

1998  
Annual Report  
of the  
Clerk of the Court

1998  
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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Stuart M. Cohen  
Clerk of the Court  
Court of Appeals

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*State of New York  
Court of Appeals*



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April 1999

The Annual Report of the Clerk of the Court, Stuart Cohen, reveals a Court of Appeals hard at work and eminently successful in fulfilling its responsibility to declare the law of the State of New York. Under the superb leadership of Chief Judge Judith Kaye, the Court strives to remain current in its work and to maintain the quality of decisions that has been its strength for so many years.

The last year has seen the retirement from the Court of Judge Vito Titone, a person who served the Court and the judiciary with distinction for many years. The Court is fortunate to have as his successor a person who has rendered outstanding service to the judiciary for a number of years, Judge Albert Rosenblatt. We salute Judge Titone on his departure and welcome Judge Rosenblatt to the Court.

One cannot read the Annual Report without a sense of the variety of cases that come before the Court. The small sample, included in this report, of the approximately two hundred cases decided during 1998 is reflective of the complex nature of our society and the constant recourse to the courts to settle disputes. It goes without saying that the preeminence of the Court of Appeals is due to the quality of the people who work for the Court and with the Court. The personnel of the Court and their varied activities make the Court function as one of the outstanding institutions of our nation. For the quality of their work and their dedication, the Judges of the Court are truly appreciative.

George Bundy Smith

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Introduction

**T**he Annual Report for 1997 noted that it had been an extraordinary year. Nineteen ninety-eight also did not disappoint in this regard. The Court lost a superb jurist with the retirement of Senior Associate Judge Vito J. Titone, and gained a superb jurist with the appointment of Associate Judge Albert M. Rosenblatt. The first capital appeal under the 1995 death penalty statute was filed in 1998, and the Court subsequently issued its first Initial Capital Appeal Management Order in that case.

I am often approached by members of the Bar and the public, who tell me what a pleasure it is doing business with the Court. I thank the entire Clerk's staff for maintaining the high level of service to Bench, Bar and public for which the Clerk's Office is justly known.

This report is divided into four parts. The first offers a statistical and graphic overview of the matters filed with and decided by the Court in 1998. The second describes various functions of the Clerk's Office and summarizes the administrative accomplishments of the year. The third part highlights selected major decisions of 1998. The fourth consists of appendices with detailed statistics and other information.

## I. The Work of the Court

The Court of Appeals -- New York's highest court -- is composed of its Chief Judge and six Associate Judges, each appointed to a fourteen-year term. Created by the New York State Constitution of 1846, the Court of Appeals was established "to bring harmony and unity into the law."<sup>1</sup>

The jurisdiction of the Court of Appeals is almost exclusively appellate. 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 expound upon the law of its jurisdiction for the benefit of the community at large.<sup>2</sup> Reflecting the Court's historical purpose, the State Constitution and the 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, open and difficult questions of law having Statewide importance. Often these appeals involve issues in which the lower courts of the State are in conflict. Nonetheless, the correction of error by courts below remains a legitimate, if less frequent, justification for this Court's decision to grant review. Civil motions for leave to appeal are determined by the full Court; criminal leave applications are assigned to the Judges individually for resolution. By State Constitution and statute, the Appellate Division can also 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.

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<sup>1</sup> Historical Resume of the Judiciary Article, Problems Relating to Judicial Administration and Organization, Vol IX, 1938 New York State Const. Conv. Comm., at 6.

<sup>2</sup> See Rules of the Supreme Court of the United States, Rule 10 (Considerations Governing Review on Writ of Certiorari); Cope, Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of Other States and the Federal System, 45 Fla L Rev 21 (1993).

The Judges of the Court collectively decide all appeals and motions. Individually, they decide applications for leave to appeal in criminal cases and emergency show cause orders. For most appeals, the Judges entertain oral argument and write opinions or memoranda setting forth the reasons for their decisions.

In 1998, the Court and its Judges expeditiously disposed of some 5,000 matters. The Court decided 198 appeals. Also in 1998, the Court decided 1550 motions and 2982 criminal leave applications. A detailed analysis of the Court's work follows.

#### A. Appeals Calendar and Currency

##### 1. The Calendar

The Court of Appeals employs two methods of resolving appeals. The principal method is oral argument with full briefing by the parties (normal course). The Court also employs sua sponte merits review of submissions without oral argument (SSM). In 1998, litigants and the public continued to benefit from the prompt calendaring, hearing and disposition of appeals. The average period from filing of a notice of appeal or an order granting leave to appeal to calendaring was approximately six months, about the same as in 1997. Also in 1998, the average period from readiness (all papers served and filed) to calendaring was approximately one and one-half months, again about the same as in 1997. The average time from argument or submission to disposition of an appeal decided in the normal course was 37 days; for all appeals, the average time from argument or submission to disposition was 36 days.

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 1998 (including SSM appeals tracked to normal course) was 220 days. For all appeals, including those decided pursuant to the SSM procedure, those dismissed pursuant to Rule 500.3 sua sponte subject matter jurisdictional inquiries (SSD), and those dismissed pursuant to Rule 500.9 for failure to perfect, the average was 168 days.

Thus, by every measure, the Court maintained its exceptional currency in calendaring and deciding appeals in 1998.



## 2. Filings

Three hundred forty nine notices of appeal and orders granting leave to appeal were filed in 1998 (432 were filed in 1997). Two hundred sixty-seven filings were civil matters (compared to 298 in 1997), and 82 were criminal matters (compared to 134 in 1997). The 1997 orders granting leave to appeal included 54 relating to criminal cases involving a single issue, which the Court of Appeals treated, for statistical purposes, as a single appeal.

The first notice of appeal in a capital case brought under the State's 1995 death penalty statute was filed in 1998 in the Kings County case of People v Darrel K. Harris (the State Constitution provides a mandatory appeal directly to the Court of Appeals from a judgment of conviction and capital sentence). On September 22, 1998, the Court issued an Initial Capital Appeal Management Order (see Rule 510.8[a]) for the case, which remained pending at year's end. In this order, the Court assigned the Capital Defender Office as counsel and set dates for (1) transcription of all proceedings in the case, (2) furnishing to assigned counsel a copy of the record of proceedings, (3) settlement of the record by stipulation or the filing of a motion to settle the record, and (4) filing and serving the settled record on appeal.

During 1998, 1513 motions were filed, a 4.4% decrease from the 1583 filed in 1997. Nonetheless, the 1998 statistics continue to reflect a significant number of motion filings in the last five years, all of which require substantial judicial and staff effort to process and decide.

