had previously found similar disclaimers sufficient to bar a sophisticated investor's fraud claims, in *Basis Yield* the Court held the opposite, with Justice Renwick now writing for the majority. Furthermore, the Court found that even if the disclaimers were sufficiently specific, the special facts doctrine would allow plaintiff's claim to go forward, because "Goldman had access to non-public information regarding the deteriorating credit quality of subprime mortgages." *Id.*

While the Court attempted to distinguish the disclaimers from those in *HSH*, the real difference in the cases which, for the Court, now justified a completely different outcome, seems to be the Court's invocation of the special facts doctrine (relied on by the dissenting justices in *ACA, supra*), and the claim that Goldman was trying to secretly get rid of its own toxic assets.

By now, the proverbial handwriting seemed to be on the wall. In *Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Global Mkts. Inc.*, 119 A.D.3d 136 (1st Dept. 2014)³ ("*Loreley No. 3*"), plaintiff made the claim (following the *Basis Yield* winning formula), that defendant Citigroup was using CDOs to get rid of the bank's own toxic assets. Justice Renwick, again writing for a unanimous Court, quoted extensively from the complaint (119 A.D.3d at 139-142) and summarized the allegations: "the gravamen of the complaint is essentially that Citigroup secretly selected its riskiest mortgage for sale to its investors as CDOs and purchased credit default swaps to short the issuance." 119 A.D.3d at 142. Justice Renwick quoted her previous opinion in *Basis Yield* extensively in holding that "Citigroup's disclaimers and disclosures do not preclude, as a matter of law, a claim of justifiable reliance on the seller's misrepresentations or omissions, as an element of fraud." 119 A.D.3d at 146.

Loreley Fin. (Jersey) No. 28 v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 117 A.D.3d 463 (1st Dept. 2014)⁴ was released by the First Department the same day as *Loreley No. 3*, above. There is a significant factual difference, though, between this case and *Loreley No. 3*. Plaintiff did not allege that defendant Merrill Lynch was trying to reduce its own toxic asset exposure, as with the claim advanced against Citigroup in *Loreley No. 3*.

The Court again extensively quoted plaintiff's complaint in an unsigned opinion. Merrill Lynch was the arranger "integrally involved in the structuring and sale of [the CDO] . . . was the initial purchaser of the securities, provided the initial financing, and acted as a counterparty by purchasing the CDS." 117 A.D.3d at 467. In that context, the Court noted that the plaintiff alleged that defendants "concealed

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from plaintiff and other investors that [the CDO] had been designed to meet the specifications of an undisclosed hedge fund whose interests as a net-short investor were diametrically opposed to the deal's success." 117 A.D.3d at 466.

The *No. 28* decision is far more abbreviated in its examination of precedent, and the First Department made no mention of its previous decisions in *HSH*, *ACA*, and *Loreley No. 3*. The holding rests on an alleged false statement as to who had in fact selected the collateral, as well as the selection of the collateral itself. The Court's only citation to *Basis Yield* is on a point not germane to this issue.

The most recent decision from the First Department involving allegations of fraud in a CDO utilizing RMBS is *Basis Pac-Rim Opportunity Fund (Master) v. TCW Asset Mgt. Co.*, 124 A.D.3d 538 (1st Dept. 2015).⁵ The essential facts are set out at length in the Supreme Court opinion. *Basis Pac-Rim Opportunity Fund (Master) v. TCW Asset Mgmt. Co.*, 40 Misc. 3d 1240 (A), 2013 N.Y. Misc. LEXIS 4032 (Sup. Ct. N.Y. Cnty. Sept. 10, 2013), (Kornreich, J.S.C.), *aff'd*, 2015 N.Y. App. Div. Lexis 655 (1st Dep't Jan. 26, 2015). The Supreme Court (the motion court) did not dismiss the fraud claim, allowing discovery to go forward to afford plaintiff the opportunity to better develop its theory.

