

SMALL Town

By the Hon. Milton A. Tingling (Retired)

BIG Impact on Law

THERE IS A SMALL TOWN in Northern Westchester County that has a disproportionate effect on law in the Appellate Division, Second Department and in the state, but no one can complain! The town is Yorktown, a bedroom community of roughly 35,000 persons. The town's impact is felt through its two former Town Justices, Hon. Jeffrey A. Cohen and Hon. Mark C. Dillon. They were each elected to the town bench in the late 1980s, where they served together for a decade as pursuant to Town Law each town in New York elects two residents as judges to four-year terms. They ran in different years and each was elected and re-elected.

Judge Cohen remained on the Yorktown bench for 17 years while Judge Dillon served there approximately 10 years. Each separately rose to the Westchester County Court, then to the Supreme Court in the 9th Judicial District, and then to the Appellate Division, Second Department, where they have now served together for eight years.

The parallel careers of these judges seem contradictory and truly unique. They belong to different political parties. One is Jewish, the other Catholic. One began as a Westchester County Legal Aid Attorney trying felony trials and then together with a law partner opened a general private practice in White Plains concentrating in real estate,

condo-coop law and criminal law. The other spent three years as a Westchester Assistant District Attorney and was then a personal injury litigator in the state and federal courts. One is a Mets fan, the other, the Yankees, one the Giants, the other the Jets. In so many respects opposite ends of the spectrum but uniquely they were elected and re-elected in Yorktown, and both to this day remain not only colleagues but close personal friends.

Yes, when the two judges first served together on the town bench they brought with them their different perspectives but saw eye to eye on most every local issue. Working together for almost a decade, they expanded a community service program for first-time non-violent youthful offenders, were the first town justices in Westchester to create a mediation program alternative to small claims and civil trials, increased the number of court sessions to keep pace with volume, and each year jointly published a "State of the Court" message to the residents of the town.

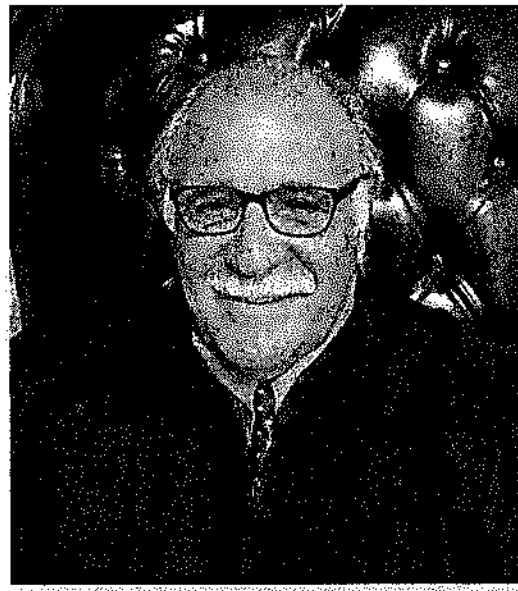
Politics in Yorktown is known even today to be contentious, but the two Town Justices —Dillon and Cohen— were each cross-endorsed once by the other's political party in alternating years to assure their continuation on the bench. It had not happened in Yorktown before, nor since. These days it is rare to find such cooperation and friendship across the bench or the "aisle" from

members of different parties. In this case opposites indeed attract. But that was just the beginning.

Both judges followed career paths to Westchester County Court and then the New York State Supreme Court. Their Supreme Court time was primarily in Westchester, but each temporary handled one-year assignments or *ad hoc* trials in neighboring counties such as Rockland, Orange and Dutchess.

Then, remarkably, each went to the Appellate Division, Dillon by appointment of Governor Pataki and several years later it was Cohen by appointment of Governor Paterson, where they once again began working together this time on Second Department appeals with far greater reach and impact than their earlier work at the local court level. The Second Department handles 65% of all appeals in New York State and its jurisdiction spans from Suffolk to Orange Counties, which consists of half the population of the State of New York. Dillon and Cohen are thus a substantive force on the entire New York State Appellate Bench.

Justice Dillon, the former criminal prosecutor, was a member of the panel with Justices Rei Rivera, Gabriel Krausman, and Anita Florio, that ordered a new trial for Martin Tankleff after Tankleff had served 19 years in prison for murder despite what many people believe to be new evidence of



The Honorable Mark C. Dillon and the Honorable Jeffrey A. Cohen

Tankleff's actual innocence (49 A.D.3d 160 [2007]). Dillon wrote companion opinions in 2008, *Chowdhury v. Rodriguez* (57 A.D.3d 121 [2008]) and *Ortega v. Puccia* (57 A.D.3d 54 [2008]) that clarified the different standards of proof for liability of landowners and contractors under Labor Law 200 that are routinely cited and followed today, and *Kihl v. Pfeffer* (47 A.D.3d 154 [2007]) and *Firmes v. Chase Manhattan Automotive Finance* (50 A.D.3d 18 [2008] *lv. to appeal denied*, 11 N.Y.3d 705 [2008]), which collectively established the different evidentiary standards required for parties' entitlement to collateral source hearings under CPLR 4545 and at the hearings themselves.