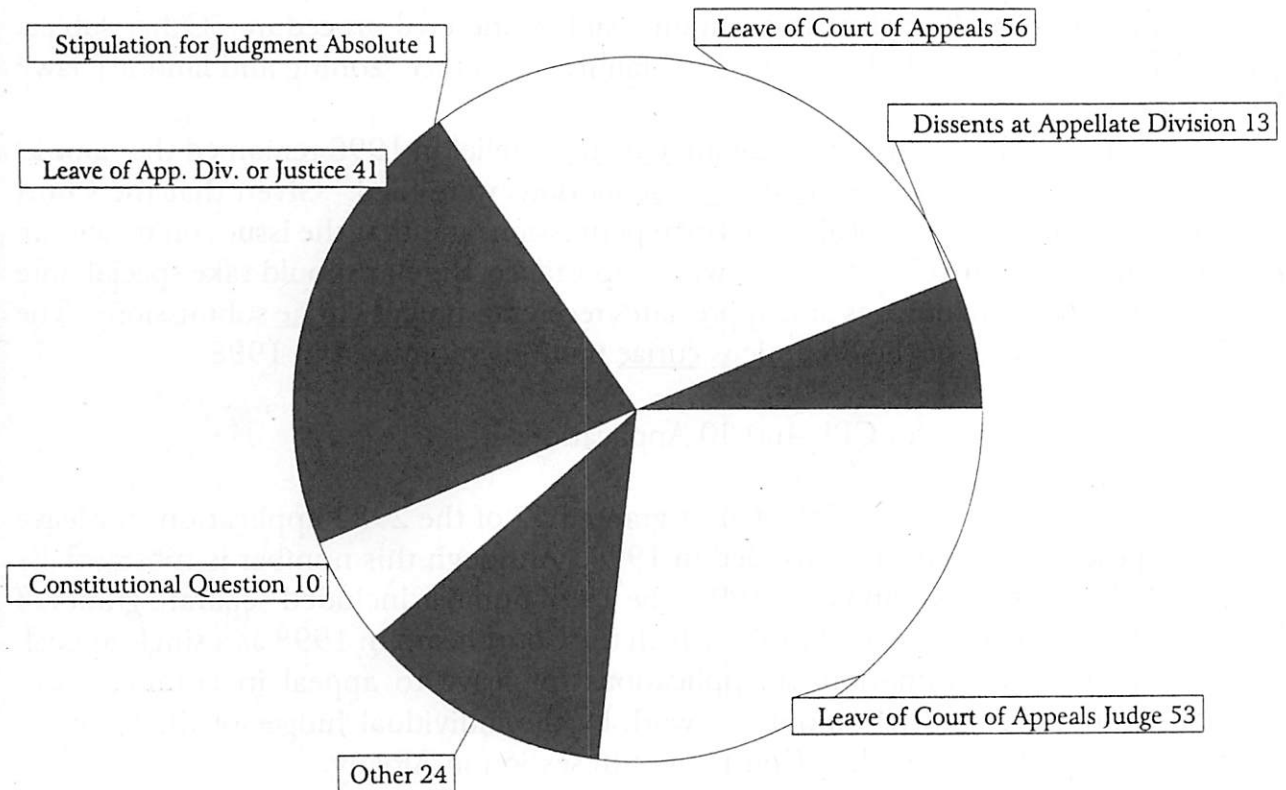
Two thousand nine hundred and fifty-three applications for leave to appeal in criminal cases were assigned to individual Judges of the Court in 1998. On average, each Judge was assigned 451 cases in 1998.

## 3. Dispositions

### (a) Appeals and Writings

The Court decided 198 appeals in 1998 (124 civil and 74 criminal). Of these decisions, 181 were unanimous. The Court issued 106 majority opinions, four Per Curiam opinions and 44 memoranda. Seventeen dissenting opinions and four concurring opinions were written. The following chart analyzes these 198 appeals by jurisdictional predicate.

## Jurisdictional Predicates for Appeals Decided in 1998



### (b) Motions

The Court decided 1550 motions in 1998 -- 78 fewer than in 1997. Each motion is decided upon submitted papers and an individual Judge's written report to the full Court, which is reviewed and voted upon by the full Court. The average period of time from return date to disposition for civil motions for leave to appeal was 61 days, while the average period of time from return date to disposition for all motions was 52 days.

Of the 1196 motions for leave to appeal in civil cases decided in 1998, the Court granted 7.6%, denied 72.5%, and dismissed 19.9% for jurisdictional defects. These percentages are similar to those for 1996 and 1997 dispositions of civil motions for leave to appeal.

The Court granted 91 motions for leave to appeal in civil cases in 1998. The most frequently raised issues involved Medicaid and Medicare (public entitlements), arbitration, juvenile rights, torts, municipal law and civil procedure. Other subject matter categories included civil rights, family, insurance, zoning and land use law.

The number of motions for amicus curiae relief in 1998 remained the same as in 1997; in each year, 88 amicus curiae motions were filed. Given that the Court hears the majority of appeals by its own permission, and that the issues on review are generally open, novel and of Statewide importance, the Bar should take special note that the Court encourages and appreciates receiving amicus curiae submissions. The Court granted 71 of the 88 amicus curiae motions submitted in 1998.

(c) CPL 460.20 Applications

Individual Judges of the Court granted 57 of the 2982 applications for leave to appeal in criminal cases decided in 1998. Although this number is substantially lower than the 110 granted in 1997, the 1997 number included separate grants of leave to appeal in 54 related cases, which the Court heard in 1998 as a single appeal. Review and determination of applications for leave to appeal in criminal cases constitute a substantial amount of work by the individual Judges of the Court in their home Chambers when Court is not in session in Albany.

In 1998, on average, 62 days elapsed from the assignment to Judges of applications for leave to appeal in criminal cases to their disposition. The period during which such applications are pending usually includes several weeks for the parties to prepare and file their written arguments.

(d) Review of State Commission on Judicial Conduct  
Determinations

In 1998, the Court reviewed two determinations of the State Commission on Judicial Conduct. The sanction of removal determined by the Commission was accepted in both cases. Two orders of removal were entered in cases in which review was not requested. In addition, the Court ordered two suspensions with pay.

