

LEAVEWORTHY



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on Courts of Appellate Jurisdiction

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A reminder to our readers: Your contributions of ideas and articles for this semi-annual publication are welcome. Please send your submissions to CTSAPP@nysba.org.

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

Pioneer, Trailblazer and Jurist: What's Next for Justice Peters?

By Sean Morton and Rosemary Queenan¹

We interviewed Karen K. Peters, former Presiding Justice of the Appellate Division, Third Judicial Department, at Albany Law School on Kate Stoneman Day, an annual event held to honor the first woman to practice law in New York State. It was a particularly appropriate day for the interview, as Justice Peters, a 2006 recipient of the Kate Stoneman Award, is a trailblazer and a pioneer like Ms. Stoneman herself.

Justice Peters ascended through various levels of the judiciary against enormous odds. When she became a Family Court judge in Ulster County in 1983, she was the first woman elected to that position. She was also the first woman elected to the Supreme Court in the 28-county Third Judicial Department, and the first woman to be appointed as Presiding Justice of the Appellate Division, Third Department.

Her experiences with gender inequality have fueled her passion to fight for diversity in the legal profession. As former chair of the Gender Fairness Committee of the Third Judicial District, Justice Peters is well known in New York for her contributions in this area. We asked her how she was



able to make progress in diversifying the profession.

Diversity in the Legal Profession

SM & RQ: How were you able to be successful in your efforts to diversify the profession?

KP: Diversity is a passion of mine. Some people think diversity is a responsibility rather than their passion. Diversity is not about accommodating people. It is about creating an environment that is comfortable for people and that welcomes people from different genders, races, religions, nationalities and identities. It is also about learning your own biases and understanding them. Everyone should understand where it is that they are blocking themselves off from welcoming other people.

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SM & RQ: What should the legal profession do to improve diversity?

KP: We should make it clear that diversity is about opening our world to our courts, our offices and our law schools. When I was Presiding Justice, I made it very clear that I wanted to increase diversity in the Court at every level. Not just on the bench.

In fact, when Justice Peters became Presiding Justice, she implemented a hiring process that required her to meet personally with every candidate for appointment to a position on the Court's staff. She believes that, through this process, she was able to focus on her goal of improving diversity in the Court. She also felt strongly about this process as a way to let Court employees know that every person in the Court is valuable.

Our conversation then turned specifically to female representation in the courts. We started with a discussion of U.S. District Court Judge Jack Weinstein's rule urging young female attorneys to have a more substantial role in his Court. Judge Weinstein implemented this rule after the release of a study and report by the Commercial and Federal Litigation Section of the New York State Bar Association on gender disparity in the courtroom.² We asked Justice Peters to share her thoughts about Judge Weinstein's initiative.

KP: That was a very interesting study. The Third Department participated in that study as well as the other departments of the Appellate Division. It raises an interesting question: if all of the partners in law firms were women, would we have this problem? It reminds us that there is still an enormous glass ceiling in law firm practice today. What I like about this initiative is that it is being imposed by the judges, which enables the partner to say to the client: listen, we are doing this because this is what the judge wants in order to encourage more participation at all levels.

SM & RQ: What can we do to get men to participate in our efforts to increase gender diversity in the profession?

KP: If you had more female partners in firms, you would have more buy-in from the men.

Mentors

SM & RQ: In the context of your work in the area of gender diversity, you have been a wonderful mentor to many attorneys in the legal field, both women and men. Who was your mentor during your legal career?

KP: I didn't have a mentor when I started practicing.

There weren't a lot of female judges around when I became a judge and there were no female judges in Ulster County. But I followed certain historical women, including Lillian Hellman, whom I have often spoken about. Lillian Hellman is well known for her refusal to disclose the names of the members of the communist party and for saying "I cannot and will not cut my conscience to fit this year's fashions." I have never met her but I have read everything she has written and I really tried to emulate her courage. Another mentor was Dr. Sheila Bloom, a psychiatrist, who, while not a lawyer, was a great mentor to me in the field of alcoholism. Dr. Bloom taught me how to prepare to be successful. She is a brilliant psychiatrist. We worked closely together to propose legislation raising the drinking age from 18 to 19, which involved fighting the liquor lobby, and she really taught me the importance of being prepared and having strong negotiation skills. And then there was Judge Kaye, whom I did not meet until I was a Family Court judge. Judge Kaye was an incredible mentor to all female lawyers. When I was a judge in Family Court, she reached out to me and asked me to meet with her to tell her about some of the issues we faced in Family Court. She cared about people at all levels and they didn't have to be wealthy or smart. She taught me how important it is, as a judge, to listen to everyone.

