



# LEAVEWORTHY

The Newsletter of the NYSBA Committee on Courts of Appellate Jurisdiction

WINTER 2022



Well Being and  
the Appellate Lawyer



Does Pleading Guilty Trump  
the Sixth Amendment?



Meet Presiding Justice  
Hector D. LaSalle



# LEAVEWORTHY

## Winter 2022

### Committee Chair:

Michael J. Miller, Esq.  
PO Box 2057  
Miller Place, NY 11764-8836  
(934) 500-4944  
mjmilleresq@gmail.com

### Staff Liaison:

Kathryn Calista  
New York State Bar Association  
One Elk Street, Albany, NY 12207  
(518) 487-5594  
kcalista@nysba.org

### Editorial Team:

Mark Diamond, Editor  
(917) 660-8758  
markdiam@gmail.com  
Malvina Nathanson  
Amy E. Bedell  
Margaret Nyland Wood

*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.*

## MESSAGE FROM THE CHAIR

Dear Colleagues.

Last spring, I was privileged to become the chairperson of the Committee on Courts of Appellate Jurisdiction. When I was appointed, I believed that the first meeting I would chair would be in person. My belief was shared by many or most of our colleagues because at that time it looked as if the Covid-19 pandemic would soon run its course and we would return to normal. I eagerly anticipated chairing an in-person meeting after the summer hiatus.

Well, as you know, that did not happen and we have continued to meet in the virtual world. But things are otherwise looking up. The Governor has filled most of the judicial

vacancies in the Appellate Division and the branches of that Court report that they are working efficiently. The pandemic forced us to advance the changeover to electronic filing, which should be a tremendous boon to efficiency. Most importantly, we all learned that we – attorneys, courts, clerks, and staff – can function admirably under stressful conditions. Our democracy and society require the third branch of government to carry on even in the most inauspicious time. We did and we should be proud of this.

But I still hope to see you all in person soon.

*Michael J. Miller*

## IN THIS ISSUE

Message From the Chair . . . . .	2
Well-Being and the Appellate Lawyer . . . . .	3
Does Pleading Guilty Trump the Sixth Amendment? . . . . .	4
Important Appellate Decisions . . . . .	6
The Pro Bono Appeals Program Wants You! . . . . .	8
Hector D. LaSalle Takes the Helm at the Second Department . . . . .	9
High Success Rate at CCAJ's Moot Court Program . . . . .	11

*You are invited to  
Join the Legacy Society  
of The New York  
Bar Foundation*



**THE NEW YORK  
BAR FOUNDATION**

Advancing Justice and Fostering the Rule of Law

Legacy donors provide a better tomorrow for generations of New Yorkers in need.

Your gifts help the Foundation fund charitable and educational law-related projects in perpetuity – safeguarding access to justice and the rule of law in New York State.

A Legacy Gift is the greatest honor that a donor can bestow upon the Foundation.

Please join these guardians of justice by making a bequest or establishing a planned gift to the Foundation of \$1,000 or more.

Call the Foundation at 518/487-5650 for more information or download the form at [www.tnybf.org/legacysociety](http://www.tnybf.org/legacysociety).

# Well-Being and the Appellate Lawyer

BY ROBERT HERBST

The recent NYSBA Attorney Well-Being Task Force Report made clear what many already know: The law is a stressful profession. Being an appellate lawyer has its own types of stress.

If you are the appellant, your side has already lost at least once, so you will be heading into the wind. If you are the appellee or respondent, you do not want to snatch defeat from the jaws of victory. Regardless, you may be dealing with the flaws of a record you did not create.

These stresses are on top of ones shared with the rest of our profession, ranging from long hours, juggling multiple matters, billable hours, collecting fees, and fighting with adversaries. Lawyers may experience secondary trauma or compassion fatigue as they are repeatedly exposed to and absorb their clients' own stress. With all that, lawyers are also expected to do pro bono work and volunteer for bar association and community activities. It's enough to make your blood boil. From an evolutionary standpoint, it does.

We are still designed to be hunter gatherers. Work-related stress sets off the fight-or-flight reaction. Our bodies respond as if we were under a physical threat from a predator, and we react physically. Our blood pressure and heart rate increase, we produce more of the stress hormones adrenaline and cortisol, and our blood sugar levels go up for extra energy. A real physical threat would soon be over by either fighting or running, and our system would then calm down.

Instead, we sit and write the brief, and then move on to the next one. The perceived threat never ends. The stress just builds, and we become anxious, irritable and depressed. We might eat more calorie-rich foods to maintain our energy levels, which can lead to weight gain. We may develop high blood pressure, heart disease, hormonal imbalances and diabetes from high blood sugar. The sedentary nature of appellate work adds to the health problems caused by stress. Sitting too much by itself is as much a morbidity factor as smoking.

