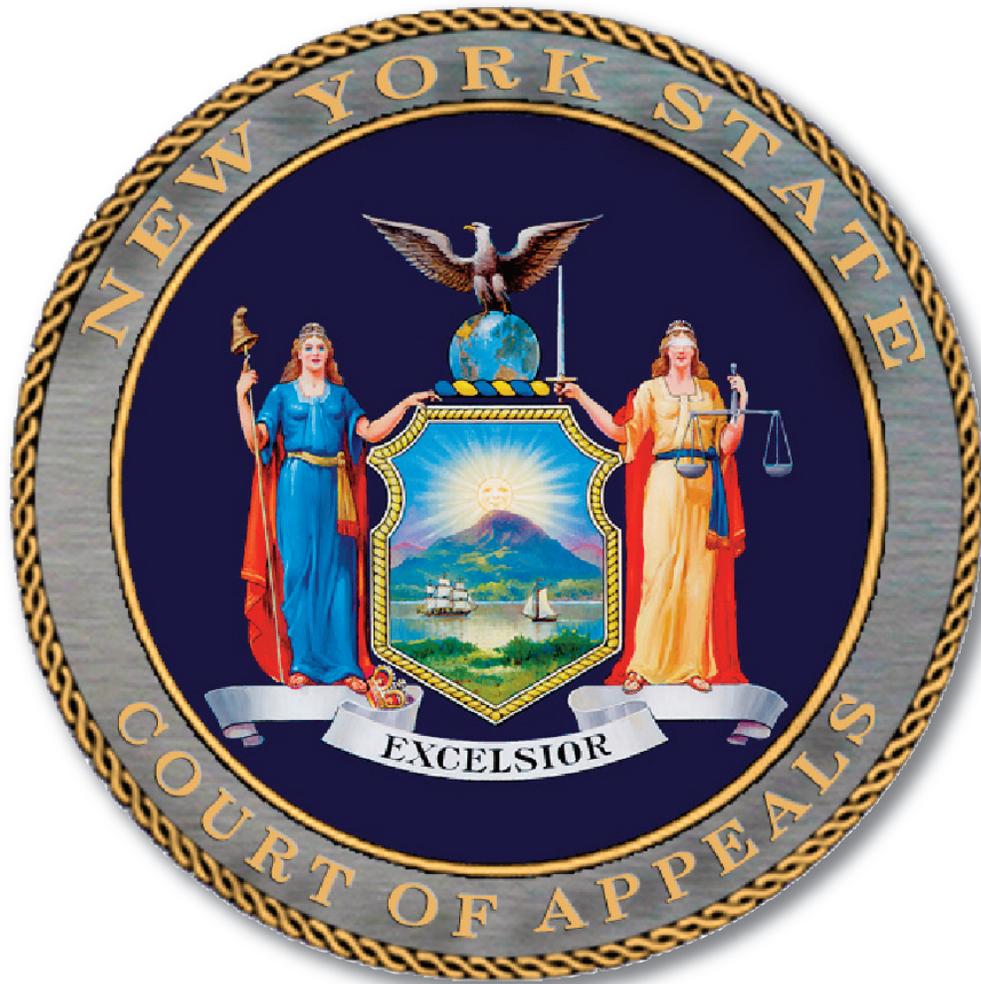


COURT OF APPEALS  
*of the*  
STATE OF NEW YORK

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*2013*  
ANNUAL REPORT  
*of the*  
CLERK OF THE COURT

**2013**

**ANNUAL REPORT OF THE  
CLERK OF THE COURT  
TO THE  
JUDGES OF THE COURT OF APPEALS  
OF THE STATE OF NEW YORK**

**\*\*\***

**Andrew W. Klein  
Clerk of the Court  
Court of Appeals**



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*State of New York  
Court of Appeals*



*780 Third Avenue, 18th Floor  
New York, New York 10017*

*Robert S. Smith  
Judge*

March, 2014

2013 was a year of change, and healing. We began the year saddened by the loss of two beloved colleagues, Judge Theodore Jones, who died suddenly in November 2012, and Judge Carmen Ciparick, who retired at the end of that year. Their successors, Judges Jenny Rivera and Sheila Abdus-Salaam, joined us in early 2013, and now seem like longtime members of the family.

But as always, our Court is much more than just the judges. The lawyers who work and who supervise others working in the clerk's office, on our central staff or as clerks to individual judges, and the non-lawyers who do everything from providing security to preparing food to keeping the building clean are a remarkable group of people -- united and motivated, I think, by the belief that what they do really matters. And it does matter. We are all part of an institution that is important to the community, and we all take pride in that.

2013, like every other year, saw a number of changes among the people on the Court's staff, including the retirement of our Deputy Clerk, Richard Reed, who will be fondly remembered. His successor, John Asiello, will continue, as he has for many years, to work closely with the incomparable Clerk of the Court, Andrew Klein. John has been succeeded as Consultation Clerk by his deputy, Hope Engel, and Hope in turn has been succeeded by Lisa LeCours, long a law clerk for Judge Victoria Graffeo. We know that John, Hope and Lisa will do their new jobs with the same talent and energy and commitment they brought to their old ones.

In 2013, we continued to be blessed with a tireless and gifted Chief Judge, who has guided us with a light touch but a sure sense of what the Court needs. Chief Judge Lippman's persuasive skills have worked near miracles more than once in his dealings with the other branches of government. Alas, not even he could prevent the defeat, in November 2013, of a ballot proposal to increase the retirement age of judges. But I know that if the Chief could have met personally with every voter, the vote would have come out differently.

One result of the way the vote did come out is that this is my last year on the bench. I will retire on December 31, 2014. I am looking forward to my next career, but I can't say I won't miss this Court.

A handwritten signature in dark ink, appearing to read "R. S. Smith".

Robert S. Smith



**2013**

**ANNUAL REPORT OF THE  
CLERK OF THE COURT  
TO THE  
JUDGES OF THE COURT OF APPEALS  
OF THE STATE OF NEW YORK**

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**Introduction**

2013 brought several significant changes to the Court of Appeals. First and foremost, two new Judges were appointed to the Court. Additionally, a key member of the Clerk's Office retired, Court rules were amended, and new operating procedures were implemented. As always, the changes were effected seamlessly, and our Judges and staff maintained their high degree of excellent service to the bar and public.

The passing of Judge Theodore Jones, Jr. in November 2012 and the retirement of Judge Carmen Beauchamp Ciparick on December 31, 2012 did not provide sufficient time for new appointments before the Court began its work in January 2013. Thus, the Court started the year with only five Judges on the bench. To my knowledge, this was the first time the Court sat through a full session with only a five-judge Court. In February 2013, Jenny Rivera joined the Court and filled the seat held by Judge Ciparick. Immediately prior to her appointment, Judge Rivera was a tenured faculty member of the City University of New York School of Law, where she founded and served as Director of the Law School's Center on Latino and Latina Rights and Equality. In May 2013, Sheila Abdus-Salaam became the first female black jurist to sit on the Court of Appeals, taking the seat held by Judge Jones. Judge Abdus-Salaam had been an Associate Justice of the Appellate Division, First Department, prior to her appointment to the Court of Appeals. After the appointments of Judges Rivera and Abdus-Salaam, the Court was back to its full complement. Both Judges have demonstrated that they are wonderful additions to the Court.

Among the nonjudicial staff, there was one notable departure, which then led to several other personnel changes. In November 2013, Richard Reed, who had served as the Court's Deputy Clerk since 2007, retired. His dedicated and impressive service to the Court is greatly appreciated. John Asiello, the Court's Consultation Clerk, who has established his legal excellence over more than a quarter of a century at the Court, was appointed the new Deputy Clerk, and I know that he will perform admirably in the position. Hope Engel, the Assistant

Consultation Clerk, was promoted to Consultation Clerk, and Lisa LeCours, Judge Graffeo's Senior Principal Law Clerk, was appointed Assistant Consultation Clerk. I have every expectation that Hope and Lisa will continue their exceptional work in their new positions.

Turning to the Court's rules, the Court again immersed itself in issues relating to attorney admission and regulation. In September 2013, the Court amended section 520.10 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law. The amendment clarifies that applicants for admission on motion in New York need not demonstrate compliance with the program and course of study requirements of section 520.3 of the Rules for the Admission of Attorneys and Counselors at Law, which apply only to candidates for the New York State bar examination. Then, in December 2013, in a continuing effort to increase pro bono legal services in New York, the Court amended the Rules for the Registration of In-House Counsel by adding section 522.8. The new section provides that attorneys registered as in-house counsel pursuant to Part 522 may provide legal services to pro bono clients in New York.

In addition to rule changes relating to attorney admission and regulation, the Court also amended its Rules of Practice. The changes were primarily designed to accommodate advancements to the Court's digital filing system. In each of the past three annual reports, I commented on the steps that the Court was taking to move forward in the digital world. 2013 brought the Court's largest advance in this respect. To better serve the public and the bar, the Court of Appeals developed, and on February 1, 2013, launched an online service -- the Court of Appeals Public Access and Search System (Court-PASS). Court-PASS provides an improved method for the filing of records and briefs in digital format on appeals to the Court of Appeals and, for the first time, offers free universal online access to these documents through a publicly-searchable database on the Court's website.

Court-PASS offers a more advanced system for litigants to submit their appeal papers digitally, replacing the previous system by which hard copies were reduced to CDs or DVDs and mailed to the Clerk's Office. Court-PASS allows parties with appeals, Rule 500.27 certified questions, and judicial conduct matters to directly upload to the Court digital copies of records and briefs. As a benefit to litigants, the required number of papers to be filed in hard copy was reduced from an original and nineteen copies to an original and nine copies. The Court's Rules of Practice were amended to address Court-PASS and certain other minor matters. The Court's technical specifications, which are referenced in the Rules, were also amended.

The direct upload of briefs and records to a server controlled by the Court has allowed the Court to maintain a permanent public archive for documents related to Court of Appeals cases pending on or filed after January 1, 2013. Anyone may search or browse the Court-PASS database free of charge, and may view or download documents from every stage of the case at the Court of Appeals, including motion papers for civil motions in which leave to appeal has been granted by the Court of Appeals, and briefs and records in civil and criminal appeals. Court-PASS also incorporates the videos and transcripts of oral arguments, as well as Court decisions.

Recognizing that Court-PASS increases accessibility to information contained in public records and briefs, mechanisms were built into the accompanying digital filing system to ensure that attorneys properly redact confidential and sensitive matters (e.g., social security numbers, financial account numbers, and names of minor children). Documents and cases that are sealed by court order or by operation of law will not be available on Court-PASS.

Court-PASS required many Court employees to undertake new duties and responsibilities, and 2013 proved to be an acclimation period. Nonetheless, as Court-PASS approached its one-year anniversary, it was operating smoothly. It is anticipated that in the future, Court-PASS will be expanded to incorporate the Court's civil motion practice.

As in the past, this year's Annual Report is divided into four parts. The first section is a narrative, statistical and graphic overview of matters filed with and decided by the Court during the year. The second describes various functions of the Clerk's Office and summarizes administrative accomplishments in 2013. The third section highlights selected decisions of 2013. The fourth part consists of appendices with detailed statistics and other information.

## **I. The Work of the Court**

The Court of Appeals is composed of its Chief Judge and six Associate Judges, each appointed by the Governor to a 14-year term. Similar to the Supreme Court of the United States and other state courts of last resort, the primary role of the New York Court of Appeals is to unify, clarify and pronounce the law of its jurisdiction for the benefit of the community at large. Reflecting the Court's historical purpose, the State Constitution and applicable jurisdictional statutes provide few grounds for appeals as of right. Thus, the Court hears most appeals by its own permission, or certiorari, granted upon civil motion or criminal leave application. Appeals by permission typically present novel and difficult questions of law having statewide importance. Often these appeals involve issues on which the holdings of the lower courts of the state conflict. The correction of error by courts below remains a legitimate, if less frequent, basis for this Court's decision to grant review. By State Constitution and statute, the Appellate Division also can grant leave to appeal to the Court of Appeals in civil cases, and individual Justices of that court can grant leave to appeal to the Court of Appeals in most criminal cases.

In addition to appellate jurisdiction, the State Constitution vests the Court of Appeals with power to answer questions of New York law certified to it by a federal appellate court or another state's court of last resort. Also, the Court of Appeals is the exclusive forum for review of determinations by the State Commission on Judicial Conduct.

The Judges of the Court collectively decide all appeals, certified questions, proceedings to review determinations of the State Commission on Judicial Conduct, and motions. Individually, the Judges decide applications for leave to appeal in criminal cases and emergency show cause orders. For most appeals, the Judges receive written and oral argument and set forth the reasons for their decisions in written opinions and memoranda.

The Court sits in Albany throughout the year, usually for two-week sessions. During these sessions, the Court meets each morning in conference to discuss the appeals argued the afternoon before, to consider and vote on writings circulated on pending appeals, and to decide motions and administrative matters. Afternoons are devoted to hearing oral argument, and evenings to preparing for the following day.

Between Albany sessions, the Judges return to their home chambers throughout the state, where they continue their work of studying briefs, writing opinions and preparing for the next Albany session. During these home chambers sessions, each Judge annually decides hundreds of requests for permission to appeal in criminal cases, prepares reports on motions for the full Court's consideration and determination, and fulfills many other judicial and professional responsibilities.

Each year, with the Appellate Division Departments, the Court of Appeals publishes a timetable for appellate review of primary election-related matters. In August of each year, the

Court holds a special session to consider expedited appeals and motions for leave to appeal in cases concerning the September primaries. The Court reviews primary election motions and appeals on the Appellate Division record and briefs, and hears oral argument of motions for leave to appeal. When the Court determines an appeal lies as of right or grants a motion for leave to appeal, oral argument of the election appeal is usually scheduled for the same day. Primary election appeals are decided quickly, often the day after oral argument is heard.

In 2013, the Court and its Judges disposed of 3,492 matters, including 259 appeals, 1,310 motions and 1,923 criminal leave applications. A detailed analysis of the Court's work follows.

## **A. Appeals Management**

### **1. Screening Procedures**

The jurisdiction of the Court is narrowly defined by the State Constitution and applicable statutes. After filing a notice of appeal or receiving an order granting leave to appeal to this Court, an appellant must file an original and one copy of a preliminary appeal statement in accordance with Rule 500.9. Pursuant to Rule 500.10, the Clerk examines all preliminary appeal statements filed for issues related to subject matter jurisdiction. This review usually occurs the day a preliminary appeal statement is filed. Written notice to counsel of any potential jurisdictional impediment follows immediately, giving the parties an opportunity to address the jurisdictional issue identified. After the parties respond to the Clerk's inquiry, the matter is referred to the Central Legal Research Staff to prepare a report on jurisdiction for review and disposition by the full Court.

Of the 158 notices of appeal received by the Court in 2013, 100 were subject to Rule 500.10 inquiries. Of those, all but 27 were dismissed sua sponte or on motion, withdrawn, or transferred to the Appellate Division. Twenty inquiries were pending at year's end. The Rule 500.10 sua sponte dismissal (SSD) screening process is valuable to the Court, the bar and the parties because it identifies at the earliest possible stage of the appeal process jurisdictionally defective appeals destined for dismissal or transfer by the Court.

