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## Collegial Deliberations Are the Heart of Appellate Decision-Making

APPELLATE ANSWERS: How do appellate judges gain the knowledge and insight into so many areas to write and make law?

By **Marie E. Lihotz and Marianne Espinosa** | November 06, 2020



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The first Monday in October marks the start of the United States Supreme Court's term. For New Jersey, appellate courts start each term on September 1. This year our Supreme Court welcomes a new Associate Justice, the Honorable Fabiana Pierre-Louis, and the Appellate Division adds Judges Morris G. Smith and Katie A. Gummer. Prior to joining the judiciary, each of these jurists developed some legal specialty: Justice Pierre-Louis worked in the U.S. Attorney's office and then private practice; Judge Smith served as general counsel with the Philadelphia Board of Education and a solicitor for the City of Camden; and Judge Gummer was a civil litigator in private practice at a large firm. Now, as members of the state's appellate benches, each will join other members of their respective courts to review legal challenges in every area of our law. So how do appellate judges gain the knowledge and insight into so many areas to write and make law?

The easy answer is "lots of hard work and study." Yet, the actual and more interesting answer to this question, posed by one of our readers, highlights the magnificent synergy among appellate jurists. To paraphrase Justice Benjamin N. Cardozo in *The Nature of the Judicial Process*: "diverse minds" come together and produce "greater value" than a single

individual leading to the court's "truth and order" in decision-making.

Developing the tone of the Appellate Division's process rests with the presiding judges. The eight PJs are the most experienced members of the court, charged not only with overall administration of the court along with their panel's case and writing assignments, they also must create an atmosphere among members of their panel to reach consensus. Trial judges newly assigned to the Appellate Division change their lens from that of a single decision-maker to a member of a group that finds common ground in reaching ultimate determinations. In short, collegial deliberations are the heart of appellate decision-making.

An oft-cited lament by those unfamiliar with the process, suggests an appellate judge's life is solitary. Certainly, when joining the appellate court, a new judge acclimates to the scope and variety of the work. At times, a judge will encounter a legal issue that falls outside his or her comfort zone. The task of reading dozens of published opinions to develop complete familiarity with the parameters of the legal concept tends to be a solitary pursuit. But, once that is completed, the best part of the process begins—the panel's interaction with one another to reach a result.

Individual opinions by the judges on a Part are equally accepted and considered. Judges with no prior exposure to an issue, at times raise questions casting the legal matter in a different light for everyone else. Civil discourse reveals disagreement and sparks debate on the what and whys of each position. A panel member's power of persuasion results not from bellicose insistence to follow individual ideology, but from a logical airing of principled analyses of the merits. As noted by others, "[t]he fundamental principle of collegiality is the recognition that judging on the appellate bench is a group process."

Our experience reveals serious consideration runs to weighing a divergent view. A more senior judge, initially so sure of a result, takes a step back to think about an opposite one. After all, the singular objective in each case is to get the law right for the benefit of the people behind the papers.

In particular, the court takes great care on unique or controversial cases in order to develop a consensus aptly coined by a former Chief Judge of the D.C. Circuit as "productive disagreement." If consensus is not achieved, a dissent presents the contra view, with the panel again going back and forth on the respective rationales, until every judge finds satisfaction in the refined result.

For a judge newly assigned to the court, the benefits of this collegial process is a subtle, yet powerful learning experience. All members of a panel have an equal voice. No one tells another what to do or how to think; but the process demands development and articulation of positions. Indeed, the judges do not act in a vacuum. Often a colleague known to have great experience in an area may be asked for guidance to examine the precedent in an area as an aid to formulating an analysis. Nevertheless, at all times judicial independence remains paramount.

We must dispel another myth. Some think certain judges, considered specialists in a legal area, are assigned those cases when they are filed. Actually, case assignments occur randomly by a unit of the Appellate Clerk's Office. A panel's presiding judge considers each case and designates the judges who will hear the matter. Yes, a perk of being PJ allows a choice in cases he or she will review. Yet, the desire to stick to the familiar is always balanced by the need to develop the legal familiarity of all appellate judges in all areas—particularly those that may not arise as frequently as do others. Complex cases allow one's development of concise writing and clear rationale. With each pre- and post-argument discussion, and through comment on drafted opinions, new judges constantly develop an enhanced understanding of the appellate process and the court's obligations when reviewing the law.

The differences in the professional and personal backgrounds of judges newly added to the Appellate Division also add an essential dimension, enriching the process. Although experience helps recognize a problem, the reasoned results occur from the open dialogue and sharing of ideas of the group. A new judge quickly realizes their duty is to the law so they see themselves as a part of something bigger. This collaboration defines our Appellate Division.

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