

“Meet Your PJ:” Hon. Gerald J. Whalen, Appellate Division, Fourth Department

John Caher: The Appellate Division Fourth Department consists of 22 counties in Central and Western New York, extending from the St. Lawrence River Valley in the north to the Pennsylvania border in the south, and from the Mohawk Valley in the East to Lake Erie and the province of Ontario to the west.

It includes the second largest city in the state, Buffalo, as well as the larger cities of Rochester and Syracuse, and the smaller cities of Batavia and Jamestown. And it includes rural farming communities in between.

Welcome to “Meet Your PJ,” a series created and produced by the New York State Judicial Institute. I'm John Caher, Senior Advisor for Strategic and Technical Communications. And today I'll be chatting with Presiding Justice Gerald J. Whalen.

Judge Whalen was designated by Governor Andrew M. Cuomo to the Appellate Division, Fourth Department, on October 1st, 2012 and as Presiding Justice of the Appellate Division on January 7th, 2016. He's a graduate of Canisius College where he earned a Bachelor of Arts degree in 1979. He earned his law degree in 1983 from the State University of New York at Buffalo. Justice Whalen was elected to New York State Supreme Court in 2005.

Prior to taking the bench, Judge Whalen was a litigation partner with Hiscock and Barclay. He was in private practice for 21 years, handling complex civil and criminal cases before taking the bench.

Judge Whalen, thank you so much for your time today. If you could just give me a brief overview, a bird's eye view of the Fourth Department. What it is, where it is and what it does?

Justice Whalen: Well, John, you did a wonderful job of setting forth the geographic boundaries of the Fourth Department. We're an intermediate appellate court which, of course, means that we're hearing cases that come from the trial level, the Supreme and County courts.

That's civil cases, criminal cases, family court cases come to us. Court of Claims cases come to us. So we're a court that receives all the court of original jurisdiction cases for appellate review.

Ninety plus percentage of our cases get resolved in our court and don't go beyond us to the Court of Appeals. And so we are essentially a court of

last resort for a lot of cases that come before us, as all the appellate courts are.

We also, as part of our duties, admit lawyers to the practice of law. We do that twice a year in ceremonies, but we also do that on a regular basis on individual applications that come before us that need to be handled more promptly.

In addition to that, we oversee attorney grievance matters that come before us. And so we're a 12-person court and we handle a lot of cases all throughout the year.

John Caher: Thank you for that overview. Now when you became a judge about 15 years ago, you'd already had a full career as a litigator. You were a partner at a very large and prestigious and law firm. Why did you want to leave that to become a judge?

Justice Whalen: Well, I'll tell you. Prior to going with Hiscock and Barclay which is now the Barclay Damon firm, I started off as a law clerk in law school with a firm that was very small, a very boutique firm in Buffalo. At the time it was called Offerman, Fallon, Mahoney and Cassano. And I received great training there. I had wonderful mentors there.

And I didn't know it when I applied to become a law clerk there that it turns out to be quite a judge-making, small firm. And so I had the pleasure of practicing initially and learning my trade there as a trial lawyer, but also learning under people such as Eugene Pigott, Jr., who became an Appellate Division judge, a Presiding Judge of the Fourth Department, and also, of course, as you know, a Court of Appeals judge. And in addition to that, Dave Mahoney, a friend and mentor of mine, and partner of mine, became a Supreme Court judge in the 8th Judicial District. And Neil Fallon was a member of the Fourth Department, also of course, elected Supreme.

And so I had the pleasure of not only having great mentors with that firm, but they were great mentors that had wonderful practices, that, after a long career as practicing lawyers, decided to make the transition to the Court.

I saw how that worked as a young lawyer, and I saw how much they enjoyed not only their trial work and the practice they did, but also how much they were renewed and reinvigorated as they became judges, and how that became a second act in their careers.

And I saw that as something as very self-fulfilling and a rewarding experience. So I aspired to it and was fortunate enough to follow in their footsteps.

John Caher: Now you had the benefit as a litigator of appearing before a great many judges in a great many different types of cases in a great many different contexts. As a litigator, what are the qualities of a good judge? What is a good judge in your mind?