## (e) Rule 500.17 Certifications

### Background

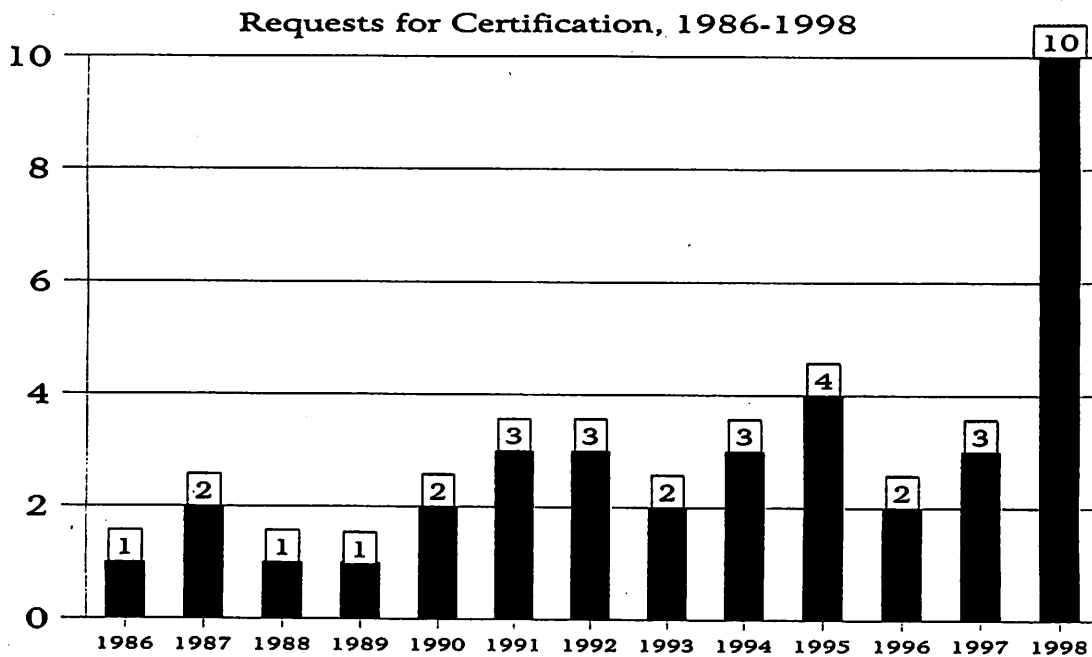
In 1985, New York State voters passed an amendment to the State Constitution granting the New York Court of Appeals discretionary jurisdiction to review certified questions from certain Federal courts and other courts of last resort (NY Const, art VI, § 3[b][9]). Thereafter, this Court promulgated section 500.17 of its Rules of Practice, which 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 cause 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 Rule 500.17, the matter is referred to an individual Judge of the Court, who circulates a thorough 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 as an appeal and, thus, as a manifestly important matter. While the certified question may be determined following full briefing and oral argument or pursuant to the Court's SSM procedures (see Rule 500.4), the ordinary, preferred method of handling is full briefing and oral argument on an accelerated track and scheduling basis.

### Overall Certified Question Statistics

#### Certified questions accepted, rejected and decided

During the first year the procedure was available -- 1986 -- the United States Court of Appeals for the Second Circuit certified one question to the New York Court of Appeals. The number of certifications remained low for several years, and gradually rose to between two and four per year. In 1998, the Court of Appeals received 10 certifications, including its first from a court other than the Second Circuit. In September 1998, the Court received a certification from the United States Court of Appeals for the Eleventh Circuit. In the Matter of Southeast Banking Corp. was argued on March 29, 1999.



This increase demonstrates that litigants in Federal courts, and the courts themselves, recognize the benefits of the certification process. The process promotes Federal-State comity by allowing the State's court of last resort to rule on unsettled issues of State law, and relieves both litigants and Federal courts of the uncertainty of guessing how the State court would answer the controlling questions of State law presented. Moreover, the procedures adopted by the New York State Court of Appeals have ensured the utility of the process by eliminating excessive delays that might otherwise deter certifications.

Of the 37 certifications received, this Court has accepted 33. The Court has declined to accept only three certifications -- each in a Per Curiam opinion spelling out the grounds for the declination.

- In Rufino v United States (69 NY2d 310), an appeal raising the same issue of State law was pending in the State's Appellate Division. The Court, in declining to accept the certification, stated: "Were we to undertake to answer the certified questions now, by the extraordinary procedure of responding to specific questions from the Federal court rather than deciding a case fully before us for review, we would necessarily affect the ordinary State procedure now in actual progress for the resolution of these issues. In the

circumstances, it is unquestionably preferable in the resolution of significant State law issues to secure the benefit afforded by our normal process -- the considered deliberation and writing of our intermediate appellate court in a pending litigation.”

- In Grabois v Jones (88 NY2d 254), an ERISA case, the Court concluded that several factors militated against discretionary review, including unlikelihood that the issue tendered would recur, limited assistance from the parties (one defendant having not appeared, another having appeared pro se), and a determination that the issue might be more appropriate for resolution in the first instance by the Federal courts.
- In Yesil v Reno (92 NY2d 455), the Court expressed uncertainty that the certified questions would be determinative of the underlying matters, noting that the case, which involved an exclusively Federal matter (Immigration and Naturalization), presented a fact pattern unlikely to arise in any State court proceeding. Moreover, the Court observed, the theoretical quality inherent in the form of the first certified question “may move this valuable certification process beyond some reasonably appropriate specificity and categorization in order for the process to satisfy the ‘determinative question’ prerequisite. Abstract or overly generalized questions might also curb this Court’s ability to promulgate a precedentially prudent and definitive answer to a law question like the narrower, follow-up certified question in this very matter, that is fact and case-specific.”<sup>3</sup>

In two other matters, the Federal court itself withdrew certifications (Riordan v Nationwide Mut. Fire Ins. Co., 984 F2d 69 [withdrawal before acceptance] and M.I.F.M. Kools v Citibank, N.A. [withdrawal after acceptance, but before argument]). Early in its experience with the certification process, the Court of Appeals issued a Per Curiam opinion declining to answer another certified question it had previously accepted, notwithstanding briefing and argument, because it became

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<sup>3</sup>In connection with the questions themselves, two added observations are pertinent. First, in some but not all instances, the Court of Appeals for the Second Circuit has added the helpful note that, while it wished to have answers to the questions as framed, it did not intend to restrict the Court of Appeals from additional guidance it might wish to offer on the State law issues (see, e.g., West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co., 49 F 3d 48 [2d Cir. 1995]; Consorti v Owens-Corning Fiberglas Corp., 45 F 3d 48 [2d Cir. 1995]; Madden v Creative Servs., 24 F 3d 394, 397 [2d Cir. 1994];). Second, the requirement of Second Circuit Rule 0.27, that the question certified “will control the outcome of a case pending” before that court, has not been uniformly reflected in the certification orders.

apparent that the question did not satisfy the requirement that it "may be determinative" of the cause (Retail Software Serv. Inc. v Lashlee, 71 NY2d 788).

In all, the Court has answered 25 certifications, many involving more than one question of law. One qualified for the Court's expedited SSM procedure. The Court has issued 23 signed majority opinions (as distinct from memoranda or summary decision list entries), two concurring opinions and three dissenting opinions.

#### Disposition times

The average period from receipt of initial certification papers to the Court's order accepting or declining review is 40 days. The average period from acceptance of a certification to disposition is 181 days, or six months. (This calculation does not include Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458, the calendaring of which was long delayed by the parties' settlement negotiations.) Where review was expedited, as is usual, disposition time has been as short as 72 days (see, Joblon v Solow, 91 NY2d 457).

#### **1998 Certified Question Statistics**

Of the ten certifications received in 1998, this Court accepted eight and declined one certification from the United States Court of Appeals for the Second Circuit (Yesil v Reno). The Court also accepted one certified question from the United States Court of Appeals for the Eleventh Circuit (In the Matter of Southeast Banking Corp.).

The Court answered certified questions in five cases, including two pending from 1997. Six certified questions accepted by the Court remained pending for review on the merits at the end of 1998.