Perhaps appellate lawyers take this heightened state of arousal to an extreme. During oral argument, they are as sharp and alert as any Me-

solithic person confronting a cave bear. Their adrenaline surges and their pulses race as they stand alone in front of a panel to try to address the concerns of the court and persuade them to find in their client's favor. Yet their physical excitement remains unfulfilled. The court says thank you, and our warrior simply sits down.

The remedy is to engage in physical activity, which will get your body out of the constant fight-or-flight mode and reduce chronic stress. This will improve your physical and mental well-being.

The Department of Health and Human Services recommends we do at least 150 minutes of moderate aerobic or 75 minutes of vigorous physical activity, or an equivalent combination, every week. The World Health Organization recently released its own updated guidelines, in part to combat inactivity related to Covid-19. Their guidelines recommend that adults do at least 150 to 300 minutes of moderate-intensity aerobic physical activity, or at least 75 to 150 minutes of vigorous-intensity aerobic physical activity throughout the week, as well as muscle-strengthening activities involving all major muscle groups two or more days a week.

Physical activity does not have to be running a marathon or peddling furiously while an instructor with a bare midriff yells at you from a computer screen. Walking the dog, gardening and biking to the store all count as physical activity. You should find things that you enjoy. While some like traditional activities such as weight lifting or jogging, others may prefer hiking, mountain biking or yoga. Or you may combine different types of activity, such as going to the gym two nights a week and playing tennis on the weekends. The key is that you move and do a mix of aerobic and strength-building activities.

If you are a busy lawyer who does not have an hour to spend, 10 minutes here and there throughout the day walking or stretching adds up. Benefits start to accumulate with any amount of moderate or vigorous physical activity. Take a walking meeting or a walk in the fresh air for lunch. You can meet the rest of your quota with some longer pieces on the weekends.

To counter the effects of too much sitting, you can set your alarm to get up and stretch for a few minutes every hour. Many find a standing desk or slow treadmill desk to be helpful. I personally refuse to do Zoom calls because they keep one rooted in front of the computer. Pre-pandemic, I would stand and walk around my office while speaking on the phone, and I continue to do that now.

In exchange for being physically active, you will feel less stressed. You will also enjoy a feeling of well-being as your brain produces endorphins and your overall health improves. It is undisputed that regular physical activity lowers your blood pressure and blood sugar, improves cholesterol levels and increases insulin sensitivity. Being active also cuts the risk of heart attack, stroke, diabetes, certain types of cancer such as colon and breast cancers, osteoporosis and fractures, obesity and certain types of dementia and cognitive decline.

Physical activity helps build muscle mass, increases functional strength and improves sleep quality and overall quality of life. It has been shown to slow the aging process and prolong your lifespan. People who are physically active have a much lower risk of all-cause mortality. Furthermore, regular physical activity also strengthens the immune system, making it better able to fight off infection. It also prevents you from developing the underlying conditions that the CDC warns can make infection with the coronavirus more severe or even fatal.

Exercise and movement provide all of these benefits. And you do not even have to fight a cave bear.

Robert Herbst is chair of the NYSBA Working Group on Attorney Physical Health and former chair of the Committee on Courts of Appellate Jurisdiction. He is also a member of the Task Force on the Treatment of Transgender Youth in Sports and the Healthcare Working Group of the Task Force on Racism, Social Equity, and the Law. An expert on health, fitness and attorney well-being, he is a 19-time world champion powerlifter.



# Does Pleading Guilty Trump the Sixth Amendment?

BY MARK DIAMOND

When does asserting your innocence open the door to the admission of testimony from a missing witness despite your Sixth Amendment right to confront your accuser? In New York, often enough.

The Center for Appellate Litigation (CFAL), which is run by NYSBA Committee on Courts of Appellate Jurisdiction member Robert Dean recently presented the case of *Hemphill v. State of New York* to the U.S. Supreme Court. It argued that the Sixth Amendment takes precedence over a state's evidentiary rule – in this case the New York doctrine that a defendant waives his constitutional rights and opens the door to otherwise precluded evidence under certain circumstances.

"It was a murder trial in the Bronx," explains CFAL senior supervising attorney Claudia Trupp, who handled the state appeals and co-authored Hemphill's certiorari case to the Supreme Court. "Mr. Hemphill was convicted. We raised 14 issues to the Appellate Division, which was by far a record for me. We lost the appeal at the First Department and Court of Appeals, particularly galling considering we raised 14 issues!" There was a dissent at both the First Department and Court of Appeals, but not on Sixth Amendment grounds.

Here is what happened: In 2009, the prosecutor alleged that, three years prior, Ronnell Gilliam and Nicholas Morris got into a street fight with others, during which someone fired a 9mm handgun that killed a child in a passing car. Gilliam admitted he was there. Several eyewitnesses testified that the man with Gilliam was the shooter, and one eyewitness said the man with Gilliam was Morris, although she did not see Morris actually shoot the gun. Police quickly searched Morris' home and found incriminating evidence, including a 9mm cartridge. He was arrested. Gilliam later identified Morris as the man he was with and the person who shot the child. Subse-

quently, Gilliam changed his story and alleged it was Hemphill, not Morris, who was his companion and the shooter.