SM & RQ: How would you describe a good mentor?

KP: Someone who is honest and straightforward and tells you the absolute truth. Many people approach me about running for office and my advice is to get a few people you are close with and ask them to tell you the worst thing about you. My father taught me that my life should speak more loudly than my lips. That is how I live my life. It's not what you say, it's what you do.

Her Role as Presiding Justice

SM & RQ: How did you balance all of your responsibilities when you were Presiding Justice of the Court?

KP: My staff will tell you that I never learned to say no. The key is having extraordinary staff assist you with what you are trying to achieve. I was blessed with extraordinary staff. My law clerk, Anthony Beccari, was amazing and Andria Bentley, my special projects counsel, was so capable. Surround yourself with really talented people.

SM & RQ: What was the biggest challenge you faced as PJ?

KP: The most serious challenge I faced was addressing issues with certain individuals who were abusing certain time and leave provisions in the Court. We had

to remove them, which is difficult when a new boss comes on board. But I had no choice. I had to take action if I wanted to act and lead in a way that was consistent with my ethics and set a standard that I wanted to be followed. The other challenge was to figure out a way to make the Court responsive to the needs of the people, which is difficult with limited finances. We did that by presenting the arguments by simultaneous video broadcast. That was a critical decision and our IT people were brilliant with making that happen. It really changed things dramatically. My goal was to make this available for the litigants. And now we have it in all of the Departments. That was a big challenge but a great achievement.

Justice Peters also noted that, in her role as PJ, she was privileged to serve under two Chief Judges: Chief Judge Jonathan Lippman and Chief Judge Janet DiFiore. She worked closely with the Chief Judges, Chief Administrative Judge Lawrence Marks, Presiding Justices Scudder, Gonzalez, Tom, Eng, Acosta and Whalen, and OCA Counsel John McConnell, to achieve statewide administrative improvements, including joint rules of the Appellate Division concerning attorney discipline and appellate practice.

Justice Peters credits the groundbreaking 2014 report of the Committee on Courts of Appellate Jurisdiction for precipitating the Administrative Board's commitment to joint appellate practice rules.

SM & RQ: You were on the Court for a number of years before you became PJ. When you were PJ, were there times when you missed having only the responsibilities you had as a member of the panel?

KP: There were times when I would have liked to have had more time to spend on a case when I was PJ. But I tried to make up for it in other ways. I would read as much as I could and when I would get in the car to travel to Albany, I would call my law clerk, Anthony, and we would talk about a legal problem and it was great uninterrupted time. Another reason I was able to do it is that I had been on the Court for so long that I knew how to approach each case.

SM & RQ: As PJ, did you feel a particular responsibility to encourage unanimity?

KP: Yes. When I first got to the Appellate Division, I didn't have much power. I just had my voice. In 1994, I wrote 11 dissents. That is why I have been called "the great dissenter." The best statistics I could find show

that, over the years on the Court, my dissents reduced dramatically. By the time I was PJ, I filed very few. That's because I learned how to draft opinions and negotiate with the other judges to achieve unanimity. When I became PJ, I was even more able to convince my colleagues. I learned that sometimes you have to agree not to address an issue or sometimes it is how you phrase a certain point you are addressing in your decision. However, there were times when I was unable to convince my colleagues. For example, I was unable to convince them in *Hurrell-Harring v. State of New York*.³ Thankfully, the Court of Appeals agreed with me. But I could not convince my colleagues.