#### **The Report of the Council on Judicial Administration and Committee on Federal Courts**

In 1998, the Council on Judicial Administration and Committee on Federal Courts of the Association of the Bar of the City of New York issued its Report and Recommendations on Second Circuit Certification of Determinative State Law Issues to the New York Court of Appeals (hereafter "ABCNY Report"), which recommends that this Court's practice of accepting or rejecting certified questions within 60 days after certification be incorporated into a formal rule (ABCNY Report, at 7). This Court's history of expeditiously determining whether to accept certifications suggests

that such a rule is unnecessary. Moreover, the time within which this Court can accept or reject a certified question is not entirely within its control, because the Court cannot begin its consideration of a certification request until the complete file has been received from the certifying court. Receipt of the file has taken as long as 15 days.

The ABCNY Report proposes a mechanism for "affording exigent treatment to certified questions that are urgent or require a decision by a certain date" (ABCNY Report, at 8). This Court has a longstanding practice of entertaining -- and granting, where appropriate -- letter requests for expedited treatment, which has also been employed in the certified question context, without the need for formal procedures.

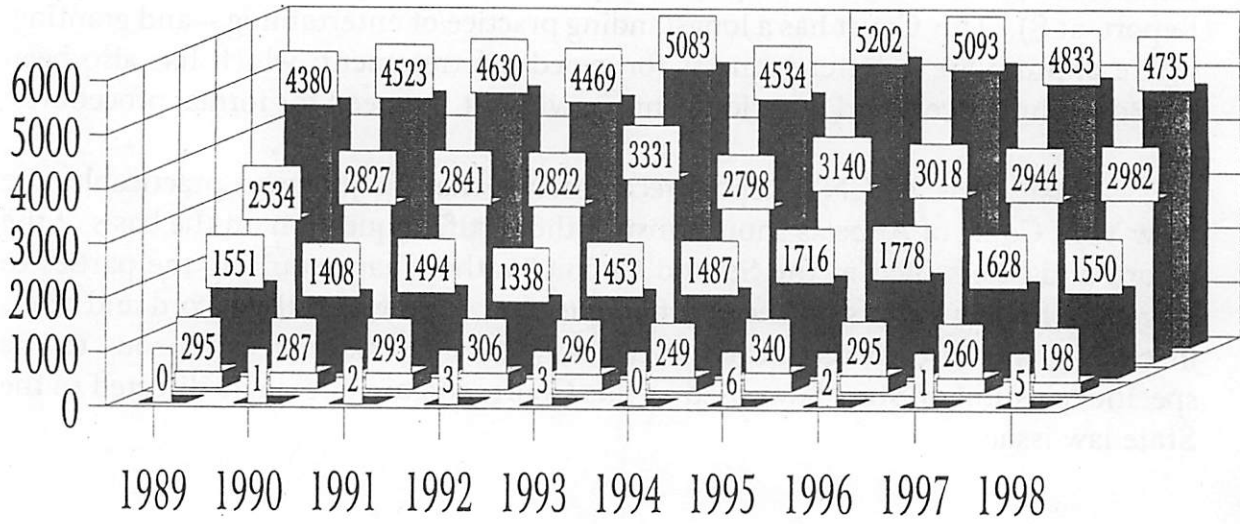
Finally, the ABCNY Report recommends that "[w]henever practicable, the New York Court of Appeals should answer the certified question on the basis of the record and briefs filed in the Second Circuit," rather than requiring the parties to serve and file new briefs on the certified question. However, the record and briefs in cases giving rise to certifications typically contain material extraneous to the specific question of State law posed to this Court, and are not singly directed to the State law issue.



(f) Comparison of Dispositions (1989-1998)

To conclude this analysis of 1998 Court of Appeals dispositions of all matters, the table below compares dispositions occurring in the years 1989 through 1998.

### Matters Decided, 1989-1998



- Total
- Criminal Leave Applications
- Motions
- Appeals
- Certified Questions

B. Sua Sponte Monitoring of Subject Matter Jurisdiction and Merits  
Evaluation of Appeals (Rule 500.3 and Rule 500.4)

1. Rule 500.3 (Jurisdiction)

The jurisdiction of the Court is narrowly defined by the State Constitution and applicable statutes. Following the filing of a notice of appeal or receipt of an order granting leave to appeal to this Court, an appellant must file two copies of a jurisdictional statement in accordance with Rule 500.2. Pursuant to Rule 500.3, the Clerk examines all jurisdictional statements filed for possible lack of subject matter jurisdiction. This review usually occurs the same day a jurisdictional statement is filed, and written notice to counsel of any potential impediment follows immediately. After the parties respond to the Clerk's inquiry, the matter is referred to the Central Legal Research Staff for preparation of a preliminary report prior to disposition by the full Court.

In 1998, 99 appeals were subject to Rule 500.3 inquiry, and all but seven were withdrawn, dismissed sua sponte or on motion, or transferred to the Appellate Division (five inquiries were pending at year's end). This sua sponte dismissal (SSD) screening process remains valuable to the public, the Court and the Bar because it identifies at the earliest possible stage of the appeal process whether an appeal is jurisdictionally defective and, hence, destined for dismissal or transfer by the Court.

2. Rule 500.4 (Merits)

Through its sua sponte merits (SSM) procedure, the Court decides appeals expeditiously on written submissions without oral argument. In 1998, the Court used the SSM procedure about as often as it did in 1997: six per cent of the appeals determined in 1998 were decided upon SSM review.

Of the 349 appeals filed in 1998, 21 (6%) were selected for SSM consideration. Of these, two were directed to full briefing and argument -- as were two appeals initially designated for SSM review in 1997 -- and one was discontinued before assignment to the Court. Five appeals remained pending assignment to the Court at the close of 1998. The remaining 13 were submitted to the Court along with two other SSM appeals pending from 1997. Thus, the Court reviewed 15 SSM appeals in 1998 -- seven criminal and eight civil.

The Court issued 13 unanimous decisions following SSM review, which included one signed opinion, eight memoranda and four decision list entries (i.e., a

brief explanatory rationale or a decision on the basis of the writing from a court below). Among these 13, six were affirmances, four were reversals and three were dismissals. Two submitted SSMs remained pending at the end of 1998.

The average length of time from the filing of a notice of appeal or order granting leave to appeal to the external disposition of an SSM decided in 1998 was 164 days.

### C. Court Rules

In 1998, the Court's Rules of Practice in noncapital matters (22 NYCRR Part 500) were revised in two respects. Section 500.2(c) was amended to delete the duplicative word "statutory" in the first sentence. Section 500.10(a) was amended to advise that specific arrangements for telephone conference calls regarding criminal leave applications may be made with the assigned Judge.

Also in 1998, the Court of Appeals approved a new Part 515 of the Rules of the Court of Appeals. This Part, which established Standards for Appellate Counsel and State Post-conviction Counsel in Capital Cases, is discussed in Part II(E) (Death Penalty) of this Report.

Part 520, Rules for the Admission of Attorneys and Counselors at Law, was substantially revised in 1998. The changes to Part 520 are detailed in Part II(D) (Attorneys' Roll Office) of this Report.