Police did not arrest Hemphill, based on eyewitness and forensic evidence that Morris was the shooter. After opening statements, but before evidence was admitted, the state was granted a mistrial because it wanted to reinvestigate the case. The prosecutor then offered Morris a deal, which he took and allocuted that he was at the scene and had a .357 caliber revolver but not the 9mm that killed the victim. He was released from prison after having served two years awaiting trial. Gilliam also took a plea and got five years in return for testifying that he had two companions and not one, Morris and Hemphill, and that Hemphill was the shooter. Hemphill was indicted in 2013, three years after Morris and Gilliam pleaded guilty and seven years after the incident. Hemphill's defense was that the prosecutor was right the first time and Gilliam's sole companion and the killer was Morris.

Here is where the Sixth Amendment comes into play. Morris moved to Barbados, and the prosecutor was unwilling to call him to testify because Morris did not want to come back. Instead, the prosecutor offered Morris' plea allocation in which he claimed that he had a .357 caliber handgun but not a 9mm gun at the scene. The prosecutor's purpose in offering this evidence was to have the jury believe that Morris was honest and so it must have been Hemphill who shot the child.

Hemphill objected that Morris' allocation was testimonial, since it was intended to be used and was used against him at trial. He argued that since Morris was not present to cross examine for purposes of rebutting his factual assertions, his allocation was inadmissible.

Admission of the evidence, said Hemphill, violated *Crawford v. Washington*, 541

U.S. 36 (2004), and *Ohio v. Clark*, 576 U.S. 237 (2015), which held that a plea allocation is the type of declaration of fact used in a criminal prosecution that invokes a defendant's Sixth Amendment right to confront the person who made it. The trial court overruled Hemphill's objection, holding that he had "opened the door" to the allocation by his defense that it was Morris who shot the child, and opening the door trumped Hemphill's Sixth Amendment right to confront Morris. During summation, the prosecutor relied on Morris' allocation to argue that, because Morris did not have the 9mm handgun, it must have been Hemphill who had it. Hemphill was convicted of murder and got 25 years to life in prison.

In affirming the judgment, the First Department agreed with the defense that a non-testifying witness' plea allocation is normally inadmissible under the Confrontation Clause. However, Hemphill "opened the door" to its admission by claiming, by way of cross examination of the prosecutor's witnesses, that it must have been Morris who shot the child, since 9mm ammo was found in his home right after the incident and because several eyewitnesses testified Gilliam's companion shot the child and Morris was that companion.

The Court cited *People v. Reid*, 19 N.Y.3d 382 (2012), which held that in New York, when a criminal defendant "opens the door" to evidence, he loses his right to exclude out-of-court statements otherwise barred by the Confrontation Clause. The question, said the appellate court, is did the defendant selectively reveal only those details of a testimonial statement that are potentially helpful to his defense while concealing from the jury other details that would tend to explain the portions he introduced and place them in context?

Justice Manzanet-Daniels dissented, holding that the evidence was insufficient to convict

Hemphill, considering several eyewitnesses identified Morris as the gunman and the only witness who said it was Hemphill was his co-defendant, Gilliam, who originally said that Morris was the shooter. On review, the Court of Appeals held simply that the trial court did not abuse its discretion in admitting Morris' statement.

or disprove, it is admissible even when the Sixth Amendment would otherwise make it inadmissible.

At the Supreme Court, Hemphill's team argued that the Confrontation Clause afforded him the right, and his only opportunity, to confront the reliability and accuracy of

necessarily true. In other words, the court's ruling caused Hemphill's mere questioning of the truth of Morris' plea allocation to automatically open the door to its admission even though Hemphill was not the one who offered the allocation into evidence.

For the same reason, said Hemphill's team,



"Matt Bova and I, along with the Stanford Law School Supreme Court Litigation Clinic, filed for certiorari with the Supreme Court. Jeffrey Fisher of Stanford argued, and I joined him during oral argument, which was an experience," said Trupp. "These are judges you see on television, whose opinions make law for the country."

The main issue at the Supreme Court was this: Does the relevance of evidence trump the Confrontation Clause or does the Confrontation Clause trump relevance?

"The cases in the circuit courts are sort of split," explained Trupp. "The Sixth Circuit says that nothing that violates a defendant's Sixth Amendment opens the door to its admission. The Second Circuit held that the 'rule of completeness' justified admission of relevant plea allocations regardless of a defendant's Sixth Amendment right." If an issue needs additional evidence to prove

Morris' assertions about the crime. His absence at trial, which was through no fault of Hemphill and so not an equitable forfeiture of his Sixth Amendment right, should have prevented the introduction of his out-of-court plea allocation since he was not there to cross examine. As a fundamental constitutional right, the Sixth Amendment cannot be superseded even when the trial court finds the evidence is relevant; otherwise, the constitutional right would not be worth the parchment on which it is written.

