



The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

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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.

Welcome

In this newest edition of *Leaveworthy*, the Committee on Courts of Appellate Jurisdiction is proud to print Editor William Stock's exclusive interview with Presiding Justice of the Second Department Randall T. Eng.

Justice Eng recounts how his life has come full circle – from his roots just a few blocks from the courthouse at 45 Monroe Place to the current challenges he faces presiding over one of the busiest appellate courts in the land.

Draw near and ye shall be heard.

— Cynthia F. Feathers

— Denise A. Hartman

Co-Chairs of the Committee on Courts of Appellate Jurisdiction



Interview with the Honorable Randall T. Eng, Presiding Justice of the Appellate Division Second Judicial Department

By William B. Stock, Esq.¹

Leaveworthy: *Your Honor, can you discuss your background briefly? What led you to the bar and then the bench?*

Justice Eng: I was a 1965 graduate of Brooklyn Technical High School, just blocks from where we are now at the Appellate Division for the Second Department. I studied a pre-engineering curriculum, but I noticed that I actually preferred my more liberal arts studies, such as English, social studies, and writing courses, and I thought that my skills were more appropriate for the law than for science and technology. So because of that, I made a decision to study as a pre-law student, and then I went on to law school and I'm not sorry. I haven't looked back. I've had a very satisfying career and over 40 years as a member of the bar and bench in New York. I attended law school just a block from here as well, at St. John's University School of Law, when they were in Brooklyn. As you might remember, they were at 96 Schermerhorn Street until

1972, when they relocated to the Queens campus. So my legal career began here in, in Brooklyn Heights and it is concluding here in Brooklyn Heights. So it's an interesting circular journey that I've taken in my legal career.

Leaveworthy: *Well, as a poet said, in my end is my beginning.*

Justice Eng: How true it is because I spent most of my legal career in Queens, and I never thought that I would actually conclude my legal career here in Brooklyn, where it began. And it's been very satisfying to come back to my legal origins, so to speak.

Leaveworthy: *What led you to the bench?*

Justice Eng: In 1983, when I was appointed by Mayor Koch to the New York City Criminal Court, there was a perceived need to have diversity on the bench. I was already in the administration of Mayor Koch.

1. Mr. Stock is an appellate attorney and litigator, as well as a degreed Law Librarian, with more than 20 years' experience.

I was Inspector General of the New York City Department of Correction, and I was encouraged to apply for service on the bench because there had never been an Asian on the bench anywhere in New York State. So because of my criminal justice background and my involvement in the Koch administration, I became a candidate for appointment to the New York City Criminal Court.

Leaveworthy: *Now, you have been both a trial judge and an appellate judge. How did the two positions differ?*

Justice Eng: Well, they differ essentially in the need for collegiality as an appellate judge. As a trial judge, you make rulings by yourself. You may consult with colleagues occasionally; but the decisions and the outcomes are your responsibility. As an appellate judge, of course, you're one of a panel of the judges. It may be four, it may be five, and it's necessary to try to forge a consensus regarding the decision that is rendered. And we do work very hard to have a consensus. And when we can't, then we dissent. But the process requires considering the views of other judges and trying to blend them with your own view of the case, with the law and the facts, and to achieve a consensus. And if you have to dissent, then you have to be very mindful of the reasons why you're dissenting and the means by which you articulate your views.

Leaveworthy: *What are the duties of a Presiding Justice?*

Justice Eng: Dealing with the operation of a court that consists, at full complement, of 22 judges and various staffs; calendaring cases efficiently; making certain decisions are rendered promptly; and having oversight over all the decisions that come out of the Court regarding legal consistency. Of course, we sit in separate panels. It isn't unusual to have different results from different panels that are looking at the same issue. It's up to the Presiding Justice to try to reconcile the work product of those panels. I'm speaking of having to try to speak in one voice to the greatest degree possible. In light of the fact that we have so many different panels of judges, we are unlike our Court of Appeals and other courts of last resort that sit in single panels. So be it nine, be it seven, it's one panel of judges that's hearing cases. Here, where you have to have a number of different panels, you have to deal with the results and the outcomes.

I also have a lot of other responsibilities. Of course, we admit lawyers, and we have a tremendous volume of candidates to process. Right now there are some 3,000 Second Department residents awaiting the results of the bar examination. Those that are successful have to be processed and admitted to the bar by our Court.

