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THE NEW YORK COURT OF APPEALS: A PRACTICAL PERSPECTIVE

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ON EAGLE STREET in Albany stately marble pillars flank the entrance to Court of Appeals Hall. Here, from the dramatically hand-carved bench in one of the most handsome courtrooms in the nation, the seven judges of the New York Court of Appeals dispense the ultimate decisional law of the state. Sometimes in startling, thunderbolt fashion, more often in a less-exciting, subtle manner, but always, these decisions make and shape the legal principles that govern every phase of New York's vastly complex activities. Even legislative pronouncements are not immune from the pervading authority of New York's highest judicial tribunal which, albeit within narrow confines, holds the power of life and death over the acts of the legislature.

But despite its obvious position of paramount importance in New York's judicial structure, the actual workings of this court, the essential mechanics of its decisional process, even the broad outlines of its jurisdiction, are little known and less understood. To many lawyers, Court of Appeals decisions are born in the advance sheet; they are discovered there by the attorney in much the same fashion that Moses

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was discovered on the river bank by Pharaoh's daughter. Their parentage and the circumstances of their origin are a mystery.

This ignorance of the work of the Court of Appeals is explicable. Only a small percentage of the Bar ever comes in personal contact with the court and even fewer are ever exposed to the actual method of its decision-making. Moreover, although recently there has been a quickened public interest in the makeup and *modus operandi* of the Supreme Court of the United States and a consequent rash of printed material about that body,¹ the processes of our own Court of Appeals have gone virtually unpublicized.

A description of the mechanical processes of the court, therefore, even the meagre sketch offered here, may be of some value. Possibly, it will help give a new dimension to the decisions and opinions of the court which in one manner or another, mediately or immediately, affect most lawyers daily. If it serves no important practical purpose it may at least satisfy what should be a natural curiosity about the work of New York's highest judicial body.

JURISDICTION OF THE COURT OF APPEALS IN BROAD OUTLINE

Any discussion of the work done by the Court of Appeals must be prefaced with a description, no matter how brief, of its jurisdiction.

Few areas of our law are plagued with the sort of vexing conundrums that are encountered with such distressing frequency in a study of Court of Appeals jurisdiction. Although susceptible of broad outlining, the constitutional and statutory definitions that prescribe and circumscribe review in New York's highest court achieve enormous complexity in their application.²

¹ See, e.g., Lewis, *How the Supreme Court Reaches Decisions*, N.Y. Times, Dec. 1, 1957 (Magazine), p. 51; *The Bright Young Men Behind the Bench*, U.S. News & World Report, July 12, 1957, p. 45.

² Unquestionably the single most authoritative work on Court of Appeals jurisdiction is COHEN & KARGER, *POWERS OF THE NEW YORK COURT OF APPEALS*

As originally conceived and as presently constituted, the Court of Appeals' main function is to settle the law administered by the separate, and sometimes discordant, intermediate appellate courts.³ The details of its jurisdictional provisions are largely the product of progressive attempts at supplying strictures on what was at one time an immensely unworkable volume of appeals.⁴ By 1925 the formulation of these limitations had reached a stage which has remained comparatively static since then. These last most significant restrictions were proposed in the Constitutional Convention of 1921⁵ and written into the law in 1925 as Article VI, Section 7 of the New York Constitution.⁶

In its present form the jurisdiction of the Court of Appeals is purely appellate.⁷ Two broad classes of cases are appealable. The first are those which are received only by permission, either of the court itself (in the same manner that the United States Supreme Court grants writs of certiorari) or by permission of the Appellate Division, and the second are those cases which are thrust upon the Court of Appeals as a matter of right.⁸

These two classes of appeals are described with some precision in the Civil Practice Act.⁹

The type of case most frequently before the Court of Appeals is the appeal as a matter of right in a civil case from a final determination of the Appellate Division, which determination involved either a reversal, modification or

(rev. ed. 1952). Both of the authors spent extended periods of time as law secretaries in the court. Their work is a remarkably thorough and competent treatment of this very intricate area of law. It is not infrequently cited by the court in its opinions.

³ See 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF 1894 898 (1900).

⁴ COHEN & KARGER, *op. cit. supra* note 2, § 7, at 29.

⁵ See LEG. DOC. No. 37, at 19-20 (1922).

⁶ N.Y. Sess. Laws 1926, ch. 725 amended N.Y. CIV. PRAC. ACT §§ 588-89 to conform to the changes made in the constitution.

⁷ By virtue of N.Y. JUDICIARY LAW § 53, the Court of Appeals does have rule making power in connection with admission to the Bar.

⁸ The word "thrust" is used advisedly; the great number of affirmances without opinion in appeals that come to the Court of Appeals as a matter of right indicates that many of the cases which are appealed by virtue of this absolute prerogative would be refused by the court if it had the power to do so. COHEN & KARGER, *op. cit. supra* note 2, § 7, at 31.