## II. Administrative Functions and Accomplishments

### A. Case Management

The Clerk, Deputy Clerk, Consultation Clerk, Assistant Consultation Clerk, two Assistant Deputy Clerks, Chief Motion Clerk, Prisoner Applications Clerk, several secretaries, court attendants and service 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 conferences; and preparing the Court's decisions for release to the public. In every case, multiple controls insure that the Court's actual determinations are accurately reported in the written decisions and orders released to the public.

In addition, many members of the Clerk's Office staff respond -- in person, by telephone and in writing -- to inquiries and requests for information from attorneys, litigants, the public, academicians and other 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 programs designed to educate the Bar about the Court's practice. A list of relevant Clerk's Office telephone numbers is included in Appendix 2.

#### B. Central Legal Research Staff

The Central Legal Research Staff prepares draft reports on civil motions for leave to appeal, certified questions and selected appeals under the supervision of individual Judges and the Clerk of the Court for the Court's full review and deliberation. Staff attorneys also write and revise research materials for use by the Judges' Chambers and the Clerk's Office and perform other research and analytical tasks as requested. In 1998, Central Staff again revised and updated the civil practice jurisdictional outline for the Court's internal use.

Through December 1998 Decision Days, Central Staff attorneys completed 1161 motion reports, 86 SSD reports, 10 certified question reports, and 5 SSM reports. Central Staff continued to maintain excellent currency in its work.

Attorneys usually join the Central Legal Research Staff directly following law school graduation. This year, staff attorneys represent Albany, Brooklyn, SUNY Buffalo, Columbia University, Cornell University, New York, CUNY Queens, St. John's University and Syracuse University law schools. Staff attorneys hired for 1999 will represent Albany, SUNY Buffalo, Hofstra University, Pace University, CUNY Queens, and Touro University law schools.

During 1998, the Building Manager's staff completed improvements to Central Staff's work space. In addition, the Information Systems Department and the Librarian worked to enhance the technical aspects of the Court's computerized legal research capabilities and, with the assistance of the Building Manager, linked Central Staff attorneys to the Court's internal network.

In 1998, the Chief Court Attorney was appointed to the Executive Committee of the American Bar Association's Council of Appellate Staff Attorneys.

### C. Library

The Librarian provides extensive legal and general reference services to the Judges of the Court, their law clerks and the Clerk's Office staff. In 1998, the Librarian reviewed the Court of Appeals collection to identify areas of strength and weakness. Additions to the collection were catalogued, superseded materials were deleted, and an updated Book Catalog was issued. The Librarian and her two assistants also monitored mergers in the legal publishing industry, revising title maintenance and accounting procedures accordingly.

In 1998, the Librarian regularly alerted the Judges and staff to newly-published journal articles and newly-acquired materials. The Librarian also updated and distributed internally the Election Law Index and the SSM Index. Staff attorneys and Chambers clerks received training in electronic research, with instruction focused on cost-efficient searching. During 1998, the Librarian established procedures for capturing in electronic form internal reports on motions and appeals, and this conversion is proceeding successfully. When completed, the database will provide full text access to these reports, in addition to the searchable abstracts now available.

The State Library, the Library of Albany Law School, the Legislative Library, and Albany Public Library continued to work with the Court of Appeals Library throughout 1998 to ensure access to the materials required by the Court. The Clerk expresses his ongoing appreciation for their cooperation in timely furnishing requested materials. Special thanks are due the Montgomery County Department of History and Archives, which donated to the Court an extremely rare copy of the Senate and Assembly Document Series for 1836-1919. Appellate Division Justice James N. White and Montgomery County Librarian Pat North were instrumental in arranging the donation. Because virtually all pre-1920 Bill Jackets were destroyed when the Capitol caught fire in the early part of this century, these sister series are often the only remaining avenue for establishing legislative intent prior to 1920.

In celebration of Law Day 1998, which occurred during the Court of Appeals' 150th anniversary year, the Court established an essay and poetry contest on the theme "If I were Chief Judge of the State of New York..." which "recogniz[ed] the responsibility we owe to future generations to pass our cherished inheritance on to them." Over seventy students from thirteen schools participated. The Librarian served on a committee which selected the eight winning entries, which were

published in a commemorative booklet distributed to all Depository Libraries in the State. The eight student winners, with their families and teachers, attended Law Day 1998 and a luncheon in their honor with the Judges of the Court.

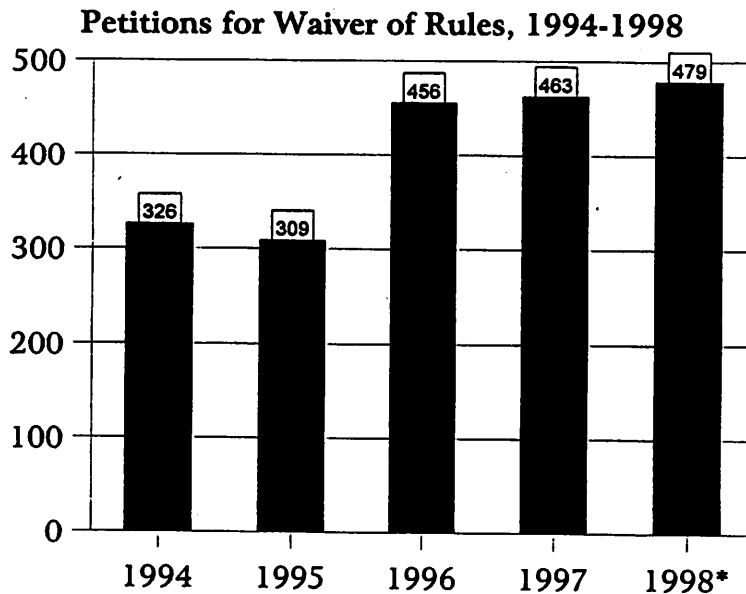
#### D. Attorneys' Roll Office

One staff attorney manages the Attorneys' Roll Office, supported by a secretary. The office has access, via computer terminal, to information on each attorney admitted to practice in the State, including the date and Appellate Division Department of admission and any subsequent change in status due to disciplinary or other administrative action. The Court's records complement the official registry of attorneys maintained by the Office of Court Administration, which answers public inquiries about the status of attorneys. The Attorneys' Roll Office prepares certificates of admission upon request and maintains a file of certificates of commencement of clerkship. Additionally, the staff attorney drafts preliminary reports to the Court on matters relating to (1) attorney disciplinary cases, (2) petitions for 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, and (3) proposed Rule changes ultimately decided by the Court.

After a comprehensive review of the Rules for the Admission of Attorneys and Counselors at Law (22 NYCRR Part 520), begun in 1997, the Court amended sections 520.3, 520.4, 520.6, 520.10, 520.11 and 520.12 (effective May 27, 1998) in a number of respects. Through these revisions, the Court sought to enhance the flexibility of the Rules while maintaining its high standards for admission to the Bar. The Court did not amend the Rules for the Licensing of Legal Consultants (22 NYCRR Part 521) in 1998.

The Attorneys' Roll Office created a new internal database for disciplinary motions, which is complete from 1994 to the present, including an index and the full content of motion reports now retrievable in WordPerfect or searchable by ISYS. To complement the motion database, the office has prepared a binder for use in manual research.