Additionally, Hemphill argued that he never opened the door to the plea allocation in the first place. He was not the one who put the issue into play; he was only defending himself against an issue raised by the prosecutor. By circumventing the Sixth Amendment to allow the plea allocation, the trial court put a chilling effect on Hemphill's right to defend himself against the prosecutor's theory of the case, which was not

the "rule of completeness" relied upon by the trial and appellate courts in affirming Hemphill's conviction applies only where a party introduces a fragment of an out-of-court statement. But Hemphill had never introduced any statement by Morris. In any event, the rule of completeness is just another rule of evidence, and a state rule cannot supersede a defendant's constitutional right to confrontation.

This case may change the landscape of decades' worth of law in New York about our Sixth Amendment right to confront our accusers and the application of the state's opening-the-door exception.

Epilogue: On January 20, 2022, the U.S. Supreme Court reversed and remanded, holding that the defense does not open the door to testimonial hearsay by merely presenting a third party defense.

# Important Appellate Decisions

MICHAEL J. HUTTER

This article focuses on several recent decisions of interest to seasoned appellate practitioners. Its theme is that an ignored rule of appellate practice may lead to outright dismissal of the appeal or loss of a winnable argument.

## PRESERVATION OF A WEIGHT OF THE EVIDENCE CLAIM

The Second Department issued a well-reasoned decision in *Evans v. New York City Transit Auth.*, 179 A.D.3d 105 (2d Dep't 2019) where the Court rejected its past precedent and held that a party need not make a motion to set aside a verdict to be entitled to a weight of the evidence review on direct appeal. The Fourth Department, in two decisions handed down the same day, embraced the *Evans* holding, rejecting as well its prior precedent.

In *Defisher v. PPZ Supermarkets, Inc.*, 186 A.D.3d 1062 (4th Dep't 2020), the plaintiff commenced a negligence action to recover damages for the injuries she sustained when she slipped and fell on water in the vestibule of a supermarket. The jury returned a verdict in favor of defendant, finding that there was no water on the floor where the plaintiff fell. The plaintiff did not make a post-trial motion for a new trial under CPLR 4404(a).

On appeal, the plaintiff challenged the verdict on the ground that it was against the weight of the evidence. She did not address the issue of whether her argument was preserved for review in view of her absent post-trial motion and defendant did not get into that issue, although it did argue there was ample evidence to support the jury finding. The Fourth Department raised the preservation issue *sua sponte* and concluded the plaintiff "was not required to preserve [her] contention that the jury verdict was contrary to the weight of the evidence by making a post-verdict motion for a new trial." In support, the Court cited *Evans* and its rationale; namely, that it, like the trial court, possessed the power to order a new

trial where the appellant made no motion for that relief in the trial court. The Court then held, "[T]o the extent that our prior decisions held otherwise, they should no longer be followed." Addressing the merits of plaintiff's argument, the Court agreed with defendant and held the verdict was supported by a fair interpretation of the record.

Another Fourth Department decision, *Alexander R. v. Krone*, 186 A.D.3d 981 (4th Dep't 2020) involved an appeal from a judgment entered upon a non-jury verdict. The appeal arose from an accident that occurred when a minivan carrying 10 occupants on the New York State Thruway collided with the back of a dump truck, which was parked on the shoulder. Three of the occupants died and the remaining occupants sustained serious injuries. The plaintiffs alleged the defendant was reckless. The Supreme Court found the defendant acted with reckless disregard for the safety of others and was 35% liable for the collision. The defendant did not make a post-trial motion claiming insufficient evidence.

The Fourth Department agreed with the defendant that there was insufficient evidence that he acted recklessly and dismissed the complaint. In doing so, it acknowledged that no post-trial motion was made but held, as it did in *DeFisher*, that there was no need to make such a motion to preserve the issue for appeal. It held that prior decisions holding that a post-trial motion in non-jury cases was required to preserve the argument "should no longer be followed."

The takeaways for these decisions are several. First, there is no need to make a post-trial motion to set aside a verdict to preserve a weight of evidence argument for appeal, regardless of whether the verdict was rendered by the jury or a judge. The Court perceived no principled reason to have one rule for jury verdicts and another for bench trials. This one size fits all approach is surely a sensible one.

Second, while *DeFisher* and *Alexander R.*, as well as *Evans*, involved against-the-weight-of-the-evidence arguments, their holdings should extend to other arguments where no post-trial motions were made, including excessiveness or inadequacy of damages awards. The courts' rationale is equally applicable to these other arguments. Third, attorneys are certainly not precluded from making a post-trial motion to raise such claims. However, if they do, and the motion is denied with the trial court finding the verdict was not against the weight of the evidence, an appellate court may factor that conclusion into its assessment of the evidence. A better course of action may be to refrain from making the motion, lest a denial is used against the attorney on appeal, unless there are signs that the trial court may be receptive to the motion. Fourth, the preservation rule still holds sway in the First and Third Departments. Until those courts hold otherwise, attorneys in those departments should consider making a post-trial motion in order to preserve an issue.