⁹ N.Y. CIV. PRAC. ACT §§ 588-90.

dissent.¹⁰ With relatively few exceptions the remainder of the cases found on the court calendar are appeals by permission of the Court of Appeals or Appellate Division.¹¹

In criminal cases, other than capital, appeal lies to the Court of Appeals only by permission granted either by a judge of the Court of Appeals or a justice of the Appellate Division.¹² Where the death penalty has been imposed the constitution of the state provides for appeal as a matter of right directly to the Court of Appeals from the trial court.¹³

These are the general provisions describing appealability. As noted, their application to particular fact patterns can present formidable difficulties. More than one ulcer has been nourished by the anguishing task of determining whether an order or judgment is "final" within the meaning of the constitution; whether the determination constitutes a "modification," and whether the party appealing has "standing."¹⁴

The confusion created by some questions of "appealability," *i.e.*, whether a case can properly be put before the Court of Appeals, is compounded by a second jurisdictional aspect. Assuming an appeal is properly lodged in the Court of Appeals a question remains as to its "reviewability," *i.e.*, the nature and scope of the issues which the court is empowered to consider and affect.

Basically, the Court of Appeals is a court of law and not of fact. By constitutional prescription the jurisdiction of the court is limited to the review of questions of law except for narrowly defined exceptions. Where the death

¹⁰ N.Y. CIV. PRAC. ACT § 588.

¹¹ In the court year commencing July 1, 1958 and ending June 30, 1959 the Court of Appeals decided 383 cases. 180 had as the basis of their jurisdiction a reversal, modification or dissent in the Appellate Division. 173 were appeals by permission. 5 N.Y. JUDICIAL CONFERENCE ANN. REP. 159 (1960).

¹² N.Y. CODE CRIM. PROC. § 520(3).

¹³ N.Y. CONST. art. VI, § 7; N.Y. CODE CRIM. PROC. §§ 517-20.

¹⁴ A particularly striking example of the sort of problems confronted is supplied by the recent case of *Baidach v. Togut*, 7 N.Y.2d 128, 164 N.E.2d 373 196 N.Y.S.2d 67 (1959). In the *Baidach* case appellant survived a preliminary motion to dismiss his appeal as of right on the ground that the determination of the Appellate Division did not constitute a modification [6 N.Y.2d 996, 161 N.E.2d 753, 191 N.Y.S.2d 975 (1959)] only to have his appeal dismissed after argument of the cause on the merits because he did not have standing.

penalty has been decreed in a criminal case or where the Appellate Division on reversing or modifying finds new facts, the Court of Appeals may inquire into the evidence and make its own determination as to the facts.¹⁵ The omnipresent difficulty with these provisions is the virtual impossibility of predicting what will be considered a question of fact as distinguished from a matter of law. Aside from the simplest illustration, the case in which opposing witnesses give conflicting and not inherently incredible testimony thereby giving rise to a question of fact,¹⁶ no general formulae are available. Determinations are made by the court on a purely *ad hoc* basis, sometimes with perplexing results.¹⁷

MOTIONS FOR LEAVE TO APPEAL: THEIR SIGNIFICANCE

The Court of Appeals spends a considerable part of its time deciding which cases to decide. Beginning in early September and continuously throughout the year the court receives and passes upon hundreds of requests for permission to appeal from decisions in lower tribunals. These motions

¹⁵ N.Y. CONST. art. VI, § 7; N.Y. CIV. PRAC. ACT § 605.

¹⁶ See, *e.g.*, *Sadowski v. Long Island R.R.*, 292 N.Y. 448, 55 N.E.2d 497 (1944).

¹⁷ At times the courts themselves lose hold of the slippery distinctions in this area. An illustration of this is found in the fascinating history of the case of *Sagorsky v. Malyon*, 283 App. Div. 859, 129 N.Y.S.2d 900 (1st Dep't 1954) (memorandum decision), *rev'd*, 307 N.Y. 584, 123 N.E.2d 79 (1954) (per curiam). On the first trial a plaintiff's verdict was returned in this action on an insurance policy. The Appellate Division, First Department, holding that the verdict was "against the weight of the evidence," reversed the trial court and dismissed the complaint. The Court of Appeals reversed, stating that since the Appellate Division had found that the verdict was "against the weight of the evidence" it could not dismiss the complaint but was compelled to order a new trial. On the second trial [2 App. Div.2d 675, 153 N.Y.S.2d 560 (1st Dep't 1956) (memorandum decision), *rev'd*, 3 N.Y.2d 907, 145 N.E.2d 871, 167 N.Y.S.2d 926 (1957) (per curiam)] a plaintiff's verdict was again returned. This time it was set aside and the complaint dismissed by the trial court on motion. The Appellate Division affirmed this determination only to be again reversed by the Court of Appeals. On this second review of the case the Court of Appeals said that the evidence contained a question of fact which precluded dismissal. The matter was remitted to the Appellate Division. Confronted with the case for the third time the Appellate Division conceded that it had earlier been in error, then promptly ordered a new trial on a question not theretofore considered on the appeal; the propriety of the trial judge's charge [4 App. Div.2d 1016, 490 N.Y.S.2d 168 (1st Dep't 1957)]. By this time the litigants, exhausted from their frantic flights up and down the judicial ladder, succumbed to the apparent futility of the chase, and settled out of court.

are by court rule non-arguable¹⁸ and their disposition is rarely attended by anything more than a short entry.¹⁹ It would be a mistake, however, to conclude that the treatment of these applications occupies a relatively unimportant position in the schedule of court work. Although the review of such motions is necessarily less intensive than the review on appeal, they are afforded the same solemn consideration that is devoted to every matter before the court. As in the case of appeals each judge of the court receives and studies copies of the briefs on the motion²⁰ and each judge votes on its disposition.