Finally, in 1998 the Attorneys' Roll Office created a new database for archiving and reviewing filed petitions for waiver of the Court's admission rules. While data input for prior years will be completed in the future, all 1998 petitions have been entered into the new database.



\*After the May 27, 1998 effective date of the Rule changes, 41 petitions were denied, or dismissed as academic or abandoned, and 13 petitions were withdrawn.

### E. Death Penalty

The 1995 death penalty statute created significant administrative and rulemaking responsibilities for the Court of Appeals. Since 1995, the Court has dedicated substantial time and personnel to meet these obligations, without any increase in Court staff or budget. All members of the Clerk's Office staff have contributed to the capital rulemaking process and to the development of internal procedures for processing capital cases. Additionally, in May 1997, at the Court's request, the Office of Court Administration appointed a Capital Case Coordinator to oversee administration of the capital case database, which Judiciary Law § 211-a requires the Court of Appeals to maintain. Finally, the Deputy Clerk continues to serve on an Office of Court Administration committee appointed by the Chief Judge to monitor the court system's administration of the death penalty statute.

In December 1995, pursuant to Judiciary Law § 35-b(4), the Court of Appeals approved Minimum Standards for Lead and Associate Counsel in Capital Cases, which the Capital Defender Office had promulgated for capital trial counsel in consultation with the Administrative Board of the Courts. Having determined that this statute did not expressly require similar standards for capital appellate and State

post-conviction counsel, in March 1997 the Chief Judge acted pursuant to the powers granted her by article 6, section 28 of the State Constitution and referred the matter of minimum standards for appellate and State post-conviction counsel to the Capital Defender Office and the Administrative Board for report and recommendations back to the Court of Appeals. Following a period of public comment on subsequently proposed standards, the Chief Judge promulgated standards for appellate and State post-conviction counsel, which were approved by the Court of Appeals and filed with the Secretary of State on May 7, 1998. These standards are codified at 22 NYCRR Part 515.

Thereafter, because the Capital Defender Office and the Departmental Screening Panels were in the process of developing procedures for recruiting and screening capital appellate counsel, the Court of Appeals released a Notice to the Bar on October 7, 1998 soliciting applications by counsel for placement on an interim roster of capital appellate counsel.

In September 1997, at the Court's direction, the Clerk had written the four Departmental Screening Panels requesting their respective responses to a series of questions concerning the experience thus far with compensating counsel under the capital counsel fee schedules approved by the Court in November 1996 pursuant to Judiciary Law § 35-b(5). In reply, three of four Departmental Screening Panels proposed reductions in the hourly rate of compensation for Lead and Associate Counsel. Following a period of public comment, on December 16, 1998 the Court of Appeals signed an order approving reduced capital counsel fee schedules for the four Judicial Departments. The order was publicly promulgated and disseminated on December 23, 1998.

Throughout the year, the Clerk's Office staff considered other matters relating to the administration of capital appeals, including the Court's capital case database and data report system and procedures for reviewing and approving capital counsel vouchers for fees and expenses on appeals to this Court.

#### F. Management and Operations

The Administrative Services Assistant, aided by two secretarial assistants, is responsible for supervising fiscal and personnel systems and functions, including purchasing, inventory control, fiscal cost recording and reporting, preparation of payroll documents, processing vouchers, counseling employees on and processing applications for various benefit programs and development of the Court's annual budget request.



A supplies manager is responsible for distribution of supplies. He also assists in comparison shopping and purchasing office supplies and equipment. Under the supervision of the Clerk and Deputy Clerk, another secretarial assistant records and tracks all employees' time and leave information.

## G. Budget and Finance

The Administrative Services Assistant is responsible for initial preparation, administration, implementation and monitoring of the Court's annual budget.

### 1. Expenditures

The work of the Court and all its ancillary agencies was performed within the 1998-1999 fiscal year budget appropriation of \$10,336,906. This figure included all judicial and staff salaries (personal services costs) and all other cost factors (non-personal services costs), including in-house maintenance of Court of Appeals Hall.

### 2. Budget Requests

The total request for fiscal year 1999-2000 for the Court and its ancillary agencies is \$10,415,089, an increase of .8% from the previous year's appropriation.

The 1999-2000 personal services request of \$8,255,036 reflects an increase of \$5,047, or .06%, over the current year's appropriation. This request includes funding for salary increments for all eligible nonjudicial employees as well as annualization of the October 1, 1998 three percent general salary increase for nonjudicial employees. The 1999-2000 non-personal services request of \$2,160,063 reflects an increase of \$73,136, or 3.5% more than the current year's adjusted appropriation. The requested nonpersonal service appropriation of \$2,160,053 includes adjustments in legal reference materials (\$19,979), real estate rentals (\$15,648), computer-assisted legal research (\$25,400), and replacement equipment (\$37,278). These increases are partially offset by reductions in utility costs (-\$23,960) and miscellaneous contractual services (-\$21,043).

The modest increase in the budget request demonstrates the Clerk's continuing commitment to operating the Court in an efficient and economical manner.

### 3. Revenues

In calendar year 1998, the Court reported filing fees of \$250 for each of 105 civil appeals. The \$26,250 realized was 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 (\$28,200), the computer bulletin board access service (\$2,100) and miscellaneous collections (\$1,905.43). For calendar year 1998, revenue collections totaled \$58,455.43.

#### H. Public Information

The Public Information Officer, assisted by a part time secretary, provides information concerning the work and history of New York's highest court to all segments of the public -- from school children to media representatives to members of the Bar. Throughout the year, the Public Information Officer and other members of the Clerk's Office staff conduct tours of the historic Courtroom for visitors.

The Public Information Office disseminates the Court's decisions upon release. The decisions on cases and motions also are listed on the Court's computer Bulletin Board. The Public Information Officer prepares monthly for public use a descriptive summary of cases to be argued before the Court. A version of that summary is now posted monthly on the Bulletin Board and is available in print form at Court of Appeals Hall. During 1998, the Public Information Office maintained the list of subscribers to the Court's slip opinions and handled requests from the public for individual slip opinions.

#### I. Document Reproduction and Court Attendants

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. Court attendants screen and deliver mail in-house, and maintain the Court's appeal records room, keeping track of and distributing all briefs, records, exhibits and original court files. When Court is in session, the court attendants also assist the Judges in the Courtroom and in conference.

#### J. Court of Appeals Hall

The Building Manager, Deputy Building Superintendent and their staff are responsible for the excellent condition and beautiful appearance of Court of Appeals

Hall and its grounds. The Building Manager and Deputy Building Superintendent also coordinate all work by outside contractors, arrange for transportation of appeal records and other materials between Court of Appeals Hall and the Judges' Home Chambers, and supervise the provision of security services by the building guards.