The motion court then held that plaintiff's claim for negligent misrepresentation must be dismissed because, "where . . . the parties entered into an arm's length RMBS transaction, no special relationship exists." *Id.* This appeal to the First Department solely involved the dismissal of the negligent misrepresentation claim. The Appellate Division affirmed the motion court's dismissal of that claim on the ground that plaintiffs "failed to establish the existence of a special relationship of trust or confidence between the parties." 2015 N.Y. App. Div. Lexis 655, at *1-2. Furthermore, the First Department held that, "the involvement of a collateral manager in an arm's length transaction does not establish a special relationship as a matter of law." *Id.* (citing *Zohar CDO 2003-1, Ltd. v. Xinhua Sports & Entertainment Ltd.*, 111 A.D.3d 578, 579 (1st Dep't 2013)).

The single most interesting factor in this series of cases is that Justice Renwick was the author of the Court's opinions in *Basis Yield* and *Loreley No. 3* and participated in the appeals of *ACA* and *No. 28*. There are several conclusions that can be drawn when the decisions are viewed with the microscope of hindsight; and when we endeavor to read the tea leaves, we come to the following: Recognizing that the Court sits in five-judge panels, and thus three Justices need to agree on a position to carry the day, one Justice of the Court, Justice Renwick, became the pivot for the Court's majority view on this issue.

The facts of all of the cases are similar, and the distinctions should not necessarily have been sufficient to produce such contrary results in so short a time period. For example, the disclaimers and non-reliance clauses in the transaction documents were largely the same in all of the cases. In the first

case, *HSH*, those clauses operated as a complete bar to the fraud claims. The Court went so far as to suggest that the plaintiff itself would be committing a fraud if it negotiated the clauses, the CDO went forward in reliance on the clauses, and then plaintiff pressed a claim for fraud against the defendant bank after the investment went south. Within a year, Justice Renwick held the majority with a narrative sufficient to overcome a unanimous Court opinion that should have barred the claims.

More importantly perhaps is that the issue appears to have been resolved by the Court of Appeals in line with Justice Renwick's views. In *ACA Financial Guaranty Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (May 7, 2015), the Court held that plaintiff "sufficiently pleaded justifiable reliance for the causes of action for fraud in the inducement and fraudulent concealment." Judge Read, joined by First Department alumna Judge Abdus-Salaam, authored a vigorous dissent that comports with the early First Department cases in rejecting *ACA*'s claims of justifiable reliance. (Editor's Note: In her interview in this issue of LEAVEWORTHY, Judge Read lists that dissent as among her best writings.)

If Toffler was right, that sanity hinges on the ability to predict the immediate future "on the basis of information fed him by the environment," most of the litigants might have been searching for therapy from the Court of Appeals. That finally arrived when the Court accepted Justice Renwick's narrative in *ACA*.

The Honorable James Catterson, formerly an Associate Justice of the First Department, is now Special Counsel in Kaye Scholer's Complex Litigation Department. Among the most widely published jurists in New York history, Justice Catterson sat on some 6,000 criminal and civil appeals. He can be contacted at james.catterson@kayescholar.com. Brian J. Isaac, a noted "Super Lawyer" in appellate practice, is a partner in the New York law firm of Pollack, Pollack, Isaac & DeCicco. Mr. Isaac, who has written or been involved in almost 2,000 appeals, was recently admitted into the Best Attorneys in America and The Nation's Top One Per Cent Group. He can be reached at bji@ppid.com.

1 The panel consisted of Gonzalez, P.J., Friedman, Moskowitz, Freedman, and Roman.

2 The panel consisted of Tom, Acosta, Renwick, DeGrasse, and Richter.

3 The panel consisted of Mazzarelli, Sweeny, Renwick, Freedman, and Gische.

4 The panel was the same panel as *Loreley Fin. No. 3*; see note 3.

5 The panel consisted of Mazzarelli, Renwick, DeGrasse, Richter, and Clark.

A Conversation With Judge Susan Phillips Read

By John A. Cirando, Esq.