For all practical purposes the question as to whether leave to appeal should be granted in a particular case which presents a legal issue is completely within the discretion of the Court of Appeals. The statutory provisions governing motions for leave to appeal offer no criteria for the exercise of judgment in this area other than the traditional injunction that the "interest of substantial justice be served."²¹

To a considerable extent, the sort of case in which permission will be granted depends upon the court's current conception of its underlying function and purpose. At a time in the past when the court regarded itself solely as a court for the harmonizing, clarifying and settling of legal principles,²² the acceptability of cases for review was tested against that measuring rod. Thus, in 1896 a unanimous Court of Appeals speaking through the opinion of Chief Judge Andrews stated:

[T]he right reserved to apply to the court or a judge to allow an appeal, was intended primarily to provide for exceptional cases where

¹⁸ N.Y. Cr. App. R. XXI.

¹⁹ *But see* *Sciolina v. Erie Preserving Co.*, 151 N.Y. 50, 45 N.E. 371 (1896).

²⁰ The motion papers consist of eighteen printed copies of the briefs and affidavits and one copy of the record below. The reason for requiring only one copy of the record is the obvious economic one. In order to avoid the possibility that an unsuccessful applicant will have unnecessarily incurred the considerable expense of printing new records on appeal for the purpose of the motion, the court assumes for itself the inconvenience of circulating one record among seven judges. N.Y. Cr. App. R. XXI.

²¹ N.Y. Civ. Prac. Act § 589(4)(a).

²² 2 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF 1894 893 (1900).

public interests or the interest of jurisprudence might be endangered by permitting a decision to go unchallenged. . . .²³

The attitude of the Court of Appeals has altered with the passage of time. The nature of this change is concisely described by Cohen and Karger:

But the underlying conception of the function of the Court of Appeals has changed since these principles were laid down. Until 1925 the Court did not sit to correct errors in particular determinations. It . . . was closely restricted to the function of laying down principles for the guidance of the courts below. Today the Court is truly an *appellate* court. It has, in addition to its earlier powers, the duty to see justice done in every case no matter how brought before it It seems safe to say [today] that a party moving for leave to appeal will ordinarily be successful if he can show reversible error in the determination below, regardless of the breadth or importance of the question presented. As a practical matter, the Court does not overstep its proper function if it grants leave to appeal in any case where examination . . . discloses probable error.²⁴

Of course, the considerations that might induce the granting of leave to appeal set out by Judge Andrews have by no means been diminished in significance by the court's broadened conception of its jurisdiction. They have merely been complemented. Today, as in 1896, if the case is affected with a broad public interest or extensive legal significance, the chances of receiving permission to appeal are excellent.

Although the existence of probable error below will prompt today's Court of Appeals to grant leave to appeal, the granting of leave is by no means a reliable indication of an eventual reversal. Indeed, the statistics speak quite eloquently to the contrary.²⁵

Upon analysis, these statistics are something less than startling. Reasons, other than a desire to correct a presumably erroneous determination below, may conduce to the

²³ *Sciolina v. Erie Preserving Co.*, *supra* note 19, at 53, 45 N.E. 371 at 372 (1896).

²⁴ COHEN & KARGER, *op. cit. supra* note 2, § 82, at 355.

²⁵ Of the 104 cases appealed by permission of the Court of Appeals in the 1958-59 court year only 25% (26) eventuated in reversals. 5 N.Y. JUDICIAL CONFERENCE ANN. REP. 159 (1960).

grant of permission. Cases may be let up for review because of a discrepancy in the Appellate Division or because the matter is one of first impression on which the Court of Appeals desires to write.²⁶ Another factor contributes to and helps explain the small percentage of eventual reversals in cases appealed by permission of the court. By virtue of an informal rule of practice, it is possible for a party to receive leave to appeal where only two of the seven judges actually consider the case worthy of review. By time-honored tradition the rest of the court will accede if two judges request that permission be granted. Upon the vote of these two the remaining judges formally concur with the result that the motion is granted unanimously. As a practical consequence cases can be—and have been—let up on the sole ground of probable error where five judges of the court are convinced that the decision below is a correct one. If the majority remains unpersuaded by appellant's additional brief and oral argument when the case is reached, the result is, of course, an affirmance.

On the other hand, denial of a motion for leave to appeal bears a less ambiguous significance. In view of the fact that a finding of probable error by the court below will ordinarily result in the grant of leave to appeal, it is fairly inferable from a refusal to grant permission that the court thereby confirms the propriety of the decision below.²⁷ This inference has force only as a practical judgment as to the significance of the court's disposition of the motion. It is by no means binding upon the courts.²⁸

²⁶ See, e.g., *People v. Carroll*, 3 N.Y.2d 686, 148 N.E.2d 875, 177 N.Y.S.2d 812 (1958).

²⁷ In *Bednarsh v. Cohen*, 292 N.Y. 578, 54 N.E.2d 693, (1944) (per curiam), an election law case, the motion for leave was denied "without consideration of the questions of law which the appellants seek to present, on the ground that a motion for leave to appeal made at this time should as a matter of public policy be denied." *Id.* at 579, 54 N.E.2d at 694. The fact that the Court apparently felt constrained to disavow any judgment on the merits of the law points raised by the motion, lends some support to the conclusion reached above.

²⁸ *Marchant v. Mead Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929), *cert. denied*, 282 U.S. 808 (1930).