Justice Peters' Jurisprudence

Hurrell-Harring involved a class action lawsuit filed by the NYCLU on behalf of 20 named criminal defendants who were being, or would be, represented by public defenders, legal aid attorneys and assigned counsel. The NYCLU claimed that New York's failure to provide adequate resources to the public defense system deprived criminal defendants of their right to effective assistance of counsel and sought an injunction requiring the State to provide a constitutionally adequate system. Plaintiffs' allegations included not being represented at arraignment and inadequate representation generally during the pre-trial proceedings. The State's motion to dismiss was denied by then-Supreme Court Justice Eugene Devine. In July 2009, the Third Department reversed Justice Devine's decision, finding that the plaintiffs "failed to state a cause of action that is justiciable."⁴ The Court held that there was no cognizable claim for ineffective assistance of counsel other than one seeking post-conviction relief.⁵ Justice Peters, joined by then-Justice Leslie E. Stein (now Associate Judge on the Court of Appeals) dissented. Justice Peters wrote: "It is fundamental to our constitutional jurisprudence, at both the federal and state levels, that the right to counsel assures to a defendant 'the guiding hand of counsel at every step in the proceedings against him. Without it, though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence.'"⁶ She added, "[w]hen determining what constitutes effective representation, it has been held that the 'most critical period' of the proceedings against defendants may well be 'from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important'; indeed defen-

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dants are as much entitled to the aid of counsel during this period as they are at the trial itself.”⁷ Justice Peters concluded, “plaintiffs’ allegations . . . set forth clear deficiencies that, without question, implicate plaintiffs’ right to counsel under our Federal and State Constitutions.”⁸

In 2010, the Court of Appeals modified the decision of the Third Department and allowed the lawsuit to proceed.⁹ In 2014, the case settled and the State agreed to adopt major reforms focusing on the five *Hurrell-Harring* counties. In 2017, the State passed legislation authorizing the State’s Office of Indigent Legal Services to establish standards that address the presence of counsel at a criminal defendant’s first court appearance, reasonable limits on public defenders’ caseloads, proper training, supervision, support and resources for attorneys defending criminal defendants.

SM & RQ: What do you think is the future of indigent representation in NY State?

KP: The decision in *Hurrell-Harring* and the legislation that was later enacted has substantially improved the opportunities for indigent defendants in criminal cases to have counsel at the most important stages of the proceeding, which is early rather than late. But we have a long way to go. The Office of Court Administration is working hard to implement these reforms and they are doing a great job trying to come up with ways to improve the system. The next challenge is the adequacy of counsel for individuals who are assigned lawyers in civil cases. The Chief Judge just appointed me the Chair of the Commission on Parental Legal Representation to address this challenge.

SM & RQ: Is there a decision you wrote that you are most proud of?

KP: I am proud of many of my dissents. Sometimes you see the future and your colleagues just aren’t there yet. I am very proud of *Hurrell-Harring*.

Justice Peters also spoke at length about a dissent she wrote in 1998 in *People v. Marion Jane Hearn*¹⁰—a case she found in a box in her basement while preparing for this interview. *People v. Hearn* involved a woman who had been married for 47 years with two children. When her husband was diagnosed with a serious medical condition, he asked their son to kill him. His son refused, but Marion Jane agreed to do it. She shot her husband and stayed with him in bed until he died. She then called the police, was

arrested for murder in the second degree and was ultimately charged with manslaughter in the second degree. She pleaded guilty and the trial judge sentenced her to 1½ to 4½ years in state prison. Marion Jane appealed, arguing that the sentence was unduly harsh and excessive. The Third Department affirmed the judgment by 3-2 vote with Justice Peters authoring the dissenting opinion. In her dissent, Justice Peters acknowledged that the trial court had not abused its discretion in imposing the sentence that it had. Nonetheless, she noted that the prosecutor had sought a six-month sentence and concluded that Hearn’s “unyielding dedication to her spouse and her family, coupled with her law-abiding life” would warrant the imposition of a local jail term in the interest of justice.

SM & RQ: You described this as a case that haunts you. Why?

KP: This was one of those cases where we had an extraordinary circumstance. She had never committed another crime. What she did was done out of love. But the judge who issued the sentence said he wanted to make an example of her.

