Chapter 1

The New York Court of Appeals

I begin with a paean to the Court of Appeals, my professional home for more than a quarter century. *Paean* means "a song of praise or thanksgiving; a shout or song of triumph, joy, or exultation," and is hardly an everyday word. But the New York Court of Appeals is hardly an ordinary place, and it deserves to be lauded and celebrated in a uniquely special way with a specific word.

I know I'm not alone in this feeling. What precipitated this segment was a call from a highly experienced New York City lawyer after his first appearance before the Court of Appeals. He's a big firm partner who has litigated for decades and even clerked for a justice of the US Supreme Court. He struggled to find words sufficient to capture the ecstasy of his experience before the Court of Appeals—the building, the courtroom, the staff, the judges, the level of their preparation and quality of argument. When I repeated this story to a law firm colleague, he continued in the same vein about his own experience two years earlier. He told me that having arrived the day before his scheduled argument—wisely intending to get a sense of the bench he would face—he was disappointed to learn that the court was not sitting that day. The court officer who conveyed that news insisted on accompanying him into the courtroom, showing him where everyone would sit and the next day's calendar, even giving him a brochure and gavel-tipped Court of Appeals pencils for his children.

Court of Appeals Hall

My paean starts with the court building itself, which is nestled between the Albany County Courthouse and City Hall, diagonally across from the Capitol, with a small park in between. Now known as Court of Appeals Hall, the white marble Greek Revival structure was originally known as State Hall and was completed in 1842 to house state officers. The Court of Appeals officially commenced in 1847—the state constitution of 1846 declares that "there shall be a Court of Appeals"—and was originally located on the third floor of the Capitol. Interestingly, an apparent contest between two leading architects of the day—H. H. Richardson and Leopold Eidlitz—as to who would design the Capitol was resolved by "dividing the baby" between them. The space occupied by the Court of Appeals in the Capitol fell to Richardson. In 1917, when the court moved from

the Capitol to occupy State Hall, Richardson's courtroom—including the floor-to-ceiling hand-carved oak paneling, the furniture, and the Mexican onyx (nonworking) fireplace (what a treat it is to sit in the courtroom's fireplace!) was—except for the ceiling—dismantled and moved to what has ever since been known as Court of Appeals Hall. The ceiling was "mocked in" in plaster to match. The courtroom is not the largest, grandest, or most ornate I have ever seen, but it is the most beautiful.

I need to jump ahead a bit to 2002, when the court updated its magnificent home. That had been done only once before, in 1958, and it was high time to do so again to meet physical and technological demands. The court had earlier moved the Office of the State Reporter (responsible for publishing the court's decisions) out of Court of Appeals Hall to its own quarters, but that left insufficient space. For the first time, plans to enlarge the structure—actually add meaningfully to the size of the building, making it asymmetrical—met resistance from historic preservationists. I decided not to engage in battle with them.

As we fruitlessly searched in the city of Albany for expansion space, we miraculously received the enthusiastic endorsement of the historic preservationists and, between 2002 and 2004, went forward with enlargement of the building from roughly 60,000 to 90,000 square feet.[1] Much of what had been the former marble facade of the building became interior wall space, as we added significantly at two ends of the building and took the interior down to brick; we uncovered magnificent vaulted ceilings hidden behind acoustical tile installed in 1958. But it was scary! I am so grateful to my colleague Richard C. Wesley, who originally laid the renovation idea on the table, before beating a retreat to the US Court of Appeals for the Second Circuit. There are too many heroes of the renovation—Clerk of the Court Stuart Cohen and building manager Brian Emigh, chief among them—to mention and thank every one of them here.

Suffice it to say that given the ultimate success of the renovation, the terrors, miseries, and agonies—certainly attendant to any building overhaul—are long forgotten. In hindsight, it was a ton of fun coordinating colors (ivory, navy, deep red, and dark green throughout the building), finding matching marble for the new facade (I visited the Danby Quarry—more accurately a mine—in Vermont), selecting furnishings and materials, and allocating space. For the first time, all seven judges' chambers would now be on the same floor, instead of five on the second floor and two on the third, permitting more natural exchanges among them. Considering the extent of the renovation, my favorite