Q. Why did you want to be a judge?

A. I studied at the University of Chicago Law School during what had to have been a golden age, even for that estimable institution. My teachers included such 20th century legal luminaries as Soia Mentschikoff, the assistant chief reporter of the Uniform Commercial Code, who taught, in addition to commercial law, a famous first-year course, “Elements of the



Judge Susan Phillips Read

Law.” That course introduced fledgling lawyers to the mysteries of the common law so famously explored by her late husband, Karl Llewellyn, in his classic work *The Common Law Tradition*. Other teachers were Grant Gilmore, the drafter of article nine of the Code, who—naturally—taught secured transactions in addition to contracts; Harry Kalven, master of the law of torts, among other specialties; and the constitutional scholar and incomparable literary

stylist, Philip Kurland. And a very, very young Richard Posner, still going strong on the Seventh Circuit, joined the faculty my first year. Immersed in this stimulating intellectual environment, it is no wonder that over time I fell in love with the law. I am no abstract thinker, though, and always supposed that a judicial career might allow me to entertain my more “academic” interests and inclinations, while grappling with real-life problems.

Q. How did a native Ohioan, educated in the Midwest, wind up living in New York’s Capital District?

A. I always say that I ended up in the Albany area because I married a native New Yorker who considered living more than 25 miles from the Saratoga flat track a hardship too heavy to bear. More seriously, my husband, Howard Read, was among a handful of University of Chicago Law School graduates who joined the Department of Public Service during the tenure of Public Service Commission Chairman Joseph C. Swidler, himself a graduate of the Law School, who had been recruited by Governor Rockefeller to overhaul utility regulation in New York State.

I was not at all thrilled by the prospect of practicing law outside a major metropolitan area and considered my agreement to be exiled to such a far outpost of civilization as upstate New York to be an indicium of my true love for my husband-to-be, who had graduated and moved to Albany two years before I finished law school. I will never forget that when I expressed these negative thoughts and lamented my fate to Professor Kurland, my faculty adviser and mentor, he told me to buck up—that Albany was, after all, a State capital so I was bound to find interesting legal work. He was certainly right about that, although neither of us could have possibly imagined the trajectory of a career that took me to the bench of the preeminent common law and commercial court in the United States.

Q. Did you accomplish your goals on the Court?

A. I tried to give each case my full attention and unbiased consideration and, when I carried the Court, to write a majority opinion that was clearly and narrowly drawn, faithful to precedent, and cognizant of practical realities. Sometimes, of course, these latter two goals conflict. But this is my ideal of the craft of appellate decision-making. The degree to which I made a positive contribution to the body of New York law, I leave for others to determine. I am satisfied that I worked as hard as I am capable of working to meet the standards that I set for myself.

Q. You have been called the “Renaissance Judge.” How did you earn that designation?

A. Well, I had not heard that sobriquet applied before to me, as opposed to that famous Sherlockian, athlete, and author, Judge Albert Rosenblatt, but, like Al, I have many interests apart from the law. I have always been a sports nut whose earliest memories involve Ohio State football. I wore an outrageously tacky Ohio State tie to conference and on the bench (but *inside* my robe!) the day after OSU won the NCAA football championship last January. And I have—by exposure through marriage—developed quite an interest in and knowledge of thoroughbred horseracing. I studied piano seriously for many years (now that I am off the Court, I hope for time to play my lonely Yamaha upright) and was a committed chorister and vocal soloist through my college years. In fact, I surely would have pursued a career in music, probably as a musicologist, if I had not persisted in my ambition to become a lawyer.

My love of classical music, I suppose, leads directly to my near obsession with classical ballet, which is music made physical. As a youngster, I studied ballet with a teacher who filled my head with tales of George Balanchine and the New York City Ballet (NYCB), whose dancers I saw only when they occasionally performed on “The Bell Telephone Hour”

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or other TV variety programs of the era. But I read everything the Gallia County Public Library had to offer about Mr. B. and his dancers. And soon after I married and moved to Albany, I discovered that the Saratoga Performing Arts Center (SPAC) in nearby Saratoga Springs, New York was the summer home of the NYCB and the Philadelphia Orchestra. My father adored Eugene Ormandy and the Philadelphia Orchestra, and so I had grown up listening to the Philly's recordings. I firmly believe in the power of the arts to improve the quality of life and the mind and have for decades dedicated considerable time and treasure to support institutions and programs that bring classical music and dance to the public and, especially, to children who might not otherwise experience the joy of live performance. I am particularly devoted to SPAC, NYCB, and the School of American Ballet. I have since 2008 served on the SPAC Board, of which I have been Chairman since 2012.