DECISION OF AN APPEAL—THE METHOD

If permission to appeal is granted, or the decision below is appealable as a matter of right, the mechanical task of bringing the case before the Court of Appeals is relatively trouble-free. Although the various pertinent statutes and rules present, on first reading, a rather confused description of the procedure,²⁹ with the aid of a competent printer and the ever-available assistance of the fine Court of Appeals Clerks' offices, the perfecting of an appeal presents no serious problem.

Once the notice of appeal is timely served,³⁰ appellant is relatively secure. In the Supreme Court of the United States and some other federal and state courts, the rules of procedure for the perfecting of appeals are self-executing. In many courts these rules hang over the head of the litigant like the sword of Damocles and fall upon the unfortunate who is late or has overlooked some technical requirement with all the inexorable effect of a guillotine. Not so in the Court of Appeals. Ample provision is made for the avoidance of unnecessary delays,³¹ but for the most part the expeditious processing of appeals is managed without recourse to anything stronger than a suggestion from the clerk's office.³²

²⁹ See, *e.g.*, N.Y. CIV. PRAC. ACT §§ 575-76, 593; N.Y. CT. APP. R. I, IV, V, VI, VII, XIX.

³⁰ The limitations of time fixed by the statute are jurisdictional and inflexible. N.Y. CIV. PRAC. ACT § 592. An omission to file the notice of appeal within the prescribed time is irremediably fatal to the appeal. See, *e.g.*, N.Y. CIV. PRAC. ACT § 99; *Lehman v. Rudin*, 254 N.Y. 508, 173 N.E. 842 (1930) (memorandum decision); *Pollack v. Port Morris Bank*, 257 N.Y. 287, 177 N.E. 865 (1931) (per curiam); *Ocean Accident & Guarantee Corp. v. Otis Elevator Co.*, 291 N.Y. 254, 52 N.E.2d 421 (1943) (per curiam).

³¹ See, *e.g.*, N.Y. CT. APP. R. I; *Steinberg v. Mealey*, 296 N.Y. 614, 68 N.E.2d 887 (1946) (memorandum decision). See also N.Y. CT. APP. R. VI, VII.

³² Much to the credit of the present court and its clerk's office, the calendar is now under such excellent control as to permit counsel on an appeal to select their own date for argument upon two weeks' notice before the commencement of the court session. This is particularly notable in light of the heavy work load of cases and motions shouldered by the present court. See 5 N.Y. JUDICIAL CONFERENCE ANN. REP. 159 (1960).

The case comes to the Court of Appeals in the form of a record on appeal and written argument or brief.³³

The importance of these written arguments can hardly be gainsaid. Although the court is by no means confined to the law supplied in the briefs, a good brief will assure that no pertinent principle of law or consideration of policy escapes the attention of the judges. For the most part, the briefs submitted in recent years have been adequate by court standards. But not an inconsiderable number of them leave much to be desired. Particularly vexing to the court is the written argument that is traitor to its name; a prolix, rambling collection of pertinent law and banal generalities that pretends to be a "brief." One harried judge of the court described just such a brief—a sixty-seven page argument by appellant in a relatively uncomplicated contract case—as an attempt at "persuasion by inundation." The method is not recommended.³⁴

Once the record and briefs have been filed the case is ready for consideration by the court.

THE ROTATION SYSTEM

At the very heart of the decisional method employed by the Court of Appeals is the traditional system whereby each appeal becomes the special charge of one of the seven judges of the court. The system is a practical necessity dictated

³³ N.Y. CT. APP. R. VII provides for eighteen printed copies of the record and briefs. Each of the seven judges receives copies. The rest are distributed, after the case has been decided, to various law libraries throughout the state. Provision is made for appeal in *forma pauperis*, N.Y. CIV. PRAC. ACT § 558. See *People v. Pride*, 3 N.Y.2d 545, 549, 147 N.E.2d 719, 721, 170 N.Y.S.2d 321, 324 (1958).

³⁴ Appellant was unsuccessful. The brief referred to amounted to little more than a punctuation mark in comparison with the arguments filed in the famous case of *Willett v. Herrick*, 258 Mass. 585, 155 N.E. 589, *cert. denied*, 275 U.S. 545 (1927). In an historically herculean effort by both sides, 1,595 pages of brief (printed quarto size paper) were filed for appellants and 1,107 for appellee.

There is no prescribed form of brief for the Court of Appeals. The Rules provide only for the mode of printing. N.Y. CT. APP. R. V. Excellent suggestions for the writing of briefs appropriate in the Court of Appeals have been published in recent years. See, *e.g.*, Mattison, *The Appellate Brief*, 8 FEDERATION OF INS. COUN. 66, 72 (Summer 1958); RE, BRIEF WRITING AND ORAL ARGUMENT (2d ed. 1957).

by the court's huge volume of work. In the 1958-59 court year 1,020 cases and motions were decided.³⁵ Some 1,000 records and twice that number of briefs were submitted for consideration. No doubt many of these matters, because of jurisdictional defects or the sheer simplicity of the questions presented, were quickly processed. The vast bulk of them, however, required extensive study, analysis, research and consultation. Even if the court had worked seven days a week throughout the entire court year, each judge would have had to study, consider, vote on and perhaps write an opinion in three cases (3 records and 6 or more briefs) a day in order to keep up with the calendar. The rotation system serves as a partial solution for this otherwise impossible workload.