Justice Cohen says of Justice Dillon "He is a judge's judge! A conservative intellectual with an easy-going manner always respectful to bench and bar."

After being appointed to the Appellate Division for just a few months, Justice Cohen, joined by Justice Robert J. Miller, dissented in *Yatauro v. Mangano* (87 A.D.3d 582, *rev'd.*, 17 N.Y.3d 420 [2011]). In *Yatauro*, duly elected members of the Nassau County Legislature brought an

Article 78 petition, seeking declaratory and injunctive relief in their challenge to the immediate implementation of a redistricting plan which would affect the voting rights of thousands. Justices Cohen and Miller, with whom the Court of Appeals soon thereafter unanimously agreed, held that Nassau County Charter required a three-step process toward implementation of the redistricting plan and that, although the adoption of a local law was the first step in that process, it did not operate to alter the legislative district boundaries for the then upcoming 2011 general election.

More recently in *People v. McCullum* (159 A.D.3d 8, *lv. to appeal granted*, 31 N.Y.3d 1150 [2018]), Justice Cohen, who was a member of a panel with Justices John M. Leventhal, Sylvia O. Hinds-Radix, and Francesca E. Connolly, opined that an occupant of a leasehold, after a warrant of eviction had been issued, does not retain the protections of the Fourth Amendment to the United States Constitution when a New York City Marshal tenders "legal possession" of the leasehold to a landlord without a physical eviction. This case has been granted leave by the Court of Appeals. In *Matter of Hei Ting C.*, (109

A.D.3d 100 [2013]), Justice Cohen, joined by Justices Randall Eng, Mark Dillon and Plummer Lott, opined that a child does not become dependent on a juvenile court within the meaning of 8 U.S.C. § 1101 (a) (27) (J) (iii) (I), governing eligibility for special immigrant juvenile status (SIJS), when one of the child's parents files a petition for child support upon which the Family Court enters an order of support.

Dillon describes Cohen as "someone with a radar for fairness, is known for his affable demeanor on and off the bench, while also always staying within the confines of the law."

The two jurists have had their share of challenging trial-level caseloads before ascending to the Appellate Division. Justice Cohen presided over a Sex Offense Part in Westchester County for almost three years, and Justice Dillon served for two years in Westchester's Matrimonial Part. During Gail Prudenti's tenure as Presiding Justice at Second Department, each jurist volunteered time during their summers to try to settle cases out of the Department, with both Dillon and Cohen serving in New York County.

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Free time is in short supply for the Appellate Division Justices, but is used productively. Justice Cohen uses some of it as a founding member and President of the Justice Brandeis Law Society of the 9th Judicial District for over a decade, and as an active grandfather of four. Despite turning 70 this year he continues to serve on another court—the racquetball court on a regular basis. His two children and their spouses—two dental specialists and two attorneys—and all four grandchildren reside in Yorktown, another rarity in itself. Justice Cohen has also co-authored several New York Law Journal articles as well as co-authored an article published in the *Hofstra Law Review* together with the late Justice Thomas A. Dickerson and Justice Cheryl E. Chambers.

In his “free” time, Justice Dillon is an Adjunct Professor of New York Practice

at Fordham Law School, has been President of the Westchester-Putnam Chapter of the Fordham Law Alumni Association, serves on the school’s national alumni board, has published in the last decade several law review articles on the CPLR, published a book on Montana vigilantism in the 1860s, writes a monthly practice column for the Westchester and Rockland bar associations, has taught almost 100 CLEs since his appointment to the Appellate Division in 2005, and has a lifetime dedication to daily long-distance running and competing in annual half marathons. Both judges quip that when they are not working, they are usually thinking about work.

It is indeed doubtful that any town in New York State has ever produced two local judges who, after serving together in a justice court, followed similar career

paths to the Appellate Division. It is doubtful that it will ever happen again. And not unlike “RBG” and the late Antonin Scalia on the U. S. Supreme Court for years, although ideologically they may differ around the edges—their bond of friendship has remained strong while serving on the same benches together for much of the past 30 years. It is a sign, which is sometimes lacking in today’s government and politics, where people from across different aisles can work together constructively for the constituents they serve.

If nothing else, Dillon and Cohen are a great example of a time gone by—for now!

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