## PRESERVATION OF A GENERAL VERDICT CLAIM

It is black-letter appellate law that where multiple theories of liability are submitted to a jury, a general verdict in the plaintiff's favor can stand only if all the theories are supported by the evidence (*see* New York Appellate Practice § 4.07 (LexisNexis Matthew Bender)). The reason is that a general verdict as to liability leaves the appellate court with no clue as to which theory of liability the jury adopted, and the court would be otherwise forced to engage in speculation to determine whether the claimed error affected the jury's verdict. *Davis v. Caldwell*, 54 N.Y.2d 176 (1981). Does this rule apply where the plaintiff proposes a general verdict and the defendant fails to request a special verdict or object to the use of a general verdict?

The Fourth Department addressed this issue in *Wright-Perkins v. Lyons*, 188 A.D.3d 1604 (4th Dep't 2020). In this medical malpractice action, the plaintiff alleged negli-

gence caused her to suffer a serious bowel injury after she gave birth. Two separate departures were established at trial by the plaintiff, who argued those departures in her closing. While the defendant could have requested a special verdict, asking the jury to make separate specific findings of negligence and causation as to each alleged departure, no such request was made, and there was no objection to the general verdict submitted to the jury. The jury held that negligence was a substantial factor in causing the injury and damages.

On appeal, the defendant argued that the plaintiff's proof of causation related to only one of plaintiff's alleged departures and was insufficient to support the general verdict. The Court rejected the argument. It held that while reversal generally is required when a general verdict is used and there is an error affecting only one theory of liability, "reversal is not required because defendant, as the party asserting an error resulting from the use of the general verdict sheet, failed to request a special verdict sheet or to object to the use of the general verdict sheet."

The teaching of *Wright-Perkins* is clear. Where multiple theories of liability are to be charged to a jury, the defendant's failure to object to the submission of the case on a general verdict will preclude the defendant from claiming that a reversal is required because the evidence supported a finding of liability on only some of the theories submitted to the jury. In other words, the defendant will prevail only if none of the submitted theories of liability are supported by the jury. Thus, a defendant will need to consider whether to agree to a general verdict or request a special verdict. For a further discussion of this matter, the reader is directed to 1 NYPJI3d (2020 ed.), 1:97 and commentary.

## INTEREST OF JUSTICE REVIEW

It is well-established that to preserve an argument that evidence was as a matter of law erroneously admitted or excluded, you must timely object and state the specific ground for objection. CPLR 4017; CPLR 5501(a) (3). However, the Appellate Division is empowered to review unpreserved arguments in both civil and criminal cases in the interest of justice. See *Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988);

CPL § 470.15(3)(c). A review of the case law where this interest of justice power is sought to be invoked shows that it is used sparingly.

Indeed, as this equivalent power is characterized by the federal courts in civil cases, it is fair to say that appellants in New York who seek to invoke this power "are like rich men who wish to enter the Kingdom: their prospect compares with those of camels who wish to pass through the eye of the needle." *United States v. Krankel*, 164 F.3d 1046 (7th Cir. 1998).

Nonetheless, this power is invoked, as it was in *Gubitosi v. Hyppolite*, 188 A.D.3d 1015 (2d Dep't 2020). In this motor vehicle accident case, a trial on damages was held following partial summary judgment to plaintiff on liability at which causation was at issue. The plaintiff alleged injuries to his neck caused by the accident, and the defendants disputed causation. At the trial, it was revealed for the first time that the plaintiff had injured his neck before the accident. But the defendant did not lodge any protest to this revelation before the trial court. The jury awarded substantial damages.

On appeal, the defendants argued that the plaintiff's failure to disclose his prior neck injury prejudiced them. The Second Department, after acknowledging that the defendants had failed to preserve this contention, invoked its interest of justice review power. In its view, the plaintiff's failure prejudiced the defendants, as causation was a central issue in the damages trial and the defendants had no opportunity to cross-examine plaintiff's expert about the prior injury because only the pre-recorded videotaped testimony of that expert was presented at trial. Of note, there is no discussion, much less comment, on why the defendants did not protest the plaintiff's failure at trial.

While one might be tempted to conclude that the Court's exercise of the interest of justice review power was an example of "I know it when I see it" jurisprudence, such conclusion would be an unfair assessment. Rather, the Court saw the plaintiff's conduct as a fundamental error that resulted in an injustice to defendants. After all, the defendants were arguing that the subject accident did not cause the plaintiff's injuries. In this regard, the Second Department was plainly cognizant that "courts or justice exist for

the purpose of securing fair determination of controversies." *Nicholas v. Rosenthal*, 283 A.D. 9 (1st Dep't 1953). Perhaps that needle is wider than thought. Counsel should keep this policy argument in mind when unpreserved issues are present.