Justice Whalen: I think number one, and it's probably not a surprise to people who actually tried cases, the number one quality that I liked in a trial judge was a good and even temperament. There was nothing more disruptive to the ability to handle a case, either on a motion or on a trial, than to have a judge whose temperament was not even, who was irascible, who sometimes would go off in the courtroom in ways that just disrupted things.

And so I always thought that temperament was a really critical component of a good and able judge. In addition to that, I think that the real quality of a trial judge, not unlike that in an appellate judge, is to listen.

A lot of trial judges come from trial lawyers, whether it's a prosecutor or whether it's a civil lawyer, and so what I found happened in some cases is that the judge would, at least in the beginning of their career, not leave behind their role as a trial attorney and they would engage too much, and speak too much in the court process, during motions or during the trial. Learning how not to engage, how to listen, and how to respond when necessary and to control the courtroom when necessary, but to allow the lawyers to try their own cases, I thought, were probably the top qualities of a good trial judge.

John Caher: That's interesting, because I have heard experienced litigators complain, "I wish the judge would let *me* try *my* case!"

Justice Whalen: Yeah, or the old saying is, "If you're going to try my case, don't lose it!"

John Caher: Now, what about the calculus for an appellate judge as opposed to a trial judge, is that a different skill set, a different demeanor?

Justice Whalen: It is. It draws upon different skill sets, certainly. Obviously, listening is very, very important for the same as a trial judge with an appellate judge. But one of the things that is critical with, I think, the appellate judge's role is the ability to work in collaboration with other judges. Very often

what happens is the trial judges get elevated, right? The elected Supremes get elevated to the appellate court. And so you're used to being in charge of your courtroom. You're used to being the one who's the last word on things ultimately.

But when you're in an appellate setting, you need to work with your other judges and collaborate to reach the final decision. It's not your decision, it's the Court's decision. That's a very hard thing, I find and have found, for new Appellate Division judges to absorb, that, yes, you have the ability to concur, yes, you have the ability to dissent.

But the decision itself, the majority decision or unanimous decision, is a decision of the full court. It's not your decision, and you need to be a responsible partner in coming to that decision. And so I think being able to listen, being able to take into consideration other judge's views on things so that you can reach a consensus, reach a majority decision, I think is a really important factor.

It's a suppressing of the ego really as much as you can. And when you're dealing with elected Supremes, it can sometimes be a learning process for new Appellate Division judges, and it certainly was for me, frankly.

John Caher: Your court has always struck me as a very collegial court, and we'll get into that a little bit later. But before we do that, knowing what you now know, would you, as a judge, would you be different as a litigator? And as an appellate judge, would you be different as a trial judge?

Justice Whalen: Well, I'll tell you. I've had this conversation with my colleagues on the appellate court here and we all agree that the experience of being on the appellate court is invaluable. It would make us such better trial attorneys and better trial judges.

The idea that we sit and we focus on the record and we comb through the record and we analyze the issues that were before the Court and what the rulings were, because we can do deep dives into these issues, to take that and go back to be a trial attorney allows you to preserve the record better, protect it better.

I was trying cases for a lot of years, 21 years as a trial lawyer, and certainly I knew to protect the record, or at least I thought I did until I became a trial judge and then I became an Appellate Division judge.

What you learn in those roles would be very helpful as a trial attorney going back to be able to really protect the record and really understand

how it's important to make sure that you get a judgment, that is not subject to reversal and being sent back, that you can maintain that. And that's an important skill to acquire. And not all trial lawyers have that.

John Caher: Do you have a judicial role model or were there mentors that you look up to?

Justice Whalen: Well, I would say that someone that I don't know personally, although I did meet her recently within the last year or so, Ruth Bader Ginsburg. I don't know that we could find a better role model in the court alive today than Supreme Court Justice Ginsburg. When you meet her, it's almost like an electric experience.

She's just so dynamic and so full of energy, it's a very special experience. Her dedication to the court, her dedication to her craft as a judge. Her writings are incredibly thoughtful, logical, detailed. So, she would be, I think, a role model for me and I think for many, many people.

And as I mentioned before though from people in my life on a regular basis, I had the blessing of Justice Pigott and Judge Pigott on the Court of Appeals. But then also Leo Fallon and Dave Mahoney who were personal friends, who were partners. And they all gave me a little, not only an insight into being a judge, but also I could see from them their abilities.

