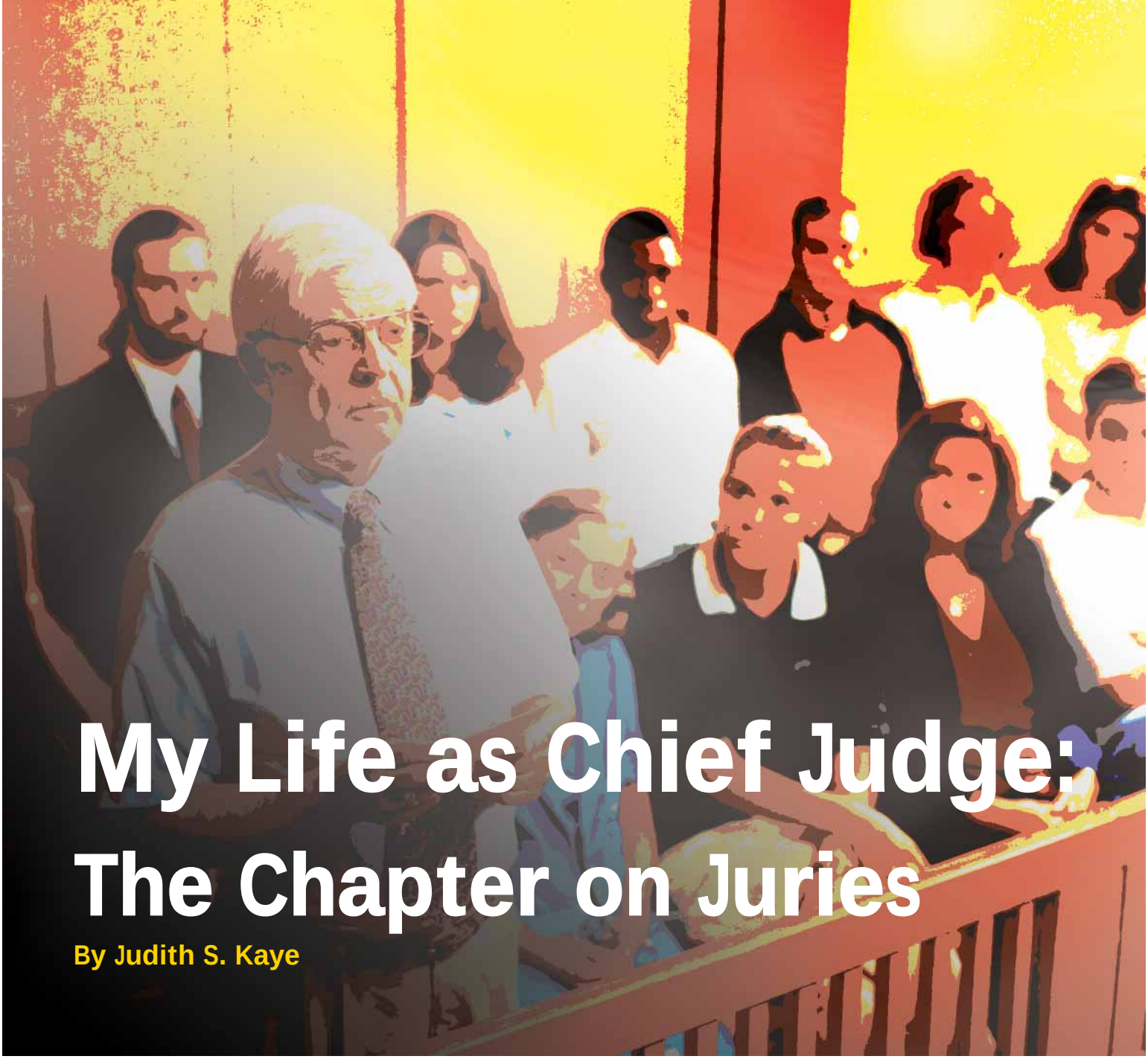

My Life as Chief Judge: The Chapter on Juries

By Judith S. Kaye

A recent speaking engagement prompted me to reflect on my years as Chief Judge. Ultimately, these ruminations took shape, and I share my thoughts with readers of the *Journal*.

As Chief Judge I hold two positions, each genuinely a full-time job. As Chief Judge of the Court of Appeals, I am one of seven equals, hearing appeals on a range of issues that defies human imagination. On any one day at Court of Appeals Hall we could be hearing argument on budget-making authority, or education funding, under the State Constitution; a slip-and-fall on a patch of ice; a construction site injury under Labor Law § 240; a multiple murder case; and a teacher's claim that his right to tenure under the Education Law has been violated.