Q. Please briefly explain your tenure at the Court of Appeals.

A. This sounds like a request for an epitaph. Make mine, "She advocated her position forcefully, but was always willing to consider compromise to achieve the clarity promoted by unanimity."

Q. What was your most satisfying opinion?

A. My most important majority opinion in a divided civil case may have been *Kirschner v KPMG LLP* (15 NY3d 446 [2010]), the in pari delicto decision. My most important majority opinion in a divided criminal case was probably *Policano v Herbert* (7 NY3d 588 [2006]), which reviewed the evolution of the Court's depraved indifference jurisprudence and declined to apply the *Feingold* rule retroactively. A dissent is a confession of failure—you admit for all the world to see that you were unable to persuade three other judges to your point of view, to paraphrase Judge Hugh R. Jones in his famous Benjamin N. Cardozo Lecture, "Cogitations on Appellate Decision-Making." But dissents are satisfying to write in the sense that the author is free to indulge in more pungent wordsmithery. Some of my best writings—purely as writings—are probably my dissents in the school funding cases (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893 [2003] and *Hussein v State of New York*, 19 NY3d 899 [2012]); in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2011]), the Stuyvesant Town rent regulation case; and, just this past spring, in *ACA Fin. Guar. Corp. v Goldman, Sachs & Co.* (25 NY3d 1043 [2015]), which addressed whether the element of "justifiable reliance" necessary to sustain fraud claims had been adequately pleaded.

Q. Are there voting blocks on the Court?

A. Not that I ever observed. Over the years, I have surely agreed with certain judges much more often than with others. But I defy anyone to discern a pattern whereby groups of Court of Appeals judges have routinely voted together in a kind of ideological lockstep, as some claim is the case with the United States Supreme Court.

Q. Do you have advice for attorneys regarding their oral arguments?

A. Know your case and the cases you rely upon backwards and forwards. And never try to duck a question that threatens to reveal a weakness in your argument. In fact, it is always better to acknowledge infirmities up front, and then diminish their importance insofar as possible, rather than wait for a judge to press you about the issue, as will inevitably happen at some point during your oral argument.

Do you have advice for attorneys regarding their briefs?

A. Shorter is always better, no matter how complicated the case. So revise, revise, and revise some more to hone your arguments.

Q. What will you miss the most?

A. Sitting on the Court of Appeals, I experienced the privilege and pleasure of deliberating with my colleagues on the most fascinating, challenging, and important issues of New York law, briefed and argued by our State's and nation's finest lawyers. This, of course, is why Chief Judge Kaye always refers to the Court as "lawyer heaven." Additionally, since I live in Rensselaer County, close to downtown Albany, I was resident in historic and beautiful Court of Appeals Hall. This afforded me and my law secretary and clerks the great good fortune to be coddled by the Court's superb staff. I miss them all every day.

Q. What are your plans for "retirement"?

A. Well, I am still finding my sea legs. In the immediate future, my husband has planned many of the kinds of trips that we were unable to take when my travel opportunities were confined by the Court's rather relentless schedule. This is a very important year at SPAC, as 2016 is the 50th anniversary season, and I am involved in planning special commemorative events, among other projects. I plan to leave the SPAC Board after this milestone year, but am sure I will remain involved there and, most likely, will serve on boards of other nonprofit arts-related institutions, as I have been approached to do so and truly enjoy not-for-profit board work.

I have lately been busy reading newly published legal books because I am a designated "respectable authority," responsible for nominating and writing capsule reviews for the *Green Bag Almanac & Reader* of my five favorite law books published in 2015. (For several years, I have been on the Board of Advisers for the *Almanac*, an annual collection of exemplary legal writing in multiple categories. The *Almanac* is an offshoot of *The Green Bag*, the self-styled "entertaining" quarterly legal journal.) And, of course, I am talking to everyone I can about how to put together an interesting and productive "judicial afterlife" (Chief Judge Kaye's term) for the long term. I fully expect to be involved in law on some level as long as I remain a sentient human being; I especially miss and crave dealing with complex commercial legal matters.