### **2. Normal Course Appeals**

The Court determines most appeals "in the normal course," meaning after full briefing and oral argument by the parties. In these cases, copies of the briefs and record are circulated to each member of the Court well in advance of the argument date. Each Judge becomes conversant with the issues in the cases, using oral argument to address any questions or concerns prompted by the briefs. At the end of each afternoon of argument, each appeal argued or submitted that day is assigned by random draw to one member of the Court for reporting to the full Court at the next morning's conference.

In conference, the Judges are seated clockwise in seniority order around the conference table. When a majority of the Court agrees with the reporting Judge's proposed disposition, the reporting Judge becomes responsible for preparing the Court's writing in the case. If the majority of the Court disagrees with the recommended disposition of the appeal, the first Judge taking the majority position who is seated to the right of the reporting Judge assumes responsibility for the proposed writing, thus maintaining randomness in the distribution of all writings for the Court. Draft writings are circulated to all Judges during the Court's subsequent intersession and, after further deliberation and discussion of the proposed writings, the Court's determination of each appeal is handed down, typically during the next session of the Court.

### **3. Alternative Track Appeals**

The Court also employs the alternative track of sua sponte merits (SSM) review of appeals pursuant to Rule 500.11. Through this SSM procedure, the Court decides a number of appeals on letter submissions without oral argument, saving the litigants and the Court the time and expense of full briefing and oral argument; for this reason, the parties may request SSM review. A case may be placed on SSM track if it involves narrow issues of law or issues decided by a recent appeal, or for other reasons listed in the rule. As with normal-coursed appeals, SSM appeals are assigned on a random basis to individual Judges for reporting purposes and are conferenced and determined by the entire Court.

Of the 350 appeals filed in 2013, 50 (14.3%) were initially selected to receive SSM consideration, a slight increase from the percentage initially selected in 2012 (13.5%). Thirty-two were civil matters and 18 were criminal matters. Eight appeals initially selected to receive SSM consideration in 2013 were directed to full briefing and oral argument. Of the 259 appeals decided in 2013, 30 (11.6%) were decided upon SSM review (15% were so decided in 2012; 15.3% were so decided in 2011). Eighteen were civil matters and 12 were criminal matters.

Of the 50 appeals filed in 2013 and initially selected to receive SSM consideration, 25 were taken from orders or judgments of the Appellate Division, First Department. Five of those 25 were appeals as of right based on a double dissent below, 2 were appeals as of right on other grounds, and 18 were leave grants of the Appellate Division or a Justice of that court.

### **4. Promptness in Deciding Appeals**

In 2013, litigants and the public continued to benefit from the Court's remarkable tradition of prompt calendaring, hearing and disposition of appeals. The average time from argument or submission to disposition of an appeal decided in the normal course was 36 days; for all appeals, the average time from argument or submission to disposition was 34 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 11 months. The average period from readiness (papers served and filed) to calendaring for oral argument was approximately six months.

The average length of time from the filing of a notice of appeal or order granting leave to appeal to the release to the public of a decision in a normal-coursed appeal decided in 2013 (including SSM appeals tracked to normal course) was 375 days. For all appeals, including those decided pursuant to the Rule 500.11 SSM procedure, those dismissed pursuant to Rule 500.10 SSD inquiries, and those dismissed pursuant to Rule 500.16 (a) for failure to perfect, the average was 291 days. Thus, by every measure, in 2013 the Court maintained its long tradition of exceptional currency in calendaring and deciding appeals.

## **B. The Court's 2013 Docket**

### **1. Filings**

Three hundred fifty (350) notices of appeal and orders granting leave to appeal were filed in 2013 (340 were filed in 2012). Two hundred sixty-one (261) filings were civil matters (compared to 235 in 2012), and 89 were criminal matters (compared to 105 in 2012). The Appellate Division departments issued 74 of the orders granting leave to appeal filed in 2013 (50 were civil, 24 were criminal). Of these, the First Department issued 41 (31 civil and 10 criminal).

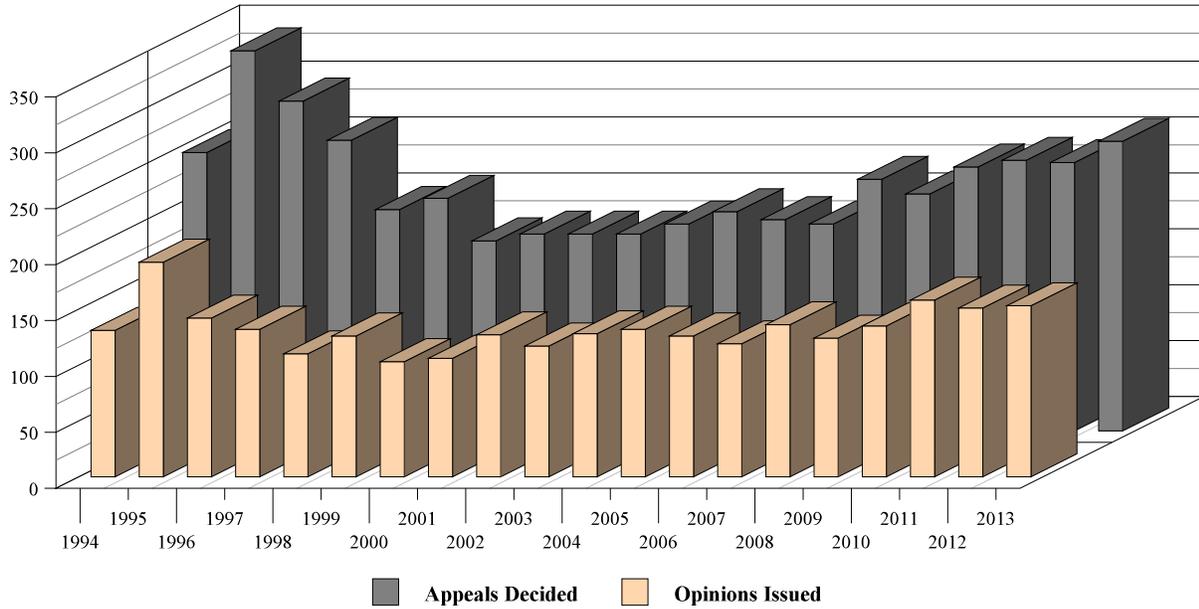
Motion filings remained steady in 2013. During the year, 1,292 motions were submitted to the Court, compared to the 1,296 submitted in 2012. Criminal leave applications increased slightly in 2013. Two thousand forty-four (2,044) applications for leave to appeal in criminal cases were assigned to individual Judges of the Court during the year, 30 more than in 2012. On average, each Judge was assigned 324 such applications during the year.

### **2. Dispositions**

#### **(a) Appeals and Writings**

In 2013, the Court decided 259 appeals (148 civil and 111 criminal, compared to 149 civil and 91 criminal in 2012). Of these appeals, 166 were decided unanimously. The Court issued 150 signed opinions, 3 per curiam opinions, 81 dissenting opinions, 31 concurring opinions, 81 memoranda and 31 decision list entries (5 of which were dissenting entries). The chart on the next page tracks appeals decided and full opinions (signed and per curiam) issued over the past 20 years.

## Appeals Decided and Opinions Issued 1994-2013

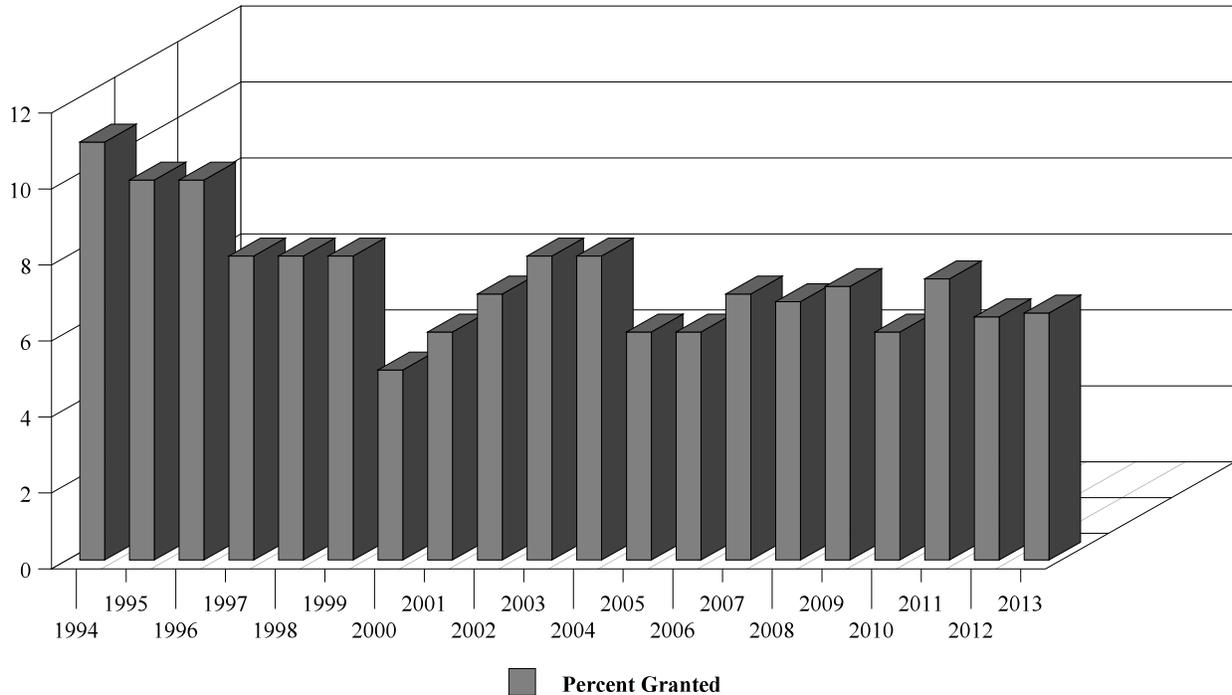


### (b) Motions

There were 1,292 motions submitted to the Court in 2013, essentially consistent with the 1,296 submitted in 2012. Of the 996 motions for leave to appeal decided in 2013, 6.5% were granted, 74.2% were denied, 19.1% were dismissed, and 0.2% were withdrawn.

The average period of time from return date to disposition for civil motions for leave to appeal was 54 days, while the average period of time from return date to disposition for all motions was 49 days. The chart on the next page shows the percentage of civil motions for leave to appeal granted over the past 20 years.

**Motions for Leave to Appeal Granted by Year  
1994-2013**



Sixty-five motions for leave to appeal were granted in 2013. The Court's leave grants covered a wide range of subjects. The Court granted leave to an auction house to address whether notations made by the auction house's clerk contemporaneously with bidding on an antique -- which referred to the purchaser and the consignor of the antique only by number -- constituted a memorandum of sale sufficient to satisfy the statute of frauds. The Court also granted leave to address the validity of New York City's Portion Cap Rule, which prohibited New York City restaurants, movie theaters and other food establishments from serving sugary drinks in sizes larger than 16 ounces. The Court as well granted leave to determine whether the enactment of the Single Adults Eligibility Procedure -- a New York City rule that governed the intake and admission process of single adults applying for temporary housing -- violated the City Administrative Procedure Act. In two cases involving hydrofracking, the Court granted leave to address whether the towns' local ordinances were preempted by the state's Oil Gas and Solution Mining Law.

In the civil service and collective bargaining areas, the Court granted leave to consider a town's failure to negotiate with a union before changing its vehicle use policy; the reclassification of titles for civil service employees in the City of New York; the appointment and promotion of firefighters; and the discipline of teachers. In Sex Offender Registration Act proceedings and civil confinement proceedings under the Mental Hygiene Law, the Court

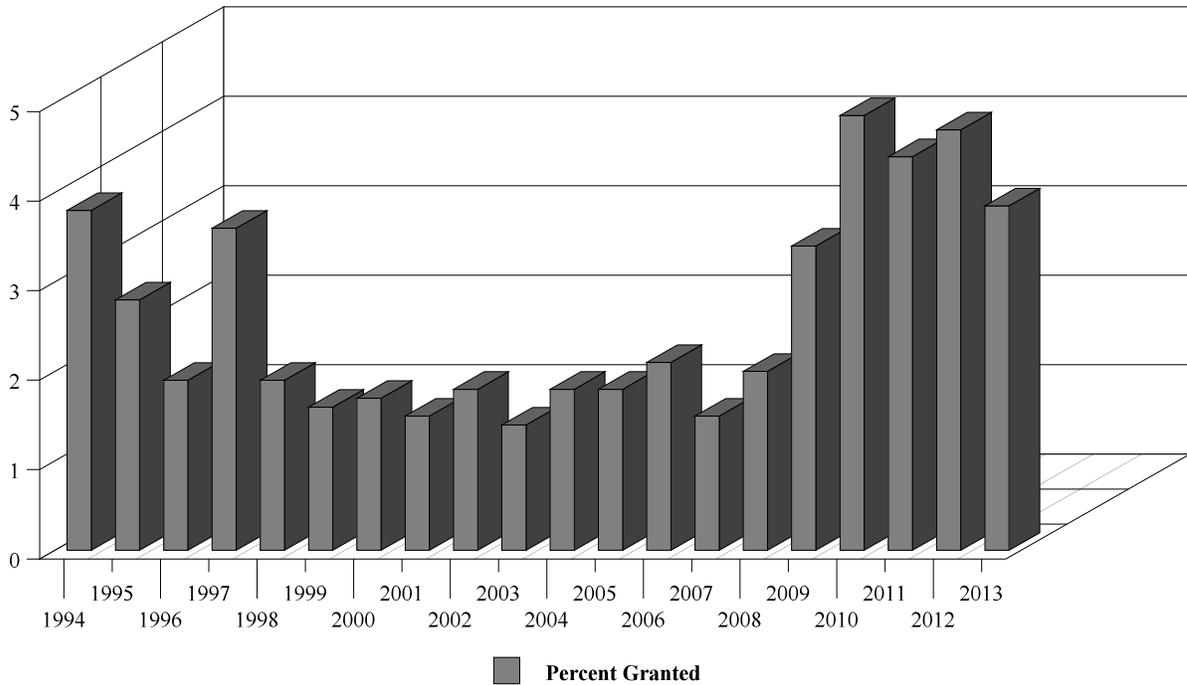
granted leave to address the relevance of testimony by a lay witness on the issue of mental abnormality in a SORA proceeding; the ineffective assistance of counsel in a SORA proceeding; the "number of victims" and "prior convictions" as risk factors to be considered in determining a sex offender's classification in a SORA proceeding; the requirements necessary to adjudicate that individuals are subject to civil commitment under the Mental Hygiene Law; and whether a change of venue is permitted and an individual can waive the annual hearing in a civil confinement proceeding. In the Workers' Compensation Law field, the Court granted leave to determine whether, pursuant to Workers' Compensation Law section 29, a carrier can take a full credit from the claimant's recovery against an employer in a federal section 1983 action and whether the Workers' Compensation Board exceeded its statutory authority by promulgating guidelines regarding the medical necessity of certain medical treatments.