1. Years later, Albany's county executive, knowing that we had looked at historic Centennial Hall across the street, called me to say that we could have that then-collapsing building "for nothing" (his words), all efforts at their own private development having failed. We accepted the offer and proceeded with plans to locate the State Reporter there, as well as a modest lodging room for each nonresident judge, who otherwise stays at a mediocre local hotel, with a judicial branch museum in the lobby. That erupted into a ludicrous scandal over the so-called palatial space being planned for the judges in the midst of a state fiscal crisis, so the living quarters part was halted, and the small rooms were rented out as offices. Having spent twenty-five years largely at a hotel two weeks out of every five, it is beyond sad that the non-Albany judges can't have a small, regular room to come to, a place to leave a few personal effects and security downstairs (we had two security incidents in my years at hotels), as well as our museum in the lobby. What's more, the court saved a beautiful century-old building, which would have otherwise become a parking lot.

compliment from Court of Appeals long-timers revisiting the building is "nothing has changed," meaning the beauty and dignity of the hall are fully intact. Indeed, comprehensive though the project was, in the courtroom itself we merely spruced up the furnishings, including a return to the style of the original light fixtures—now six chandeliers instead of one, to provide more light—updating the carpeting, and recovering the chair seats. (Embarrassingly, we discovered on day one of the public reopening that they needed more stuffing—everyone had left his or her imprint on the seats at the rear of the courtroom.) Among my toughest decisions was choosing fabric texture for the new draperies—closer weave meant more sheen, looser weave meant more swag.

All of this returns me to the subject of the Richardson courtroom. To my mind, the Court of Appeals physically is vastly underappreciated, including its glorious rotunda and magnificent courtroom. One day as I wandered through our beautifully enlarged space, it occurred to me that now we had a better opportunity to bring in the public, which is something courts should strive to do. The courthouse is, after all, a public building, and sadly the public rarely visited the Court of Appeals. So we initiated a public lecture series, cosponsored with the Historical Society of the Courts of the State of New York, centered on legal subjects of wide interest and drew crowds of 200 or more Capital District residents and others. One of my favorites was "The Shape of Justice: Courthouse Architecture," delivered by two preeminent architects, Henry N. Cobb and Paul Bayard. I could not better capture the emotion our courtroom engenders than to quote the words of Henry Cobb, which I enthusiastically affirm:

> Look around you now and notice how eloquently this room gives voice to values that underlie the administration of justice in our democratic society. Notice that the room is stately yet unpretentious, highly ordered yet refreshingly nonhierarchical, beautifully crafted yet materially modest, appropriately ceremonial yet warmly human. If I were speaking to you in a lecture hall, I would be obligated to illustrate these points with projected images, but here I need only to invite you to enjoy discovering for yourself the myriad details that together constitute the eloquent voice of this room. Wherever you are seated—whether near the bench or fireplace, or in one of the ram's-head armchairs, or toward the rear with a sweeping view of the many portraits arrayed around its paneled walls, you are palpably enveloped here in the voice of architecture as spoken by a master of our art.
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> Here, more effectively than in any other courtroom I know, the collegial character of an appeals court and the collective nature of its judgments is eloquently affirmed. When we consider the coherence and splendor of this chamber, with its magnificent fireplace and wonderful carved ornament—on its walls, on its bench, on its tables and chairs, all of which were custom-made at this site—it is easy to understand why, when the court later outgrew its quarters in the Capitol, it took the unprecedented step of dismantling the courtroom and reconstructing it virtually intact in its new quarters in the old State Hall, now appropriately renamed, of course, Court of Appeals Hall.

Of course, my paean goes far beyond love for bricks and mortar. Indeed, it is truly the people of the court—the judges and staff—who create and continue this extraordinary institution. The dedication of the staff—many of whom have served for decades, and many of whom never worked anywhere else—can only be described as genetic. It's a family I joined in September 1983, knowing that I could ask anything of anyone and it would be done, and the tradition endures. We share one another's personal joys and tragedies and delight in the work of the court, whether keeping the brass interior staircase rails polished or cleaning chambers (which begins before 5 a.m., anticipating the judges' early arrivals; I often found homemade biscotti on the seat awaiting me in the morning), or ensuring that the public's needs and questions are answered promptly and courteously, or handling difficult dockets superbly. The feelings go both ways. For several years at the court we had a book club, another bridge between the judges and staff; I knitted baby sweaters when I learned that one of the court officers was expecting twins. I have no reluctance recommending that people call, write, or visit the Clerk's Office with any question, or seek information from the public information officer or the lawyer/librarian, or help from one of the court officers in the lobby. They never disappoint.