Honest, we have days like that. The very idea of a court such as ours – a second level of appeal – is that we will, through a relatively few cases raising novel issues of statewide significance, settle and declare law that has widespread application. I am proud of our Court, which is sound and efficient in its work, and true to its awesome responsibility. I think of my judicial role, as a Judge of the Court of

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Appeals, as Lawyer Heaven. That is as true today as it was on September 12, 1983, over 23 years ago, when I first took my seat on the Court of Appeals.

But the second box of stationery, which I acquired more than 13 years ago, Chief Judge of the State of New York, a chief executive officer role, is right up there too. When I saw *Pride of the Yankees* recently on television, for the 100th time, I thought I could adopt Lou Gehrig's closing line as my own. Genuinely, I feel that I am the luckiest person on the face of the Earth.

Two Basic Questions

As I stepped back and thought hard about what I do, particularly as head of the Third Branch of government, it occurred to me that most often I was returning to two overlapping questions. First, how do we assure the delivery of justice in this modern, fast-paced, rapidly changing society? And second, how do we maintain the trust and confidence of the public so that our work and our decrees are respected? I could think of no better context for a discussion of both questions than the subject of juries.

The jury system is central to the delivery of justice in the New York State courts, where we have close to 10,000 jury trials a year. Jury service, moreover, is the courts' direct link, often our *only* direct link, with the millions of citizens called to serve as jurors – more than 650,000 a year in New York State alone. Surely, 650,000 positive jury experiences would be a great means of fostering public confidence in the justice system. How do we best assure public trust and confidence when jurors come into our courts? Jury issues run the gamut of my responsibilities; I've even been summoned several times to serve as a juror. Believe me, I know the pain of people being rejected during *voir dire*.

The jury, of course, is the subject of innumerable Court of Appeals decisions, on issues such as discrimination in selection, juror misconduct, even how jurors are seated in a courtroom for *voir dire*. But instead of Court of Appeals jurisprudence, I will focus on my executive and administrative Chief Judge role. Both of the fundamental questions I've posed are pertinent to the subject of juries.

The Roots of Our Jury System

The jury system came to our shores with our earliest settlers. Throughout the colonies, the jury was seen as a fundamental right and a way for the public to restrain government power. As you might imagine, the colonists were none too pleased when the Crown dispensed with jury trials for anyone accused of violating the despised Stamp and Navigation Acts. That added to the many grievances against King George III listed in the Declaration of Independence. So it's no surprise that Article III of the United States Constitution provided for a right to trial by jury for all crimes except impeachment; the omission of that right in civil cases ultimately led to inclusion of the Seventh Amendment in the Bill of Rights, guaranteeing jury trials in certain civil cases. Every state constitution separately secured those rights.

The jury in many ways reflects the progress of America. The right to have, and to serve on, juries has been part of our nation's struggle from its beginnings. Just think: critical as the jury was to the founders of a free nation, they limited service to white male landowners. Although the requirement of property ownership did not last long, it was not until 1880 that the Supreme Court held that jury service could not be restricted by race; not until 1975 that the Court prohibited the systematic exclusion of women from jury service; and not until 1986 that it banned the discriminatory use of peremptory challenges.

New York's public policy echoes our proud history. In the words of Judiciary Law § 500, litigants entitled to a jury "shall have the right to grand and petit juries selected at random from a fair cross section of the community[,] . . . all eligible citizens shall have the opportunity to serve . . . and shall have an obligation to serve when summoned for that purpose, unless excused."

Reality vs. Rhetoric

Regrettably, the reality of jury service has not always matched the rhetoric. By the early 1990s in New York, we were calling the same people every two years like clockwork, and they served on average two full weeks, even if not selected for a trial. One reason for this was that our statutes allowed dozens of automatic exemptions and disqualifications from jury service, ranging from judges, doctors, lawyers, police officers, firefighters, and elected officials to embalmers, podiatrists, people who wore prosthetic devices and people who made them, to individuals with principal child-care responsibilities. Seemingly every group that could lobby Albany for an automatic exemption successfully did, and that sorely depleted our jury pools. To makes things worse, the court system did little follow-up on the rooms filled with summonses returned as undeliverable.