The Court's other leave grants covered a wide variety of topics including, among others, whether: the whistleblower law requires employees to plead the specific law, rule or regulation that is allegedly being violated by their employer; the New York Commission on Judicial Conduct may obtain records in a sealed criminal proceeding for its use in disciplinary action against a judge; the Appellate Division exceeded its authority in an attorney disciplinary proceeding by acting on its own motion in suspending an attorney; and the disclosure of names of retired members of the state teachers' retirement system is permitted under the Freedom of Information Law. Other leave grants addressed: a "substantial modification" issue in a products liability action; service of process on a corporation; calculation of a prisoner's good time credit; the statutory time period within which a customer must make a claim to its bank for the payment of an altered or forged item; the consideration of victim impact statements in the rescission of a parole determination; charge-backs for the cost of educating town residents at community colleges outside of the town; the application of the public trust doctrine to a restaurant in a New York City park; and the disqualification of a District Attorney and the appointment of a Special District Attorney.

### **(c) CPL 460.20 Applications**

Individual Judges of the Court granted 74 of the 1,923 applications for leave to appeal in criminal cases decided in 2013 -- down slightly, on a percentage basis, from the grant of 99 of the 2,096 applications made in 2012. One hundred forty-five (145) applications were dismissed for lack of jurisdiction, and 12 were withdrawn. Fourteen of the 63 applications filed by the People were granted. Three of the 242 applications for leave to appeal from intermediate appellate court orders determining applications for a writ of error coram nobis were granted. The chart on the next page reflects the percentage of applications for leave to appeal granted in criminal cases over the past 20 years.

### Criminal Leave Applications Granted by Year 1994-2013



Review and determination of applications for leave to appeal in criminal cases constitute a substantial amount of work for the individual Judges of the Court during home chambers sessions. The period during which such applications are pending usually includes several weeks for the parties to prepare and file their written arguments. In 2013, on average, 86 days elapsed from assignment to Judges to disposition of applications for leave to appeal in criminal cases.

#### **(d) Review of Determinations of the State Commission on Judicial Conduct**

By constitution and statute, the Court of Appeals has exclusive jurisdiction to review determinations of the State Commission on Judicial Conduct and to suspend a judge, with or without pay, when the Commission has determined that removal is the appropriate sanction, or while the judge is charged in this state with a crime punishable as a felony. In 2013, the Court reviewed two determinations of the State Commission on Judicial Conduct, accepting the recommended sanction (removal) in both cases. Pursuant to Judiciary Law § 44 (8), the Court suspended three judges with pay, and continued the suspension with pay of one judge.

### **(e) Certifications Pursuant to Section 500.27 of the Rules**

Section 500.27 of the Court's Rules of Practice provides that whenever it appears to the Supreme Court of the United States, any United States Court of Appeals or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before it for which no controlling precedent from this Court exists, that court may certify the dispositive questions of law to this Court. After a court certifies a question to this Court pursuant to section 500.27, the matter is referred to an individual Judge, who circulates a written report for the entire Court analyzing whether the certification should be accepted. When the Court of Appeals accepts a certified question, the matter is treated similarly to an appeal. Although the certified question may be determined pursuant to the Court's alternative "sua sponte merits" procedure (see section 500.11), the preferred method of handling is full briefing and oral argument on an expedited schedule. In 2013, the period from receipt of initial certification papers to the Court's order accepting or rejecting review was 30 days. The average period from acceptance of a certification to disposition was 7.4 months.

Three cases involving questions certified by the United States Court of Appeals for the Second Circuit remained pending at the end of 2012. In 2013, the Court answered the questions certified in those cases. Also in 2013, the Court accepted nine new cases involving questions certified by the United States Court of Appeals for the Second Circuit and one new case involving questions certified by the Supreme Court of the State of Delaware. Five of those cases remained pending at the end of 2013.

### **C. Court Rules**

In 2013, principally to address the new Court-PASS filing system, the Court made several changes to its Rules of Practice (22 NYCRR Part 500) and its Rules for Review of Determinations of the State Commission on Judicial Conduct (22 NYCRR Part 530). To allow registered in-house counsel to provide legal services to pro bono clients in New York, the Court added section 522.8 to the Rules for the Registration of In-House Counsel (22 NYCRR Part 522). The Court also amended section 520.10 of the Rules for the Admission of Attorneys and Counselors at Law (22 NYCRR Part 520), clarifying that applicants seeking admission on motion in New York need not demonstrate compliance with the program and course of study requirements of section 520.3 of the Rules, which only apply to candidates for the New York bar examination.

## **II. Administrative Functions and Accomplishments**

### **A. Court of Appeals Hall**

Court of Appeals Hall has been the Court's home for over 95 years. This classic Greek Revival building, originally known as State Hall, formally opened in 1842 with offices for the Chancellor, the Register of Chancery and the State Supreme Court. On January 8, 1917, the Court of Appeals moved across the park, from the State Capitol, into the newly refurbished building at 20 Eagle Street. The Court's beloved Richardson Courtroom was reassembled in an extension to State Hall built to accommodate both the courtroom and the Court's library and conference room. Major renovations in 1958-1959 and 2002-2004 -- the latter including two additions to the building faithful to its Greek Revival design -- produced the architectural treasure the Court inhabits today.

The Building Manager and the Deputy Building Superintendent oversee all services and operations performed by the Court's maintenance staff and by outside contractors at Court of Appeals Hall.

### **B. Case Management**

The expressions of gratitude I regularly receive from litigants and the bar attest to the expertise and professionalism of the Clerk's Office staff. Counsel and self-represented litigants will find a wealth of Court of Appeals practice aids on the Court's website (<http://www.courts.state.ny.us/ctapps>). Additionally, Clerk's Office staff respond -- in person, by telephone and in writing -- to inquiries and requests for information from attorneys, litigants, the public, academics and court administrators. Given that practice in the Court of Appeals is complex and markedly different from that in the Appellate Division, the Clerk's Office encourages such inquiries. Members of the Clerk's Office staff also regularly participate in, and consult on, programs and publications designed to educate the bar about Court of Appeals practice.

The Clerk, Deputy Clerk, Consultation Clerk, Assistant Consultation Clerk, two Assistant Deputy Clerks, Chief Motion Clerk, Prisoner Applications Clerk, several secretaries, court attendants and clerical aides perform the myriad tasks involved in appellate case management. Their responsibilities include receiving and reviewing all papers, filing and distributing to the proper recipients all materials received, scheduling and noticing oral arguments, compiling and reporting statistical information about the Court's work, assisting the Court during conference and preparing the Court's decisions for release to the public. In every case, multiple controls ensure that the Court's actual determinations are accurately reported in the written decisions and orders released to the public. The Court's document reproduction unit prepares the Court's decisions for release to the public and handles most of the Court's internal document

reproduction needs. Security attendants screen all mail. Court attendants deliver mail in-house and maintain the Court's records room, tracking and distributing all briefs, records, exhibits and original court files. During the Court's sessions, the court attendants also assist the Judges in the courtroom and in conference.

### **C. Public Information**

The Public Information Office distributes the Court's decisions to the media upon release and answers inquiries from reporters about the work of the Court. For each session, the office prepares descriptive summaries of cases scheduled to be argued before the Court. The summaries are posted on the Court's website and are available in print at Court of Appeals Hall.

The Public Information Office also provides information concerning the work and history of New York's highest court to all segments of the public -- from school children to members of the bar. Throughout the year, the Public Information Officer and other members of the Clerk's staff conduct tours of the historic courtroom for visitors. The Public Information Office maintains a list of subscribers to the Court's "hard copy" slip opinion service and handles requests from the public for individual slip opinions.

Under an agreement with Albany Law School's Government Law Center and Capital District public television station WMHT, the Public Information Office supervises the video recording of all oral arguments before the Court and of special events conducted by the Chief Judge or the Court. The recordings are preserved for legal, educational and historical research in an archive at the Government Law Center, and copies are available for purchase by the public. The recordings may be ordered from the Law Center at (518) 445-3287.

The Court's comprehensive website (<http://www.courts.state.ny.us/ctapps/>) posts information about the Court, its Judges, history, summaries of pending cases and other news, as well as Court of Appeals decisions for the past six months. The latest decisions are posted at the time of their official release. During Court sessions, the website offers live webcasts of all oral arguments heard by the Judges. Since January 2010, these webcasts have been preserved in a permanent archive on the website to allow users to view the arguments at their convenience. Transcripts of oral arguments are also now available on the website, and are archived there as well.

The website provides helpful information about the Court's practice -- including its rules, civil and criminal jurisdictional outlines, session calendars, undecided lists of argued appeals and civil motions, and a form for use by pro se litigants -- and it provides links to other judiciary-related websites. The text and webcast of the Chief Judge's most recent State of the Judiciary address are posted on the home page, and the text of prior addresses can be reached through the "Annual Releases and Events" link. Archived webcasts of Law Day Celebrations and prior Annual Reports are also available through that link.

#### **D. Office for Professional Matters**

The Court Attorney for Professional Matters manages the Office for Professional Matters. A court analyst provides administrative support for the office.

The Court Attorney drafts reports to the Court on matters relating to (1) attorney admission and disciplinary cases, (2) petitions seeking waiver of certain requirements of the Court's Rules for the Admission of Attorneys and Counselors at Law, and the Rules for the Licensing of Legal Consultants, (3) proposed rule changes ultimately decided by the Court, and (4) other matters regarding the admission and regulation of attorneys in New York.

The office responds to written and telephone inquiries related to the Court's admission rules, reviews submissions from U.S. law schools seeking approval of courses as satisfying the requirements of the Court's rules, and prepares certificates of admission upon request.

In September 2013, the Court amended section 520.10 of the Rules for the Admission of Attorneys and Counselors at Law to clarify that applicants for admission on motion in New York do not have to satisfy the program and course of study requirements contained in section 520.3 of the Rules, which pertains to candidates for the New York State bar exam. Additionally, in December 2013, the Court amended the Rules for the Registration of In-House Counsel by adding section 522.8. The new section allows attorneys who are registered as in-house counsel in New York to provide pro bono legal services in the state.

#### **E. Central Legal Research Staff**

Under the supervision of the individual Judges and the Clerk of the Court, the Central Legal Research staff prepares draft reports on motions (predominately civil motions for leave to appeal) and selected appeals for the full Court's review and deliberation. From December Decision Days 2012 through December Decision Days 2013, Central Staff completed 947 motion reports, 65 SSD reports and 16 SSM reports. Throughout 2013, Central Staff remained current in its work.

Staff attorneys also write and revise research materials for use by the Judges' chambers and Clerk's staff, and perform other research tasks as requested. During 2013, the staff completed a major revision and expansion of a substantive law manual -- covering areas of law frequently encountered in the Court's civil motion practice. Also during 2013, the Senior Deputy Chief Court Attorney updated the Court's internal jurisdictional outline.

Attorneys usually join the Central Legal Research Staff immediately following law school graduation. The staff attorneys employed in 2013 were graduates of Albany, the State University of New York at Buffalo, Cardozo, the City University of New York at Queens, Fordham University, the University of Maryland, Pace University, St. John's University,

Syracuse University and Vermont law schools. Staff attorneys hired for work beginning in 2014 will represent the following law schools: Albany, the State University of New York at Buffalo, the University of Connecticut, Harvard University, New York and Wake Forest University.

## **F. Library**

The Chief Legal Reference Attorney provides legal and general research and reference services to the Judges of the Court, their law clerks and the Clerk's Office staff. During 2013, commercial and in-house databases continued to be pivotal in the provision of legal and non-legal information. The Court subscribes to the major commercial legal research databases and the New York State Library gateway provides the Court with access to a wide range of academic and news databases.

The Court of Appeals Library staff continued to expand in-house databases that provide full-text access to the Court's internal reports. The hyperlinked intranet databases that contain important legislative documents, including the Governor's bill jackets, were also expanded.

Throughout 2013, the library staff worked on various aspects of the new Court-PASS database, an important public information and research tool developed by the New York Court of Appeals.

The Chief Legal Reference Attorney continued to be a member of the Court's CLE Committee, and she presented CLE-certified programs to Judges' Law Clerks and staff attorneys on constitutional, statutory and regulatory intent. In April 2013, she was invited to join the New York State Archives Advisory Committee, and she participated in the Committee's 2013 meetings. The upstate New York chapter of the American Association of Law Libraries held its 2013 Annual Meeting in Albany, New York. One program was held at Court of Appeals Hall, and the Chief Legal Reference Attorney and an assistant, who is a Master of Library Science student, gave presentations about the work of the library and the new Court-PASS database.

As Secretary of the Board of Trustees of *The Historical Society of the New York Courts*, the Chief Legal Reference Attorney continued to be involved in the work of the Society in 2013. She developed content for the Society's new website (<http://www.courts.state.ny.us/history/>) that focuses on New York's rich legal history. As in past years, she devised the themes and resources for the Society's New York State Community College essay competition, the winners of which are honored at the Law Day ceremony in Court of Appeals Hall.

## **G. Continuing Legal Education Committee**

The Continuing Legal Education (CLE) Committee was established in 1999 to coordinate professional training for Court of Appeals, Law Reporting Bureau, and Board of Law Examiners

attorneys. The Committee is currently chaired by the Senior Deputy Chief Court Attorney, and meets on an as-needed basis. Other members include the Deputy Clerk of the Court, the Chief Court Attorney, the Chief Legal Reference Attorney, two Judges' law clerks, and two attorneys from the Law Reporting Bureau. A Central Legal Research Staff secretary manages CLE records and coordinates crediting and certification processes with the New York State Judicial Institute (JI). Specifically, the secretary maintains three databases to track CLE classes offered by the Court, the attorneys eligible to attend classes, and the number of credits each attorney has earned at Court-sponsored programs. In addition, she prepares the paperwork necessary to comply with the rules of the JI and the CLE Board and provides general support to the Committee.

During 2013, the CLE Committee provided numerous programs for the Court-associated attorneys -- including new staff training and orientation -- totaling 14.5 credit hours. Attorneys also attended classes offered by the Appellate Division, Third Department; Albany Law School; and various state and local bar groups. These programs accounted for more than 15 additional credit hours. Several experienced/non-transitional attorneys viewed recorded programs from the JI and other sources at their desktops.

## **H. Management and Operations**

The Director of Management and Operations, aided by two secretarial assistants, is responsible for supervising fiscal and personnel systems and functions, including purchasing, inventory control, fiscal cost recording and reporting, employee time and leave management, payroll document preparation, voucher processing, benefit program administration and annual budget request development. A supplies manager is responsible for distributing supplies, comparison shopping and purchasing office supplies and equipment.

## **I. Budget and Finance**

The Director of Management and Operations is responsible for initial preparation, administration, implementation and monitoring of the Court's annual budget. The proposed annual budget is reviewed by the Clerk and Deputy Clerk before submission to the Judges of the Court for their approval.

### **1. Expenditures**

The work of the Court and its ancillary agencies was performed within the 2013-2014 fiscal year budget appropriation of \$14.6 million, which included all judicial and nonjudicial staff salaries (personal services costs) and all other cost factors (nonpersonal services costs), including in-house maintenance of Court of Appeals Hall.