## FOLLOW THE REMITTITUR

*Danielle v. Pain Mgmt. Ctr. of Long Is.*, 168 A.D.3d 672 (2d Dep't 2019), involved a medical malpractice action where the jury found three defendants negligent, apportioned liability and awarded damages. The trial court denied a post-trial motion to set aside the verdict. On an appeal from the order denying the motion, the Second Department modified the order, and the decretal paragraph of its memorandum decision and order provided that the matter was remitted to the Supreme Court for a new trial on the issue of liability with respect to the appealing defendants. Upon remittitur, Supreme Court issued an order limiting the new trial to issues of apportionment of liability among the defendants and non-party doctors.

On an appeal from that order, the Second Department reversed. *Danielle v. Pain Mgmt. Ctr. of Long Is.*, 189 A.D.3d 1351 (2d Dep't 2020). It held the Supreme Court lacked the power to limit the new trial as it directed. Its rationale was succinct: "A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher and order or judgment entered by the lower court or a remittitur must conform strictly to the remittitur." Here, the Court observed, the decretal paragraph in its prior order contained no language that indicated the new trial would be limited to issues of apportionment. The Supreme Court should not have limited the new trial to issues of apportionment of liability.

The Court's message was unmistakable that an appellate court will not tolerate the action of the trial court to which it remanded the matter to structure the new trial in the manner the trial court prefers. It is the language in the decretal paragraph of an appellate court order that controls the extent of the remittitur, not the trial court.

Michael J. Hutter is a Professor of Law at Albany Law School and Special Counsel to Powers & Santola, LLP.



# The Pro Bono Appeals Program Wants You!

BY ELISA LACKEY



In 2010, the New York State Bar Association's Committee on Courts of Appellate Jurisdiction (CCAJ) launched the Pro Bono Appeals Program (PBAP) to provide representation to appellate litigants of modest means in a variety of urgent civil matters. The program has received almost 100 inquiries, mostly in family, matrimonial, and unemployment insurance matters. We are proud of our many successful litigation outcomes.

The program was inspired by an American Bar Association report that only a few states offered pro bono appellate representation despite a pressing need for it. With support from NYSBA's executive committee, the program has received generous funding from the State Bar's philanthropic arm, The New York Bar Foundation, and several partnering agencies, including the Rural Law Center of New York and The Legal Project.

Initially, the program focused on appeals in the Third Department but quickly expanded to the Fourth Department in 2013. That year, two CCAJ members spearheaded the publication of a national manual on pro bono appeals programs. Now in its second edition, the manual continues to be distributed by the ABA Council of Appellate Lawyers.

In late 2017, the University at Buffalo School of Law Clinical Legal Education Program took over administering the program for the Fourth Department and the Rural Law Center of New York for the Third Department. Both organizations maintained a close relationship with the NYSBA.

In 2020, amid the Covid-19 pandemic, the Rural Law Center handed over the administration of Third Department pro bono appeals to the University at Buffalo School of Law's Clinical Education Program with ongoing support from the NYSBA. Because of the work that came before, the PBAP remains a successful model for coordinated pro bono assistance.

In 2021, the PBAP expanded its offerings. Folks in need can now obtain aid through our Appeals Virtual Help Desk, which offers short-term expert analysis and advice. These 30- to 60-minute consultations not only multiply the reach of the PBAP, they reduce the burden of unnecessary appeals without merit that come before the court. Volunteer attorneys offer their services and expertise to applicants who may not understand the appeals process and have questions on whether their case has merit or is even appealable.

Our virtual program also allows many volunteer attorneys who want to be part of the program but cannot take on a full appeal to provide invaluable assistance. Still, we have plenty of applicants searching for a pro bono attorney to assist with their full appeals. Building on our history, full appellate representation will continue to remain at the core of our mission.

Participating CCAJ members have donated their time and appellate expertise to carefully review all applications that come through the PBAP; their expert appellate analysis and devotion to the program is unmatched. But the need for good attorneys is ever growing, particularly in family and matrimonial matters. If you are interested in joining the volunteer list for the Pro Bono Appeals Program or have questions, please email [law-pbap@buffalo.edu](mailto:law-pbap@buffalo.edu). We offer financial assistance/reimbursement for some costs incurred for these cases, including filing fees as well as transcript, copying, and mailing costs, because we know how expensive representation is at this level.

*Elisa Lackey is administrator of the NYSBA Pro Bono Appeals Program and managing director of clinical legal education at the University at Buffalo School of Law.*



# Hector D. LaSalle Takes the Helm at the Second Department

BY MARK DIAMOND

Immigrant parents. Raised in a blue collar home by a sheet metal worker and an office manager at a Long Island factory. The only child was a bright kid, a serious student who worked hard to become a respected attorney. Winds up a judge. That's America. Winds up Presiding Justice of the Supreme Court of the State of New York Appellate Division, Second Department. That's New York.