By virtue of this system only one judge undertakes the initial responsibility of analyzing the record and briefs in each case and reporting to the rest of the court his findings and recommendation for disposition. Of course, his recommendation is by no means binding upon the court; his vote is merely one of seven. Indeed, frequently when the final count is taken after consultation the reporting judge finds himself in the minority—if not alone.

The method used to determine which judge will undertake the primary obligation of analysis is a quaint but efficient one. Each day while the court is in session six or seven cases appear on the calendar. The calendar is made up one day in advance by the clerk's office. The numerical position on the calendar of the several cases is then determined by drawing lots out of a hat.³⁶ Starting on the first day of the January session of court, the Chief Judge is assigned the case which has drawn the number one position on the calendar for that day. The succeeding cases are assigned in turn to the six other judges starting with the senior judge in point of service on the court and descending to the junior

³⁵ 5 N.Y. JUDICIAL CONFERENCE ANN. REP. 159 (1960).

³⁶ The actual drawing of lots is done by the clerk of the court, Raymond J. Cannon. Any system that leaves the numerical position of the cases purely to chance would work as well as the one now used. The "hat" method was adopted about five years ago during the tenure of Chief Judge Conway.

judges.³⁷ Throughout the year this rotation continues; each day the lots are drawn to determine the numerical position of the cases on the next day's calendar.³⁸

In an ideal world the number of appeals before the court would be sufficiently small so as to permit each judge to afford each case the same intensive study that is made by the reporting judge under the present system. But in an ideal world there would be no Court of Appeals. Within the limitations of this imperfect world in which we must live, the rotation system is a highly efficient and highly successful mode of operation. It has the advantage of lightening the onus of the court work without relieving any of the judges of the decision-making responsibility. At the same time it avoids the vice, inherent in the practice of some other appellate courts,³⁹ of specialization. In a system where judges are permitted to select their own cases or to refuse assignments, and to a less marked extent in a system where assignments are made by a Chief Judge, it is altogether possible that certain judges will attract specific, narrow, types of cases. This specialization has a tendency toward "one man" decisions and opinions which is obviously at variance with the true purpose of a multiple judge bench.⁴⁰

THE IMPORTANCE OF ORAL ARGUMENT

There has been for some time past a disagreement among attorneys over the practical worth of oral argument of an appeal. Many contend that as long as the argument has been set out in the brief there is no point in consuming the time and energies of both themselves and the bench by reiterating

³⁷ On the present Court of Appeals the order of the judges, in point of service with the court, is as follows: Chief Judge Desmond, Judge Dye (Senior Judge), Judge Fuld, Judge Froessel, Judge Van Voorhis, Judge Burke and Judge Foster (Junior Judge).

³⁸ Motions for leave to appeal are assigned, in the order of their submission, to each judge in rotation. In the case of motions the rotation starts with the Junior Judge in September and ascends to the Chief Judge.

³⁹ For a brief description of the practice in the Supreme Court of the United States and the highest courts in other states see WIENER, *EFFECTIVE APPELLATE ADVOCACY* 11-45 (1950).

⁴⁰ See Loughran, *The Argument of An Appeal in The Court of Appeals*, 12 *FORDHAM L. REV.* 1, 3 (1943).

their legal position orally.⁴¹ Coupled with this, usually, is the assertion that courts themselves are less than anxious to hear attorneys. For this latter contention no support other than an undocumented illustration of an appeal court's cavalier attitude regarding oral argument is ever offered.

It is indisputably the fact that most of the judges of the Court of Appeals—indeed the majority of appellate judges—encourage and look forward to oral argument as a valuable aid to them in the decisional process.

The late Judge Loughran of the Court of Appeals, in characteristically felicitous language, said this about oral argument:

[T]he thought may arise whether an exhaustive brief really requires the aid of oral presentation. Again the answer must be a personal one. I know that I experience a feeling of distinct disappointment when on the call of a case that falls to me, I hear the clerk say, "Submitted." When the briefs in a submitted case are picked up at the end of a day that has told heavily they are dead things. Under those circumstances, it is hard for a judge not to feel a diminution of his ardor. The printed word of the ablest advocate, to me at least, falls far short of the same arguments when heard face to face through his living voice.

The phrasing of my feeling in this aspect is difficult; but you may take my word for it, oral address may breed an intimacy between advocate and judge that can never come out of a printed page.⁴²

Judge Loughran's sentiments are typical.⁴³ Appellate courts like the Court of Appeals are constantly faced with a large, unabating case load often aggravated by briefs, which, because of their diffuseness or lack of cogency, are more of an obstacle to expeditious disposition than an aid. Under these circumstances, any opportunity to isolate the signifi-

⁴¹ See Davis, *The Argument of An Appeal*, 26 A.B.A.J. 895 (1940).

⁴² See note 40 *supra*.

⁴³ See also Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A.J. 675 (1959); Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801 (1951); *Nebraska State Bar Ass'n—Proceedings of the Forty-Fourth Annual Meeting*, 22 NEB. L. REV. 5, 39, 43 (1943); HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 61-63 (1st ed. 1928).

cant issues from all that is impertinent is recognized as valuable. Oral argument presents just such an opportunity:

It is a great saving of time of the court, in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff.⁴⁴

The importance of oral argument in the Court of Appeals is increased by the fact that in this court the briefs are seldom, if ever, read beforehand.⁴⁵ On occasion the court brings to the argument some familiarity with the case, either because of an extraordinary public interest that might prompt the court to make a preliminary perusal or because the case was earlier before the court on a motion for leave to appeal. Almost always, however, the only information the court has before the argument is a terse description of the issues and principal points of counsel.⁴⁶ Necessarily, therefore, the impression created on oral argument must be a "first" impression—and more importantly, a lasting one.