Given the huge demand for jurors, and the short supply, New York State used what were called Permanent Qualified Lists. Once qualified for jury service, a person remained qualified. Not a choice list to be on, especially given the condition of our juror facilities, which often were shabby and neglected.

How was the reality measuring up to the rhetoric? I knew for sure that we weren't earning points with the public. So in 1993, months after I became Chief Judge, we

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Jury Duty Stamp Announced

The United States Postal Service previewed its 2007 Commemorative Stamp program to the philatelic press at a stamp collecting show in late August, announcing that a stamp honoring jury duty will be released. *Linn's Stamp News* (September 11, 2006) reports: "The stamp is square and features silhouettes in various colors showing heads in two separate lines. Across the top of the stamp is a bold 'Jury Duty' and at the bottom is 'Serve with pride.'"

convened a commission of lawyers, judges and public members to review jury service in New York, with the goal of making the New York State jury system one that would be valued and appreciated by jurors, judges, attorneys and litigants alike. In six months, with a dynamic trial lawyer – Colleen McMahon, now a United States District Judge – as chair, The Jury Project handed us a blueprint for comprehensive reform, which we have been implementing ever since.

In fact, this experience was so encouraging that again and again we have convened task forces and commissions to help us address other vexing issues. Over the years, superb commissions of lawyers, judges and others have paved the way on virtually every one of our successful reforms: business courts, fiduciary appointments, drug courts, judicial selection, matrimonial litigation, the legal profession and more.

A Reform Agenda

Without doubt, the centerpiece of New York jury reform was legislation adopting The Jury Project's top recommendation – end automatic exemptions. How shocking, especially for groups that lost their exemption! Fortunately, the Legislature resisted pressure to restore exemptions, and about one million potential new jurors were added to the court lists. Then, the Legislature adopted the recommended expansion of juror source lists to include unemployment and public assistance rosters, adding yet another 500,000 potential jurors.

These reforms sent a strong message: no person, no group is more privileged, or less important, when it comes to jury service, and no one gets excused automatically from this fundamental right, and obligation, of citizenship. We underscored that message with assiduous follow-up of all summonses returned as undeliverable. Besides gaining a more diverse jury pool, we could now spread the burdens and benefits of jury duty more widely, ending the Permanent Qualified Lists, the customary two-week service and the every-two-years-like-clockwork callbacks. The Legislature also increased juror pay and ended automatic sequestration in criminal cases.

These successes were also a powerful lesson for a new Chief Judge. We treasure the independence of the Judiciary, and rightly so. It's essential to our democracy, to our system of checks and balances, that the Judiciary be wholly independent in its core decision-making function. But in so many other ways – most notably systemic reform – we are vitally connected to our partners in government. The jury program – still, by the way, a work in progress – is one of the best examples of profound system-wide reform within the Third Branch.

Which brings me to my next subject: how best to manage the bounty – or, in other words, be careful what you wish for. Not all of the potential new jurors were as pleased as the Chief Judge. Thus, the court system faced a huge new challenge, but always the vision has been clear: to deliver justice for the litigants while affording a positive experience for jurors. This means efficient use of jurors' time in their summoning, selection and service; and it means courteous, respectful treatment. A lawyer-friend – the general counsel of a major media corporation – told me that her recent jury service ranked among the great experiences of her life. We need to multiply that. Invariably the most satisfied jurors are those who have actually served to verdict on a well-run trial—they are more likely to have a favorable impression of service and feel that they have made a contribution.

Implementing the Agenda

The easier part of the challenge, without question, has been the internal administrative part – like employee training in dealing with jurors; an online system for submitting juror qualification questionnaires; more efficient summoning procedures, like allowing jurors to call in by telephone to see if they really need to show up on the summons date; obtaining one automatic postponement by telephone or on the Web; orientation of jurors through handbooks, as well as live and video presentations (which are also available at www.nyjuror.gov); decent facilities and quiet work space, including wireless Internet access and even laptop work stations in juror waiting rooms; clean restrooms with locks on bathroom doors, paper towels and liquid (instead of bar) soap (the Chief Judge checks out that sort of stuff – ladies' *and* men's rooms); and assuring prompt payment of juror fees. We have excellent court staff, who are always finding new ways to improve the jury experience.

Yes, definitely the easy part, though still – and I would think forever – a work in progress. The really hard part – changes that would give jurors tools to help improve the way they do their job – would involve cultural change.