Hon. Hector D. LaSalle became the Court's 20th Presiding Justice in May 2021, having served as an associate justice since his appointment to the Second Department by then-Governor Andrew Cuomo in 2014. Long before that, there was a BA degree from Penn State University in 1990 and a JD from University of Michigan Law School in 1993.

Discussing the beginnings of his professional career, Presiding Justice LaSalle said, "When I was a young lawyer, I concentrated on working hard and trying to do the best job I could. I was anxious to learn about our profession from established attorneys in my community. I didn't know any professionals growing up, and I was appreciative of anyone willing to mentor me. My parents always told me, 'If someone you respect is willing to teach you something, listen.'"

Justice LaSalle cut his criminal litigation teeth as an assistant district attorney in both the Narcotics and Child Abuse and Domestic Violence Bureaus of the Suffolk County District Attorney's office from 1993 to 1998. He then went to Ruskin Moscou Faltischek in Uniondale, where he did healthcare regulatory work and learned a lot about healthcare law, before going to the New York State Attorney General's office, where he primarily litigated medical malpractice cases from 1999 to 2001.

In 2001, Justice LaSalle returned to the Suffolk DA's office, where for eight years he served as deputy bureau chief of the Special Investigations Bureau in charge of the



anti-gang unit. While at the DA's office, he led several long-term criminal investigations and prosecuted high-profile criminal matters. In November 2008, he ran for New York State Supreme Court for the Tenth Judicial District.

His road to the judicial nomination was unique. "I got involved in politics after college. I loved reading and discussing various issues involving foreign policy and decided to volunteer at my local democratic committee, where I thought I could work on

these 'important' matters. I was a naïve kid. On my first day I was placed at a small table in the back of the office and asked to manually update the town's voter list and to address and stuff envelopes. To my surprise, no one asked me about my thoughts on foreign policy. It wasn't the experience I expected, but it was the experience I needed."

Justice LaSalle recalls volunteering for two hours a week for several years helping with mailings. The people he met doing that work taught him many things and became

his biggest advocates. “I would sit quietly and listen to the other volunteers talk. I learned about their lives, their concerns and what mattered to them. I rarely spoke. Most of them were blue collar workers with diverse opinions and views. I believe my time with them was well spent. I kept quiet and learned.”

The judge credits the people he volunteered with as some of his biggest advocates for his judicial candidacy. “It was my fellow volunteers of the committee who recommended to leadership that I run for judicial office. They knew I had developed a reputation for being a hardworking lawyer and they believed I was a down to earth person who treated them with respect and did whatever job I was asked to do. They liked that about me. To know that I earned their respect meant a lot to me and still does today.”

In November 2008, Justice LaSalle was elected as a Supreme Court Justice for the Tenth Judicial District in Suffolk County. From 2012 to 2014, he also served as an Associate Justice of the Appellate Term for the Ninth and Tenth Judicial Districts.

“That opportunity sort of fell into my lap,” recalls LaSalle. “Justice Tannenbaum, a respected jurist who had chambers down the hall from me, was retiring from the Appellate Term and suggested I apply for it. He said it would be additional work, but it would be fun and thought it would make me a better trial judge. I thought about it overnight. The next day, I wrote a letter to former New York State Chief Administrative Judge Gail Prudenti, who ultimately appointed me to the position. Justice Prudenti was from Suffolk County and was familiar with my work, so that didn’t hurt. To this day, I think I was the only Suffolk County judge who applied.” The PJ nods. “Hard work and being at the right place at the right time. That’s the formula.”

## THE COURT

Since his appointment as Presiding Justice of the Second Department, LaSalle has faced the daunting task of how to best manage the large caseload he inherited, which has only worsened as a result of the pandemic. He notes that addressing this issue has been an enduring priority for the Court.

Justice LaSalle stated, “The bar should be aware of how our Court prioritizes the matters which come before it. We prioritize matters involving in-custody defendants, matters involving children, and matters which have been granted a preference. Those cases typically make up 40 to 50 percent of the daily calendars. The rest of the calendar is typically made up of civil matters and we attempt to handle those matters in chronological order.

“The bench is working hard to shorten the time period between the date of argument and date of decision publication. The entire team at the Court is working to improve the Court’s efficiency and speed without sacrificing the quality of the decisions. We are continuing to work on providing parties with more detailed decisions and remain committed to authoring full opinions on matters we believe present novel issues.”

According to the Court, as of December 20, 2021, there were 4,890 open, perfected civil cases and 387 open, perfected criminal cases in the Second Department.

Part of the solution Justice LaSalle envisions to lower the Court’s caseload is an effort to enhance its Special Master’s program. The Special Master’s program, which was created by former Presiding Justice Scheinkman, has been an effective tool in resolving pending perfected appeals by voluntary agreement. The Special Master’s program enlists retired judges and experienced attorneys who conference each assigned case.

Justice LaSalle says he is currently working on making the program more efficient by using data to identify the types of cases that have proven the most likely to be resolved voluntarily and prioritizing mediation resources on those. He has enlisted a team of current Appellate Division justices to help identify ways in which the current program can become even more successful.