## **2. Budget Requests**

The total request for fiscal year 2014-2015 for the Court and its ancillary agencies is \$14,568,842. The 2014-2015 personal services request is \$12.7 million. This includes funding for all judicial positions and all filled nonjudicial positions. Funding is also included for the payment of increments, longevity bonuses, uniform allowance and location pay, as required by law, for all eligible employees. The 2014-2015 nonpersonal services request is \$1.9 million.

Notwithstanding necessary increases in travel, administration and support services, and building maintenance operations, the budget request for fiscal year 2014-2015 illustrates the Court's diligent attempt to perform its functions and those of its ancillary agencies economically and efficiently. The Court will continue to maximize opportunities for savings to limit increases in future budget requests.

## **3. Revenues**

In calendar year 2013, the Court reported filing fees for civil appeals totaling \$39,440. Also, the Court reported filing fees for motions totaling \$32,919. The funds were reported to the State Treasury, Office of the State Comptroller and Office of Court Administration pursuant to the Court Facilities Legislation (L 1987, ch 825). Additional revenues were realized through the slip opinion distribution service (\$1,200) and miscellaneous collections (\$2,974.62). For calendar year 2013, revenue collections totaled \$76,533.62.

### **J. Computer Operations**

The Information Technology Department oversees all aspects of the Court's computer and web operations under the direction of a Principal LAN Administrator, assisted by a LAN Administrator and a PC Analyst. These operations include all software and hardware used by the Court, and a statewide network connecting six remote Judges' chambers with Court of Appeals Hall.

The Department maintains a hands-on help desk to assist employees with hardware and software issues as they arise. Training on software and hardware is provided as needed, either within the Courthouse or via outside agencies, depending on the situation. Maintenance calls to the help desk are estimated at approximately 2,500 for the year. In 2013, the Department replaced all the current in-house desktop workstations for the chambers' and clerk's staff. The Department also arranged simulcast presentations and teleconferences throughout the year to bring meetings and continuing legal education information from all over the state to Court employees in Albany.

The Department is also responsible for the upkeep of three web sites: an intranet web site, the Court's main internet site located at <http://www.courts.state.ny.us/ctapps/> and the new Court-

PASS website (<http://www.nycourts.gov/ctapps/courtpass>). Over 867,000 visits were recorded to the internet site in 2013, averaging approximately 2,300 visits per day. In February 2013, the department rolled out the Court-PASS application, the Public Access and Search System website dedicated to providing both the bar and the public more access to the briefs and records filed in the Court as well as the Court's case management.

## **K. Security Services**

The Court Security Unit provides for the safety, security, and protection of the judicial staff, court personnel, and the public who visit the Court.

The Chief Security Attendant supervises the Court Security Unit, which consists of Senior Security Attendants and Court Building Guards. The attendants are sworn New York State Court Officers and have peace officer status.

The Security Unit conducts a variety of security functions, including magnetometer/security screening for the visiting public. Other functions include judicial escorts, security patrols, video monitoring, and providing a security presence in the courtroom when the Court is in session. In 2013, 53 vouchers were generated for items held at the screening post, including 1 stun gun. Mail and package screening of items received by the Court identified seven items that were deemed inappropriate communications.

The members of the Security Unit completed several mandatory training programs during 2013, including firearms, pepper spray, first aid, CPR, automated external defibrillator (AED), and baton recertification. Several Court Officers received additional training as members of the Court's Special Response Team. In the event of an emergency, members of the Special Response Team can be redeployed to any court facility. Finally, first aid/CPR/AED training was also made available for all of the Court's staff, including staff at the Law Reporting Bureau and the State Board of Law Examiners.

## **L. Personnel**

The following personnel changes occurred during 2013:

### **APPOINTMENTS:**

Fernandez, Raymond - appointed as Law Clerk to COA Judge, August 2013.

Freeman, Clark - appointed as Law Clerk to Chief Judge, August 2013.

Hopkins, Gabriel - appointed as Law Clerk to COA Judge, August 2013.

Isaacs, Elizabeth Langston - appointed as Law Clerk to Chief Judge, August 2013.

Lacovara, Christopher - appointed as Law Clerk to COA Judge, August 2013.

LaPorte, Azahar - appointed as Secretary to COA Judge, June 2013.

Martin, John - appointed as Law Clerk to COA Judge, August 2013.

Sawyer, Richard - appointed as Law Clerk to COA Judge, August 2013.

Villaronga, Genoveva - appointed as Secretary to COA Judge, May 2013.

Woll, Deborah - appointed as Senior Principal Law Clerk to COA Judge, May 2013.

#### PROMOTIONS:

Bova, Matthew J. - promoted to Principal Law Clerk to COA Judge, December 2013.

Jeng, Mindy - promoted to Senior Law Clerk to Chief Judge, April 2013.

Kandel, Erin - promoted to Senior Law Clerk to COA Judge, June 2013.

Mendez, Noel - promoted to Senior Law Clerk to COA Judge, February 2013.

Waisnor, Jonathan - promoted to Senior Law Clerk to COA Judge, December 2013.

Walthall, Claiborne - promoted to Senior Law Clerk to COA Judge, August 2013.

#### RESIGNATIONS AND RETIREMENTS:

Cooper, Jenna - Senior Law Clerk to COA Judge, resigned August 2013.

Kim, Jay - Principal Law Clerk to COA Judge, resigned August 2013.

Irby, Sandra - Senior Principal Law Clerk to COA Judge, resigned August 2013.

Jeng, Mindy - Senior Law Clerk to Chief Judge, resigned August 2013.

Reed, Richard - Deputy Clerk, resigned November 2013.

Smith, Jessica Barrie - Law Clerk to Chief Judge, resigned August 2013.

Weber, Sarah - Law Clerk to COA Judge, resigned August 2013.

## CENTRAL LEGAL RESEARCH STAFF

### **Appointments:**

Carrie Scrufari was appointed Court Attorney in July 2013. Joseph Fornadel, Krysten Kenny, Ivan Pavlenko, and Jaclyn Sheltry were appointed Court Attorneys in August 2013.

### **Promotions:**

Anya Ferris Endsley was promoted to Senior Court Attorney in July 2013. Chelsea Cerutti, Steven Cunningham, Nicole Ettlinger, Dominique Saint-Fort and Diana Schaffner were promoted to Senior Court Attorneys in August 2013.

### **Completion of Clerkships:**

Senior Court Attorney Noel Mendez joined the staff of the Honorable Jenny Rivera in February 2013, and Erin Kandel joined the staff of the Honorable Sheila Abdus-Salaam in June 2013. Greg Mann completed his Central Staff clerkship in May 2013, and Brian Lusignan completed his Central Staff clerkship in June 2013. Matthew Schrantz completed his Central Staff clerkship in August 2013, and Meredith Lee-Clark completed her Central Staff clerkship in December 2013.

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## **ACKNOWLEDGMENT**

As are all tasks at the Court of Appeals, the production of the Annual Report is a team effort. Each year, members of the Clerk's staff contribute numerical data, narrative reports, and editing and proofreading services. I thank each of them, and mention especially John Asiello, who edited the Report, and Andrea Ignazio and Bryan Lawrence, who prepared the detailed appendices. I also thank the many members of the Clerk's staff who otherwise contributed to the Report, particularly Cynthia Byrne, James Costello, Heather Davis, Margery Corbin Eddy, Brian Emigh, Cynthia McCormick, Paul McGrath, Inez Tierney, Marissa Mason and Margaret Wood.

Serving the public through the judicial branch is a privilege and a profound responsibility. I commend the entire staff for providing exemplary service to the Judges of the Court, the bar and the public throughout the year. A complete list of the Court's nonjudicial staff appears in Appendix 11.

Finally, I acknowledge the countless individuals in the Office of Court Administration and throughout the Unified Court System who, year in and year out, provide expert assistance and timely information to the Court of Appeals, its Judges and staff. This year I would like to again thank Laura Weigley for her assistance in the publication of this report.

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### **III. 2013: Year in Review**

This section -- a summary of Court of Appeals decisions handed down in 2013 -- reflects the range of constitutional, statutory, regulatory, and common law issues reaching the Court each year.

#### **ADMINISTRATIVE LAW**

##### *Matter of Bezio v Dorsey* (21 NY3d 93)

In 2010, respondent Dorsey -- an inmate in a New York correctional facility -- engaged in a month-long hunger strike, hoping to bring attention to his claims of mistreatment and to secure a transfer to another prison. When Dorsey's health deteriorated to a life-threatening condition, prison officials filed a petition seeking a court order permitting them to feed him by a nasogastric tube in order to avert his death or serious physical injury. Dorsey opposed the petition, asserting that issuance of the order would violate his constitutional rights. The Court affirmed the issuance of the order, concluding that the state's legitimate penological interests outweighed any constitutional right Dorsey might possess in relation to continuation of the hunger strike.

##### *Matter of Murphy v New York State Div. of Hous. & Community Renewal* (21 NY3d 649)

In this CPLR article 78 proceeding, petitioner challenged a determination of the New York State Division of Housing and Community Renewal (DHCR) denying his application for succession rights to a Mitchell-Lama apartment based on the tenant-of-record's failure to file a single income affidavit during the two years relevant to petitioner's application. The Court held that the agency's determination was arbitrary and capricious and that petitioner was entitled under DHCR regulations to succeed to the tenancy. Crucial to its ruling was that DHCR did not dispute that the apartment had been petitioner's residence since birth and that the record evinced no relationship between the tenant-of-record's failure to file the affidavit and petitioner's income or occupancy status. Acknowledging the vital role of the income affidavit requirement in administering the Mitchell-Lama program, the Court nevertheless concluded that, in the context of adjudicating succession rights, the filing requirement's principal purpose is to demonstrate proof of primary residence.

##### *Matter of Koch v Sheehan* (21 NY3d 697)

A physician accused of medical misconduct entered into a consent order with the Board for Professional Medical Conduct (BPMC) whereby he pleaded no contest and agreed to 36

months' probation to settle the charges lodged against him. The Office of the Medicaid Inspector General (OMIG) subsequently removed the physician from New York's Medicaid program in light of the consent order. The Court held that 18 NYCRR 515.7 (e) vests OMIG with discretion to exclude a physician from the Medicaid program in reliance solely on a consent order between that physician and BPMC, regardless of whether BPMC chooses to suspend the physician's license. OMIG must, however, explain why it considers the consent order a sufficient basis to warrant exclusion in the particular case.

## **ARBITRATION**

*Matter of Belzberg v Verus Invs. Holdings Inc.* (21 NY3d 626)

In this case, the Court addressed whether a nonsignatory to an arbitration agreement may be compelled to arbitrate a claim if he or she knowingly exploits the agreement and receives a direct benefit flowing therefrom. The Court held that the so-called "direct benefits" estoppel doctrine is to be applied when the benefit gained by the nonsignatory can be traced directly to the agreement containing the arbitration clause.

## **CIVIL PROCEDURE**

*Matter of Howard v Stature Elec., Inc.* (20 NY3d 522)

The issue on this appeal was whether an *Alford* plea to Insurance Fraud should be given preclusive effect in a Workers' Compensation proceeding for purposes of deciding a violation of Workers' Compensation Law § 114-a. The criminal court accepted the plea without any allocution as to the facts underlying it, and sentenced petitioner to an agreed-upon conditional discharge. The Court ruled that a defendant's guilty plea to insurance fraud did not foreclose him from obtaining further benefits in his workers' compensation case against his employer because he did not admit any wrongdoing in the criminal proceeding.

*Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce* (21 NY3d 55)

The United States Court of Appeals for the Second Circuit certified the question as to whether a court may issue a turnover order pursuant to CPLR 5225 (b) where an entity does not have actual possession or custody of a debtor's assets, but may have constructive possession. The Court held that the plain language of the statute referred only to "possession or custody" and excluded any reference to "control;" thus, a Court may not issue such turnover order where there is mere constructive possession.

*Cruz v TD Bank, N.A.; Martinez v Capital One Bank, N.A.* (22 NY3d 61)

In these two federal putative class actions, plaintiffs were judgment debtors whose bank accounts were frozen by judgment creditors seeking to enforce money judgments under CPLR article 52. Plaintiffs alleged that the restraining notices were invalid because the banks failed to comply with their obligations under the Exempt Income Protection Act of 2008 (EIPA) in that the banks did not send plaintiffs certain information required under CPLR 5222-a, such as claim forms pertaining to funds exempted from debt collection. In each of these actions, the bank moved to dismiss the complaint, asserting that the EIPA did not create a private right of action allowing an account holder to bring a plenary action against a depository bank. The U.S. Court of Appeals for the Second Circuit certified questions to resolve whether the judgment debtors could bring their plenary actions.

Noting that CPLR article 52 contained a comprehensive enforcement scheme that permitted aggrieved judgment debtors to pursue certain types of relief in summary proceedings commenced in specified venues, the Court answered that no private right of action against depository banks could be implied from the EIPA based on the allegations asserted in the complaints.

*Nash v Port Auth. of N.Y. & N.J.* (22 NY3d 220)

Linda Nash was injured in the 1993 World Trade Center bombing. Nash, along with other plaintiffs, obtained a liability verdict against the Port Authority, and the Appellate Division affirmed on liability. In a separate damages trial, Nash obtained a \$4.5 million judgment against the Port Authority. While Nash's damages award was on appeal, this Court heard argument concerning the underlying liability issue in *Matter of World Trade Ctr. Bombing Litig. [Ruiz]* (17 NY3d 428 [2011]). Before the *Ruiz* decision was released, the Appellate Division affirmed Nash's damages award, and the Port Authority did not appeal from that order. Nearly three months later, after this Court decided in *Ruiz* that the governmental immunity doctrine insulated the Port Authority from tortious liability, the Port Authority moved to vacate Nash's damages judgment pursuant to CPLR 5015 (a) (5) because it had been based on a liability order that had since been reversed. This Court, after explaining that CPLR 5015 required the motion court to exercise its discretion in determining whether to vacate a judgment, remitted the matter to Supreme Court so that it could conduct its own analysis of the pertinent facts in order to determine whether the Port Authority was entitled to vacatur under CPLR 5015.

*Auqui v Seven Thirty One Ltd. Partnership* (22 NY3d 246)

The determination of the Workers' Compensation Board, that claimant had no further causally-related disability and no further need for treatment, was not entitled to collateral estoppel effect in plaintiff's subsequent personal injury action. Although the quasi-judicial

determinations of administrative agencies are generally entitled to preclusive effect, here, defendant failed to establish that there was identity of issue between the workers' compensation proceeding and the negligence action. While the issue in workers' compensation proceedings concerns providing wage replacement benefits on an expedited basis, a negligence action is broader in scope and is designed to make the injured party whole.