Justice Peters also wrote the majority decision in *Matter of Gifford v. McCarthy*.¹¹ Also known as the “Liberty Ridge” case, Gifford involved a review of a determination by the New York State Division of Human Rights finding Liberty Ridge “guilty of an unlawful discriminatory practice based on sexual orientation” when it denied the McCarthys, a same-sex couple, access to its wedding venue site and wedding-related services. The Giffords, the owners, claimed that they had denied the McCarthys access due to their religious beliefs, not their sexual orientation. The Court determined that the Giffords “discriminated on the basis of sexual orientation when they refused to host the McCarthys’ wedding on the premises.”¹² The vote was 5-0. Justice Peters notes the significance of this case, given the pending “cake” case before the U.S. Supreme Court.¹³

SM & RQ: Do you have a thought on how the *Masterpiece Cakeshop*¹⁴ case will be decided?

JP: It is a very different Court now. I guess I can say that now that I am off the bench. I am not sure how it will be decided, but I think I can safely say that if the U.S. Supreme Court determines that an individual who has a business that is open to the public and sells a product can refuse to sell that product to someone on the basis of their sexual preference, that Court is also saying they

can refuse to sell that product to someone based on their race, national origin or religion. I fear for that outcome.

The Future

Justice Peters retired in January 2018 pursuant to the State Constitutional provision requiring that certain judges retire at age 70.

SM & RQ: What is your opinion about the mandatory retirement rule for judges?

KP: It is totally unfair that State Supreme Court judges can get certificated for three two-year terms and other judges have to retire.

Justice Peters is referring to another provision in the State Constitution that allows Court of Appeals and State Supreme Court judges to serve up to age 76 as State Supreme Court Justices so long as it is “certificated . . . that the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office.”

SM & RQ: Are you advocating for lifetime tenure?

KP: No. I don’t think that’s a good idea. I think having a cutoff is a great idea. I wish the proposed State Constitution amendment was for an age, for all superior court judges, between 70 and 80. I think that would have passed. But I am not resentful that I had to retire.

SM & RQ: And what will you do now?

KP: I am still trying to figure that out. I am very happy to be chairing these commissions for Chief Judge DiFiore. And I am happy to be involved in the NYSBA Committee on Judicial Wellness. I am also teaching this summer in South Africa, which I did last summer, and will likely continue to do. But I am still trying to decide what I want to do next.

SM & RQ: What are your thoughts on the future of the legal profession? Do you have any concerns moving forward?

KP: I worry about some of the choices that have been made in New York concerning the practice of law. For example, temporary practice makes no sense. (Justice Peters is referring to 22 NYCRR Part 523, which allows attorneys licensed in other jurisdictions to enter New York and practice here under certain circumstances.) I am concerned about attorneys from other jurisdictions being allowed to practice in New York without having to register. I also worry that there are so few trials, which means lawyers aren’t getting any experience trying cases. And when cases plead out, we don’t get

a chance to address the law on certain issues. Finally, I worry that many young people who are going to law school don’t want to practice law. That concerns me. Knowing the law and not using that knowledge to provide a service seems incongruous to me.

SM & RQ: What advice do you want to share with appellate attorneys?

KP: Being an appellate lawyer is a matter of trust. Someone is taking one of the most important experiences of their life and putting it in your hands. While some cases may not seem that important, to the client it is the most important thing. And that trust is critical. Appellate attorneys need to remember that they need to prepare for each case and do the best job they can no matter what the case. Someone’s life is at stake. People have faith in the rule of law. A competent, careful and qualified attorney is critical to that outcome.

SM & RQ: Do you have any advice for practitioners who want to become judges?

KP: There is an old Thai proverb: “In this world everything changes except good deeds and bad deeds. These follow you as the shadow follows the body.” If you want to become a judge, make sure you lead the life you want everyone to know you lead. Whatever you do, do it with respect and dignity and everything else will take care of itself.

Great advice from a pioneer, a trailblazer, a mentor and an accomplished jurist. We look forward to her continued success.