We also discipline attorneys in the Second Department. That, of course, is a very demanding responsibility of this Court. We review the petitions from the various grievance committees, the outcomes that have flowed from hearings conducted by special referees, and make determinations as to what will be sustained and what sanction, if any, is appropriate for the offending attorney.

Then we have other ancillary operations. We have oversight of the Grievance Committee, the Committee on Character and Fitness, and Mental Hygiene Legal Services. So I would estimate that the majority of the Presiding Justice's time is spent in the administration of those responsibilities of the Court, and just slightly under 50% is devoted to the legal issues that we've discussed already. And I also sit on panels, not as frequently as the other justices, but I do sit regularly. So all that has to be done from these chambers.

Leaveworthy: *When you assumed the position of Presiding Justice, how did you assess the strengths of the Second Department and what challenges did you see?*

Justice Eng: The greatest strength I found was the collegiality of this bench. That is, despite the Court's large size, we have remarkable collegiality in this Court, that is, everyone respects the views of each other. We do work very, very hard to try to achieve a consensus in our results. We are respectful of each other's positions, and we disagree without being disagreeable, as you might note from some of the dissents that are published here.

And I'm most proud of the fact that we have a tremendous volume of cases. We decide some 4,000 cases a year, dispositions of cases that are either affirmed, reversed or modified. And that is a very, very heavy caseload. The challenges are in keeping up with this volume. As of today's date, we are still under strength by four justices. Of 22 authorized, we have 18 now in place. We have had vacancies now for the last three years that have varied from two to four justices. And that has an impact on the court because right now we are short four justices. That is the equivalent of one less panel of justices that is able to determine cases. That means that the Court, because of its shortage now of justices, is unable to decide anywhere from 600 to 700 cases which we should be dealing with that we can't because of the shortage of judges. It was recognized years ago that because of the volume of cases here, we need 22 justices. We simply don't have them now. As of today, I can observe that there's only been a single new justice appointed to this Court in the years 2011, 2012, and now up to the end of October of 2013, one new person. When I was designated Presiding Justice, I was already an associate. So my designation was not a gain and only one new justice has been appointed in that three-calendar-year term.

Leaveworthy: *How large is the operation of the Second Department?*

Justice Eng: Well, the operation is significant. Each of the ancillary agencies employs lawyers, and the size of the staff, of course, varies but we're speaking of legal staffing for all of those services. Here at the Appellate Division itself, we have a law department that at full strength is 55 court attorneys; that is, attorneys who are in our legal department, who do research and support us as the law department. There are vacancies because of resignations, retirements. The budget situation has prevented us from back-filling as expeditiously as we'd like. In addition, we have several court attorneys who are out on maternity leave. And it's wonderful, of course, that they're dealing with the needs of their newborns, but for that period of time, their services are lost to the Court. In addition, we have the usual illnesses and recuperations that you see in a pool of over 50 people, who range in age from relatively new graduates to people well into advanced middle age. So we have our shortages there. Our Clerk's office is staffed by attorneys. The persons who have the titles of Clerk of the Court and deputy clerk and associate deputy clerk are all lawyers. And they, of course, provide a wide variety of services here. They assist me, of course, in the "quality control" that I was speaking of regarding reviewing our decisions and making recommendations regarding harmonizing the results. And they are invaluable to the Court. Many of them have had several decades of experience in this Court. So they are the institutional history of this Court in many respects, and I and every other Presiding Justice has relied upon our Clerk's office as to the discharge of their duties.

Leaveworthy: *Is this the busiest appellate court in the country?*

Justice Eng: Yes, from what I understand anecdotally, it is the busiest intermediate appellate court in the country. I don't think anyone can match our volume now. And, of course, that's because the 10 counties of the Second Department have grown, at least the suburban and the rural counties have grown to a degree that was probably unimagined when the departments were actually formed. There are so many nat-

ters that have to be heard by this Court as of right. We're asked to grant leave in very few categories of cases. We have everything from the most complex commercial matters to pro se litigants involved in relatively straightforward matters in Family Court that all have access to our Court, and we must deal with them all.