The entrenched culture I have in mind includes age-old practices of experienced lawyers and judges, such as settling cases only after (instead of before) the jury is selected; endless, unsupervised *voir dire* in civil cases; and proceedings conducted in a foreign language – legalese

– before passive jurors, who are assumed to be taking in information uncritically, recalling it accurately and not thinking about it until they are told, at the end of the trial, what the rules will be for evaluating all the information they've absorbed.

Two decades of solid research and experience in other states have shown that change is both possible and desirable.

Earlier, I mentioned statutory reforms that radically changed the face of our juries, best described as top-down reform. New rules and statutes imposed requirements, and court administration made the appropriate adjustments. But changing how trials are conducted by experienced lawyers and judges cannot be accomplished by order of a chief executive officer, particularly a CEO without power to hire, fire or promote; particularly for wonderful people at the pinnacle of their careers, mindful of affording due process and avoiding reversible error, and thus understandably more comfortable staying with ways that are tried-and-true. The sort of change I am advocating here can be accomplished only by the judges and lawyers themselves, from the ground up.

To stimulate the process of reform inside the courtroom, we convened a group of judges from around the state willing to try out some of the well-researched and best-known modern aids to juror comprehension, and we very carefully documented their experience by surveying lawyers and jurors who participated in using these aids. Perhaps the most telling finding was that, where jurors reported that the trials were "very complex," judges and lawyers reported that those same trials were not "complex." Doesn't that speak volumes? What lawyers and judges understand easily does not necessarily get through clearly to the jurors.

At the conclusion of its study, the group issued an overwhelmingly positive report, endorsing such "innovations" as opening statements that give jurors some idea of the nature of the case before *voir dire*; allowing juror note-taking to facilitate better recall of the evidence; permitting jurors to submit written questions to the judge, who would then determine whether they should be asked of witnesses; and providing jurors with a copy of the judge's final instructions to take into deliberations. This was followed by publication of a "Practical Guide" describing these practices, which we have distributed to all judges.

Will this succeed in changing the picture? Only time will tell.

Public Trust and Confidence

I turn next, and finally, to what may be the most difficult issue of all, how to assure the trust and confidence of the public – jurors and nonjurors – in the work of the courts, particularly given an abysmal lack of civic education and a flood of negative news. A major part of the answer to my question, perhaps a complete answer, is what I have just been describing: improving in every possible way the jury experience for those called to serve, and generally doing a first-rate job. Still, we need to do more. The public *should* know more about us, and *should* think well of us.

In the words of the great French statesman and observer of American life, Alexis de Tocqueville, "The jury may be regarded as a . . . public school ever open, in which every juror learns his [or her] rights." I have no doubt that de Tocqueville's observation remains true today, and that serving on a case to verdict is not only an educational experience but also a satisfying one for a juror.

Sadly, only 18% of those summoned to jury service will actually get selected for a trial. For the other 82%, we depend on courtesy, efficiency and outreach efforts, such as our orientation video, the availability in every juror assembly room of copies of informational periodicals, and Juror Appreciation Week events in courthouses throughout the state. We have also just completed a booklet about juries for teachers and students, *Democracy in Action*, designed to be shared with family, neighbors and friends.

But how do we address the fact that New Yorkers for the most part are unaware of the role of the courts in their daily lives? That is a challenge I put to the Bar: help us build a citizenry that is better informed about all three branches of government, but especially about the courts, which of necessity – and, I must admit, habit – remain somewhat remote and detached. One of our newest initiatives, announced in the 2006 State of the Judiciary, will be a Center for the Courts and the Community, a nonprofit public-private partnership now in formation, to focus on fortifying educational alliances with schoolchildren and adults, and on establishing programs to inform and facilitate the work of the media in reporting on the courts. I'd appreciate your ideas, in whatever form you see fit, for furthering the success of this new effort.

Conclusion

And there, in brief capsule, is the jury chapter in my life as Chief Judge of the State of New York. A dozen other chapters – such as children in the courts, domestic violence, drug courts, matrimonial issues, fiduciary appointments, commercial courts – have the same questions at their core: are we meeting today's needs, and how are we perceived by the public? Sometimes the answers lie in legislation, sometimes in court rules, sometimes in task forces and commissions, sometimes in small groups seeding reform, always in vital partnerships with our great Judiciary and court staff, with the Bar and with others. When the mountain moves, even a millimeter – as it clearly has in the New York State jury system – it's absolutely exhilarating.

That's one of the reasons why, as Chief Judge, I believe I am the luckiest person on the face of the Earth. ■