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A Conversation (cont'd)

Q. Do you really bleed blue?

A. Yes, with the special fervor of a convert. But let me explain. Naturally, I grew up a Cleveland Browns fan and hated the New York Giants because they always somehow managed to beat the Browns when it really mattered. I have a vivid childhood memory of the regular NFL season finale in 1958 when Pat Summerall split the uprights with a late, long field goal during a blizzard, or at least that is what the officials ruled—I have never fully accepted that the kick was good—to win the game and force a playoff, which the

Browns promptly lost, too. The Giants were then, in turn, beaten by the Baltimore Colts in the famous “Greatest Game Ever Played.” (Taking my revenge, I rooted for the Colts.) My husband Howard is a rabid New York Giants fan, though, and so I switched my allegiance in the mid-1970’s in order to avoid continued marital strife. Our parties for away games (I love to cook) soon became legendary amongst friends who share our mania for the G-men. Our friends who are Jets or Bills fans are simply not invited or welcome.

Committee Launches Moot Court Program For New York State Court of Appeals Cases

By Sharyn Rootenberg, Esq.

Last fall, the Committee on Courts of Appellate Jurisdiction announced the creation of a pilot Moot Court Program for Appellate Counsel. Attorneys with cases in the Court of Appeals may apply to the Program, requesting that a panel of experienced appellate attorneys, law professors, former judges, and clerks convene to “moot” their arguments. So far, the Program has been a resounding success.

Susan Antos, an attorney at the Empire Justice Center, a not-for-profit law firm, applied to the Program “as soon as [she] could” after the Court of Appeals granted her adversary leave to appeal. The panel “was familiar with all the briefs, including the briefs of the amici.” More than that, “[e]ach of the moot judges provided a unique and valuable perspective, and all were more than generous with their time and expertise.” In fact, two of the panelists followed up with additional ideas and suggestions in the days following the moot. “Thanks to the NYSBA moot court program,” Antos “felt well prepared on the day of [her] argument.” As LEAVEWORTHY goes to print, her case has not been decided.

Jonathan Pressment, a partner at Haynes and Boone, LLP, also took advantage of the Program before arguing a case in the Court of Appeals and had this to say about his experience:

I found the NYS Bar Association’s appellate moot court program to be an invaluable resource in the preparation of my oral argument before the Court of Appeals. Each member of the panel donated time to reviewing the parties’ respective submissions and conducting a moot of my argument that lasted for more than one hour. The questions—from some of the state’s most respective appellate litigators—hit on some of the very same points that the Judges of the Court of Appeals ultimately focused on at oral argument. Because I had been subjected to similar questioning during my moot, I was as prepared as I could be by the time I was asked to respond to questions before the Court of Appeals.

In an e-mail thanking his moot court panel for their time and assistance, Pressment commented that the session reminded him “of the camaraderie of the profession and the thrill we all get from thinking through legal issues.” Indeed, that sentiment has been echoed not only by all of the attorneys who have taken advantage of the Program to date, but also by moot court panelists who have volunteered their time. The decision in Pressment’s case is *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 NY3d 485 (2015).

After doing several moots within his firm, another attorney applied to the Program looking for “a fresh perspective.” And he got exactly that: “The experienced, well-prepared panel asked incisive questions from a perspective that I did not expect, which was precisely... [what] I needed.” In addition to the rapid-fire questioning, he was particularly grateful that the panel took the time to help him “formulate answers to the tough questions.” He found the experience “invaluable,” and “recommend[s] the program to any attorney, novice or experienced appellate practitioner, with an argument at the Court of Appeals.”

The recurring theme among attorney participants in the Program has been “the high caliber of the judges” and the level of preparedness each felt as they walked into the Court of Appeals. As for the panelists, volunteering their time to serve as judges has been an invigorating and law-affirming experience. Although winning is not everything and many factors go into measuring the success of a program such as this one, it is nonetheless worth mentioning that of the five attorneys who took advantage of this Program and have received a decision, none has lost before the Court of Appeals.

For more information on the Moot Court Program for Appellate Practitioners, as well as applications to request a moot, visit the Committee home page at www.nysba.org/ccaj and click on the link for the Program.