Leaveworthy: *It's public knowledge that the judiciary has been hit by budget cuts in recent years. You've already mentioned the strain it's put on the Appellate Divisions, but do you have the staff to handle the filings?*

Justice Eng: I have enough now to deal with our current level of filings. But it's a very fine line. I can see us going into a crisis mode with just a spike of 5% or 10% of increase because of the volume we're entertaining now. So I'm watching that very carefully. And if we lose any more justices, we're going to have a problem in having the numbers of sittings we like to have. We have lost judges in the recent past because of failure to be re-elected. And, of course, when a Supreme Court Justice is up for re-election, they're up again in another contested partisan election. And that has cost the Appellate Division statewide in all four departments the services of some very capable justices who were not successful in their re-elections. And as of the time of this interview, we had two of our justices now who are running for re-election in contested elections in the Ninth Judicial District. And if that were to happen, then if we were to lose a justice because of failure to be re-elected, then, of course, we would have to look to the Governor for an appointment of a new justice.

And the services of the justice that are lost because of failure to be re-elected are felt almost immediately because of the timing of things. Of course, the election is early in November. A justice that loses an election is off the bench as of December 31st. But, of course, a justice in an appellate court who loses his or her seat faces the task of completing all of his or her business in that less than two-month window. And they may have reserved decision on any number of cases; they may have outstanding opinions in cases; they may be on benches that have yet to decide matters that have been heard already. So a judge who's lost because of failure to be re-elected is lost to the Court almost immediately after Election Day. And these are the kinds of things that we face in our scheduling and our decision-making processes here as Presiding Justices.

Leaveworthy: *I can remember other lawyers telling me in the 1980s that the Second Department was so busy that it could take two years to get a decision, and appeals were actually shifted to other departments.*

Justice Eng: That is absolutely correct. It was a situation that arose when this bench was at an authorized level of 15 justices. And it became necessary to send appeals to other departments, which can be done constitutionally, because of our inability at that time to deal with the volume here. And then the Court was expanded to 20 justices and then 22 justices in time. But that was a reality.

Leaveworthy: *I understand that the other Appellate Divisions also have gaps in their sitting judges.*

Justice Eng: They do. The most acute situation right now is in the Third Department because they have an authorized complement of 12, but they have eight right now. So there's a bench that is down one third of its judges. And the First Department has I believe three vacancies. However, their situation was caused by some positive developments, and that is because a justice was elevated to the Court of Appeals, another was appointed to the federal district court. Positive reasons: but they are short nonetheless.

Leaveworthy: *How successful is the Civil Appeals Management Program at settling cases?*

Justice Eng: The CAMP program is very successful. The CAMP program now has been settling something like 45% of the matters that have been referred to it. And I credit that to the extraordinary service of the three retired justices of our Court currently doing that work. They're highly respected. It actually is akin to a free mediation by very experienced former judges who see issues, and who candidly evaluate them and try to bring the parties together. And without their contribution, our caseload would be significantly higher. So I'm glad to say that it's worked out well, but I also encourage the bar to follow our guidelines carefully regarding the need to appear as required and to have qualified and authorized counsel there to settle the case. Having the parties there in order to seal the deal, so to speak, and the presence of carriers' representatives who are involved in so many of these cases, is necessary to make it happen.

Leaveworthy: *What are your plans as Presiding Justice for the future of the Second Department, in particular, you seem to want to have this Court do a lot of traveling?*

Justice Eng: Transparency. The Court, of course, covers a large portion of New York State. And we are here in a beautiful courthouse that is remote from many of the sites of the rest of our jurisdiction. I have begun a program of having sittings, having calendars heard, and conducting official business at law schools. And we have in the Second Department no less than six law schools. So that's a tremendous asset in New York to have 15 law schools all over the state, but we have the ones that I've mentioned in New York. So we've already had sittings at St. John's and at Hofstra, and we have plans on the books now to go to Touro Law School, Brooklyn Law School, and there are two law schools that haven't responded to us yet if they are interested. If our schedule permits it, we'll have a sitting there as well. I find it very beneficial to get the academy and the court closer. I think it's a wonderful experience for faculty, staff, and students. It's good for our court to interact with law schools and its constituents, because after the sittings, we entertain questions about some of the procedures and some of the issues that have been argued in general. I found that the bar is very enthusiastic. They have been participating and they're glad to be involved in the same process.

I've also tried to move the Court into counties in which we haven't sat on a regular basis. We annually do have sittings in places such as Mineola, as Central Islip, in White Plains. But we haven't been to Queens as frequently as we should be, and we're trying to get back on track that way. We're sitting today in Dutchess County, which I understand we've never sat in. And we're looking at Rockland and Orange Counties. But, again, I'm trying to be respectful of the time and the convenience of lawyers. I don't want to bring people to Rockland and Orange who might find that a hardship. It can be 100 or more miles for some practitioners, let's say from Long Island to Orange County. So with all those concerns in mind, I'm trying to get us out there because it's their court.