Dave Mahoney's compassion as a judge is something that I remember very much. Gene Pigott, Judge Pigott's hard work and commitment to everyday getting up and doing the job, and showing up and being everywhere that he could be to help the bar, to make sure that his work was always done.

Leo Fallon, again one of my former partners, and a Supreme Court judge, Appellate Division judge. Leo's wonderful contribution, I think, for me was take the work seriously, but don't take yourself too seriously. All three of these folks were great collegial members of the courts they sat on.

John Caher: Now as you mentioned early on, your court is, for all intents and purposes, and in most cases, a court of last resort. I don't know what percentage of your cases get to the Court of Appeals, but a very, very small percentage.

And unlike the Court of Appeals, you really don't have any control over your calendar. You take everything that comes in the door. Last year

b1,300 cases came in the door and you heard oral arguments in 742 of them. Now how many judges do you have to shoulder this load?

Justice Whalen:

We have spots for 12. In my career, and in the Fourth Department, it's been very rare for us to have a full complement of judges. We've always been short one or two. At one point, I think we were short four. And so, it's very unusual for us now to have all 12 judges and I'm very grateful to the Governor for making the appointments that gives us a full complement of judges.

But I find it interesting in our court, when you're working in an appellate court, every time there's a change —and there have been many changes since I've been new to the Appellate Division. There's an addition of a judge, or there's a couple judges appointed, the court changes. It changes in personnel. It changes in how we interact with each other, for better or for worse.

And it's always very interesting to bring in a new judge, let them know that that dynamic is going to change amongst all the judges, that it's a new court.

I'm reading now John Paul Stevens' book. I think it's called *A Reflection of a Justice*. I thought it was interesting, John Paul Stevens refers to the Supreme Court that he sat on by the name of the *newest* judge to take the Court.

And so whoever that new judge was, it became their Court as opposed to like the Chief Judge's Court, because the new judge has changed the dynamic of the Court. Has changed the way the judges interact with each other. And I thought that was an interesting way to look at it.

So, if I were to do that now, our court would be the Bannister Court right now because Tracy Bannister has recently joined us and she has brought with her a lot of energy. Great experience. She was a former Appellate Division judge's law clerk so she was with us before for many years. So she brings that experience to the Court. I find it an interesting dynamic of the way the judges interact with each other. But yes, we have 12 judges and we all work very hard and we keep moving the work forward.

John Caher:

Now, I believe you usually sit in panels of five, although, there have been times when you've been short-handed and you had to sit in panels of four. How are those panels picked? And is there any conscious effort to make sure that all of the judges, at some point, sit with all of the other

judges so you don't get the same four or five judges sitting together all of the time?

Justice Whalen: I think if you were to look at our panel distribution throughout the time I've been Presiding Judge, you'd find that it's just a mix, a constant mix of judges. There are a couple of things that I try doing.

And how the panels are decided is first of all, the panels are constructed without any knowledge of what cases were going to be assigned to that panel. So the panels are just constructed for purposes of making sure that we have the right amount of people sitting.

I want to make sure that, if we can, that we have a geographic diversity on the panel, so that if there's lawyers appearing from the 5th District or the 8th or the 7th, that when they appear, generally, they're going to see a face that they're familiar with on the panel.

I also like to try and mix, because I think it's helpful, with the panel to not have it all be men or all women necessarily. But to have a mixture of men and women and female and male judges, justices.

And so those are the kind of things that we try and do. I coordinate that with the calendar department and we make sure we keep a constant mix going.

John Caher: So in a given day, your panel of judges will hear X number of cases. And then, what happens next? How do you get from there to a decision and how is it decided whether there's a written opinion, a memorandum, a per curiam, whatever?

Justice Whalen: John, what typically happens in our case, I'll give you a little peek behind the curtain if you will.

John Caher: Great!

Justice Whalen: What happens is on every case for argument, we have an assigned judge. And that judge's job on the case that they're assigned to is to draft a report for the panel. And that report is usually a very thorough analysis of the points being argued, the facts of the case, and recommendations as to what they think the panel should do.

So that assigned judge may also have what we refer to as a preliminary report. And that would be from one of our full-time staff attorneys or one of our two-year program lawyers. And generally what they do, they

handle the more involved records, if you will. And they do a thorough review and summary of the record before the court.