This past year witnessed the successful completion of the Court's portrait conservation and restoration program, performed by the Bureau of Historic Sites of the New York Office of Parks, Recreation and Historic Preservation. During 1998, the building maintenance staff finished renovating and rewiring the Central Legal Research Staff offices. Other major projects undertaken included improvements to the heating, ventilation and air-conditioning systems and rewiring the building to connect all computer workstations to one network. Also in 1998, the Building Manager's staff recycled 33,760 pounds of white paper, as well as other solid waste materials. Finally, the building maintenance staff provided invaluable assistance in preparing for the Court's 1998 Law Day celebration held, for the first time, on the steps of the Courthouse.

#### K. Computer Operations

The two-person Information Systems Department oversees all aspects of the Court's computer operations. The IS Department maintains a Help Desk for technical support for both hardware and software on a permanent basis. IS staff respond to an estimated 500 calls per year -- in person where possible, by telephone in long distance emergencies, and through vendor or manufacturer technical support when necessary. Training for new software and for software unfamiliar to new employees is scheduled as needed. In 1998, more than 40 employees attended various training seminars and software classes addressing beginner to advanced skills. Y2K compliance remains an ongoing priority. Most systems already comply, but adjustments continued to be made throughout the year as manufacturers communicated the need therefor.

During 1998, the IS staff initiated a "House Calls to Home Chambers" program, scheduling visits to the remote Home Chambers on a rotating basis at least once every six weeks. Also in 1998, a committee was formed to develop a replacement for the Court's computerized Bulletin Board, begun nearly ten years ago to allow subscribers to download Court of Appeals decisions and opinions.

With the assistance of an Assistant Deputy Clerk and an outside consultant, and the ready cooperation of the Clerk's Staff, the Court's AS/400 was upgraded to full OS400 operating system capability in 1998. A multitude of successfully

completed projects brought all Court of Appeals computer users into the same operating and applications threshold, which allows for more efficient maintenance and support of equipment, better training, and freer exchange of information and ideas. All workstations now run on Windows NT4.0. This achievement entailed configuring and installing new computers for 60 workstations, and modem connections where necessary, plus end user training and familiarization. Nearly all printers were replaced with HP Laserjets, which are compatible with each other and the Windows NT operating system. All workstations, hubs and servers in the Courthouse now use Ethernet network protocol. Three Home Chambers were completely rewired to bring them up to standards. Additionally, the IS Department received and began configuring seven new Dell file servers, with installation scheduled for early 1999. Finally, CD-ROM file servers were installed in each Home Chambers and in Albany to allow use of CD-ROM research software through the network. Aided by a member of the Building Manager's staff, the IS Department continued to maintain its database of inventory records for the Court.

#### L. Fire and Safety

During 1998, the Fire and Safety Committee met to review building safety requirements. Nine employees received Red Cross certificates for Standard First Aid and Community CPR skill levels.

The Clerk acknowledges the presence, professionalism and expertise of the State Police officers assigned to Court of Appeals Hall during 1998.

#### M. Personnel

The following personnel changes occurred during 1998:

#### **APPOINTMENTS:**

Rosemarie Fitzpatrick, formerly Secretary to Court of Appeals Judge Joseph W. Bellacosa, was appointed Principal Stenographer to Court of Appeals in January 1998.

Kathleen M. Vakiener was employed as Telephone Operator (temporary) in January 1998.

Linda T. Kaczmarek was employed as Clerical Research Aide in March 1998.

Charles C. Wager was employed as First Assistant Building Superintendent in April 1998.

Vivian Ali was employed as Telephone Operator (temporary) in July 1998.

Randy A. Bohannon was employed as per diem Court Building Guard (temporary) in July 1998 and appointed as permanent Court Building Guard in October 1998.

#### **PROMOTIONS:**

Travis R. Moore was promoted from Services Aide to Senior Services Aide in March 1998.

Christopher Fludd was promoted from Building Guard to Senior Building Guard in October 1998.

#### **RETIREMENTS:**

David A. Baker, Senior Assistant Building Superintendent, retired on December 10, 1998, after 24 years and five months of service.

#### **RESIGNATIONS:**

Burage S. Olsen, Senior Assistant Building Superintendent, resigned January 15, 1998, after 3 years and 2 months of service.

### **CENTRAL STAFF**

#### **APPOINTMENTS:**

Zainab A. Chaudhry, J. Matthew Donohue, Vaughn E. James, Barbara Comminos Kruzansky, Carol B. Pressman and Leah M. Soule were appointed Court Attorneys in August 1998.

#### **PROMOTIONS:**

Teresa A. Bruce, James A. Costello, Erika Duthiers, Joanne M. Harvey, Craig Hurley-Leslie, Tiffany H. Lee and Melissa E. Osborne were promoted from Court Attorneys to Senior Court Attorneys in August 1998.

## **COMPLETION OF CLERKSHIP:**

Senior Court Attorneys Lisa M. Connelly, Jason E. Markel, Theresa B. Moser, Elizabeth O'Leary, Paul Ryneski and John L. Sinatra completed their clerkships in August 1998.

## **ACKNOWLEDGMENT**

The members of the Clerk's Office staff contribute to the production of this Report by providing numerical data, narrative reports, and editing and proofreading services. I thank all of them, and mention specially Mary Ellen Cadalso, who compiled and prepared many of the detailed appendices, William Fitzpatrick, who produced the copies, Terri Buel and Hope Engel, who provided proofreading services, and Marjorie McCoy, whose editorial and compilational work was invaluable.

Throughout 1998, the Clerk's Office staff and the Building Manager's staff worked to ensure the efficient and courteous running of the Court. Again, I thank each staff member for helping provide the Bar and public exemplary service. A complete list of nonjudicial personnel appears in Appendix 11.

### III. 1998: Year In Review

This section presents a sampling of the significant decisions the Court of Appeals handed down in 1998, and highlights the range of constitutional, statutory and common law issues that reach the Court every year.

#### GOVERNMENT LAW

##### People v Romero (91 NY2d 750)

Although not licensed to practice law in New York, Israel Romero took money from a woman whom he purported to represent in a divorce action. When she belatedly learned that the words "pro se" under her signature meant she had represented herself, the woman brought a complaint against Romero to the Attorney General. The Attorney General prosecuted Romero for the unlawful practice of law and petit larceny. In dismissing the indictment, the Court ruled that the Attorney General did not have the authority to prosecute the case. Although Judiciary Law §476-a(1) directly authorizes the Attorney General to bring an action against those he believes are engaged in the unlawful practice of law, based on the language and legislative history of the statute, the Court concluded that the word "action" refers only to civil actions.

##### Matter of Holtzman v Oliensis (91 NY2d 488)

After the New York City Comptroller personally guaranteed a loan obtained by her campaign committee to finance her campaign for nomination for election to the United States Senate from a bank seeking a contract with the City, the bank's efforts to collect on the loan were forestalled by the Comptroller's policy of cutting off communication with underwriting firms responding to requests for proposals issued by her office. The Court upheld the determination of the New York City Conflicts of Interest Board that the Comptroller had violated the City Charter by using her public role for personal advantage. The Court also held that the provisions of the City Charter at issue were not preempted by the Federal Election Campaign Act.