1. Sean Morton is the Deputy Clerk of the Court at the Appellate Division, Third Judicial Department. Sean worked with Justice Peters for 17 years. Rosemary Queenan is the Associate Dean for Student Affairs and a Professor at Albany Law School. She is also the Editor of *Leaveworthy*.
2. Hon. Shira A. Scheindlin et al., *If Not Now, When? Achieving Equality For Women in the Courtroom and ADR* (2017).
3. *Hurrell-Harring v. State*, 66 A.D.3d 84 (3d Dep’t 2009), *aff’d as mod.*, 15 N.Y.3d 8 (2010).
4. *Id.*
5. *Id.* at 355.
6. *Id.*
7. *Id.*
8. *Id.* at 356.
9. *Hurrell-Harring*, 15 N.Y.3d 8.
10. *People v. Hearn*, 248 A.D.2d 889 (3d Dep’t 1998).
11. *In re Gifford v. McCarthy*, 137 A.D.3d 30 (3d Dep’t 2016).
12. *Id.* at 38.
13. The Supreme Court issued its decision on June 4, 2018, after Justice Peters’ interview. *Masterpiece Cakeshop*, 2018 WL 2465172 (2018).
14. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. of App. 2015), *cert. granted*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 137 S. Ct. 2290 (2017).

Annual Meeting 2018 | 50th Anniversary Dinner

2018 marked the 50th anniversary of NYSBA's Committee on Courts of Appellate Jurisdiction. Here are a few photos from the celebration hosted on January 23, 2018.





Appellate Perspectives

Curiosities of the Courts: Why Are Workers' Compensation Cases Only Heard in the Appellate Division, Third Department?



By Kim Stuart Swidler¹

Daniel C. Brennan, Esq. has written an entertaining and informative treatise entitled *The History and Justices of the Appellate Division, Third Department*.² I enjoyed learning so much about the evolution of this particular court from when it heard its first case in 1896 to present-day 2017. However, because most of my legal work focuses on workers' compensation law matters, I was still curious as to why the Third Department has had exclusive jurisdiction over this particular area of law.

I've researched this question but have yet to uncover a fully satisfying explanation.

Workers' Compensation Law Section 23 provides the authority for this rule that an appeal from a Workers' Compensation Board decision must be brought to the Appellate Division, Third Department:

Within thirty days after notice of the decision of the board upon such application has been served upon the parties, or within thirty days after notice of an administrative redetermination review decision by the chair pursuant to subdivision five of section fifty-two, section one hundred thirty-one or section one hundred forty-one-a of this chapter has been served upon any party in interest, an appeal may be taken therefrom to the appellate division of the supreme court, third department, by any party in interest

In *Matter of Bock v Cooperman*,³ the Court confirmed that, because the exclusive avenue for the appeal of a Workers' Compensation decision was to the Third Department, an Article 78 proceeding could not be employed to review the substance of the Board's decision.

*Matter of Empire Insurance Co. v Workers' Compensation Board*⁴ later provided a somewhat limited explanation. It was explained that the rationale behind Workers' Compensation Law Section 23 was to create a court

with a specific expertise to deal with the complexity of the appeals that are generated in this area.

But the question still remains as to why the Third Department was chosen for this task. Workers' compensation reform and the ensuing legal safeguards flow historically from the Triangle Shirtwaist Factory Fire of March 25, 1911. This workplace tragedy in which 146 garment workers' lives were lost occurred in Manhattan's Greenwich Village. So one might expect that, for symbolic reasons, these cases would be heard in Manhattan's First Department instead of in Albany.

It has also been suggested that because the Workers' Compensation Board is a New York State governmental agency, the Third Department's proximity to the State Capitol was a motivating factor. However, if that were the case, the Third Department would presumably have exclusive jurisdiction over all other agency matters including those involving the New York State Department of Health. This, however, is not the case.

So we invite our readers to help solve this mystery. Please contact me at Kimsswidler@gmail.com with your responses. The first person to provide a more detailed explanation will be published in the following *Leaveworthy* publication and will receive the above-pictured ethically appropriate prize, a gavel pencil.

Good Luck!

1. Kim Stuart Swidler is an appellate attorney who practices primarily in the area of workers' compensation law. She is also a member of the Committee on Courts of Appellate Jurisdiction and an editor of *Leaveworthy*.
2. Daniel C. Brennan, *The History and Justices of the Appellate Division, Third Department* (2017) <http://www.courts.state.ny.us/ad3/CourtHistory-9-2017.pdf>.
3. *Bock v. Cooperman*, 451 N.E.2d 498 (N.Y. 1989), *aff'g*, 89 A.D. 2d 539 (1st Dep't 1982).
4. *Empire Ins. Co. v. Workers' Comp. Bd.*, 201 A.D. 425 (1st Dep't 1994).