And then they also do the same thing in terms of analyzing the points and making recommendations. So, there are a lot of legal eyes that go on to these various cases that come before us. But in terms of the judge's role, the judge who does the report will usually take the lead in the conference after the argument.

Those reports, by the way, before argument. And so all of the judges have that information before them before they even go out to hear the argument. They also are charged with doing their own full analysis of the briefs and records in combination with having that report to review.

Very often what you'll see in these cases, John, is that I may get a report from one of the panel members that I have and I may disagree with the recommendation. And I could then do a note on that report saying, "I respectfully disagree with my colleague. I think this, that or the other thing," and set forth the reasons for that and indicate that I'm going to be asking some questions along those lines in oral argument.

And so all of that takes place before oral argument, which is the reason why I think we're considered a pretty hot court when it comes to oral argument. The judges are all ready to go on all the cases and they're fully prepared.

After the argument, we go back into conference immediately. And at that point, we go through each case and we have discussion about all the different issues on each case and come to a vote on most of the cases.

Some cases require further analysis after a conference. And those cases are then brought home by one judge who then does a further report on the case and distributes it to the panel members.

John Caher: So with all that homework that's done prior to oral argument, the judges know at oral argument what they need and what they want from the attorneys?

Justice Whalen: Right, exactly. And, interesting, what I've found is very often you'll have very pointed questions not only in the analysis and the briefs on various issues, but also pulling out of the lawyer arguing the case of facts from the record. In other words, "Where in the record do you find support for this particular point that you're making?" Because the lawyers, of course, know their cases better than anyone when they come to the court.

We spend time on the cases, but we can't spend the kind of the time the lawyers do. And the lawyers know the record as thoroughly as anybody. So, the judges in oral argument will very often be pulling out of the lawyers the specific references to the record that they think will help amplify what they believe is the ultimate conclusion that should be reached.

And when you have a case where you have notes going back and forth amongst judges, and we have a lot of those, you'll find that sometimes the judges will also use oral argument to try and convince their colleagues on the court on why they're right as opposed to one of the other colleagues who's taking a different position.

So, you'll get questions of lawyers, I find this funny, you'll sometimes get questions from lawyers from a judge who's agreeing with the lawyer, trying to pull out from that lawyer, supportive information to help convince the colleagues on the court that they're right. And the lawyers will sometimes be a little worried: "How am I being trapped here with this question?" Which it's not that at all, of course. It's trying to pull out the information you need to convince your colleagues.

John Caher: That's interesting. So, the most difficult, the most challenging, the most pointed questions may come from the judge who is most on your side but that judge wants the attorney to justify it for the other judges?

Justice Whalen: Exactly, exactly.

John Caher: Now what about dissents? What are your thoughts on dissents? In my experience, I don't know what the percentage is, but a high percentage of your cases are unanimous. But of course, there are dissents. And I think you indicated that even before oral argument, there could be some give and take and you may not be going where the other judges are going.

And maybe there's some negotiation before you even hear argument. But what are the circumstances that will prompt you to publicly break with your colleagues?

Justice Whalen: I've evolved along those lines, John. When I first joined the Court, when I disagreed with my colleagues on the panel, I was, I think now in retrospect, too quick to say I'm going to write a dissent. And I think if you were to chart — I haven't done this, but I'm certain it's true — If you were to chart my dissents by term, I think you'd find that it started off at a pretty high level and then dropped off.

And I still dissent, of course, on cases that I think are important. But I try and do it only when I really need to do a dissent. The thought is this, I think. Or should be this: If you can't convince one of the members of your panel of your position, then maybe, just maybe, you ought to second guess, rethink, whether or not you should write a dissent in the case, especially a sole dissent.

If you've got somebody with you who's supportive of you and there's a fair disagreement, then of course a dissent is appropriate and important. So I think that I would probably, if I were to talk to the younger version of myself who just joined the appellate court, I would have a nice heart to heart conversation with him about don't be so quick to write a sole dissent in a case. Leave room for the possibility that maybe, just maybe, your more experienced colleagues have gotten it right.

And so, I don't dissent all the time. I may have disagreements on a case but I don't feel the need to sole dissent unless I really strongly believe that the decision is not one that is proper either based upon the facts of the case or based upon the law. And then I will write a dissent and have so. But it's more infrequent.