Of the 109 judges who have been privileged to sit on the Court of Appeals from 1847 to date, I have worked alongside nineteen—roughly 20 percent of the judges over the past 164 years—and have known several more of them personally. My testimony, based on decades of firsthand experience, I submit, is therefore unimpeachable: they are phenomenal. Many things I would wish to say about the judges are told in later segments and, best of all, in the massive volume *The Judges of the New York Court of Appeals: A Biographical History*, the ultimate work product of us all, under the masterful direction of Judge Albert Rosenblatt. I am reluctant to name judges individually for fear of skipping someone. My praise is universal.

The governor appoints judges from all over the state, and I think being a nonresident court helps enormously. The court—meaning all seven judges, the only way the court officially convenes—gathers in Albany for sessions of oral argument generally two weeks out of every five. The judges return between sessions to their home chambers to write and study for the intervening weeks.[2] When we were together in Albany, it was dawn to dusk (and beyond) together. In between, we exchanged tons of paper but did not often see or speak to one another. Always I looked forward to gathering with my colleagues in Albany, and after two weeks of lively debate I looked forward to leaving them. There are immense personal differences among the judges—some are genuine "buddies," some less so. But at the core I encountered human beings of quality at the peak of their careers in law, dedicated to the work of the court. Our personal rapport—even those with whom

2. I was fortunate that my children were old enough that I could do this relatively easily. Back in September 1983, Luisa was in her first year at Amherst; Jonathan was a senior at Dalton, headed to Cornell; and Gordie, at Fieldston, transferred to Choate (which he chose because, among the boarding school catalogs he studied, Choate's was "the only one where the kids were smiling"). A couple of years later when Gordie was at Hamilton, Stephen mastered "the circuit," visiting all of us periodically by trekking between Albany; Amherst, Massachusetts; Ithaca, New York; and Clinton, New York.

I more often disagreed on the law—I could never hope to replicate in anything I do. Lawyer heaven.

Coincidentally, in my afterlife, I discovered objective evidence of the court's distinction that even the court may not fully appreciate. In the global agreements I now routinely encounter in my arbitration practice, I find that often the parties contractually chose New York law to govern the resolution of any dispute that might arise between them, and that is because of its recognized clarity, rationality, stability, and predictability. While the Court of Appeals surely has as its objective in each case reaching a result and setting a rule that is sound for the particular parties and the law of New York, it does not necessarily consider the impact of its holdings in faraway corners of the world. Credit needs to be shared with other New York courts and the practicing bar, but nevertheless the predominance of New York jurisprudence as the choice of law speaks volumes about the deep regard our high court has earned as a sound, stable decision maker. What a joy it was to be part of and ultimately lead this institution and its people. How painful it is to be severed from them. When they say "I miss you," I honestly respond, "I miss you more."

Here are two illustrative personal anecdotes from my first months on the court, one a judge story and one a clerk story.

As one of my draft writings was being discussed at the conference table, Judge Bernard Meyer remarked that he knew of a line in an old case that would fit perfectly into the opinion. He remembered only that the line was on the left side of the page in an opinion in the *New York Reports* (each volume about 1,000 pages), about the middle of the page. This was back in 1983, pre-Internet. I reported this to my law clerk, Gary Hoppe, and after lunch went down to the courtroom to hear oral arguments. Returning to my chambers hours later, there was Gary surrounded by at least fifty volumes scattered on the floor, pulling books from the shelves and muttering, "I'll kill him. I'll kill him." But Gary found the case, and the language Meyer recalled was indeed where he remembered it to be, and indeed it fit perfectly. At conference the next morning, as my revised draft was circulated, Bernie simply whispered, "Yes, that's it," and I said "Thanks." A great communal effort.