CPLR Lessons Learned from *Merrell v. Sliwa*

By Nicholas Berwick¹

In March, Professor Patrick Connors published the 6th edition of *New York Practice*, previously authored by Professor Siegel. The July 2018 Supplement to the new edition highlights recent cases and developments in civil appellate practice, including a recent Third Department case, *Merrell v. Sliwa*,² which underscores the significance of CPLR 2220(a)'s notice of entry requirement and one of the most important aspects of being an attorney: attention to detail.

In *Merrell v. Sliwa*, petitioner, Merrell, challenged the election of members of the Reform Party State Committee. The Supreme Court issued an order dismissing the petition based on respondents' affirmative defense that Merrell failed to join parties necessary to the action. On appeal, the Third Department determined that the appeal was "not properly before this Court" because the Supreme Court's order was "neither entered nor filed" as required by CPLR 2220(a).³ The Court noted, in a footnote, that "petitioner provided us with a copy of the order that reflects that it was 'received' by the Albany County Clerk's Office" but "there is no indication that the order was filed or entered as required by CPLR 2220."⁴ The Court also noted that the "Supreme Court notified the parties that the signing of the order did not constitute entry or filing or relieve them of the obligation to do so."⁵ Relying on CPLR 5515, the Appellate Division ruled that the appeal must be dismissed because the order was neither filed nor entered.

Despite having his appeal dismissed, Merrell is not out of luck. CPLR 5513 states that the 30-day period to appeal an order runs from the service of the order with notice of entry, with service being made by a party.⁶ Because the order was never entered, the 30-day period for his appeal did not expire and in fact had never start-

ed. At the time of this decision, Merrell's right to appeal the order of the Supreme Court was still available, assuming the order is entered and then served with notice of entry. Even the losing party can accomplish those tasks, which are necessary to prosecute the appeal.⁷

Additionally, by serving upon Merrell a signed notice of entry that was incorrect and misleading, respondents may have opened the door for frivolity sanctions.⁸ Under CPLR 2101(d), any paper filed or served must be endorsed by the attorney of the party responsible for filing or serving. Rule 130-1 of the Rules of the Chief Administrator further requires an actual signature from the attorney on such papers.⁹ This signature is an attorney's confirmation that the paper is accurate and true, and signing a paper which the attorney knows or should have known is false or misleading can lead to sanctions.¹⁰ Given that the Supreme Court had notified the parties that the signing of the order did not constitute entry or filing, respondents should have known that service of notice of entry of the order that was not entered would be false and misleading.¹¹

1. Nicholas Berwick is a third-year student at Albany Law School. We also thank Professor Patrick Connors for his assistance with this article. Professor Connors is the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School and a member of the Committee on Courts of Appellate Jurisdiction.

2. *Merrell v. Sliwa*, 156 A.D.3d 1186, 67 N.Y.S.3d 685 (3d Dep't 2017).

3. *Id.* at 1187, 67 N.Y.S.3d at 686.

4. *Id.* at 1187, 67 N.Y.S.3d at 686, n.1.

5. *Id.*

6. David D. Siegel & Patrick M. Connors, *New York Practice* § 533 (6th ed. 2018).

7. *Id.*

8. *Id.* at § 414A.

9. *Id.* at § 201.

10. *Id.*

11. *Id.*

DID YOU KNOW?

The Court of Appeals has amended its Rules of Practice relating to amicus curiae relief. Rule 500.23, as amended, requires the proposed amicus to indicate if a party, a party's counsel, or any other person or entity contributed to the preparation or funding of an amicus brief.

Rule 500.12 was also amended to specify that reply briefs by amicus curiae are not permitted.

The rule amendments became effective May 16, 2018.

JUST MOOT IT!

