

LEAVEWORTHY



The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

Vol. VI No. 1
Spring 2017

Chair:

Alan J. Pierce

Editorial Staff:

Cynthia Feathers, Editor-in-Chief
John A. Cirando
Mark Diamond
Timothy P. Murphy
Sharyn M. Rootenberg

Staff Liaison:

Patricia Wood
pwood@nysba.org

A reminder to our readers:

Your contributions of ideas and articles for this semi-annual publication are welcome. Please send your submissions to CTSAPP@nysba.org.

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Judge Pigott Returns to Trial Bench After Illustrious Appellate Career

By Timothy P. Murphy

I've known Judge Pigott for most of my 22 years as an attorney. The first time I heard him speak was in the mid-1990's at a Buffalo CLE aimed at younger attorneys. The then future judge was speaking about the always interesting topic of... wait for it... lead-poisoning litigation. I loved it. Judge Pigott showed such passion for his craft that it did not matter what particular area of litigation and law he was speaking about.

Twenty-plus years later, we now have said goodbye (as of December) to Judge Pigott as an Associate Judge of the New York Court of Appeals and hello again to Justice Pigott the trial judge. Those who find it surprising that the judge is returning to the trial bench after more than 10 years of excellent work on our state's highest court (and almost 20 years overall as an appellate judge) have perhaps not been paying attention, as I'll explain.



HON. EUGENE F. PIGOTT, JR.

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Judge Pigott: An Illustrious Appellate Career

Eugene F. Pigott, Jr., graduated from LeMoyne College in 1968. He would then serve on active duty in the United States Army until 1970. While stationed in Vietnam, he served as a Vietnamese interpreter. He graduated from SUNY at Buffalo School of Law in 1973 and was admitted to the New York State Bar the following year.

Judge Pigott's first and most consequential experience as an attorney (before taking the bench) was in the Buffalo law firm of Offermann, Fallon, Mahoney & Adner, where he worked from 1974 to 1982. The judge has often spoken about learning while there from some of the best trial attorneys of his day, including Dave Mahoney and future Appellate Division Justice (in the Fourth Department) Leo Fallon. In 1982, Judge Pigott was appointed Erie County Attorney and served in that position until 1986. That same year, he became chief trial counsel at the firm of Offermann, Cassano, Pigott & Greco.

Then came the bench. In February 1997, Judge Pigott was appointed to State Supreme Court by Governor George Pataki, and thereafter he was elected to a full 14-year term. In 1998, he was designated to the Appellate Division, Fourth Department, and he was appointed Presiding Justice in February 2000. Judge Pigott was nominated to the Court of Appeals by Governor Pataki in August 2006. His nomination was confirmed by the state senate the next month.

As a jurist, the judge is known as a pragmatist. His professional friendship with former co-associate Judge Robert S. Smith was well known, with Judge Pigott once describing himself and Judge Smith as the "mavericks" of the Court. Judge Pigott was certainly not afraid to dissent. With more than 200 majority opinions and 129 dissents authored in 10 years on the Court, Judge Pigott is thought to be the most prolific dissenter on the Court in recent memory. (By contrast, Chief Judge Kaye authored just 65 dissents in a quarter century on the Court.) So how does that mesh with the judge's reputation as a pragmatist? Hard to say, but Judge Pigott never liked to be pigeon-holed as a jurist.

A case in point was a concurring opinion he authored in his final year on the high court—one that will likely stand out for some time to criminal practitioners. In *People v. Johnson*, 27 NY3d 199 (2016), the Court affirmed a conviction, rejecting a Sixth Amendment challenge to the Manhattan DA's use of jail phone conversations in the People's case in chief. Indeed, inmates at Riker's Island (and in every other facility) are warned over and over that their phone conversations will be listened to and recorded.

Though concurring in the result, Judge Pigott authored a tremendous opinion about the importance of a defendant being at liberty in order to properly defend himself or herself. Said the judge: "It has long been known that a defendant at liberty pending trial already stands a better chance of not being convicted, or if convicted, not receiving a prison sentence, than those who are detained before trial..." *Johnson*, 27 NY3d at 209. Some more insight: "A defendant free on bail or on his own recognizance can... make good use of that liberty by consulting and participating fully with counsel in time-consuming preparations for trial, including tracking down witnesses and evidentiary leads." *Id.* at 210.

