



Seven Ways to (Almost) Improve the New York Court of Appeals

Albert M. Rosenblatt

THROUGHOUT YOUR HISTORY, I'm told, you have usually made a practice of asking a Judge of the Court of Appeals to be the speaker at your annual dinner: Either the newest judge or the one closest to leaving the Court. Well, when you asked me, I took out a calendar and looked around at my colleagues, and immediately applied an un rebuttable presumption: I am not the newest judge, and so I must be the oldest. No great feat of jurisprudence; just pure arithmetic. As Sherlock Holmes said in "The Sign of Four," when you have eliminated the impossible, the remainder, however improbable, must be the truth.

I'm going to take this opportunity to accept your invitation and give you my list of seven ways – à la David Letterman – to modify how we do things in the New York Court of Appeals.

Number 7: I'd change the name. "The New York Court of Appeals" just doesn't describe us adequately. Some of you know that before 1847, we were called "The Court for the Trial of Impeachments and the Correc-

tion of Errors." Well, that wasn't much better. But at least it was better than Connecticut, which until 1936 had the unforgettable name – this is really true – "The Supreme Court of Errors." Now, when *we* were called the Court for the Trial of Impeachment and Correction of Errors, some judges referred to us by a shorthand name, "The Court of Errors." But in truth we have *never* been the Court of Errors; the Appellate Division is the court of errors. We were the court for the *correction* of errors.

Everyone knows that the Supreme Court is the highest court in New York. Ask any of the Justices of the Supreme Court sitting in the room. They reverse us all the time. But I wouldn't switch names with them. When they go to New Jersey or Pennsylvania and they tell someone that they sit on the Supreme Court of New York that gets them a window seat in a restaurant, and I wouldn't want to take that privilege away from them. They can be the Supreme Court, and the intermediate court should remain the Appellate Division. But our Court should have a

better name. I suggest the “Superduper Really Terrific First-Rate Court of Last Resort of New York.” Imagine being affirmed by the Superduper Really Terrific First-Rate Court of Last Resort.

Number 6: I would modify our phone system. Right now, if you call the Court of Appeals, someone answers with a cheery voice and says, “Court of Appeals. May I help you?” That may be direct, but it’s very old-fashioned. Here we are in the 21st Century. It calls for automation, and perhaps we should have elevator music and a recorded voice that comes on and says:

You have reached the Court of Appeals (or if my first suggestion is followed, you have reached the Superduper Really Terrific First-Rate Court of Last Resort of New York).

If you would like to continue in English, press 1.

If you would like to proceed hereinafter in legalese, press the button designated hereinabove by the appellation of the figure two.

If you are calling about a matter and would like to *argue*, please stay on the line and we will connect you with one of our more belligerent employees.

If you are ready to submit, just say “uncle” or better yet, “I surrender!” and we will mark your case off the calendar.

If you would like directions on how to get to the Court of Appeals, go back to the Appellate Division and see if you can get two judges to dissent on the law.

If you have not been attended to, please stay on the line. Your call is *reasonably* important to us. When you are connected and the white lights goes on, you have one minute. When the red light goes on, your call will be discon-

nected, unless you have reserved rebuttal time. If you do not have a red light or a white light on your phone, see your physician.

Number 5: This suggestion relates to how our decisions are reported. Right now, if a decision is unanimous, it would just say, for example: “Opinion by Chief Judge Kaye. Judges Smith, Ciparick, Rosenblatt, Graffeo, Read, and Smith concur.” That may be accurate, but it does not tell you the level of enthusiasm of each of the judges who concurs silently – and this bothers law professors terribly. When we’re unanimous, the analysts aren’t able to divide the Court into voting blocs, and it is harder for them to write articles about this wing of the Court or that wing of the Court. Also, the professors say our decisions are masked in vanilla. So I suggest that each decision carry a color code. If the concurring judge’s name is in blue, it means the judge thinks the decision is really, really cool. If the judge’s name is in green, it means, hey, not the way I would have written it, but I can live with it. If you put your name in gray, it means, look, I’m just going along with the crowd. The judge’s name in red means, okay, on the first vote I had it the other way, but I tell you I’m not thrilled with this and if it goes one inch farther I am out of here.

Number 4: This proposal relates to certified questions from the Second Circuit. Some of you may know that the Second Circuit has been certifying cases to us with increasing frequency, with requests that we answer questions under state law that will help them decide diversity cases in which New York law is at issue. Normally, we answer these questions in one of three ways: “Yes,” “no,” or “it depends,” and then we explain. This is very constricting. I propose a fourth alternative that will give us greater latitude, and the fourth option should be

"We don't want to get involved." Just kidding. We love the Certifications.

