



TOMPKINS COUNTY BAR ASSOCIATION NEWSLETTER

NOVEMBER, 2018

At the annual dinner and membership General Meeting of the Association on November 9, 2017, the keynote speaker, Justice Robert C. Mulvey*, of the Appellate Division Third Department made the following remarks:

“Looking back to February of 2016, when the Governor announced my appointment - what was stunning was how quickly the transition was made - all my trial caseload was reassigned, Kim, Mahlon and I had a quick orientation with the Presiding Justice and Albany staff, and the boxes started piling up in our chambers.

Box after box of Records on Appeal, Brief and Exhibits, and we were off and running.

So what was different about my role, you might ask. Clearly the goal is the same: to assure that the law is properly applied to the objective facts. For a trial judge, you have the first shot at discerning the objective facts and identifying the primary issues of law.

Appellate judges have had the benefit of the trial judge’s discernment and analysis, and are in a position to review that in the context of more refined and comprehensive appellate arguments. I have noted that if the trial courts had the benefit of the extent and quality of briefing that we get their jobs would be much easier.

So the perspective changes but that is only one aspect of the change that I came to grips

with. Now I was part of a distinct institution, with a great history dating back to 1896 and a distinguished tradition and reputation. That is humbling for anyone, and daunting, to say the least, because now I had a responsibility to not just the parties to each case but to my new colleagues and to posterity.

I think the brochure we’ve made available tonight captures that sense of history and the burden that falls upon all the justices of the court.

And not just on each appellate case, but as you can see in the brochure, as part of a court operation that handles not only 1500 appellate dispositions annually, but about 7500 motions as well as attorney admissions and discipline, with all the justices involved to some degree in all aspects of the operation.

We currently have 12 justices on the court - as you know it is comprised of elected Supreme Court justices all appointed by the Governor after review by a Third Department Judicial Screening Committee. Two great recent additions this past spring are Justice Stanley Pritzker from Washington County and our old friend Justice Philip Rumsey from Cortland. Two Justices retiring at the end of the year are Presiding Justice Karen Peters, with 24 years the second longest serving member of the court in history, and Justice Robert Rose from Broome County after more than 17 years on the court.



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The Third Department is comprised of three judicial districts, with 28 counties. And I am now one of four from the Sixth District - probably the most this district has ever had on the court.

So how does the court operate?

The decisions that are handed down every Thursday at noon, I hope you will see, on a consistent basis, well-reasoned and cogent analyses that are supported by an objective view of facts and clearly supported by precedent. Most of the time you will see unanimous opinions yet there are frequent concurring opinions and dissents, so we try to reach a consensus. *Yet all are the product of a collegial court, and that collegiality is the product of humility and open-mindedness on the part of each justice, which makes the process a pleasure to be a part of.*

So what is the process, the mechanics of how these decisions are made?

III. THE PROCESS

When the cases come in they are reviewed by the attorneys in the Research Department. They are categorized by complexity and then distributed equitably among the 12 justices and scheduled over a typical ten day monthly term. Each day calendar has fifteen cases, with a different combination of five justices sitting each day. Over half of the cases are set down for oral argument. The calendar

generally starts at 1 pm and concludes by 4:00 pm. Each justice will be responsible for issuing and circulating a draft decision on three out of the fifteen cases per calendar.

Because these assignments are made several weeks prior to oral argument, you have what is known as a **Hot Bench**. The central research attorneys have prepared reports summarizing and analyzing every issue presented, and each assigned justice has the record and briefs to digest. For you appellate counsel out there, when Justice Garry is posing a question to you, rest assured that she knows that case as well as you do. And she has set that standard for me.

After oral argument, the deliberations begin. There is a conference immediately following oral argument, which gives us all a sense of what we can expect from the assigned justice on a particular case, and the assigned justice gets a sense of where his/her colleagues are on that case.

After the term is over, the draft decisions are circulated to the other members of each five-judge panel. They are reviewed and discussed informally. Questions and suggestions are made directly to the circulating judge and revisions may be made. If acceptable, the cases are voted on at the next monthly conference. If differences cannot be accommodated, the case will not be ready for a vote at the next conference and it goes on the Hold Calendar for resolution or circulation



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of concurrences/dissents and final voting.

Decisions are handed down within six to ten weeks in the following order of priority: Family court, reversals, criminal and then civil.

Oral arguments are webcast live.

So that is what we do and how we do it, but I cannot resist sharing some observations about appellate practice I have made over the past nineteen months.

1. APPELLATE PRACTICE

Robert Jackson, US Supreme Court Justice, Attorney General, Solicitor General and Nuremberg prosecutor and consummate appellate attorney (and Albany Law School graduate) once said:

"We are not final because we are infallible, but we are infallible only because we are final" [and that applies to the Appellate Divisions of this state because these courts are the last word on the bulk of the state's common law, since relatively few cases make it to the Court of Appeals].