The Covid-19 crisis has created hardships throughout society. The Second Department has been similarly affected. Justice LaSalle noted, “The realities of the pandemic have touched everyone in our region. However, despite the unforeseen challenges, the legal community has persevered. My colleagues and I have been impressed and appreciative of how quickly the appellate bar

adjusted to handling their matters on a digital platform. It was not an easy transition, but the appellate bar handled it seamlessly and allowed our Court to remain open for business.”

Justice LaSalle also noted how glad he is for the support of Chief Judge Janet DiFiore during the Covid-19 crisis. He stated, “The Covid-19 crisis resulted in a hiring freeze which prevented our Court from replacing personnel losses due to attrition. This put a significant strain on our Court. Fortunately, the freeze was lifted last spring, and we have begun the process of staffing our institution to pre-Covid levels. The Chief Judge has been a reliable partner in providing our Court the resources necessary to meet our mission. The Chief has gone above and beyond to help us through this difficult time and the members of our Court could not be more grateful.”

## PERSONAL

Justice LaSalle is a member of the New York State Bar Association, the Latino Judges Association, the Puerto Rican Bar Association, the Long Island Hispanic Bar Association and, of course, the Suffolk County Bar Association. For relaxation, he reads.

“I love reading for pleasure. It helps settle my mind. Reading is my hobby, it’s a break from the world. I read *Team of Rivals* over the summer and it was great. I recently finished *Risk: A User’s Guide* by General Stanley McChrystal, which is about organizational management, and I just began rereading *Lonesome Dove* by Larry McMurtry.”

Fifty-three-year-old Justice LaSalle lives eight miles from where he grew up. His parents were born in Puerto Rico. His father’s family moved from East Harlem to Brooklyn, where his father met his mother, and they ultimately moved to Long Island. He has been married to his wife Andrea for 24 years. Her family hails from Austria, and she works as a social worker for a non-profit organization. Their children are both college students.

Justice LaSalle commented, “My wife and I are children of blue collar workers who lived modest lifestyles. We live similarly. Quiet, simple lives.”

# High Success Rate at CCAJ's Moot Court Program

BY ALAN PIERCE

Since 2014, the Committee on Courts of Appellate Jurisdiction has operated a "Moot Court Program" for counsel who are scheduled to argue cases in the New York Court of Appeals and, on a limited basis, the Appellate Division. Most recently, the moots occur virtually via Zoom, avoiding the need for travel.

The process is simple. Counsel applies and provides the program's chair and assistant with the briefs in the appeal. The CCAJ then forms a moot team of three to seven former appellate judges and experienced practitioners, who read the briefs and moot the appeal about one to two weeks before oral argument. The moot team also answers questions and provides the best advice to moot counsel, including a candid evalua-

tion of the strengths and weaknesses of counsel's case.

The program has been of particular benefit to solo practitioners and attorneys from small firms who may not have experience in the Court of Appeals or the opportunity to moot an appeal. We operate on a first come, first served approach.

The moot judges are bound by confidentiality not to discuss the moot with anyone outside the moot. The committee reserves the right to reject requested moots based on whether the appeal is "moot-worthy," but to date we have never done so. However, acceptance of the moot is not based on subject matter or the attorney requesting the moot. The program is available to all NYS-

BA members without cost. If you are not currently a NYSBA member, proof of application and payment of the fee is required.

To date, attorneys who have used our moot court program have won more than 50% of their appeals. The forms needed to request a moot argument or to volunteer as a moot court judge are available from Kathryn Calista, the committee's staff liaison, who can be reached at [kcalista@nysba.org](mailto:kcalista@nysba.org), or 518-487-5574.

Alan Pierce is a partner in the litigation practice and leader of the appellate practice at Hancock Estabrook, LLP. He is a past chair of the NYSBA Committee on Courts of Appellate Jurisdiction.







NEW YORK STATE BAR ASSOCIATION  
**COMMITTEE ON COURTS OF APPELLATE JURISDICTION**  
One Elk Street, Albany, NY 12207

Non-Profit Org.  
U.S. POSTAGE  
**PAID**  
ALBANY, N.Y.  
PERMIT NO. 155

# New York State Bar Association Committee on Courts of Appellate Jurisdiction **Mission Statement**

*Adopted September 15, 2020*

- **Engage** attorneys, members of the judiciary, judicial staff, academics, and other interested parties in discussion of current issues in appellate practice;
- **Report** on the need for statutory and procedural rule changes to improve the administration of justice in state and federal appellate courts located in New York;
- **Educate** attorneys and pro se litigants about the subject of appellate practice by producing educational materials and sponsoring programs to enhance their skills in perfecting, briefing, and arguing appeals, and engaging in appellate motion practice; and,
- **Act** to promote access to appellate courts and assist the administration of justice by, for example, supporting programs to aid indigent litigants with pending appeals.