As I reflect on my first chambers in the courthouse (the two "juniors"—Judge Richard Simons, later Judge Fritz Alexander, and I—we each started with quarters on the third floor), I am reminded of a call I received shortly after my arrival from Jack Matthews, a fearsome figure who had been with the court forty-some years, starting after law school graduation as law clerk for Chief Judge Charles Desmond and moving up to the position of conference room clerk. Jack sat in on all the court conferences, and when he spoke it was usually to call a judge's attention to a technical error in one of our drafts—"You can't do that, Judge." Everyone's blood froze around the conference table when we heard Jack clearing his throat as if to speak. One day Jack called to say he was on his way up to see me, and that was distinctly not good news. What had I done wrong? Once I composed myself, I decided that instead of remaining in my seat behind my desk, I would pull out the little shelf in the front of the desk and sit alongside him, conveying a sense of equality and collegiality. That proved unnecessary. Minutes later Jack strode into the room, went right to my seat behind the desk and proceeded to educate me about one of the innumerable technicalities of Court of Appeals procedure I had overlooked. (There

are dozens of similar technicalities. The court's collection of motion and jurisdictional reports detailing them is appropriately called "The Arcanum.")

That is the tradition it was my good fortune to step into on September 12, 1983: an outstanding group of equals, all working hard together to do our individual and collective best possible job.

The Cases

One of the many stories floating around the courthouse is that once during oral argument, a lawyer was questioned about how he got to the Court of Appeals—meaning the jurisdictional basis for his case—and he answered, "By car." There are in fact several ways to get cases to the court. Here's a highly simplified version.

In the design of the New York court system there are trial courts, with case filings each year numbering in the four million range, and intermediate appellate courts, with cases numbering in the tens of thousands. Everyone basically has a right to bring a case to a trial court, and (unlike the federal court system) a right to full review of the decision once, generally by the Appellate Division, which has broad "interests of justice" jurisdiction and can address even factual disputes (differences over what words were spoken or what things were done). The Court of Appeals offers a second layer of appeal, which is more constricted and less available. The road to the court has obstacles, consistent with the goal that the opportunity for yet another layer of appeal should be more sparingly available, to resolve issues of significance going beyond factual differences between the parties—in other words, to settle and declare the law for the whole state.

To this end, there are three essentials, each with its own exceptions. First, cases reaching the court must have been finally decided below it—there is to be no piecemeal Court of Appeals review of cases. Second, the cases generally must present only questions of law, not of facts, the review of which stops at the Appellate Division. Third, the issues must have significance beyond the parties, so that in a relatively few cases the court can decide legal questions with broad impact.

This trio of requirements makes for oral arguments with little late-night TV appeal. It's usually the facts, the human tangles, the things people actually say and do to one another that draw popular interest. From the bench, we often had to remind lawyers presenting argument that ours is a law court and they should stay focused on the law. Every now and then I toyed with the idea of shaking things up by saying, "We know the law, Counsel, just stick with the facts." I consciously tried to limit humor from the bench. It's always easy for judges to get a laugh, but that sort of egotism disrupts the appropriate courtroom decorum. Though oral arguments at the Court of Appeals have been recorded for decades, we attracted no television audience. Humor and drama certainly would have made us more popular. But the Court of Appeals is not *Judge Judy*—an excellent entertainer—and we were soon dropped from local TV. Pity. I always brought home the videotaped argument in aid of opinions I was drafting. I imagine lawyers purchased copies, too, especially when they felt good about their presentation and wanted to show off to friends and family.

Before 1986, many cases came to the court "as of right"—for example, even the opinion of a single dissenting Appellate Division judge was a ticket to the Court of Appeals. In my initial years on the court we heard approximately 800 appeals annually, arriving at the courthouse Sunday afternoons for two packed weeks of argument, at least seven cases a day. That changed radically for the better in 1985 when the state constitution was amended to transform the court to a basically "cert" (or certiorari) court, meaning that the judges largely get to select the docket, pretty much like the US Supreme Court. The result has been that the Court of Appeals hears roughly 250 cases annually, and I assure you that it's still a full-time job. The nine justices of the Supreme Court hear approximately seventy appeals annually.

One further general observation: civil and criminal cases follow different pathways to the court. Since 1986 civil cases get to the court by application, or motion for leave to appeal from a decision of the intermediate appellate court. There are roughly 1,000 civil motions for leave to appeal annually. Each motion is assigned to one judge, purely in decreasing order of seniority, assisted by an attorney on the Court's Central Legal Research staff, resident in Albany (contrasted with "elbow clerks," who travel with and serve their respective judges), for preparation of a report to grant or deny leave to appeal, which is then circulated for a vote by the full court. Motions for leave to appeal are conferenced every morning the court is in session. Typically they top the daily conference agenda. It takes the vote of two judges to grant leave. As with everything else in life, there are exceptions, practically and systemically. As a practical matter, leave may be granted if even one of the seven judges very strenuously urges it. Systemically, civil cases can still occasionally reach the court as a matter of right—without a motion—as when there are two dissents at the Appellate Division or the sole issue is a substantial constitutional question.

