

## **Bring Your Lunch to the Court of Appeals: A Conversation with Judge Leslie Stein**

It's not often that you get the chance to have lunch with a sitting judge of your state's high court, much less in a group of just four other people. Lucky for me, that's the kind of quality programming that the Albany County Bar Association provides. Last time, it was lunch with Justice Michael Lynch of the Appellate Division, Third Department. This time, the ACBA's Brown Bag Lunch program brought me to the Court of Appeals for lunch with Associate Judge Leslie Stein. As always, it was a fantastic program. Here are just a few highlights of what we talked about.

### **Differences between the Trial Bench, the Appellate Division, and the Court of Appeals**

Judge Stein's career on the bench has run the gamut. She began in the Civil Part of City Court, was then elected to Supreme Court, elevated to the Appellate Division shortly after that, and was appointed to the Court of Appeals three years ago. So what's the biggest differences between her stops?

Besides the general complexity of the cases before her, which of course increased as she rose to the Appellate Division and now on the Court of Appeals, Judge Stein explained that the biggest difference between sitting in City Court and the Appellate Division and the Court of Appeals is learning how to make a collaborative decision on the cases you hear. While at City Court or Supreme Court, Judge Stein was the sole person responsible for the decisions in the cases she heard. She got to review the law, the facts, and decide the outcome that she thought was right every time.

Once she was elevated to the Appellate Division and especially now on the Court of Appeals, the decision-making process became much more collaborative. After oral argument, Judge Stein explained that all the judges on the case sit down at conference to discuss the issues and a possible result. In that discussion, the Judges have to convince each other of the right outcome, and no one Judge's perspective can control. You need at least 3 votes at the Appellate Division and 4 at the Court of Appeals to issue a decision, after all. There is much more give and take, and compromise about what the Judges are willing to agree to. That process, Judge Stein said, often leads to much narrower opinions on the relevant issues to get the agreement that the Court needs to decide a case.

## **The Use of Oral Argument Questions and Separate Opinions to Develop the Law**

But when the Judges can't all agree on a particular issue, Judge Stein said that questions at oral argument and writing separate opinions are often useful to help push the Court to reach agreement. In fact, oftentimes, the Judges go into oral argument with a few questions that are designed more to persuade their colleagues on an issue than they are to elicit a response from the advocates. And the Judges each have a good sense of which questions are which. The Judges have their own unique styles of questioning, Judge Stein told us, and when the questions are being used to persuade their colleagues on the Court, it's pretty easy to see.

Judge Stein offered some important advice for advocates who argue before the Court. The Judges all know that you're wrapped up in the particular facts and issues in your client's case, but you have to be ready to answer the bigger question: "What rule would you have this Court adopt?" The Court wants to know where the line should be drawn not only for the particular case in front of it, but for all cases throughout the State. It's sometimes surprising, she said, that attorneys come to argument unready to answer that question. Don't let that be you (especially because if you've watched the Court's arguments, the question about what the rule is comes up in almost every single one).

Judge Stein also told us that separate opinions can have the same persuasive purpose. About one week before the start of the argument session, each Judge is assigned to write an opinion on a case that will be argued at that term (this is a change from the Court's prior practice where the Judges randomly were assigned writings at the conference immediately *after* oral argument concluded). Thus, Judge Stein explained, when the Judges leave the bench after oral argument at the Court of Appeals, they know which cases they'll be writing an opinion in, but not necessary whether that opinion will be for the majority or the dissent. After argument, the Judges head to conference, discuss the issues in each case, with the least senior Judge (now, Judge Feinman) beginning, and hold an initial vote on the case. If the Judge that has been assigned the writing has the majority, then he or she will write the majority opinion, and the dissent is assigned to the next least senior Judge who disagrees.

Many times, however, Judge Stein explained, the Judges who are writing the dissent write opinions that never leave the internal chambers of the Court. They are offered to persuade the majority to narrow its opinion as a part of the give and take process. The draft dissenting opinions are used for points of discussion among the

Judges to see if they can reach a compromise on the issues. Many times, it works, the Judges agree to sign on to the majority, and the draft dissent is scrapped, having served its purpose.

But when it doesn't, the dissent becomes part of the Court's opinion, offering the bench and bar a different critique of the issues in the case. Judge Stein told us that dissents can also be valuable to signal when a Judge feels that the law should be changed, as Judge Rivera recently did in calling for a reexamination of the excited utterance exception to the hearsay rule in People v Cummings or Judge Wilson did in calling for the Court to interpret its jurisdiction to include the ability to dismiss an appeal as improvidently granted.

Concurring opinions can be used the same way, Judge Stein noted. When a Judge agrees in principle with the Court's proposed result, but would use different reasoning to get there, he or she will use a concurrence to explain the difference. Or, as Judge Fahey did recently, to explain that the issues in the case are important and should be decided, but that this particular case is not the right one in which to reach them, and to signal to the bar to bring these issues to the Court in another case. Much of what the Court does, Judge Stein said, is about the development of the law, and not necessarily just for the case in front of it.

## **The Process of Hiring Clerks**

No discussion of the inner workings of the Court of Appeals would be complete without touching on the subject of those attorneys who help the Judges do their jobs. All of the Judges on the Court have different policies on who they will hire for clerks, what kinds of experience they're looking for, whether they want permanent or rotating clerks, and whether they're willing to hire clerks straight out of law school.

Although some Judges on the Court have exclusively rotating clerks for 2-year terms in order to get a fresh perspective in chambers, Judge Stein has traditionally had permanent law clerks, people she has grown to know well and who know her intellectual tendencies. That, she thinks, has worked very well for her over the years. But, just recently, Judge Stein hired a new clerk on a 2-year term commitment. So, she's willing to reevaluate her stance and her new clerk, she said, is working out very well.

When we asked what she looks for in a potential clerk, she said that it's important for the applicant to have at least 2-3 years of experience representing clients of some sort. That perspective is important to sort through the arguments that the

attorneys in each case bring to the Court. The practical experience helps Judge Stein sort through the practical impact of the cases that the Court is deciding, which is always a consideration when the Court decides cases that affect the law statewide.

Judge Stein also looks for strong writers, of course, but importantly also someone who is willing to stand up to her and tell her when the clerk thinks she is wrong on the law. It's ultimately the Judge's call where her opinion comes out in a case, but the process of reaching that decision is strengthened when the clerks provide a strong point of view and don't just agree with Judge Stein's initial reaction.

Best of all, as we finished up lunch with Judge Stein, she offered to take us on a private tour of the Court, to see the detailed hand-carved woodworking throughout the courtroom, sit in the Judges' chairs and look at the still existing spittoon underneath the bench, tour the robing room where the Judges get ready for argument before they enter the courtroom, see the two-story conference room and the "Cardozo" room where the decisions get made, and last but certainly not least, the Judges' chambers on the second floor.

Not bad for a brown bag lunch. Not bad at all. It was, in fact, as fantastic program, and many thanks are owed to the Albany County Bar Association for continuing to put this great programming on for its members and to Judge Stein for taking the time out of her busy schedule between sessions to host us.

*Found at <https://nysappeals.com/2018/05/17/bring-your-lunch-to-the-court-of-appeals-a-conversation-with-judge-leslie-stein/>*