While recognizing the importance of maintaining security in the correctional facility, Judge Pigott was concerned about the prosecutor having effectively the same access to the information as the NYC Department of Correction had. A defendant has to communicate with the outside world in order to prepare a defense. Therefore, "[t]rial courts must be vigilant to protect the detainees' constitutional rights, and consideration should be given to placing limitations on the prosecutor's ability to obtain these recordings." *Id.* at 211.

Though appointed to our state's highest court by a conservative governor, Judge Pigott was truly his own man. Last year in an interview with the Appellate Practice Committee of the Bar Association of Erie County, Judge Pigott observed how important it is for attorneys to adapt to circumstances to best serve their clients.

Judge Pigott: An Illustrious Appellate Career

Attorneys also need time away from work, the judge noted, in order to best serve each particular client. You may have 100 files to worry about, but your client has one case that is crucial to his or her lives. Take time off and be with your family or your work will suffer, the judge warned.

So what does Judge Pigott do now that he has retired from the appellate bench? He keeps working, returning to the trial parts of Buffalo—the first former Court of Appeals judge to do so in some 45 years. Perhaps someday he'll take his own advice. For our sake, we hope it is not too soon. As the judge told the *New York Law Journal* in December, leaving the Court of Appeals was not retirement; it was a homecoming.

I won't bore you with laundry list of the many awards the judge has won over the years from the bar, law school alumni, and colleagues; but this past January, the Committee on Courts of Appellate Jurisdiction recognized his great work at our annual meeting in Manhattan. This was well-deserved recognition for the appellate judge who was always a trial judge at heart.

Photos of that annual meeting dinner celebrating Judge Pigott are presented to the right and on page 6.



CHIEF JUDGE JANET DIFIORE AND JUDGE PIGOTT.



MICHAEL MILLER OF NYC, WHO WILL BE PRESIDENT-ELECT OF THE STATE BAR EFFECTIVE JUNE 1, 2017, AND HON. MARTIN SCHOENFELD, JUSTICE, SUPREME COURT, APPELLATE TERM, FIRST DEPARTMENT, AND A MEMBER OF THE COMMITTEE ON COURTS OF APPELLATE JURISDICTION.



JOHN SHEEHAN OF LENOX, MA; MALVINA NATHANSON OF NYC, A COMMITTEE MEMBER, AND PATRICIA WOOD, THE COMMITTEE'S STAFF LIAISON.

Appellate Perspectives

How to Make Your Appellate Briefs Sing

By Cynthia Feathers



Cynthia Feathers

Of course, we each bring our own unique sensibility to the law and our work as practicing lawyers. How we analyze cases and present ideas is based not only on the record, the law, and our client's needs, but also on our own life experience.

Case in point. This author's experience as a piano student for 20 years before attending law

school has formed the prism through which I've considered how to write an effective brief. It might sound like a stretch, but it's not. The study and performance of music has a lot to say about how to effectively convey ideas to an audience in other contexts.

Take the architecture of a piece of music versus a legal brief. Music listeners and brief readers crave structure to make sense of a jumble of ideas as we encounter them, so that they are easier to process, understand, and enjoy. Consider the overture, or the instrumental opening, to an opera. It sets the stage for the story and the music and tantalizes the audience. Think of the memorable overture to Rossini's *Barber of Seville*. Similarly, a substantive preliminary statement provides a sneak preview of the brief that can effectively prime the panel of appellate judges for the facts and arguments they are about to read.

Sometimes I think of a brief's structure as analogous to a typical piano sonata. In an opening allegro movement, expect an exposition of ideas and development of themes. Similarly in the brief, in the statement of facts, all of the key ideas needed to understand the narrative of the case and salient elements that will advance the argument may be briskly set forth with clarity.

The sonata's middle movement may be an adante or adagio section. In the brief, the next "movement," or section, may be the argument, where the author slowly and methodically sets forth legal standards, substantive law, and key analogous and distinguishable cases, and

carefully compares and contrasts those cases to the facts of the instant appeal. While the final movement of the sonata may be a shorter presto finale with punch and verve, the closing section of the brief may be a final section that aptly wraps up the key ideas and arguments.

Neither the sonata form nor the classical brief format is a straightjacket that inhibits creative and fresh perspective. On the contrary, they merely provide a structure into which intelligent ideas and elegant expression can be poured in endless ways. And the structures can be adapted and stretched, as needed, to fit the composer's or author's needs. Compare a perfect, precise sonata by Mozart and the depth and fire of a Beethoven composition, both employing the same fundamental form.