Number 3: My next suggestion deals with limitations in the size and length of briefs. Although the Court of Appeals currently imposes no page limitations on briefs, most courts do; for example, under the Rules of the Appellate Division, Third Department – 22 NYCRR 800.8(a) – there is a 70-page limit for the appellant's brief. But it is well known that *there is nothing a lawyer can say in 15 pages that cannot be said in 375 pages!* Perhaps we should create a *minimum* length for briefs in the Court of Appeals?

Relatedly, under rule 22 NYCRR 500.1(e) of the rules of the Court of Appeals, there is a requirement that pages in a brief be numbered consecutively. I can certainly understand that the pages in a brief be numbered – but why do they have to be numbered consecutively? Are we that rigid? Any judge worth her salt should be able to open any page of the brief and get the drift of it.

Number 2: My next suggestion is that judges be afforded the right to board airplanes without going through security. In our courthouses, they trust us to walk right past the magnetometers, so why not at the airports? The last time I took a flight, I was chosen for special treatment, standing there, without shoes, as two uniformed people went rummaging through my briefcase. I can imagine them thumbing through a stack of papers, unreleased decisions of our Court ... including a dissent I'm working on. And there's a very real danger that one of the TSA guards will start reading my dissent, and say, "Who wrote this? Does collateral estoppel mean *nothing* to you?"

Number 1: My last suggestion relates to the internal workings of our Court. There are lots of former law clerks and present law clerks in the room, and everyone knows that one job of law clerks is to prepare the case

for the judge and write up a memorandum before oral argument. Sometimes the memorandum would say "recommend affirm" or "recommend reverse," but I discourage these recommendations because if I don't agree, the law clerk might feel ... disappointment ... or worse yet ... RAGE. A former judge of our Court told about how the Judges would go into private consultation and vote, and when they come out the law clerks are very eager to learn how the vote went, and in one instance the judges came out and the chief law clerk said "WHAT?? The judge voted to affirm? Every law clerk voted to reverse!"

Along those lines, the Chief Judge reminded me of a story Governor Mario Cuomo used to tell on himself, about when he was a law clerk at the Court of Appeals for Judge Adrian Burke, and how he wrote up his report and recommendation for Judge Burke, who then went into the consultation room with the other judges and when Judge Burke came out he said, "Mario, your recommendation did not get a single vote, not even mine."

But once in a while I get a recommendation from a law clerk, and my favorite recommendation was very recent, where he said, at the top of the page, "affirm, reluctantly." I thought that had such a nice lilt. Just short of affirm, grudgingly. Affirm reluctantly had almost a musical cast. And so I would ask the Chief to authorize clerks' recommendations in musical terms, as in symphonies or concertos:

- ◇ affirm ("gently, with spirit") – *affettuoso con brio*
- ◇ reverse on the dissenting opinion below ("painfully") – *doloroso*
- ◇ affirm ("as loudly as possible") – *fortissimo*
- ◇ reverse with costs ("mournfully") – *lamentoso*

- ◇ affirm in a memorandum (“extremely quickly”) – *prestissimo*
- ◇ reverse with costs and attorney’s fees to appellant – *bellicoso con brio*
- ◇ dismiss the appeal (“a joke”) – *scherzo*
- ◇ affirm with honor – *punctilio*
- ◇ Lastly, Appellate Division order reversed and Supreme Court judgment reinstated (“victoriously”) – *vittorioso!*



Finally, I would enact a rule declaring that this Albany County Bar Association is among the jolliest anywhere in the world, and that you hold events like this not yearly but weekly, because I enjoy your company so much.

I conclude with an expression of gratitude to people who are dearest to me, start-

ing with my wife, Julie. And to my phenomenal secretary Inez Tierney, and my wonderful law clerks, former and present: Jim Lagios (father of eight-day-old twin girls), Justin Long, Tim Kerr, and Gordon Lyon; and a toast to my colleagues on the Court, Judges George Bundy Smith, Carmen Beauchamp Ciparick, Victoria Grafeo, Susan Phillips Read, and Robert Sherlock Smith, and especially our leader Chief Judge Judith S. Kaye. I am so lucky to be among them. They are the brightest, most hard-working, congenial, and dedicated people I ever met. Sometimes we let years go by and look back on the good old days and wish we could have appreciated them more. I do not expect to have that regret, because I appreciate and value every day that I have with them and all the people I work with at the court. Just being in their company and working with them is enough to fulfill any person’s dream. It has certainly fulfilled mine. *gfb*