John Caher: Unlike the Court of Appeals, your court has fact-finding jurisdiction and interest of justice jurisdiction. You can review the facts. The Court of Appeals can't. You can consider unpreserved issues. The Court of Appeals can't. How does that affect the dynamics of what you do?

Justice Whalen: To give you one example, I think when I joined the Court, again, I had conversations with my colleagues about the idea of using interest of justice powers in the review of sentencing. And it was a pretty rare thing I'm told in the past prior to me getting to the Court for our Court to do those interest of justice reviews and to affect or touch or reduce sentences.

I think since I've been on the Court, and don't misunderstand me, this isn't because of me. I think it's just the timing of me coming on the Court. Just before me getting there, there had been more of an activity on the Court of reviewing sentences, for example, and using our interest of justice authority to do that.

And since I have been there, I've found that to be something that's certainly more frequent than what was done in the past. But we take very seriously the authority that we're granted in the Constitution with respect to interest of justice authority and reviewing the errors.

And so, you're right to say does that cause an interplay? Does that cause a conversation amongst the colleagues in conference as to when we exercise that authority? It certainly does. And some folks are a little more reticent to use that authority. Others are not.

But I find that having that authority is an important part of the appellate court's jurisprudence. And I think it's made a real impact in people's lives, in the parties' lives, when we do entertain the use of that authority.

John Caher: Of course, when you do invoke your interest of justice power, you've basically taken the Court of Appeals out of the game, right?

Justice Whalen: Right.

John Caher: Then they can't review it and you definitely have the last word there, right?

Justice Whalen: There's no question, right, exactly, exactly. And so that's why though, that's a primary reason, or one of the primary reasons, why we're really careful about when we use that authority. And so we don't find our way into that conversation lightly. It's something that comes with a lot of thought and a lot of deliberation.

John Caher: Now I don't know what percentage of cases get to the Court of Appeals, but it's a fairly small percentage, as with all of the departments. And there are, as you know, a few ways a case can get to the Court of Appeals. One of them is they can get there with a grant from the Appellate Division.

And this Chief Judge and pretty much every Chief Judge in my memory has sent a not so subtle messages that they would prefer that that power be exercised judiciously. What do you think of that? What are the circumstances when you think it's appropriate for your court to basically force a case on to the Court of Appeals?

Justice Whalen: Obviously, we hold the Chief Judge and the Court of Appeals in great respect. And to the extent that they would like to control the cases that they take, we certainly respect that view from them. However, the Constitution does give us authority to force a case on. And we will do that and we have done that.

In situations, very often, when there's a conflict amongst the departments, of course, it can go up. And we'll grant leave to do that. Very often, we will look at an issue that we have struggled with on our

court. And sometimes, we've struggled with it over and over and we see other courts struggling with the issue. And we think it's one that's right for the Court of Appeals to handle.

And it's not always the case where it's a final disposition, right? So sometimes it would go back to the trial court depending on how we ruled on it if we didn't grant leave to go up. So, we do like to look hard at that.

We don't do it a lot, believe me, but we do take a hard look at it and there are times when we have done it and we'll continue to do in the future when we think that it's an issue that we're struggling with and we think it's time for the Court of Appeals to help solve this area of law so that the litigants know what to expect.

We have 12 judges. Five sit on panels. We don't want panels disagreeing with each other from the same court. And so when we get into a situation like that, very often it's one where we say, "Look, if we really can't come to a consistent ruling on these, we need to send this up."

John Caher:

I see. Now as I mentioned earlier, in my experience, the Fourth Department, and actually all of the departments are quite collegial. And I would imagine that you and the other judges have some rather spirited disagreements in conference.

How do you as the Presiding Justice prevent these disagreements among people who are strong willed, intelligent, opinionated, perhaps a little stubborn, from devolving into personal antagonism, so they can work together?

Justice Whalen:

I will tell you this that I was blessed to come on to the Fourth Department as an additional justice with Judge Scudder being the Presiding Judge. And Judge Scudder was this wonderful, calming influence on the Court. He was somebody that everybody could talk to. He could talk to everybody.

And he made sure that when people were engaging with each other, they were doing it in a very respectful way, that when notes went around and they were disagreeing with somebody else's report or with somebody else's note, that they were written in a very respectful way.

And I have had very rare times that I've thought it would have been helpful for me to go into a judge's chambers with a notes and say-

John Caher:

Calm down.