Leaveworthy: *Except in rare cases, the Second Department does not permit rebuttal. What is the policy behind that rule?*

Justice Eng: As my predecessors have said, the reasons are almost lost in antiquity because it's been the policy for many years. I have been reviewing it. I think that, as a practical matter, it's a matter of economy and time because when we have calendars of 22 cases, having four to five hours or oral argument is not that uncommon. If we had rebuttal, it might lengthen it. Of course, you could reserve rebuttal time from your time. But I'll say this: we do not use lights, we don't have red lights, bright lights or whatever else at the podium. Time is requested and it's made a note of. But I think that any practitioner who has been here a number of times will know that we do not cut anybody off. If the judges have questions, it's never shortened. I think that everyone gets a fair

hearing here. We also advise those arguing that in the case where there is a misstatement of fact by a respondent or where there's an entirely new argument made, we permit a response. So there is in effect rebuttal for those things that are the most egregious of situations in which rebuttal might be necessary.

Leaveworthy: *What research facilities does the Court have?*

Justice Eng: We have a full-time qualified librarian who is a very knowledgeable person in doing electronic research as well as book research. And book research now seems to be really fading into the background. We have no shortage of resources for legal research because of our experienced librarians and because of the resources that we have access to. I think we have the ability to conduct research at a level that's more than appropriate to our needs. And I have not heard any complaints from the law department regarding any lack of access to materials. We will find it. It may take us a little time; but we'll find it. I haven't seen anything in which we have had a complaint where we couldn't get something or we couldn't have access to it.

Leaveworthy: *Do you see the need for a Fifth Department?*

Justice Eng: [laughs] I have to respond to that in a guarded fashion, only because I shouldn't be involved in the political processes that are necessary in order to make that happen. But I think it speaks for itself; that is, when you have a department that covers more than 40% of the population of New York State and covers 10 counties, there is a need, just from the perspective of numbers. It would certainly be helpful to have a Fifth Department to reduce the volume here, to reduce potentially some of the hardship on the part of litigants to come to this Court. As I may have pointed out before, some of our litigants have to travel more than 100 miles to come to the Court. And those are not an easy 100 miles, as we all know, with the kinds of traffic and parking and even public transportation problems we have. So I think, for the convenience of litigants and for the more equal distribution of the caseload, it certainly would be a positive development.

Leaveworthy: *What can the typical appellate practitioner do to improve his or her performance before the Court, both in writing and in oral argument?*

Justice Eng: Well, of course, preparation and knowledge of the issues and being prepared for a hot bench. I think that anyone who has appeared before this Court knows that the judges on the bench know the record and they know the arguments. And attorneys should be prepared to answer likely questions from the bench, rather than be prepared with a set piece argument. Of course, we'll hear your set piece argument. But I think that a prepared practitioner will know what it is on the minds of the judges and be prepared to answer them directly and succinctly.

As far as the writing goes, the writing runs the entire range. We have brilliant briefs that come this way, masterful legal briefs. We have others that are prepared by persons who probably have little or no experience beyond what they were taught in law school. I would think that anybody that presents something to this Court should be prepared to work from an excellent work product because we pay very careful attention to what you write. And if you haven't covered the issues there, if you haven't done research to assist the Court in making its decision, then you're at a disadvantage. So it's preparation.

Leaveworthy: *Have you any concluding thoughts for the bar?*

Justice Eng: You know, I would like to ask the bar to be thoughtful in their requests for oral argument and for the length of oral argument. I have found that on many occasions attorneys have requested time that is put on the briefs and that the parties do not come, so the matter ends up being submitted. Now if argument is requested, then the justices will be determining whether or not they're going to ask questions about this area, about that area and will prepare themselves in one fashion. If something is going to be submitted, we'll make our determinations using other approaches. It's helpful for the efficiency of the Court to know if oral argument is really needed, if it's really going to be conducted, and to have the length of time more accurately reflected. Quite often people will ask for 15 minutes, the maximum time, without giving thought to the fact that what they might have to say in their presentation might only take five minutes, it might take 10 minutes. And I think it would be better if they tailored the request to what the actual requirements are. And if something is to be submitted, then say so, so we can plan accordingly because of the length of the calendars and out of respect to the other litigants. So I think we might be able to have a greater efficiency there.

Leaveworthy: *Thank you very much.*