## **CIVIL RIGHTS LAW**

### *Matter of Cunningham v Dept. of Labor* (21 NY3d 515)

Cunningham, an employee of the Department of Labor, was suspected of submitting inaccurate travel vouchers. To investigate this misconduct, the Department of Labor attached a GPS device to Cunningham's car. Relying in part on the GPS results, the Department of Labor terminated Cunningham's employment. The Court held that the government need not obtain a warrant prior to placing a GPS device on a car used for work-related travel. If the government has reasonable suspicion of work-related misconduct and the GPS search is related to that misconduct, the placement of the device is permissible. However, the Court found the GPS search's scope unreasonable because the search was not limited to work-related activities but instead was a 24-hour, month-long search that even captured Cunningham's movements while on a family vacation.

### *Matter of Holmes v Winter* (22 NY3d 300)

The issue presented was the extent to which New York's Shield Law protects a New York journalist from being compelled to disclose confidential sources in a criminal proceeding conducted in another state. Holmes was a defendant in Colorado, facing multiple counts of murder for engaging in a shooting spree at a movie theater. After the police obtained a notebook that Holmes had sent to a psychiatrist before the shootings, the trial court presiding over the criminal case issued an order precluding either side from disclosing the existence of the notebook or its contents. Winter -- a New York-based investigative reporter for Fox News -- published an online news article describing the notebook, indicating she learned about it from two unidentified law enforcement sources. Holmes sought to determine the identity of the individuals who disclosed the information so that they could be sanctioned, and sought to compel Winter to come to Colorado to testify in the sanction proceeding.

Disagreeing with both lower courts, the Court held that Holmes's subpoena application should have been denied. The Court determined that it would violate the well-defined and longstanding New York public policy for a New York court to issue a subpoena compelling Winter, a New York reporter, to attend a proceeding in another state where there was a substantial likelihood that she would be compelled to identify her sources.

## CONSTITUTIONAL LAW

*Overstock.com, Inc. v New York State Dept. of Taxation & Fin.* (20 NY3d 586)

Plaintiffs, online retailers, challenged Tax Law § 1101 (b) (8) (vi) -- New York's "Internet tax" -- arguing that it was facially unconstitutional under the Commerce and Due Process Clauses of the United States Constitution. The Court determined that the active solicitation of New York business by New York residents on the retailers' behalf, generating a significant amount of revenue, satisfied the presence requirement and established a substantial nexus with the state. The Court also rejected the due process challenge, finding that the presumption was constitutionally valid. Since residents were compensated for referrals that resulted in sales, it was rational to presume that they would seek to increase successful referrals by soliciting customers and that they would reach out to other New York residents to accomplish that purpose.

*Brightonian Nursing Home v Daines* (21 NY3d 570)

At issue was the power of the State to regulate withdrawals of nursing home assets and equity by operators of facilities with positive equity positions. Plaintiffs argued that the regulation interfered with their substantive due process right to property and that it amounted to an unconstitutional delegation of legislative power to the executive branch. The Court found both challenges unavailing, reaffirming the State's broad power to regulate in the economic sphere to achieve a legitimate governmental purpose -- here, preserving the financial and operational viability of facilities serving a specially vulnerable clientele -- and the power of the legislature to delegate an appropriately circumscribed enforcement function to an administrative agency without running afoul of the separation of powers doctrine.

*People v Hughes* (22 NY3d 44)

Defendant possessed a loaded and unlicensed handgun in his home, and was convicted of second degree criminal possession of a firearm, a felony. A prior misdemeanor barred him from defeating the weapon possession charge on the ground that the possession took place in his home, and he argued that the felony conviction infringed his Second Amendment right to bear arms. The Court noted that New York's criminal weapon possession laws prohibit only unlicensed possession of handguns, and do not prevent someone convicted of a misdemeanor from securing a license and possessing a handgun lawfully. The Court assumed without deciding that the extent of the punishment imposed on defendant was subject to Second Amendment scrutiny. It held that New York's second degree criminal possession statute was constitutional on that assumption, because keeping guns away from people who have shown they cannot be trusted to obey the law is substantially related to the important government objective of preventing criminal use of firearms.

## CONTRACTS

*White v Farrell* (20 NY3d 487)

After a deal for the sale of lakeside property fell through, the buyers sued the sellers to recover their \$25,000 deposit. The sellers counterclaimed, successfully alleging breach of contract, and sought the difference between the contract price and the lower price at which they eventually sold the property, some 14 months after the breach. The Court held that the measure of damages was the difference, if any, between the contract price and the fair market value of the property at the time of the breach. The Court added that the price obtained by the seller on a later resale of the property might well bear on damages, depending upon the circumstances.

*Schlessinger v Valspar Corp.* (21 NY3d 166)

Plaintiffs bought furniture from a department store and, at the same time, purchased a five-year furniture protection plan from Valspar Corporation. The plan was a contract wherein Valspar agreed that, if the furniture became stained or damaged during the contract period, it would "perform one or more" of a number of services -- ranging from advice on stain removal to replacement of the furniture -- or would arrange a store credit or offer a financial settlement. The plan's store closure provision further specified, however, that if the store location where the furniture was purchased went out of business, Valspar would refund the plan's original purchase price. Here, the department store went into bankruptcy during the contract's term, and the United States Court of Appeals for the Second Circuit certified two questions to the Court: whether plaintiffs could seek to have the store closure provision, which violated General Business Law § 395-a, declared void as against public policy; and whether they could bring suit pursuant to General Business Law § 349 for deceptive acts or practices as a result of the inclusion of the illegal store closure provision in the contract. The Court answered that a breach-of-contract claim against Valspar would succeed if General Business Law § 395-a rendered the store closure provision null and void, which would remove a refund as an option and cast Valspar into breach, but that section 395-a does not, in fact, make contract clauses that contradict its terms null and void. The Court further responded that a violation of General Business Law § 395-a does not, standing alone, give rise to a cause of action under General Business Law § 349 for deceptive acts or practices.

*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh* (22 NY3d 470)

The issue before the Court was whether an auctioneer's name on a standard auction house clerking sheet, in place of the consignor, is sufficient to satisfy the statute of frauds. Here,

respondent successfully bid, via telephone, on an antique at one of appellant's auctions. Respondent was sent an invoice for over \$400,000, but refused to remit payment. The Court, relying on a 150-year-old decision by the Supreme Court of Judicature, then the highest common law court in the State, held that the auctioneer's name, as agent of the consignor, satisfied the statute's requirement that a writing contain "the name of the person on whose account the sale was made."

## CRIMINAL LAW

*People v Baker* (20 NY3d 354)

Defendant challenged the constitutional validity of the disorderly conduct statute, claiming that, if it was applied to criminalize his conduct, the statute violated the First Amendment since his remarks did not constitute obscenity or fighting words. In this case, where defendant made two brief, abusive statements to a police officer that were not accompanied by any menacing conduct, the record did not reveal that the officer felt threatened by the statements, and there were no indicia of a risk of public disturbance in light of the timing and location of the incident, the Court held that the People's allegations were insufficient to establish the public harm element. Since the conduct did not rise to the level of disorderly conduct under the statute, it was evident that the arrest was not supported by probable cause and the Court had no occasion to address defendant's First Amendment arguments.

*People v Pealer* (20 NY3d 447)

The question presented was whether the People can admit into evidence records establishing routine inspection and maintenance of breathalyzer machines in a criminal case without calling as witnesses the individuals who created the records. The Court held that the documents were nontestimonial in nature and, therefore, were not subject to the Confrontation Clause requirements set forth in *Crawford v Washington* (541 US 36 [2004]). The Court concluded that the three records were nontestimonial since they were prepared by an agency independent of law enforcement for the purpose of advising a police agency that its machine was functioning properly, not for the purpose of facilitating a particular criminal prosecution, and they contained objective facts related to the calibration of the equipment that did not inculcate the accused or prove an essential element of any charge pending against him.

*People v DeProspero* (20 NY3d 527)

Defendant's personal computer and other digital media devices were taken into custody "for the purpose of further analysis and examination" pursuant to a lawful warrant. A

preliminary search of the devices' hard memory disclosed images depicting illicit activity for which defendant was successfully prosecuted. Upon further examination, additional incriminating images were discovered. In the ensuing prosecution, defendant sought suppression of the newly discovered images, arguing that the authority of the search warrant expired with the termination of the prior prosecution. The Court held that the warrant extinguished any relevant expectation of privacy defendant had in the seized devices and that the justification for the contemplated forensic examination survived the prior prosecution.

*People v Griffin* (20 NY3d 626)

The Court held that relieving counsel, without consulting the defendant, deprived defendant of his Sixth Amendment right to counsel and that such a claim was not barred by defendant's guilty plea. After adjournments for various reasons, the defense attorney informed the trial court that he would not be ready for trial on a future date because he was going to be resigning from the Legal Aid Society. The trial court insisted a new attorney be assigned and ready for trial in two weeks' time. A supervisor from the Legal Aid Society, then present, requested to be heard and informed the trial court that a new attorney could not be ready for trial on the next court date. The trial court responded by relieving the Legal Aid Society and appointing 18-b counsel.

*People v Handy* (20 NY3d 663)

The defendant was charged with assaulting a deputy sheriff in jail. A video camera in the jail captured part of the incident, but the jail lost the video footage. The Court held that the failure to preserve this potentially exculpatory evidence after the defendant requested that very video required an "adverse inference charge." This charge would inform the jury that it could infer that the lost evidence would have helped the defendant's case.

*People v Echevarria; People v Moss; People v Johnson* (21 NY3d 1)

The common issue in these drug "buy and bust" cases was whether the trial courts properly decided to close the courtrooms to the general public during the testimony of undercover police officers. The Court concluded that defendants' constitutional rights were not violated, but it cautioned that trial courts considering requests for courtroom closure must be vigilant in protecting a defendant's fundamental right to a public trial. Reasonable alternatives must be considered and an adequate connection between an officer's safety and the circumstances of the case must be reviewed, including examination of the area where the officer operates and its proximity to the events underlying the instant prosecution, whether the officer has received threats, whether there are other pending cases involving the officer, and what efforts have been taken to conceal the officer's identity.

*People v Monk* (21 NY3d 27)

Defendant sought to withdraw his guilty plea on the ground that the sentencing court failed to advise him that he could be subject to an additional term of imprisonment if he violated the conditions of his postrelease supervision. The Court held that the sentencing judge was not required to inform defendant of this consequence because it was a collateral, rather than a direct consequence of the plea. A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the defendant's punishment and consists of the core components of the sentence. Here, by contrast, the consequence of violating postrelease supervision is uncertain at the time of the plea. Further, the State Board of Parole, not the courts, is responsible for establishing the conditions of a defendant's postrelease supervision; decides whether or not a defendant has violated a condition; and, in the event a violation is determined to have occurred, fixes the proper remedy.

*People v Guilford* (21 NY3d 205)

Before confessing to the murder of his paramour, Guilford was subjected to 49 1/2 hours of virtually continuous interrogation. The question posed on appeal was the attenuation of defendant's confession from the prior interrogation. The Court held, as a matter of law, that the prosecution had not made the necessary demonstration of voluntariness. Neither an eight-hour break between the questioning and the statement nor the recent intervention of counsel were deemed sufficient to show that the coercive effects of the prior interrogation had been neutralized.

*People v Oliveras* (21 NY3d 339)

Trial counsel declined to review certain records when considering whether to introduce evidence of defendant's mental weakness to rebut the voluntariness of his admissions. Trial counsel failed to fully investigate the case, and failed to collect the type of information a lawyer needs in order to determine the best course of action for his client. The Court held that a total failure to investigate the facts of a case and review pertinent records results in a constitutional deprivation of the right to a fair trial. At a bare minimum, attorneys must review relevant records and consider any pertinent information contained therein before pursuing a particular trial strategy.

*People v Barboni* (21 NY3d 393)

The Court again considered issues related to the two mens rea elements of depraved indifference murder, in particular the requirement of "utter disregard for the value of human life." Defendant was found guilty of second-degree murder for the killing of a 15-month-old child left in his care, who suffered multiple skull fractures. Defendant argued that the evidence was more consistent with his having assaulted the child in a fit of rage than with the mens rea of wanton indifference. The Court pointed out that defendant, by his post-assault inaction, which lasted some two hours, turned the assault into a brutal and prolonged course of conduct against a vulnerable victim. The Court concluded that there was sufficient evidence of the first mens rea element of depraved indifference murder. With respect to recklessness, the second mens rea element, the Court rejected defendant's contention that the evidence was consistent only with the conclusion that defendant inflicted the child's injuries intentionally, not recklessly. The Court reasoned that the extensive injuries suffered by the child were explicable in light of his tender age and did not require the conclusion that the perpetrator intended to cause serious physical injury or death.

*People v Brinson; People v Blankymsee* (21 NY3d 490)

In these cases, each defendant claimed that the imposition of mandatory postrelease supervision (PRS) to their respective sentences at resentencing violated the Double Jeopardy Clause of the Fifth Amendment. The defendants had been resentenced because the sentencing court failed to impose PRS as part of their original sentences. The Court held that where multiple sentences are properly aggregated into a single sentence, a legitimate expectation of finality with respect to those sentences arises upon completion of the aggregate sentence. The Court concluded that defendants may have a legitimate expectation of finality upon the completion of their respective aggregate sentences, and that resentencing to correct the errors does not run afoul of the double jeopardy clause.

*People v Rudolph* (21 NY3d 497)

A youthful offender adjudication allows minors under the age of 18 to avoid the stigma of a criminal conviction because such an adjudication "vacates" the conviction and prevents a criminal record. Under New York law, a judge must determine whether a defendant should receive a youthful offender adjudication. In this case, the defendant's plea bargain did not include a youthful offender adjudication and the judge never considered whether that adjudication was appropriate because the defendant never requested that determination from the sentencing court. This Court, however, held that a defendant cannot waive the right to have a judge determine youthful offender status, either through a failure to request that determination or through a plea-bargained agreement which does not include a youthful offender adjudication. This was so, the Court held, because the right to have a judge determine youthful offender status is simply "too valuable" to be waived.

*People v Morris* (21 NY3d 588)

During defendant's prosecution for resisting arrest and criminal possession of a weapon, the trial court permitted the People to introduce a recording of a 911 call reporting that a person matching defendant's description committed an uncharged gunpoint robbery, as well as testimony describing the radio run the arresting officers received about the call. Defendant argued that he was deprived of a fair trial by the admission of the 911 evidence, which defendant claimed was prejudicial and lacked probative value. The Court held that the trial court did not abuse its discretion by admitting the 911 evidence. The 911 evidence was probative of all the police conduct, not just the stop, and it therefore aided the jury in putting the officers' actions in proper context. The evidence was also probative of the officers' credibility, which was a central issue for the jury to resolve on the resisting arrest charge. Any potential for prejudice was offset by the trial court's four strong limiting instructions, which emphasized that the 911 evidence was not to be considered proof of the uncharged crime.

*People v Brown; People v Harris; People v Carter* (21 NY3d 739)

The Court concluded in three cases that the sentence imposed for "simple" knowing unlawful possession of a loaded weapon (i.e., without any intent to use) was properly run consecutively to the sentence for another crime (in two cases, murder; in one case, attempted murder) committed with the same weapon. The Court noted that possession of a loaded weapon is an element of the actus reus required to be proved for murder and attempted murder, and that the actus reus for "simple" weapon possession is possession alone. So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has been completed, and consecutive sentencing is permissible.