Justice Whalen: Yeah, "This one could have been written a little differently and here's why it's important that we write it a little differently. Same argument. Same position. Just you take out the ... Edit these words here and all of a sudden it's a much easier note for the person who's disagreeing with you to take and absorb."

And so I've had to do that on occasion. Rare occasion. The judges on our court are very respectful of each other. But that's the kind of thing the Presiding Judge, I think, will have to do it from time to time, just to make sure that the relationships continue and that you don't have real hostility on the court which would be really detrimental to the joint decision-making rules that we have here.

John Caher: Let's look at that collegiality from maybe a different perspective. Invariably and inevitably you will review and you'll occasionally reverse the decisions of a trial judge. And although you have a wide geographic area, it's not a huge legal community. And I would imagine that you and your judges know a lot of the judges that you reverse. Is that uncomfortable to do that?

Justice Whalen: It's funny. When I was a trial judge, I had one case in particular where I wrote a decision and I relied upon a Court of Appeals case which I thought was appropriate. My case ultimately went to the Fourth Department, my current court, but by the time it got to the Fourth Department, the Court of Appeals had flipped its decision.

And so when the Fourth Department reversed me, they cited the new Court of Appeals decision saying I was in error because the Court of Appeals has said this. And I thought to myself, "It wouldn't have taken but one sentence to say that, 'At the time the judge wrote the decision...'"

And so, I bring to this job that sensitivity to our trial judges. We certainly don't worry about we know this judge or we know that judge and we would feel bad about reversing them in part or in full.

The way I look at this, and Judge Pigott talked to me about this when I first joined the Court. He said, "You have to think of yourself as almost like a safety net for the trial judges."

"The trial judges are very often under a lot of stress, a big case load, and a time constraint. They're making decisions during a trial. They're ruling on jury charges, for example, in very short periods of time where they don't have a lot of time to really sit about and think about it. And so you have to think about these trial judges in the environment within which

they're making decisions." We, on the other hand, get the full record. We get the briefs. We get to really spend time on this.

And so, Judge Pigott said to me, and I think he's right: "We need to explain to the trial judge, we're like a safety net. You can't spend the time you need to spend on a decision. And maybe it needs to be modified. Maybe you got it wrong. We're there to help catch that so that ultimately the right decisions be made."

It's not an antagonistic thing. It's not something where we're pointing out their errors, except that to help them get to the right decision and help us get to the right decision.

John Caher: Are you able to look at it the same way when it's going in the other direction? I know your court has occasionally been reversed by the Court of Appeals. It'd be very, very unlikely if every one of your judges was vindicated every time a case went up and that every time they were in the majority, the Court affirmed, and every time they were in the minority, the Court reversed. So what are the internal dynamics when your court gets reversed, how is that taken by the judges?

Justice Whalen: We try really hard to get to the decision, to have it be the right decision. We know we're doing the best we can to do that. And when the Court of Appeals disagrees with us, that's why they're there. They've made a different decision and that's fine.

And so we now have to go back and fix what we've been doing and look at it a different way. I haven't experienced that here on this court where people complain about being reversed or, "I think the Court got it wrong."

It's more a function of, "Okay, that's what the Court of Appeals wants in these particular cases, thank you for the clarification. Thank you for the direction. We will take that and move forward with it." It's really not, believe me, not any kind of where we get our nose out of joint because the Court of Appeals has reversed us.

And I would speak to trial judges periodically and I'll tell them that. I'll say, "Look, we're in the chain of decision-making and sometimes we'll reverse a trial judge and sometimes the Court of Appeals will agree with the trial judge. So, we don't always get it right."

And so we're doing the best we can. You're doing the best you can. Let's do our jobs the best we can to ultimately get to the right decision. And then move on.

John Caher: Now, as Presiding Justice, you have a great many administrative duties as well, not only locally, if 22 counties is local, but statewide as a member of the Administrative Board which, of course, is the four PJ's and the Chief Judge. What are the major issues right now statewide with the Administrative Board?

Justice Whalen: Well, this little conversation we're having is going to be held and preserved, I presume, for future views by people. And so they should know that we are in the middle of the COVID pandemic and that, I would say, has been the primary focus of the Administrative Board since March.