Despite the fact that there is usually a considerable interval of time between the argument of a case and the voting in conference, there can be little doubt that the impression created on the oral argument persists in the minds of the judges until a decision is actually made. There is considerable and vivid evidence of this. In a survey made some ten years ago the majority of appellate judges polled indicated that in most cases their impression at the close of the oral arguments coincided with their final votes.⁴⁷ Indeed, it has been reported that one former Chief Judge of the Court of Appeals had for a considerable period of time kept notes of his reactions after argument and of his final votes and

⁴⁴ HUGHES, *op. cit. supra* note 43, at 63.

⁴⁵ See WIENER, *EFFECTIVE APPELLATE ADVOCACY* 18, n.39 (1950), quoting a letter from Hon. Bruce Bromley, Associate Judge of the Court of Appeals, June 22, 1949. See also Loughran, *The Arguments of an Appeal in the Court of Appeals*, 12 *FORDHAM L. REV.* 1, 4 (1943).

⁴⁶ Very brief abstracts on each case appearing on the next day's calendar are prepared and distributed to the judges by a confidential clerk of the court on the night preceding the arguments.

⁴⁷ WIENER, *op. cit. supra* note 45, at 45.

found that the two were identical in ninety-seven per cent of the cases!⁴⁸

ROLE OF THE LAW SECRETARY

After oral argument the judges of the court take up the business of analysis of the cases argued and the preparation of reports. At this stage of the decisional process the work of the law secretary is first encountered.

The judges select their own secretaries. Ordinarily, these young men are chosen from graduating classes of various law schools upon the basis of their academic excellence and their experience in legal research and writing. More often than not they are former editors of or contributors to their school's law review.

The precise nature and extent of their work varies with the individual judge but the basic duties of the various law secretaries are the same. In cases where written reports are to be submitted, most judges have their secretaries prepare preliminary summaries and analyses of the records and briefs in the cases to which the judge has been assigned. These preliminary reports are extremely comprehensive. Extensive legal research is done, often reaching far beyond the law supplied in the briefs of counsel. By the time the secretary's report has been prepared and submitted to the judge, the judge has already made an independent study of the record and briefs. Long hours of discussion between judge and his assistant may then follow. Principally, the judge is interested in establishing the accuracy of the findings of the secretary as to the factual content of the record and the state of the available pertinent law. When the judge is satisfied, he uses the secretary's report—or what remains of it—in the preparation of his own memorandum for the court.⁴⁹

Ordinarily, the law secretary is also called upon to read over and offer suggestions on the opinions written by his judge. In this regard his function is much the same as that

⁴⁸ *Ibid.*

⁴⁹ A similar routine is followed in connection with motions.

of the law assistant in the Supreme Court of the United States.⁵⁰ The secretary checks the facts set out in the opinion against the record to assure an absolute correspondence. All citations and supporting authorities are carefully analyzed and their suitability for the proposition assigned to them is tested. Any reservations on the part of the secretary are discussed with the judge.

Although the function of the law secretary is largely a mechanical one, on occasion he is utilized as a sounding board for the judge's ruminations, and at times he may offer some constructive observation about a case and the applicable law that will be considered and accepted by the judge. For the most part, however, his task is merely to supply the clay out of which his judge molds the decision.

THE CONFIDENTIAL MEMORANDUM

In practically every case and motion decided by the Court of Appeals the judge to whom the matter has been assigned prepares a written report.⁵¹ These confidential⁵² memoranda are circulated to the other judges of the court before any consultation on the case is held.

Over the years the reports have been formalized to a marked extent. In today's court the ordinary confidential memorandum will contain a jurisdictional statement describing the history of the litigation in the lower courts and the basis of its appealability to the Court of Appeals, a statement of the pertinent facts and evidence, the contentions of the parties, the issue or issues and a discussion of the law. Every memorandum concludes with a recommended disposition.

The length of these reports varies with the type and complexity of the case being treated,⁵³ but in all cases they

⁵⁰ *The Bright Young Men Behind The Bench*, U.S. News & World Report, July 12, 1957, p. 45.

⁵¹ Oral reports are sometimes given in election cases and other extraordinary appeals where a decision must be reached in a limited period of time.

⁵² The reports are strictly intramural. They are not available for inspection by the public.

⁵³ One report in a case involving a complicated trust question, consumed 65 printed pages. Ordinarily the reports are not longer than 15 or so pages.

are notably thorough. Most attorneys would probably be surprised to learn that even in cases eventually affirmed without opinion and relegated to the obscure back pages of the New York Reports, a lengthy report advertent to and discussing each of the points and all of the authorities cited by counsel, is prepared.

These memoranda are carefully studied by the other judges on the bench. If a judge receiving the report agrees with the disposition it suggests, he will merely make a notation of his concurrence for the court consultation. If he disagrees, quite often he will make a point of discussing the matter informally with the reporting judge before conference. Occasionally these informal discussions will erase preliminary doubts. If the difference of opinion is apparently irreconcilable the judge receiving the report will prepare his own memorandum for the court—usually a brief one—stating his disagreement. This may draw a reply memorandum from the reporting judge. Frequently it is left unanswered until consultation.⁵⁴

CONSULTATION

The decisional process of the Court of Appeals culminates in the court consultation. It is here that the decision is actually made.⁵⁵ Every case and every motion is passed on in consultation where the entire bench has the opportunity to and does in fact confer before any vote is taken or any opinion written.