*People v Boyer; People v Sanders* (22 NY3d 15)

In these cases, the trial courts failed to pronounce the postrelease supervision (PRS) components of defendants' sentences at sentencing for their felony convictions, as required by *People v Sparber* (10 NY3d 457 [2008]). Defendants argued that they could not be sentenced as predicate felons on later convictions because the *Sparber* resentencing proceedings on their prior convictions had reset the dates of those convictions for purposes of the sequentiality requirement of the recidivist sentencing statutes, disqualifying the prior convictions from serving as predicate felony convictions. The Court held that a *Sparber* resentencing on a defendant's prior conviction does not alter the date of sentence for that conviction, which remains the original date on which the defendant received a lawful prison term for a valid conviction. A *Sparber* resentencing is not a plenary resentencing that repeals the entire original sentence and replaces it with a new one, but rather serves to correct a mere clerical or procedural error while leaving the remainder of the original sentence, and its date, intact.

*People ex rel. Ryan v Cheverko* (22 NY3d 132)

Penal Law section 70.30 (2) (b) provides in relevant part that if definite sentences of imprisonment "run consecutively and are to be served in a single institution, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term, or by service of two years imprisonment . . . whichever is less." The Court concluded that, when the statute's two-year aggregate term applies, jail time and good time credits must be deducted from that two-year term rather than the aggregate term imposed by the sentencing court. In so holding, the Court rejected respondent's proposed reading of the statute, noting that, by withholding credits whenever the two-year statutory term applied, respondents would unfairly disadvantage pre-trial detainees and discourage prisoners from earning good behavior credit.

*People v Abraham* (22 NY3d 140)

The People's theory of the case was that defendant burned down a building on his property and lied to his insurance company about the cause of the fire in order to collect wrongfully on the policy. The jury convicted defendant of insurance fraud but acquitted him of arson and reckless endangerment. Defendant argued on appeal that his acquittal of arson was factually inconsistent with his conviction for insurance fraud and that the acquittal rendered the evidence legally insufficient to support his conviction. This Court rejected defendant's arguments and reasoned that factual inconsistency and legal insufficiency are analytically distinct. It held that an acquittal is not a preclusive finding of any fact, in the same trial, that could have underlain the jury's determination.

*People v Peque; People v Diaz; People v Thomas* (22 NY3d 168)

In these criminal cases, defendants, who were foreign-born non-citizens, pleaded guilty to felonies which, under federal law, subjected them to deportation. Upon accepting defendants' pleas, the trial courts did not issue the warning required by CPL 220.50 (7), namely that, if they were not American citizens, they might be deported as a result of their pleas.

The Court concluded that defendant Peque's claim was unpreserved for appellate review. In the other cases, the Court held that, in light of the close connection between the modern immigration system and the criminal justice system, "deportation constitutes such a substantial and unique consequence of a plea that it must be mentioned by the trial court to a defendant as a matter of fundamental fairness." In reaching that conclusion, the Court overruled part of *People v Ford* (86 NY2d 397 [1995]) that had held to the contrary.

The Court also addressed the appropriate remedy, concluding that the trial court's failure to warn of deportation does not entitle the defendant to automatic withdrawal or vacatur of the plea, but, rather, to overturn the conviction, the defendant must establish the existence of a reasonable probability that, had the court warned the defendant of the possibility of deportation, the defendant would have rejected the plea and opted to go to trial.

*People v Heidgen; People v Taylor; People v McPherson* (22 NY3d 259)

Three defendants, who had each caused the death of at least one other person when driving while intoxicated by drugs or alcohol and in an extremely reckless manner, challenged their convictions for depraved indifference murder. The Court concluded that, although the ordinary drunk driving case likely would not present circumstances evincing a depraved indifference to human life, the evidence in these highly egregious cases was legally sufficient to support the convictions. The Court observed that the mental state of depraved indifference could be proven circumstantially and held that, in each case, a rational jury could have found that the evidence, viewed in the light most favorable to the People, supported the conclusion that the defendant, despite the influence of drugs or alcohol, was aware of and disregarded the grave risk of death presented by his or her conduct.

*People v Kevin W.* (22 NY3d 287)

In *People v Havelka* (45 NY2d 636 [1978]), the Court held that the People, if afforded a full and fair opportunity to present evidence of the dispositive issues at a suppression hearing, are not entitled to a remand after appeal for a reopened hearing. Observing that the principles underlying *Havelka* have equivalent force in the pretrial setting, the Court held that a trial judge may not reopen a suppression hearing to give the People an opportunity to shore up their evidentiary or legal position absent a showing that they were deprived of a full and fair opportunity to be heard the first time around.

*People v Oddone* (22 NY3d 369)

In this homicide case, the People's trial theory was that the defendant placed the victim in a headlock while in a bar. The jury convicted the defendant of manslaughter, finding that he caused the victim's death with intent to cause him serious physical injury. A key issue at the trial was the length of the headlock. The Court held that the trial court erred in refusing to allow counsel to refresh a witness's memory on the issue. The Court also analyzed the admissibility of expert testimony on the cause of the victim's death and reasoned that a proponent of scientific evidence need not prove that the testimony is generally accepted when the testimony is based on the expert's "personal 'experience' -- meaning what he had observed, heard and read about particular cases." Last, the Court considered the admissibility of expert testimony on an eyewitness' ability to remember the length of an incident. At trial, the defendant offered an expert who would have testified that eyewitnesses tend to overestimate the length of a traumatic incident. The Court did not rule on the admissibility of this testimony but noted that evidence bearing on the reliability of eyewitness observations should only be admitted when, in light of the People's evidence at trial, the evidence is of "critical importance" and will not distract the jury from the central issues at trial.

*People v Pignataro* (22 NY3d 381)

In *People v Catu* (4 NY3d 242 [2005]), the Court held that a defendant who pleaded guilty without notice of a mandatory period of postrelease supervision (PRS) had not entered a voluntary guilty plea, and the plea must be vacated. In 2008, the Legislature enacted Penal Law section 70.85, which allowed a court to resentence a defendant without the mandatory period of PRS, thereby avoiding the automatic vacatur of the defendant's plea. In *Pignataro*, the Court held that section 70.85 was a constitutionally permissible legislative remedy because it changed the sentencing laws so that defendant pleaded guilty with the requisite awareness of the direct consequences of his plea.

### **HOME RULE LAW**

*Greater N.Y. Taxi Assn. v State of New York; Taxicab Service Assn. v State of New York; Metropolitan Taxicab Board of Trade v Bloomberg* (21 NY3d 289)

These three appeals involved constitutional challenges to chapter 602 of the Laws of 2011, as amended by chapter 9 of the laws of 2012 (“HAIL Act”), which regulated medallion taxicabs and livery vehicles in the City of New York. The legislation was challenged by medallion owners and their representatives, an association of credit lenders and credit unions that financed medallion purchases, and a member of the New York City Council. This Court concluded that the HAIL Act did not violate the Municipal Home Rule Clause (NY Const, art IX, § 2 [b] [2]), the Double Enactment Clause (NY Const, art IX, § 2 [b] [1]), or the Exclusive Privileges Clause (NY Const, art III, § 17).

*Empire State Ch. of Associated Bldrs. & Contrs., Inc. v Smith* (21 NY3d 309)

The Wicks Law, originally enacted in 1912, requires public entities seeking bids on construction contracts to obtain separate bids for different parts of the project when the total cost of the contract exceeds \$50,000. This rule prevents local legislatures from hiring “general contractors” who provide all relevant construction services. In 2008, the Legislature amended the Wicks Law to raise the \$50,000 threshold to \$3 million in the five counties located in New York City; \$1.5 million in Nassau, Suffolk and Westchester Counties; and \$500,000 in the other 54 counties.

The question in this case was whether the Legislature violated the State Constitution's Home Rule Clause in imposing different county-by-county thresholds without a "rational basis" for the different treatment. The Court found it irrelevant whether the Legislature's different Wicks thresholds were "reasonable" because as long as the legislation advances a matter of substantial state concern, the Home Rule Clause does not bar the Legislature from creating distinctions between localities.

## INSURANCE LAW

*United States Fid. & Guar. Co. v American Re-Insurance Co.* (20 NY3d 407)

United States Fidelity & Guaranty Company ("USF&G") purchased reinsurance from several other insurers. The reinsurance contract only covered claims exceeding specified values. After USF&G paid a multi-million dollar settlement in a California asbestos case that involved a lump-sum value for hundreds of different claims, it sought payment from its reinsurers.

The reinsurers argued that USF&G's allocation of the California settlement payments was not in "good faith" but was designed to maximize reinsurance recovery. The Court agreed in part with the reinsurers' argument, finding that the reinsurance claim must be "reasonable" -- i.e., must reasonably reflect the settlement that the parties would have reached "if the reinsurance did not exist." The Court then found that certain questions of good faith had to be resolved by a jury.

*Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.* (21 NY3d 139)

In the wake of its settlement with a minor plaintiff who suffered abuse at the hands of a priest, the Diocese commenced suit against one of its several insurance carriers seeking reimbursement for the settlement. The Diocese argued that the abuse constituted a single occurrence under the policy. National Union argued that the abuse constituted multiple occurrences subject to a requirement in the policy that the Diocese contribute \$250,000 for each occurrence, and that the settlement be paid on a pro rata basis across all of the Diocese's insurance policies. Interpreting the language of the policy, the Court held that any potential liability should be apportioned among the several insurance policies, pro rata.

*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.* (21 NY3d 324)

Without admitting or denying its culpability, Bear Stearns entered into a settlement agreement regarding violations of federal securities laws. Subsequently, Bear Stearns commenced this breach of contract action against its primary professional liability carrier and its six excess carriers seeking indemnification for, among other claims, a \$160 million disgorgement payment. The insurers pursued CPLR 3211 motions to dismiss and, on appeal, the primary issue before the Court was whether it would violate public policy for Bear Stearns to be indemnified for the disgorgement payment on the rationale that the risk of being ordered to return ill-gotten gains should not be insurable. Although recognizing that some jurisdictions have adopted such a rule, the Court concluded that the insurers had not conclusively established that the disgorgement proceeds represented ill-gotten gains. As such, the insurers could not rely on the SEC order alone to demonstrate the applicability of the public policy exemption and since, given the procedural posture of the case, Bear Stearns' allegations must be assumed to be true, the insurers were not entitled to dismissal of the claims related to the disgorgement payment at that juncture.

*Georgitsi Realty, LLC v Penn-Star Ins. Co.* (21 NY3d 606)

A neighboring property owner's excavation of an underground parking garage damaged plaintiff's building. The neighbor continued the excavation in the face of several stop-work orders and a temporary restraining order placing it on notice that it was harming plaintiff's building. Plaintiff brought a coverage action against its property insurer, claiming the neighbor's activities were "wilful and malicious damage to, or destruction of" the building and fell within the policy's coverage for "vandalism." In answering the first of two certified questions from a federal appellate court, the Court held that vandalism may include acts not directed at the covered property. As to the second question, it concluded that a wrongdoer may be found to have committed vandalism if it acts with "such a conscious and deliberate disregard of the interests of others that [its conduct] may be called wilful or wanton."

## **JUDICIARY LAW**

*People v Hampton* (21 NY3d 277)

Defendant was convicted of intentional murder and weapon possession. After the verdict was handed down, the trial judge recused himself. At the time, there was a motion pending for a trial order of dismissal or, alternatively, for an order setting aside the jury verdict on the ground of insufficient evidence. Citing Judiciary Law § 21, defendant took the position that only the judge who originally heard and witnessed the testimony was authorized to decide the motion, and requested a mistrial. Section 21 provides that, with the exception of appellate judges, a judge "shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge." The Court held that section 21 does not bar a substitute judge from deciding a question of law presented in a motion argued orally before another judge so long as a transcript or recording of the prior argument is available for review, the substitute judge indicates on the record familiarity with the prior proceedings, and no prejudice is shown.

## **LABOR and EMPLOYMENT**

*Barenboim v Starbucks Corp.* (21 NY3d 460)

In this certified question from the United States Court of Appeals for the Second Circuit, the Court was asked whether the tip-sharing policy established by Starbucks was legal under Labor Law § 196-d. Deferring in part to the interpretation of the New York Department of Labor -- the agency charged with enforcing the statute -- the Court determined that tip pools should be limited to those employees who customarily serve customers at Starbucks establishments, even if those employees sometimes perform supervisory duties. But employees who possess considerable authority and control over subordinates, such as the power to make hiring and firing

determinations, are not eligible to participate in the tip pools. Having clarified the reach of the statute, it was left to the federal courts to decide how to apply these principles in the two Starbucks cases.

*De La Cruz v Caddell Dry Dock & Repair Co., Inc.* (21 NY3d 530)

A municipal vessel such as a ferry boat or garbage barge is a "public work" within the meaning of Labor Law § 220 and article I, § 17 of the State Constitution, so that workers involved in its construction, maintenance or repair must be paid prevailing wages. The Court concluded that a public work need not be a structure attached to land. The Court held that a project is subject to the prevailing wage requirements if, as here, three conditions are met: a public agency is a party to a contract involving the employment of laborers, workmen, or mechanics; the contract concerns a project that primarily involves construction-like labor and is paid for by public funds; and the primary objective of the work product is the benefit of the general public.

*Soto v J. Crew Inc.* (21 NY3d 562)

The plaintiff in this Labor Law § 240 (1) action was an employee of a cleaning service contractor who was injured when he fell from a four-foot-tall, A-frame ladder while dusting a six-foot-high display shelf in a J. Crew retail store. J. Crew moved for summary judgment, seeking dismissal of the complaint on the basis that plaintiff was not engaged in a "cleaning" activity within the meaning of the statute. Outside the context of commercial window washing, the Court determined that an activity cannot be characterized as "cleaning" under Labor Law § 240(1) if it is routine (in the sense that it occurs frequently); it requires neither specialized equipment or expertise, nor the unusual deployment of labor; it involves insignificant elevation-related risks comparable to those inherent in typical domestic cleaning; and is unrelated to any ongoing construction, renovation, painting, alteration or repair project. The Court concluded that the dusting of a six-foot-high display shelf could not be characterized as "cleaning" but was routine maintenance, falling outside the ambit of the statute. Hence, J. Crew was entitled to summary judgment dismissing the Labor Law § 240 (1) claim.

*Dahar v Holland Ladder & Mfg. Co.* (18 NY3d 521)

Plaintiff was injured when he fell off a ladder while cleaning a steel "wall module" in a metal factory. The module was eventually going to be fastened into a wall and used to support pipes. Plaintiff sued the owners of the factory where the accident occurred as well as the purchaser of the wall module, claiming that, in "cleaning" the wall module, which was a "structure," he was engaged in protected activity under Labor Law § 240 (1). The Court disagreed. Although plaintiff was "cleaning," and although the wall module was technically a "structure" under this Court's broad definition of the term, the Court held that his injury was not of the kind Labor Law § 240 (1) was designed to protect. While acknowledging that the statute

has been extended beyond the construction context, the Court found no evidence that it was intended to compensate workers who are hurt while cleaning an object during the manufacturing process.