As Solicitor General, I made three arguments of every case:

First came the one that I planned, as I thought, logical, coherent, complete;

Second was the one actually presented - interrupted, incoherent, disjointed, and disappointing;

Third, was the utterly devastating argument that I thought of after going to bed that night." (That's the one you think of while driving back from Albany on Route 88.)

My advice to you is to read the lecture given by attorney John W. Davis to the NYC Bar Assn. in 1940 titled "The Argument of the Appeal" - he argued 130 times in the US Supreme Court and is considered the finest appellate attorney of the 20th century.

My list of tips is partly stolen, partly off the top of my head:

TIPS ON APPELLATE ARGUMENT:

1. **Remember your job:** to formulate your argument in terms of *how the court can reach the result you seek based on existing law*. That may be simplistic but it may help you focus on the task at hand.

2. **Do not submit** - argue your case - why? - because you want to be helpful to the court, to help us grasp the case and "separate the wheat from the chaff" - to clarify and emphasize - you have the luxury of 10 minutes with the five judges of the court, make them count.



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3. **Do not answer** a judge's question with a question - it rarely happens but, trust me, it's not an effective technique.

4. **Listen carefully** to a judge's question and make every effort to answer it - act like you are grateful for the question - If you can't answer it, say so.

5. **Know your record** - you will be able to answer a judge's question, which is most likely on a key point - but you will also be able to keep your adversary from getting away with a misrepresentation or embellishment of the record.

6. **Do not belittle or demean your adversary** - respect for your adversary is respect for the Court.

7. **Show respect for the Court** - not for the judges' egos but to show that all of us have the same respect for the Court as an institution - *that binds us together, bench and bar.*

8. **Shorten that Brief!** - A brief that is too long means that you did not spend the time necessary to shorten it.

9. My final tip for Tompkins County attorneys arguing in the Third Dept: **Slow down** - I don't mean in speaking but on a certain stretch of Route 88 - there's a trooper

near Richfield Springs, trust me.

CONCLUSION

Best part of the job - when the court is called to order, and we stand behind our respective chairs and the Bailiff says:

"Ladies and Gentlemen, The Justices of the Court. Hear ye, Hear ye, Hear ye: all persons having business before this Appellate Division of the Supreme Court, held in and for the Third Judicial Department of the State of New York, let them draw near, give their attention and they shall be heard."

And I look over and I probably see Beth Garry, Phil Rumsey or my other colleagues on the bench, and the odds are that I will see one of you in the courtroom, and also see a block of stone with "Tompkins" etched into it, as one of the 28 counties of the Third Department - it's a great feeling and is a reminder of my friends and colleagues here in Ithaca and my pride in representing all of you on this court.

As some of you may know about me, I like to step back and look at the big picture once in a while, not just with life but especially with regard to our profession. I love history and tend to take the historical perspective on things.



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We all get lost in the day-to-day routines of running a law practice, handling matters for clients and working in the courts but I think it is so important to stop and appreciate the significance of what we are doing, the role we're playing in our society, and the fact that we are continuing to preserve and enhance the Rule of Law. Everything you do as an attorney, in one way or another, confirms the pre-eminence of law as a foundation and framework for a civil society. A routine real estate closing or standard probate file, or a misdemeanor case in a justice court reinforces for your clients that we have a body of principles, rules and regulations that are time-honored and essential in maintaining a functioning economy, private property rights, equality and justice - "the foundation on which an ordered society rests" and all of you contribute to that everyday.

So, I urge all of you to remember that and to uphold the honor and dignity of the profession and take pride in it - maintain high ethical standards and insist that your colleagues do so as well. As William Jennings Bryan said about the legal profession, "its principles ennoble and its practice elevates."

And because this Association has always furthered those principles I will always take pride in being a member and your colleague.

Thank you."

*Hon. Mulvey's bio (summary) can be accessed at:

<http://www.courts.state.ny.us/ad3/Bios/MulveyBios.html>

The 2018 Annual General Meeting of Members of the Tompkins County Bar Association (TCBA) shall be held on Wednesday November 7, 2018.

Where: Zaza's Cucina, 622 Cascadilla Street, Ithaca, NY 14850.

Time: 5:00 PM - 9:00 PM

Advance RSVPs and payment required.

New members slated to be voted into the Association:

Amelia Christian

Andrew Kelly

Kristen Grabowski

Emily Perks Quinlan

Zulaikha Safi

New member applications can be submitted electronically at www.tompkinsbar.com

Slate of Officers nominated for election:

President - Carla McKain

Vice President - Michael C. Pehinec, Jr.

Treasurer - Hayden Brainard

Secretary - Emily Rockett

Immediate Past President - Ciano Lama

This newsletter was compiled by Khandikile Mvunga Sokoni. Questions, suggestions and ideas for future articles can be sent to kms@truelawshlaw.com