And we've been looking to see how can we make the Court operate differently, more safely for the parties, for the lawyers, for the judges, for the staff of the court system. And that has been a real challenge for us. And it's really been, what we've been doing at our Administrative meetings, in large measure. That's the focus because it's been such a dramatic change in the way we've done business.

John Caher: I bet. Now has your court fallen in any sort of a backlog because of the pandemic?

Justice Whalen: Well, yes it has. We've had some people working from home and we've had a really skeletal staff in our main office Rochester, New York. And that's slowed down the process of the appeals in terms of cases coming in.

Now in terms of having time to get cases that were backlogged done and out, it's helped us in that regard. And so we have been able to address backlog cases more efficiently. But the problem is that there's now a pent-up number of cases and we're expecting that there's going to be a bit of a backlog going forward.

But everybody's committed to making sure that we continue to operate. We continue to get cases resolved and decisions out. The stream of work, in terms of us working, not the same volume necessarily, but us working, has been continuous.

John Caher: Just a couple of more questions and then I'll let get back to your backlog. This will put you on the spot a little bit. What do you wish the other

branches of government, the Executive and legislative branches, better understood about the Judicial branch?

Justice Whalen: That's an interesting question, John. I would that when we're deciding a case, we're deciding based upon the Constitution, based upon the statute and based upon the facts of that particular case, primarily.

And so the idea that other branches of government may try to extrapolate what we may do on a future case, of course that's important. Stare decisis is important. But you can get a little bit too in the weeds on those things. Facts of the cases as they come to us change slightly. And if they change slightly, that will sometimes change the outcome of the case.

And so I think they need to understand that we're ruling on the case before us. And we're doing so with an effort to try and give some guidance to the lawyers and to the parties going forward. But also keep in mind, the facts of these cases change and sometimes subtle changes in facts will result in different decisions.

John Caher: I've asked this question of the other Presiding Justices as well and I want to pose it to you and see if your answer is similar to what they are. But imagine there is an attorney about to argue before the Fourth Department for the first time, what's your advice? What should they do and what should they not do?

Justice Whalen: I would find it worthwhile for a new lawyer to say, "Your Honors, may it please the Court, I'd just like you to know this is the first time I've appeared before this Court or before any appellate court." And then begin their argument.

In other words, let us know that you're not a seasoned appellate lawyer. That's helpful for the judges. We're human beings. We've been there for our first time also and it might be helpful to us to know that. So I wouldn't hesitate to do that. But in terms of somebody who's been practicing on a regular basis, there are some things that I think are important.

One, I think be succinct and hit your strongest points right off the bat as quick as you can. I think that's important. It doesn't necessarily mean you go point-by-point. One point, two point, three. Sometimes you thought point one was the strongest until you got the reply brief and now you think maybe point two's the strongest. Go to point two.

Don't feel like you need to argue if you've had seven or eight points in your brief. Don't argue all of them. Don't try to argue all of them. It's just not efficient. You can submit other brief with respect to those other points. I also think it's very important and sometimes nervousness results in this happening.

Sometimes lawyers will talk on top of judges' questions. They'll be anticipating what the question is and before it's asked completely, they will start answering. I don't think that that's helpful. The judge would like to get their question out typically before you start answering. I think that's important.

And I also think that when the judge is asking a question, listen to the question and answer the question as best you can. In other words, don't listen to the question and then just start talking about some other point in your brief that you think is important. Because you will lose points with the whole panel if you're not responding to questions.

And lastly, I think and found this to be very ... And I didn't do this as a lawyer and probably should have. I find sometimes the most persuasive argument by a lawyer when being challenged on one of their points that they know is not maybe their strongest point. If they, not concede the point, but they concede that maybe it's not their strongest point in the brief when they're being questioned about it.

And then answer the question, but then move off into their strongest point of the brief, I find that advocacy to be pretty effective. In other words, somewhat acknowledge and if you know that this point's in your brief. It had to be raised. But it's not the strongest point in your brief. But here is the strongest point in my brief and this is why I wanted to look back at that.

So that would be some of the tips I would give a lawyer coming to argue before our court.

John Caher: Well that's great advice. And Judge, thank you so much for time, and I do appreciate it and very much appreciate the work you do in my home region, the western part of the state.

Justice Whalen: John, thank you very much. It's a pleasure to be with you today.