*Sullivan v Harnisch* (19 NY3d 259)

The general rule in New York is that there is no common law cause of action for the wrongful discharge of an at-will employee. In *Weider v Skala* (80 NY2d 628 [1992]), the Court carved out a narrow exception to this rule, holding that a lawyer who claimed to have been fired for insisting that his firm report professional misconduct in accordance with the governing disciplinary rules had a damages claim against the firm. In this case, a hedge fund executive, whose many hats included Executive Vice President, Treasurer, Secretary, and Chief Compliance Officer of his employer, relied on *Weider* in claiming that he was wrongfully discharged after he accused the Company's Chief Executive Officer and President of misconduct. The Court concluded the present case was distinguishable and held that the claim should be dismissed, pointing out that, unlike lawyers, the plaintiff was not "associated with other compliance officers in a firm where all were subject to self-regulation as members of a common profession." In addition, because plaintiff had various other titles in addition to compliance officer, it could not be said that regulatory compliance "was at the very core and, indeed, the only purpose" of his employment.

## **MENTAL HYGIENE LAW**

*Matter of State of New York v Floyd Y.* (22 NY3d 95)

Mental Hygiene Law article 10 authorizes the State to detain a sex offender for treatment following proof at trial that the sex offender suffers from a mental abnormality, as defined in that statute. In this article 10 case, the State introduced evidence of respondent's uncharged sex crimes through the unreliable hearsay testimony of psychiatric experts. The Court concluded that the Due Process Clause of the United States Constitution prevents the admission of unreliable hearsay at article 10 trials, where the evidence is more prejudicial than probative, even when it serves as the basis for an expert's opinion.

*Matter of State of New York v Nelson D.* (22 NY3d 233)

Nelson D. was deemed to suffer from a "mental abnormality" as defined by article 10 of the Mental Hygiene Law. After a dispositional hearing, Supreme Court concluded that he was in need of "strict and intensive supervision and treatment," or "SIST." Supreme Court ordered that Nelson D. be placed in a confinement facility as part of the SIST placement. The Court held

that article 10 of the Mental Hygiene Law provides for only two mutually exclusive placements: confinement or SIST, which is outpatient treatment. Nelson D.'s SIST placement subjected him to a form of confinement that was in direct contravention of the statute. In addition, the Court held that Nelson D.'s improper placement in a confinement facility denied him the full range of procedural protections that are expressly designed to avoid the unlawful continuation of civil confinement.

## **PARENT and CHILD**

*Matter of Granger v Misercola* (21 NY3d 86)

The appeal concerned the legal standard to be used in a Family Court Act proceeding when a prisoner seeks visitation with his or her child against the wishes of the custodial parent. The Court clarified that the appropriate starting point in such a proceeding is a rebuttable presumption that the noncustodial parent will be granted visitation. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated. However, the presumption in favor of visitation may be rebutted through demonstration, by a preponderance of the evidence, that visitation would be harmful to the child's welfare or that the right to visitation has been forfeited. The Court determined that the lower courts properly applied the presumption when they granted visitation to the prisoner.

## **PARTNERSHIP LAW**

*Gelman v Buehler* (20 NY3d 534)

Under Partnership Law § 62 (1) (b), a partnership can be dissolved at will by either party unless it was created for a "definite term" or to accomplish a "particular undertaking." This action involved an oral partnership agreement between two business school graduates who contemplated raising sufficient funds from third-party investors to enable them to research business opportunities for investment growth potential. After several months of attempting to solicit funds, one partner withdrew from the enterprise and the other commenced this action claiming that the withdrawing partner's attempt to unilaterally dissolve the partnership violated Partnership Law § 62(1)(b). When entering into the oral partnership, the parties had not agreed to maintain the enterprise for a fixed period of time and the members' planned objectives were too amorphous and uncertain to satisfy the particularity requirement. Since no exception to the general at-will dissolution rule was established in this case, the complaint against the withdrawing partner was properly dismissed.

## TAXATION

*Expedia, Inc. v City of N.Y. Dept. of Fin.* (22 NY3d 121)

Through a local law, New York City sought to tax the fees charged by online travel companies for hotel occupancy. A group of travel companies sued, seeking a declaration that the tax was unconstitutional, and the Appellate Division ruled in their favor. The Court reversed, finding that New York's tax, which was limited to fees charged as a condition of occupancy, had been authorized by broadly worded enabling legislation.

## TORTS

*Oakes v Patel* (20 NY3d 633)

Plaintiff suffered a massive stroke, which he alleged defendants failed to diagnose and treat. He obtained a \$5.1 million medical malpractice verdict against Kaleida, the company that owned the hospital involved in his care, another hospital for which Kaleida was vicariously liable, and two of his doctors. Defendants refused to agree to the trial court's proposed increase in the award (known as an additur) to \$17.4 million, choosing a new trial on damages instead. The jury in the second damages trial awarded plaintiff \$17.7 million. After the verdict, defendants raised several objections to various motions decided in plaintiff's favor between the trials.

First, defendants argued that the additur was excessive. The Court held that defendants were not required to specify the amount of a reasonable additur in order to preserve their challenge to the additur's excessiveness. However, having declined to challenge the amount of the additur or remittitur by taking an appeal before the second trial, defendants forfeited their right to challenge it after that trial was over. Secondly, the Court found the trial court's denial of Kaleida's motion to amend its answer to raise a new defense was reviewable because it necessarily affected the final judgment. However, it concluded that the trial court did not abuse its discretion in denying the belated motion. It also held that there was sufficient evidence for the jury to find the non-party hospital liable.

Before the second trial, the trial court granted plaintiff's motion in limine to preclude defendants from offering evidence that some of plaintiff's injuries might have occurred even in the absence of the malpractice. The Court reversed and ordered a new trial, reasoning that the evidence was relevant to the award of pain and suffering damages. However, defendants failed to present any argument as to how the error affected the jury's award for loss of services or custodial care, and the Court did not disturb those awards.

*Hastings v Sauve* (21 NY3d 122)

A cow collided with the plaintiff's car on a public roadway. In a negligence lawsuit filed by the plaintiff against the cow's owners and the owner of the land from which the cow escaped, the Court held that the plaintiff had a valid negligence theory. While a person is generally not liable for negligent supervision of an animal unless the animal has "vicious propensities," the Court declined to extend that rule to cases involving cows that enter public roadways. Rejecting a lawsuit in such a case would, the Court said, "immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property."

*Landon v Kroll Lab. Specialists, Inc.* (22 NY3d 1)

Landon commenced this action against a drug testing laboratory for the alleged negligent testing of his biological sample. The laboratory detected the presence of cannabinoids in a test of his oral fluid sample. The Court held that Landon's complaint, alleging that the laboratory failed to perform the test in accordance with applicable standards, stated a cause of action sufficient to withstand a CPLR 3211 (a) (7) motion to dismiss. The laboratory had a duty to exercise reasonable care when testing plaintiff's sample and to perform the test in keeping with professionally accepted standards. The Court noted that, despite the absence of a contract between plaintiff and defendant, the alleged harm to plaintiff was direct. In addition, the Court observed that the potential consequences of a false positive test were significant and the laboratory would be in the best position to prevent false positive results. Finally, the Court found plaintiff's allegations of a loss of freedom by having conditions of probation extended, and the resulting emotional harm, sufficient to state a cognizable injury.



## **IV. Appendices**



## **APPENDICES**

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**APPENDIX 1**

**JUDGES OF THE COURT OF APPEALS**

**Hon. Jonathan Lippman**  
**Chief Judge of the Court of Appeals**

**Hon. Victoria A. Graffeo**  
**Senior Associate Judge of the Court of Appeals**

**Hon. Susan Phillips Read**  
**Associate Judge of the Court of Appeals**

**Hon. Robert S. Smith**  
**Associate Judge of the Court of Appeals**

**Hon. Eugene F. Pigott, Jr.**  
**Associate Judge of the Court of Appeals**

**Hon. Jenny Rivera**  
**Associate Judge of the Court of Appeals**

**Hon. Sheila Abdus-Salaam**  
**Associate Judge of the Court of Appeals**

**APPENDIX 2**

**CLERK'S OFFICE TELEPHONE NUMBERS**

**Court of Appeals Switchboard: (518) 455-7700**

**Questions Concerning Motions:  
Heather Davis, Esq. (518) 455-7705**

**Questions Concerning Criminal Leave Applications:  
Cynthia D. Byrne (518) 455-7784**

**Questions Concerning Civil and Criminal Appeals:  
Susan S. Dautel, Esq. (518) 455-7701  
James A. Costello, Esq. (518) 455-7702**

**Questions Concerning Attorney Admission and Discipline:  
Margaret Nyland Wood, Esq. (518) 455-7760**

**General Information and Courthouse Tours:  
Gary Spencer  
(518) 455-7711**

**Court of Appeals internet website  
<http://www.courts.state.ny.us/ctapps/>**

**SUMMARY OF TOTAL APPEALS DECIDED IN 2013 BY JURISDICTIONAL PREDICATE**  
**January 1, 2013 through December 31, 2013**

<b>BASIS OF JURISDICTION: ALL APPEALS</b>	<b>TYPE OF DISPOSITION</b>					<b>Total</b>
	<b>Affirmance</b>	<b>Reversal</b>	<b>Modification</b>	<b>Dismissal</b>	<b>Other<sup>1</sup></b>	
Dissents in Appellate Division	17	9	4	1	0	31
Permission of Court of Appeals or Judge thereof	94	43	7	1	0	145
Permission of Appellate Division or Justice thereof	26	12	4	1	0	43
Constitutional Question	7	6	0	0	0	13
Stipulation for Judgment Absolute	1	0	0	0	0	1
Other	2	1	0	0	23	26
<b>Totals</b>	<b>147</b>	<b>71</b>	<b>15</b>	<b>3</b>	<b>23</b>	<b>259</b>

<b>BASIS OF JURISDICTION: CIVIL APPEALS</b>	<b>TYPE OF DISPOSITION</b>					<b>Total</b>
	<b>Affirmance</b>	<b>Reversal</b>	<b>Modification</b>	<b>Dismissal</b>	<b>Other<sup>1</sup></b>	
Dissents in Appellate Division	17	9	4	1	0	31
Permission of Court of Appeals	32	16	3	1	0	52
Permission of Appellate Division	15	8	2	0	0	25
Constitutional Question	7	6	0	0	0	13
Stipulation for Judgment Absolute	1	0	0	0	0	1
Other	2	1	0	0	23	26
<b>Totals</b>	<b>74</b>	<b>40</b>	<b>9</b>	<b>2</b>	<b>23</b>	<b>148</b>

<b>BASIS OF JURISDICTION: CRIMINAL APPEALS</b>	<b>TYPE OF DISPOSITION</b>					<b>Total</b>
	<b>Affirmance</b>	<b>Reversal</b>	<b>Modification</b>	<b>Dismissal</b>	<b>Other<sup>1</sup></b>	
Permission of Court of Appeals Judge	62	27	4	0	0	93
Permission of Appellate Division Justice	11	4	2	1	0	18
<b>Totals</b>	<b>73</b>	<b>31</b>	<b>6</b>	<b>1</b>	<b>0</b>	<b>111</b>

<sup>1</sup> Includes anomalies which did not result in an affirmance, reversal, modification or dismissal (e.g., judicial suspensions, acceptance of a case for review pursuant to Rule 500.27).

APPENDIX 4

COMPARATIVE STATISTICAL ANALYSIS FOR APPEALS DECIDED IN 2013

ALL APPEALS - PERCENT CIVIL AND CRIMINAL

	2009	2010	2011	2012	2013
Civil	69% (146 of 212)	58% (137 of 236)	54% (130 of 242)	62% (149 of 240)	57% (148 of 259)
Criminal	31% (66 of 212)	42% (99 of 236)	46% (112 of 242)	38% (91 of 240)	43% (111 of 259)

CIVIL APPEALS - TYPE OF DISPOSITION

	2009	2010	2011	2012	2013
Affirmed	41%	38%	51%	54%	49%
Reversed	35%	35%	30%	30%	27%
Modified	9%	11%	12%	10%	6%
Dismissed	1%	3%	1%	0%	2%
Other (e.g., judicial suspension; Rule 500.27 certified question)	14%	13%	6%	6%	16%

CRIMINAL APPEALS - TYPE OF DISPOSITION

	2009	2010	2011	2012	2013
Affirmed	71%	62%	59%	58%	66%
Reversed	21%	32%	30%	29%	28%
Modified	8%	4%	8%	12%	5%
Dismissed	--	2%	3%	1%	1%

**CIVIL APPEALS DECIDED - JURISDICTIONAL PREDICATES**

	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
<b>Appellate Division Dissents</b>	20% (29 of 146)	21.2% (29 of 137)	14.6% (19 of 130)	14% (21 of 149)	21% (31 of 148)
<b>Court of Appeals Leave Grants</b>	36.3% (52 of 146)	41.6% (57 of 137)	40% (52 of 130)	51% (76 of 149)	35% (52 of 148)
<b>Appellate Division Leave Grants</b>	21.9% (32 of 146)	21.9% (30 of 137)	38.4% (50 of 130)	24% (36 of 149)	17% (25 of 148)
<b>Constitutional Question</b>	6.1% (9 of 146)	2.9% (4 of 137)	.8% (1 of 130)	4% (6 of 149)	9% (13 of 148)
<b>Stipulation for Judgment Absolute</b>	--	--	--	--	1% (1 of 148)
<b>CPLR 5601(d)</b>	1.4% (2 of 146)	--	.8% (1 of 130)	1% (1 of 149)	2% (3 of 148)
<b>Supreme Court Remand</b>	2% (3 of 146)	--	--	--	--
<b>Judiciary Law § 44</b> <sup>1</sup>	3.4% (5 of 146)	.7% (1 of 137)	.8% (1 of 130)	3% (4 of 149)	4% (6 of 148)
<b>Certified Question (Rule 500.27)</b> <sup>2</sup>	8.9% (13 of 146)	11.7% (16 of 137)	3.8% (5 of 130)	3% (5 of 149)	11% (17 of 148)
<b>Other</b>	--	--	.8% (1 of 130)	--	--

<sup>1</sup> Includes judicial suspension matters.

<sup>2</sup> Includes decisions accepting/declining certification.