On each alternate Monday and every Tuesday, Wednesday and Thursday while in session, the court sits in consultation from 10 A.M. until 1 P.M. These conferences, held in the second floor library of the courthouse, are conducted in strict secrecy. Aside from the seven judges only two other persons—both confidential clerks—are present.

At about fifteen minutes before ten on the morning of a conference, the judges begin to file into the library.

⁵⁴ The confidential memoranda are kept permanently on file in the Court of Appeals index. An elaborate and current index system is maintained to permit the use of these reports as research aids.

⁵⁵ See Crane, *Minute of The Court of Appeals*, 278 N.Y. V, VI (1938).

Wooden trolleys with the records, briefs and reports of all the cases likely to be discussed have previously been placed beside the judges' places at the conference table. The conference is conducted at a large table around which the judges' places are arranged according to their length of service with the court from the Chief Judge, clockwise around the table in descending order to the junior judge.

Before each conference the judges make a final review of the matters likely to be reached. This pre-conference study keeps some of the judges in their chambers until well after midnight on the evening before consultation. Others arrive at the court as early as 7 A.M. to refresh their recollections as to the arguments and reports in the immediately pending cases.

At ten o'clock promptly, the conference begins. Each judge has before him a calendar of the undecided cases and a notation of the stage of proceeding they have reached. Before a case will be called for conference, the reporting judge's memorandum must have been circulated and ample time allowed for study and the submission of memoranda in disagreement. Consequently a case may not be reached in consultation until weeks after it has been argued. Herein lies an important distinction between the practice of the Court of Appeals and the practice in many other appellate courts where conferences are held immediately or shortly after oral argument.⁵⁶ Quite plainly, under the system employed by the Court of Appeals, judges reach the decision-making stage much better prepared to discuss and consider the intricacies of the cases before them than they would be just after oral argument. In the interval between oral argument and consultation they have had the benefit of their own independent investigation of the briefs and record, a comprehensive written analysis from a fellow judge and perhaps, in addition, the efforts of their own law secretaries.⁵⁷

⁵⁶ See Lewis, *How the Supreme Court Reaches Decisions*, N.Y. Times, Dec. 1, 1957 (Magazine), pp. 51, 54; WIENER, *op. cit. supra* note 45, at 22-42.

⁵⁷ The relative efficiency of the two systems has been the subject of substantial differences of opinion. See, *e.g.*, HUGHES, *op. cit. supra* note 43, at 59.

When the case is reached on the conference calendar, the Chief Judge starts the discussion by briefly identifying the case and calling upon the reporting judge for comments. The matter passes from the reporting judge clockwise around the table. Each judge, in turn, is given an opportunity to state his views on the case. There is no limit, other than the discretion of the individual judges, on the time allowed for these comments. As a matter of course they are usually kept within workable bounds. At times, however, a judge may consume an hour or so in discussing his position.

In some cases the feeling of the judges is unanimous and the vote is taken with little, if any, comment or discussion. On the other hand many of the appeals generate severe divergences of opinion and prolonged discussion. It is not unusual for a case of this sort to be carried over from one conference to the next—or even to several further conferences—before discussion is finally ended and the vote taken. At all times, however, the conference is conducted with dignity and restraint. A former Chief Judge of the court gave this description :

By tradition the consultations of the court are an outstanding feature of main importance to the work. They are quite formal. The judge to whom a case has fallen is expected to report fully upon all questions involved, and while making his report it is the duty of the Chief Judge to see that he is not interrupted, no matter how long he may take. When he is through, the matter then passes to the next associate in rank who is accorded like treatment. By this method it has been found that every man is afforded full opportunity for self-expression and the indulgence of his own peculiar method of approach or attack. He is not cramped or frightened or dismayed by constant or boisterous interruption. The calmness of the discussions which never, in my twenty-one years of experience, have exceeded parliamentary language, affords reason its proper domain. Excitement, feelings and emotions, experience has taught us are apt to deter good judgment.⁵⁸

⁵⁸ Crane, *Minute of The Court of Appeals*, 278 N.Y. V (1938).

THE ASSIGNMENT AND PREPARATION OF OPINIONS

It is by its written opinions that the Court of Appeals performs the function for which it was principally designed. Decisions dispose of the case at hand but opinions settle the law. The practices of the court with regard to the assignment of opinions and their actual preparation reflect its acute awareness of the overriding importance of this aspect of the court's work.

Opinions are not written in every decided case.⁵⁹ In those that are unanimously affirmed no opinion is filed unless some new or important question of law is involved.⁶⁰ Although unanimous, if the decision constitutes a reversal of the court below an explanation of the decision is usually given.⁶¹ Invariably, where there is a division of the court in the final vote one or more opinions are filed.