Whatever musical form is used, musical ideas must be presented in a compelling way. That means knowing how to shape a line and a phrase, how to use a change in tempo and dynamics to dramatic effect, and how to employ pauses, or silence between notes. Similarly, legal ideas should not be presented in undisciplined three-page paragraphs, without any structure or shape to aid the judges reading the brief. The attorney author should provide manageable paragraphs, topic sentences, and varied sentence structure. And he or she should not overdo the drama.

When reading brash, overheated rhetoric, it's like hearing a piece of music that's performed fortissimo, every note. But that's not pathos and passion. That's overbearing. Such performances drive the reader and listener away. Drama is allowed, but it is only effective when used sparingly. Loud notes may be effective, for example, when they come at the end of a crescendo that started from a whispered pianissimo. Likewise, use of "loud" adverbs and adjectives should be sparing. Find a powerful adjective to fit a powerful fact or argument.

Repetition and redundancy are relevant issues in both musical and appellate performance. How boring when a pianist repeats a passage, as directed by the composer, with no variation from the first time. But how interesting when the second time around, the passage changes



in tempo or dynamics or to bring out counterpoint in the left hand, as if you had reflected on the original musical idea and found new meaning. Similarly, how tiresome when a brief writer cuts and pastes long passages from the statement of facts in the argument section. Instead, it may be far more deft to crystallize key facts for the argument and to free the court from undue repetition.

Good taste matters in musical performance, as in brief writing. So just as excessive rubato in Chopin can seem schmaltzy not poignant, so extravagant and needless adverbs and adjectives in briefs can show bad taste that undermines the message. The farther the author departs from a dignified, objective tone, the more he risks turning off his “audience.” What a wrong note we appellate lawyers hit when we fudge the facts or make a personal attack on a trial judge or opposing counsel.

But the above analogies or metaphors are not what resonate most when comparing the tackling of a new piece of music and a new record on appeal. It is the joy of turning chaos into order, of encountering complex notes or ideas and eventually discerning themes that will drive every note or word and produce a unique interpretation. It helps to know musical theory, just as it helps to understand statutes and rules impacting appellate practice. Having solid technical skills, like being able to play lightning-fast arpeggios or octaves, or being able to employ a great legal vocabulary, is also useful.

However, in the end, performing the music or writing the brief is primarily about intelligence, rigorous analysis, and depth of thought or feeling. The musical and legal performers need the ability to deconstruct a record or a composition and then reconstruct it and ultimately express lucidly and persuasively our musical ideas or legal arguments.

Another realm in which great musical performers remind me of stellar attorneys is in knowing when to push the boundaries. We want to understand traditional interpretations of musical works, just as we need to understand what legal precedents say and generally to faithfully apply them. But wonderful things can happen when musicians—whether composers or performers—create something new and different, and when appellate lawyers and judges find that it is time to change the law.

In 1955, when Glenn Gould made his initial recording of Bach’s Goldberg Variations, he helped the world see this two-century-old music in a fresh way. In his hands, the variations were not an esoteric exercise in baroque contrapuntal music. His interpretation and recording were a dazzling tour de force that attracted listeners worldwide. The year before, Thurgood Marshall’s fight to dismantle the separate-but-equal doctrine in public education led to the landmark decision in *Brown v. Board of Education*, 347 US 483, overturning longstanding precedent in interpreting the 14th Amendment’s equal protection clause in a new way.

In the end, the workaday life of a musical performer or appellate lawyer is not so grand. Most of us will not proudly shape our genre for generations to come. But we can humbly strive to understand the music or the record, do the hard work demanded, communicate ideas with clarity, and strike the right tone.



Annual Meeting Dinner Celebrates Judge Pigott



HON. PETER TOM, ACTING PRESIDING JUSTICE OF THE APPELLATE DIVISION, FIRST DEPARTMENT AND HON. CARMEN CIPARICK, RETIRED COURT OF APPEALS JUDGE.



JUDGE PIGOTT AND HON. KAREN PETERS, PRESIDING JUSTICE OF THE APPELLATE DIVISION, THIRD DEPARTMENT.



JUDGE PIGOTT, ALONG WITH ALAN PIERCE, CHAIR OF THE COMMITTEE ON COURTS OF APPELLATE JURISDICTION, AND FORMER CHIEF JUDGE JONATHAN LIPPMAN.

Legal Deposition Transcript: Who's on First?