As in the past, criminal cases come not by formal motion but by letter application to the court—in a given year the number of these applications is generally more than double the number of civil motions for leave to appeal. Each criminal leave application is assigned for review to a single judge in order of seniority, and that judge alone decides whether leave should be granted. Here I will say something that applies generally to the work of the court I am describing. My accounts of how cases are prepared by the judges individually are based strictly on my own experience—I have no idea how my colleagues, within chambers, arranges his or her own matters. For me, every criminal leave application was first fully reviewed by one of my law clerks, who prepared a written report I studied along with the underlying letter application and prior court documents. If merited, I would schedule a call or appearance with counsel. My objective always was to grant, not deny, the criminal leave application, unless convinced otherwise.

In recent years, the bar raised concerns about the low number of leave grants—perhaps some of us were a bit stingy in granting leave to appeal. With the judges' consciousness raised, the numbers have gone up a bit—but so have the relatively less significant unsigned memorandum affirmances of criminal convictions. Whether the push to grant more criminal leave applications makes any real difference to the law or to the defendants remains to be seen. An alternative suggestion from some members of the bar to put all criminal leave applications through the same formal motion process as the civil cases would add tremendously, and I believe unnecessarily, to the burdens on

the court and the already insufficient pool of available counsel for indigent defendants.

While cases overwhelmingly arrive on the calendar by grant of leave, in 1985 the state constitution was further amended to open yet another significant avenue to the court: certified questions. These are requests for leave to appeal made not by the parties but by another court—a federal appellate court or high court of a sister state—and reflect the line between our parallel state-federal court systems. Although federal courts and courts of other states can opine on issues of New York law, our own state courts have the ultimate authority to speak to state law issues. For example, if the meaning of a state statute is at issue before the federal courts, they can go ahead and interpret the statute, but the state courts can later overrule their interpretation. Embarrassing and inefficient. The certification process offers these courts an opportunity to put only the state law issue to the state court for resolution while retaining the rest of the case for application of the now-explicated law to the facts.

For nearly two decades the procedure has worked remarkably well in New York. Of the court's 250 or so appeals annually, usually a half dozen or more important questions have come through the certification process, usually from the federal appellate court sitting in New York—the US Court of Appeals for the Second Circuit—eliciting quick, final resolution of the state law issue. I see at least two additional advantages. First, from the New York Court of Appeals' point of view, it's an opportunity to opine on a significant law issue "unencumbered" by the underlying facts. *Nicholson v. Scoppetta* is for me a great example where, given only a certified question of law, we were able to state a broad principle regarding removing children from domestic violence situations that continues a to be central to the disposition of many cases. It might not otherwise have been as widely impactful a decision had it arisen in the context of specific facts (in the book *Women: A Celebration of Strength*, the authors identify the writing as among "50 Key Cases for Women's Equality"). Second, I sense that the certification procedure has strengthened the relationship and promoted a sense of parity between the Second Circuit and the New York Court of Appeals. All around, a good move.

The variety of cases before the Court of Appeals, civil and criminal, is boundless. Several years ago the court's public information officer, Richard Zander, mentioned to me that the post-Christmas weeks were pretty dead news time, so in an effort to stimulate greater public awareness of what we do, I had each judge synopsize half a dozen of his or her significant decisions and we put the list out to the media during those weeks. Not surprisingly, that failed in its intended purpose, but it did become a tradition, continued today, for each Court of Appeals judge at year end to summarize five or so key decisions. The full list, arranged by category of law, is included in the *Annual Report of the Clerk of the Court*, reflecting the amazing A to Z (administrative law to zoning) range of legal issues that find their way to Albany—family law, mental hygiene, contracts, land use, municipal law, consumer protection, insurance, landlord/tenant are but a few examples. It's an interesting compilation of what each of the judges considers to be his or her "decisions of the year."