In the United States Supreme Court and some other appellate courts, opinions are assigned by the chief judge.⁶² The practice is different in the Court of Appeals. In our highest court the writer of the opinion is, unless for some reason he defers, the judge who first casts a vote for the position to be supported by the opinion. Thus, if a case is unanimously decided and an opinion is to be written, the reporting judge, who recommended the decision initially, will author it. If there is a division of opinion the reporting judge necessarily will cast the first vote either for the majority or dissent depending upon whether or not a majority of the court agreed with his report. One of the opinions written, therefore, either the majority or dissenting opinion, will be written by

⁵⁹ In the 1958-59 court year a total of 197 opinions were written in 383 decided cases. 5 N.Y. JUDICIAL CONFERENCE ANN. REP. 169 (1960). Where no opinion is written the affirmation is not to be taken as an approval of the reasons given below. See, *e.g.*, *Matter of Clark*, 275 N.Y. 1, 9 N.E.2d 753 (1937); *Adrico Realty Corp. v. City of New York*, 250 N.Y. 29, 44, 164 N.E. 732, 735 (1928).

⁶⁰ See, *e.g.*, *New Amsterdam Cas. Co. v. Stecker*, 3 N.Y.2d 1, 143 N.E.2d 357, 163 N.Y.S.2d 626 (1957).

⁶¹ *Drinkhouse v. Parka Corp.*, 3 N.Y.2d 82, 143 N.E.2d 767, 164 N.Y.S.2d 1 (1957); *Bellizzi v. Huntley Estates*, 3 N.Y.2d 112, 143 N.E.2d 802, 164 N.Y.S.2d 395 (1957).

⁶² HUGHES, *op. cit. supra* note 43, at 58-60; WIENER, *op. cit. supra* note 45, at 21-45.

the reporting judge. If he is in the majority then the dissent will be assigned to the first judge around the conference table who casts his vote in disagreement with the report. At any time, other judges of the court may write concurring opinions.

After the final vote, the writer for the majority draws a preliminary draft of his opinion which is circulated to the rest of the court. Frequently, this first effort will be acceptable to the other judges who have voted with the opinion writer. At times it is not; objection may be made to the breadth of the language or possibly to the omission of something deemed significant. Usually these problems are discussed informally in chambers and solved there. If they are not solved a concurring opinion will probably be filed.

The writer of the dissent, his arsenal of intellectual missiles prepared for the attack, awaits circulation of the majority opinion. Once the majority opinion has been studied the dissent's response is prepared. In approach and tenor this opinion may be considerably different from the one filed by the majority. These differences were unforgettably described in the classic treatment by Judge Cardozo:

Comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase. He dreams of an unworthy brood of scions, the spawn of careless dicta, disowned by the *ratio decidendi*, to which all legitimate offspring must be able to trace their lineage. . . . Not so, however, the dissenter. He has laid aside the role of the hierophant, which he will be only too glad to resume when the chances of war make him again the spokesman of the majority. For the moment, he is the gladiator making a last stand against the lions.⁶³

On occasion the first thrusts of the gladiator cause the lion to roar anew—in the form of a revised majority opinion. A great deal of intellectual tugging, in further draft opinions and conference discussion, may ensue. Sometimes out of the tugging and exchanges eventuates a compromise in which the majority surrenders some part of its opinion, objectionable to

⁶³ CARDOZO, *Law and Literature*, in *SELECTED WRITINGS OF BENJAMIN CARDOZO* 353 (Hall ed. 1947).

the dissent, in exchange for the withdrawal of the dissenting opinion. On rare occasions the result may be an unsigned per curiam opinion.⁶⁴ More often, however, the two views remain incompatible and final opinions on both sides are submitted.

Once the opinions have been agreed upon, the case is ready to be handed down. On decision days, usually Thursday of every week that the court is in session, the Chief Judge formally hands down to the clerk of the court a list of the decided cases and opinions. A few weeks later these decisions appear in the advance sheets. With very rare exceptions, once handed down, the court's connection with the cases is ended.⁶⁵

CONCLUSION

The technique of decision-making in the Court of Appeals, the product of a century's development, is an efficient one. In design it assures thorough study and consideration of every matter before the court by each of its seven judges. But this system, like all human systems, must depend for its ultimate efficacy on the people implementing it. It has been well said that the court as an institution is nothing more than "the lengthened shadow of many men."⁶⁶

Over the past 100 years the shadow cast by the men of the Court of Appeals, its judges, has been a formidable one indeed. In the main this state has been distinguished by the eminence and integrity of the men who have comprised the bench of its highest court. Those who know the judges of the present court only through their opinions have some reason to know that this tradition of excellence is being perpetuated. Those fortunate enough to have been personally exposed to the judges themselves and to their work in the court are unshakably confirmed in that conclusion.

⁶⁴ One judge of the Court of Appeals has described this latter phenomenon as an opinion "where we agree to pool our weaknesses." Manley, *Nonpareil Among Judges*, 34 CORNELL L.Q. 50, 52 (1948).

⁶⁵ *But see* 56-70 58th Street Holding Corp. v. Fedders Quigan Corp., 5 N.Y.2d 557, 159 N.E.2d 150, 186 N.Y.S.2d 583, *reargument granted*, 6 N.Y.2d 878, 160 N.E.2d 124, 188 N.Y.S.2d 995 (memorandum decision), *aff'd mem.*, 7 N.Y.2d 752, 162 N.E.2d 747, 193 N.Y.S.2d 665 (1959).

⁶⁶ Field, C.J., *Observance of the 250th Anniversary of the Supreme Judicial Court*, 312 Mass. 746 (1942).