By Sharyn Rootenberg

In their careers, appellate lawyers may read thousands of pages of transcripts. Sometimes, among the dry, dense passages, court reporters deliver inadvertently humorous passages due to misunderstood words. Other times the proceedings themselves border on the absurd.

For instance, in assessing the penalty in a student disciplinary case, a hearing officer was provided with a letter from teacher to parent stating that, during lunch duty, the teacher saw the student take another student's plastic fruit cup and throw it 10 feet in the air, letting it land with a thud on the lunch table, and further noting that the lid did not pop off, so there was not a big mess. After reading the letter aloud, the hearing officer sought a reaction. The parent said: "I want to find out why the fruit cup failed to explode. My son may not be getting enough height on his throws."

Below is another example of absurdity, in which it took five pages to identify an exhibit using an alphanumeric tag. A real excerpt, but with fictional names, is set forth here.

Q... with respect to the bottom photograph on 11H?

A. Yes.

Q. Just a closer view?

A. Yes. We've got two H's here?

Q. That's an "I."

MR. SMITH: What's an "I?" No, that's not an "I."

MR. BROWN: That is an "I."

THE WITNESS: It's an "I," I see, I'm sorry.

MR. BROWN: I'm going to help you.

MR. SMITH: That looks like an "H."

MR. BROWN: I'm going to put a line under it so we can see which way it goes.

THE WITNESS: Thank you.

MR. SMITH: Now it says "hi," right?

MR. BROWN: No, it doesn't.

MR. SMITH: It does, it says "hi."

MR. BROWN: No, there's a line under the I.

MR. SMITH: It says "hi," H-I.

MR. BROWN: No, it's a line under a capital I. You want me to circle it, would that be easier?

MR. SMITH: I don't know what that is.

MR. BROWN: Okay, good.

MR. SMITH: So this is H-I, document H-I?

MR. BROWN: No, it is 11I.

MR. SMITH: Document 11HI.

MR. BROWN: I'm going to help you out, I'm going to write the word "eleven aye" so it's very clear (indicating). Is that helpful?

MR. SMITH: Not really.

MR. BROWN: It's not?

MR. SMITH: Do you understand what this is?

MR. BROWN: We're just talking about the document number now, we're not talking about anything else yet.

11 H I

MR. SMITH: I understand.

MR. BROWN: Could we agree now it says 11I?

MR. SMITH: So this is 11HI?

MR. BROWN: No, it's 11I.

MR. SMITH: I—

MR. BROWN: Mr. Smith, let me try to help you, it's 11A, 11B, 11C, 11D, 11E, 11F, 11G, 11H, and now we're up to 11I.

MR. SMITH: But as the witness pointed out, you see there are two Hs. So then you changed this one to—

MR. BROWN: We haven't changed anything, sir, we're simply making it clear.

MR. SMITH: Why don't you take the capital H off of it?

MR. BROWN: It's not an "H," sir, it is an "I."

MR. SMITH: [To the witness] What is that in front of you that I'm pointing to (indicating).

THE WITNESS: It would say "hi."

Continued on back page



Deposition Transcript: Who's on First? (cont'd)

MR. SMITH: What's the first letter?

THE WITNESS: "H."

MR. SMITH: So it's an "H," can we take the "H" off there?

MR. BROWN: If you look at this way (indicating), now tell me what it is, sir. All it is [is] that you're having an orientation problem.

MR. SMITH: No, we're not doing pictograms here, I'm trying to figure this out.

MR. BROWN: You're either being obstinate or—

MR. SMITH: I'm not being obstinate at all.

MR. BROWN: It's very simple, the Court Reporter marked every single page in order on a vertical basis.

MR. SMITH: And—

Mr. BROWN: Let me finish please.

MR. SMITH: Sure.

MR. BROWN: I've been going in order, a capital H and capital I, happens to be at a 90-degree angle they look alike.

MR. SMITH: Why don't you pose the question, we'll do the best we can.

MR. BROWN: Let me finish.

MR. SMITH: Why don't you pose a question.

MR. BROWN: I want to make sure you understand what we're talking about the—

MR. SMITH: Listen, the record will speak for itself.

MR. BROWN: No, the record doesn't talk, we talk.

MR. SMITH: You're talking a lot, so why don't you move on and ask a question about this document.

Q. The document I've clarified and [which] now clearly says "11I" because it's written out with the words "eleven" and word "aye," can you tell me, sir, what's in the top photograph?