APPENDIX 6

CRIMINAL APPEALS DECIDED - JURISDICTIONAL PREDICATES

	2009	2010	2011	2012	2013
<b>Permission of Court of Appeals Judge</b>	70% (46 of 66)	77% (76 of 99)	78% (87 of 112)	84% (76 of 91)	84% (93 of 111)
<b>Permission of Appellate Division Justice</b>	30% (20 of 66)	23% (23 of 99)	22% (25 of 112)	16% (15 of 91)	16% (18 of 111)

**MOTION STATISTICS (2009 - 2013)**

Motions Undecided as of January 1, 2013 - 182  
 Motions Submitted in 2013 - 1292  
 Motions Undecided as of December 31, 2013 - 164  
 Motion Dispositions During 2013 - 1310

	2009	2010	2011	2012	2013
Motions Submitted for Calendar Year	1397	1380	1375	1296	1292
Motions Decided for Calendar Year	1370 <sup>1</sup>	1384 <sup>1</sup>	1355 <sup>1</sup>	1330 <sup>1</sup>	1310 <sup>1</sup>
Motions for leave to appeal	1074	1045	1112	999	996
granted	77	63	82	64	65
denied	794	758	822	733	739
dismissed	199	224	203	202	190
withdrawn	4	5	5	9	2
Motions to dismiss appeals	7	5	6	9	12
granted	4	3	2	3	2
denied	2	1	4	6	7
dismissed	1	1	0	0	3
withdrawn	0	0	0	0	0
Sua Sponte and Court's own motion dismissals	90	96	76	85	92
<b>TOTAL DISMISSAL OF APPEALS</b>	94	99	78	84	94
Motions for reargument of appeal	28	27	20	28	22
granted	0	0	0	1	3
Motions for reargument of motion	38	46	39	67	54
granted	0	2	3	0	1
Motions for assignment of counsel	55	83	51	86	45
granted	55	83	51	85	45
Legal Aid	12	24	8	13	10
denied	0	0	0	1	0
dismissed	0	0	0	0	0

<sup>1</sup> Because more than one relief request may be decided under a single motion, the total of decisions by relief requests is greater than the total number of motions decided.

**APPENDIX 7 (continued)**

	2009	2010	2011	2012	2013
Motions to waive rule compliance granted	2 0	0 0	0 0	5 5	0 0
Motions for poor person status granted	191 8	160 6	155 7	126 8	159 6
Motions for poor person status denied	0	0	0	0	0
Motions for poor person status dismissed	183	154	148	118	153
Motions to vacate dismissal/preclusion granted	14 12	11 11	17 16	11 8	5 5
Motions for calendar preference granted	1 1	1 1	0 0	0 0	0 0
Motions for amicus curiae status granted	116 112	98 95	76 76	82 77	124 119
Motions for Executive Law § 71 Order (AG)	0	0	0	0	0
Motions for leave to intervene granted	0 0	2 2	0 0	0 0	2 0
Motions to stay/vacate stay granted	20 4	18 1	26 4	26 3	34 3
Motions to stay/vacate stay denied	1	2	0	3	0
Motions to stay/vacate stay dismissed	15	15	22	20	31
Motions to stay/vacate stay withdrawn	0	0	0	0	0
Motions for CPL 460.30 extension granted	25 22	20 17	16 12	18 16	22 21
Motions to strike appendix or brief granted	3 1	8 1	14 8	5 2	7 3
Motions to amend remittitur granted	0 0	0 0	0 0	1 0	1 0
Motions for miscellaneous relief granted	12 0	16 1	13 0	11 1	9 3
Motions for miscellaneous relief denied	7	9	10	8	3
Motions for miscellaneous relief dismissed	5	6	3	2	3
Motions for miscellaneous relief withdrawn	0	0	0	0	0
Withdrawals/substitution of counsel granted	0	2	1	2	1
Withdrawals/substitution of counsel denied	0	2	0	0	1
	0	0	1	2	0

**CRIMINAL LEAVE APPLICATIONS ENTERTAINED  
BY COURT OF APPEALS JUDGES**

	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
<b>TOTAL APPLICATIONS ASSIGNED:</b>	2347	2207	2190	2014	2044
<b>TOTAL APPLICATIONS DECIDED:<sup>1</sup></b>	2380	2220	2089	2096	1923
<b>TOTAL APPLICATIONS GRANTED:</b>	81	108	91	99	74
<b>TOTAL APPLICATIONS DENIED:</b>	2093	1928	1845	1842	1692
<b>TOTAL APPLICATIONS DISMISSED:</b>	203	174	142	147	145
<b>TOTAL APPLICATIONS WITHDRAWN:</b>	3	10	11	6	12
<b>TOTAL PEOPLE'S APPLICATIONS:</b>	48	59	70	50	63
<b>(a) GRANTED:</b>	14	16	18	10	14
<b>(b) DENIED:</b>	32	37	42	33	39
<b>(c) DISMISSED:</b>	0	4	2	5	3
<b>(d) WITHDRAWN:</b>	2	2	8	2	7
<b>AVERAGE NUMBER OF APPLICATIONS ASSIGNED TO EACH JUDGE:</b>	335	315	313	287 <sup>2</sup>	324 <sup>3</sup>
<b>AVERAGE NUMBER OF GRANTS FOR EACH JUDGE:</b>	12	15	13	14 <sup>2</sup>	11

<sup>1</sup> Includes some applications assigned in previous year.

<sup>2</sup> Because of the death of one Judge in November 2012 and the retirement of another Judge at the end of 2012, which affected the Court's normal assignment procedures, the computed averages this year are approximated.

<sup>3</sup> This average was calculated by dividing the total number of applications assigned during 7 weeks of the year by 5, during 15 weeks of the year by 6 and during 30 weeks of the year by 7 because only 5 Judges were being assigned applications for 7 weeks, 6 Judges for 15 weeks and 7 Judges for 30 weeks.

APPENDIX 9

2013

THRESHOLD REVIEW OF SUBJECT MATTER  
JURISDICTION BY THE COURT OF APPEALS

	2009	2010	2011	2012	2013
<b>SSD (sua sponte dismissal) - Rule 500.10</b>					
Total number of inquiry letters sent	84	86	63	71	100
Appeals withdrawn on stipulation	2	2	3	1	2
Dismissed by Court sua sponte	54	61	48	43	69
Transferred to Appellate Division sua sponte	6	3	0	4	2
Appeals allowed to proceed in normal course (a final judicial determination of subject matter jurisdiction to be made by the Court after argument or submission)	7	3	6	14	6
Jurisdiction retained - appeals decided	1	2	0	4	1 <sup>1</sup>
Inquiries pending at year's end	14	15	6	5	20

<sup>1</sup> Withdrawn by stipulation

**COMPARATIVE ANALYSIS OF OFFICE FOR PROFESSIONAL MATTERS STATISTICS**

**2009 - 2013**

	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
<b>Attorneys Admitted (OCA)</b> <sup>1</sup>	10,203	10,132	9,855	9,657	10,251
<b>Registered In-House Counsel</b>	-	-	362 <sup>2</sup>	118	91
<b>Certificates of Admission</b>	74	69	57	78	91
<b>Clerkship Certificates</b>	8	5	5	9	4
<b>Petitions for Waiver</b> <sup>3</sup>	208	198	236	357	313
<b>Written Inquiries</b>	94	70	76	98	82
<b>Disciplinary Orders</b>	3,483 <sup>4</sup>	2,295 <sup>4</sup>	605	527	3,012 <sup>4</sup>
<b>Name Change Orders</b>	968	952	1,072	1,074	923

<sup>1</sup> The Office of Court Administration maintains the Official Register for Attorneys and Counselors at Law (see Judiciary Law § 468).

<sup>2</sup> In 2011, the Court amended the Rules for the Admission of Attorneys and Counselors at Law by adding a new Part 522 relating to the registration of in-house counsel.

<sup>3</sup> Includes correspondence to law schools reviewing their J.D. and LL.M. programs under Rules 520.3 and 520.6.

<sup>4</sup> Includes orders involving multiple attorneys' violation of the registration requirements (see Judiciary Law § 468-a).

## APPENDIX 11

### NONJUDICIAL STAFF

**Asiello, John P. - Deputy Clerk of the Court**  
**Austin, Louis C. - Senior Court Building Guard**  
**Bleshman, Joseph M. - Counsel to the Chief Judge**  
**Bohannon, Lisa - Senior Court Analyst**  
**Bova, Matthew J. - Senior Law Clerk to Judge Smith**  
**Bowman, Jennifer L. - Senior Court Building Guard**  
**Brizzie, Gary J. - Principal Custodial Aide**  
**Byrne, Cynthia D. - Criminal Leave Applications Clerk**  
**Cerutti, Chelsea A. - Senior Court Attorney**  
**Cleary, Lisa M. - Principal Stenographer**  
**Cooper, Jenna B. - Senior Law Clerk to Judge Smith (resigned August 2013)**  
**Costello, James A. - Assistant Deputy Clerk**  
**Couser, Lisa A. - Clerical Assistant**  
**Cross, Robert J. - Senior Court Building Guard**  
**Culligan, David O. - Clerical Assistant**  
**Cunningham, Steven M. - Senior Court Attorney**  
**Dautel, Susan S. - Assistant Deputy Clerk**  
**Davis, Heather A. - Chief Motion Clerk**

**Appendix 11 (Continued)**

**Donnelly, William E. - Assistant Building Superintendent I**  
**Dragonette, John M. - Senior Court Building Guard**  
**Drury, Lisa A. - Senior Principal Law Clerk to Judge Read**  
**Duncan, Priscilla - Secretary to Judge Read**  
**Dunn, Matthew R. - Senior Principal Law Clerk to Judge Graffeo**  
**Eddy, Margery Corbin - Senior Deputy Chief Court Attorney**  
**Emigh, Brian J. - Building Manager**  
**Endsley, Anya Ferris - Senior Court Attorney**  
**Engel, Hope B. - Consultation Clerk**  
**Ettlinger, Nicole J. - Senior Court Attorney**  
**Fernandez, Raymond - Law Clerk to Judge Rivera**  
**Fix-Mossman, Lori E. - Principal Stenographer**  
**Fludd, Christopher - Senior Court Building Guard**  
**Fornadel, Joseph - Court Attorney**  
**Freeman, Clark - Law Clerk to Chief Judge Lippman**  
**Garcia, Heather A. - Senior Security Attendant**  
**Gerber, Matthew - Security Attendant**  
**Gilbert, Marianne - Principal Stenographer**  
**Grogan, Bruce D. - Senior Principal Law Clerk to Judge Pigott**  
**Haas, Tammy L. - Principal Assistant Building Superintendent**

**Appendix 11 (Continued)**

**Hartnagle, Mary C. - Senior Custodial Aide**  
**Heaney, Denise C. - Senior Security Attendant**  
**Herrington, June A. - Principal Stenographer**  
**Holman, Cynthia M. - Stenographer**  
**Hopkins, Gabriel - Law Clerk to Judge Read**  
**Hosang-Brown, Yanique - Principal Court Analyst**  
**Ignazio, Andrea R. - Principal Stenographer**  
**Irby, Sandra H. - Senior Principal Law Clerk to Judge Rivera (resigned August 2013)**  
**Irwin, Nancy J. - Principal Stenographer**  
**Isaacs, Elizabeth Langston - Law Clerk to Chief Judge Lippman**  
**Jeng, Mindy - Senior Law Clerk to Chief Judge Lippman (resigned August 2013)**  
**Kaiser, Warren - PC Analyst**  
**Kandel, Erin P. - Senior Law Clerk to Judge Abdus-Salaam**  
**Kane, Suzanne M. - Principal Stenographer**  
**Kearns, Ronald J. - HVAC Assistant Building Superintendent**  
**Kenny, Krysten - Court Attorney**  
**Kim, Jay - Principal Law Clerk to Judge Rivera (resigned August 2013)**  
**Klein, Andrew W. - Clerk of the Court**  
**Kong, Yongjun - Principal Custodial Aide**  
**Lacovara, Christopher - Law Clerk to Judge Smith**

**Appendix 11 (Continued)**

**LaPorte, Azahar - Secretary to Judge Rivera**

**Lawrence, Bryan D. - Principal Local Area Network Administrator**

**LeCours, Lisa A. - Senior Principal Law Clerk to Judge Graffeo**

**Lee-Clark, Meredith G. - Senior Court Attorney (resigned December 2013)**

**Lusignan, Brian M. - Senior Court Attorney (resigned June 2013)**

**Lyon, Gordon W. - Senior Principal Law Clerk to Judge Pigott**

**MacVean, Rachael M. - Principal Court Attorney**

**Mann, Greg E. - Senior Court Attorney (resigned May 2013)**

**Martin, John - Law Clerk to Judge Abdus-Salaam**

**Mason, Marissa K. - Clerical Assistant**

**Mayo, Michael J. - Deputy Building Superintendent**

**McCormick, Cynthia A. - Director of Management and Operations**

**McGrath, Paul J. - Chief Court Attorney**

**Mendez, Noel - Senior Law Clerk to Judge Rivera**

**Minutello, Kathleen - Senior Custodial Aide**

**Moore, Travis R. - Senior Security Attendant**

**Muller, Joseph J. - Senior Security Attendant**

**Mulyca, Jonathan A. - Clerical Assistant**

**Murray, Elizabeth F. - Chief Legal Reference Attorney**

**Nina, Eddie A. - Senior Security Attendant**

**Appendix 11 (Continued)**

**O'Friel, Jennifer A. - Executive Assistant to Chief Judge Lippman**  
**Pasquarelli, Angela M. - Senior Services Aide**  
**Pavlenko, Ivan - Court Attorney**  
**Pepper, Francis W. - Principal Custodial Aide**  
**Reed, Richard A. - Deputy Clerk of the Court (retired November 2013)**  
**Rudykoff, Nathaniel T. - Senior Principal Law Clerk to Chief Judge Lippman**  
**Saint-Fort, Dominique F. - Senior Court Attorney**  
**Sawyer, Richard - Law Clerk to Judge Rivera**  
**Schaffner, Diana E. - Senior Court Attorney**  
**Schrantz, Matthew J. - Senior Court Attorney (resigned August 2013)**  
**Scrufari, Carrie - Court Attorney**  
**Sheltry, Jaclyn - Court Attorney**  
**Sherwin, Stephen P. - Senior Principal Law Clerk to Judge Graffeo**  
**Smith, Jessica Barrie - Law Clerk to Chief Judge Lippman (resigned August 2013)**  
**Somerville, Robert - Senior Court Building Guard**  
**Spencer, Gary H. - Public Information Officer**  
**Spiewak, Keith J. - Local Area Network Administrator**  
**Stromecki, Kristie L. - Senior Principal Law Clerk to Judge Pigott**  
**Tierney, Inez M. - Principal Court Analyst**  
**Turon, Kristin L. - Stenographer**

**Appendix 11 (Continued)**

**VanDeloo, James F. - Senior Assistant Building Superintendent**  
**Villaronga, Genoveva - Secretary to Judge Abdus-Salaam**  
**Waddell, Maureen A. - Secretary to Judge Pigott**  
**Waisnor, Jonathan D. - Senior Law Clerk to Judge Smith**  
**Waithe, Nelvon H. - Senior Court Building Guard**  
**Walthall, Claiborne - Senior Law Clerk to Judge Read**  
**Warechak, Andrew R. - Principal Custodial Aide**  
**Wasserbach, Debra C. - Secretary to Judge Graffeo**  
**Weber, Sarah - Law Clerk to Judge Read (resigned August 2013)**  
**Welch, Joseph H. - Senior Clerical Assistant**  
**Wodzinski, Esther T. - Secretary to Judge Smith**  
**Woll, Deborah - Senior Principal Law Clerk to Judge Abdus-Salaam**  
**Wood, Margaret N. - Principal Prisoner Applications Attorney; Court Attorney for Professional Matters**  
**Yalamas, George C. - Chief Security Attendant**