By Ed Markarian¹

I attended a CLE in 2011 where State Bar CCAJ committee member Vincent Buzard described moot court opportunities for attorneys with arguments before the U.S. Supreme Court. I was envious. Soon after, Buffalo attorneys Timothy Murphy (current Co-Chair of the CCAJ) and Wendy Whiting started a moot court program for the Erie County Bar Association. After I was invited to join the CCAJ, I learned that, led by CCAJ members Hon. Denise Hartman, Cynthia Feathers and Alan Pierce, the State Bar had created a moot program for pending New York State and Second Circuit Court of Appeals cases.

I expect that practitioners reading this article make exhaustive efforts to improve and refine their briefs. Not every case merits a moot, but where the Court of Appeals has granted leave, or the Appellate Division has divided three votes to two, exhaustive efforts to improve oral argument might be similarly justified. I recognize that our schedules are beyond full, but how many times will we make it to the Court of Appeals? Maybe never again. We scrub our briefs. Why not do the same for oral argument?

Some say that oral argument does not matter but I have heard appellate judges say it matters 10 to 20 percent of the time. I believe it, and for close cases at the Court of Appeals maybe the number is higher. How much effort would you put into your brief to improve your odds by 20 percent? I expect a lot.

I also know for certain that you can lose a case by making a bad oral argument. Defeat can be snatched from the jaws of victory. If nothing else, consider a moot for defensive purposes. Your moot panelists might alert you to a trap question.

Appellate attorneys in Buffalo commiserate that there are three arguments that we make in each case. The one we plan to make while driving on the Thruway to the courthouse, the one we actually make while we are there, and the one we wish we had made while driving home. After a recent case, my drive home from Albany was longer than usual. I had faced tough questions and

wished I had done better. However, reargument was granted in that case. That is when I decided to sign up for a moot.

A remarkable benefit of the State Bar program is the quality of its moot judges. Hon. Bernard J. Malone, Jr., who served as Appellate Division Justice on the First and Third Departments, is a regular panelist. He could not be more friendly and helpful, but he makes it clear that he views his role as trying to benefit the Court more than counsel. His primary goal is to aid the Court by fostering quality arguments so that the Court can better assess the issues. Judge Malone was a panelist for me, and the first question he asked was one of the first questions I received from the Court. I am extraordinarily grateful to him and to attorneys Alan Pierce, Nicholas Tishler and Jean Gerbini for their brilliance and for *volunteering* to serve as panelists.

The moot program keeps statistics on whether mooters end up winning. So far mooters win most of the time. Thankfully, I did not spoil that trend (barely—four votes to three).

Round two at the Court of Appeals went better for me than round one but, candidly, I do not think that my case fell into the 20 percent where oral argument affected the outcome. The Judges had mastered the case and, I suspect, knew their positions before I showed up. But at least, I hope, I did no harm.

After the argument, while driving back to Buffalo, I still thought about questions I could have answered better and arguments I wished I had made. However, the list of things I wished I had said was shorter than it was the first time.

I strongly endorse and encourage use of the State Bar Association moot program.

1. Ed Markarian is a Partner at Magavern Grimm LLP. He is also a member of the Committee on Courts of Appellate Jurisdiction.

ARE YOU ARGUING AN APPEAL BEFORE THE APPELLATE DIVISION OR COURT OF APPEALS?

If you answered “yes,” consider participating in the Courts of Appellate Jurisdiction Committee’s Moot Court Program. This program—available at no cost to members of the NYSBA—offers any attorney who is arguing a case before the Appellate Division or the Court of Appeals to apply and request that the Program “moot” his or her argument before a panel of experienced appellate attorneys and former judges. Following the “moot,” the panel will provide the attorney with feedback and suggestions.

This program has had much success. In fact, the majority of attorneys who have participated in the program, including Ed Markarian, who shares his experience in the accompanying article, were successful on appeal. For more information on the CCAJ Moot Court Program, please contact CCAJ member Alan Pierce at apierce@hancocklaw.com.

Committee Members

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STATED PURPOSE

COMMITTEE ON COURTS OF APPELLATE JURISDICTION

Formed: June 1, 1968

The Committee on Courts of Appellate Jurisdiction shall be charged with the duty to observe and consider the administration of justice in the courts of appellate jurisdiction and it shall make recommendations to the Committee on judicial administration for the improvement thereof.



NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON COURTS OF APPELLATE JURISDICTION

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