##### Matter of Village of Scarsdale v Jorling (91 NY2d 507)

In a clash over rates charged localities for water from the New York City water supply pitting the New York City Water Board against Westchester County and the Village of Scarsdale, the Court held that the New York State Department of Environmental Conservation has the power to set the final rates for entitlement and

excess water consumption by users outside of New York City, although the Water Board does have the power to fix initial water usage rates.

## CONSTITUTIONAL LAW

### Stringfellow's of New York v City of New York (91 NY2d 382)

New York City amended its zoning laws to restrict the proximity of strip clubs, X-rated video stores, and other "adult entertainment" to churches, schools and one another. On appeal, the threshold issue was whether the City's zoning ordinance was directed at controlling the content of the message or at entirely separate societal goals, such as crime control and the preservation of property values. Having long recognized the authority of municipalities to implement zoning laws to address various quality of life issues, the Court ruled that the amendments did not violate constitutional guarantees of free speech. The Court held that the City's effort to control the negative secondary effects of the adult establishments did not violate the standards set down by the Supreme Court of the United States in Renton v Playtime Theatres and by this Court in Matter of Town of Islip v Caviglia.

### Matter of New York Assn. of Convenience Stores v Urbach (92 NY2d 204)

In this dispute over the non-collection of State taxes on cigarettes, alcohol and gasoline sold to non-Indians on Indian reservations in this State, the Court rejected the State's threshold argument that convenience store owners losing business to the reservations did not have standing. The Court agreed with the Appellate Division below that the convenience store owners' grievance was essentially an Equal Protection claim based on differential enforcement of the tax laws. However, the Court rejected the Appellate Division's conclusion that the Tax Department's failure to enforce the tax laws against a particular class of transactions, i.e., on-reservation sales to non-Indians, constituted a form of race-based discrimination subject to the demanding strict scrutiny analysis. The Court held the Tax Department's policy of forbearing to collect tax on on-reservation sales should be reviewed under a rational basis standard.

### Matter of Tamagni v Tax Appeals Tribunal (91 NY2d 530)

The Tamagnis lived in New Jersey but were also statutory residents of New York, having spent more than 183 days here. They claimed that New York State's income tax scheme violated the dormant Commerce Clause of the Federal Constitution insofar as the scheme subjected their income from intangible assets to full taxation in both New York and New Jersey. The Court held that the New York tax did not trigger Commerce Clause scrutiny because it was based solely on the taxpayer's status as a New York State resident, without regard to any economic



activities conducted here. In the alternative, the Court held that even if Commerce Clause analysis were applicable, the tax was not unconstitutional because it did not discriminate against interstate commerce, and States have traditionally retained broad powers to tax their own residents.

### FEDERAL PREEMPTION

Drattel v Toyota Motor Corp. (92 NY2d 35)

After a car accident left his wife with permanent brain damage, plaintiff sued Toyota in a products liability action claiming that the car was defectively designed because it did not contain airbags. Resolution of Toyota's appeal regarding the airbags claim turned on whether the 1966 National Traffic and Motor Vehicle Safety Act preempted plaintiff's State lawsuit. The Court held that the Federal statute did not expressly displace the claim; nor did the statute impliedly do so. The Court noted the reliable indicia of Congressional intent to preserve common law causes of action, a lack of Congressional intent to occupy the entire field, and an absence of "conflict" since Federal law did not prevent Toyota from using airbags -- it merely provided the option of installing airbags to meet passive restraint requirements. Thus, the Court permitted plaintiff's airbag-related litigation to proceed in State court.

### DEATH PENALTY

Matter of Hynes v Tomei; Matter of Relin v Connell (92 NY2d 613)

In the Court's first death penalty case since the new statute became effective, the Court declared unconstitutional provisions governing guilty pleas. These provisions allowed a defendant to enter a plea of guilty to first degree murder only when the agreed-upon sentence was life imprisonment without parole or certain other specified terms of imprisonment. In effect, once a District Attorney filed a notice of intent to seek the death penalty, only a defendant who pleaded not guilty and went to trial before a jury risked the death penalty. Applying a 1968 decision of the Supreme Court of the United States -- United States v Jackson (390 US 570) -- the Court of Appeals determined that the pleading provisions of the New York statute impermissibly burdened defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial by needlessly encouraging guilty pleas and jury waivers to avoid death sentences. The Court held that the challenged provisions were severable, however, and the balance of the statute remained intact.

## REPRODUCTIVE RIGHTS

### Kass v Kass (91 NY2d 554)

In this novel case, the Court was called upon to decide the fate of a couple's five cryopreserved pre-zygotes, developed through an in vitro fertilization program. The couple divorced and the wife sought sole custody of the pre-zygotes, for implantation in her. Challenging the wife's bid for custody, the husband asserted that, in accordance with the consent forms which the couple had signed at the hospital, the pre-zygotes were to be donated to research. The Court concluded that constitutional rights in the area of reproductive choice were not implicated in the dispute and that the pre-zygotes were not "persons" for constitutional purposes. Instead, the Court resolved the issue as one of contract, concluding that the consents signed by the parties unequivocally manifested their mutual intention that, under the circumstances presented, the pre-zygotes be donated for research. The case underscores the importance of a couple's agreement at the time of entering an in vitro fertilization program.

## EVIDENCE

### Cohens v Hess (92 NY2d 511)

In this personal injury action, the Court addressed whether a guilty plea to a traffic offense, which was later permitted to be withdrawn, was admissible as impeachment material in a subsequent civil action for damages even though it would not be admissible in a criminal trial. The Court concluded that because vacatur of the guilty plea was not based on a violation of due process, but rather was an exercise of City Court's discretion, the plea was admissible to impeach defendant and to demonstrate his negligence in a subsequent civil action. The Court distinguished the use of a withdrawn guilty plea in a civil case -- where a defendant could take the stand to explain the plea to the jury -- and its use in a criminal case -- where the defendant might be tacitly forced to take the stand in violation of his fundamental right not to testify.

## CONTRACTS

### Matter of Diamond Asphalt Corp. v Sander (92 NY2d 244)

New York City solicited bids for all aspects of work involved in a public street repaving project, including utility interference work, pursuant to a joint bidding agreement among New York City, Consolidated Edison, New York Telephone and Empire City Subway. The City awarded the contract to the contractor that submitted the lowest aggregate bid, irrespective of the discrete costs associated with

the utility interference work. The Court invalidated the joint bidding agreement, holding that private utility interference work does not constitute "public work" for purposes of determining the lowest responsible bidder under General Municipal Law § 103(1). On a related issue, the Court held that bypass contractor selection authority (avoiding low bidder requirements), formerly vested in the defunct Board of Estimate by the replaced City Charter, was not transferred solely to the Mayor under revised New York City Charter § 313(b)(2).

Norcon Power Partners, L.P. v Niagara Mohawk Power Corp. (92 NY2d 458)

Niagara Mohawk Power Corporation and Norcon Power Partners L.P., an independent power producer, entered into a long-term contract obligating Niagara Mohawk to purchase electricity produced at Norcon's plant. In a Federal lawsuit brought concerning the contract, the District Court ruled in favor of Norcon. In answer to a question certified by the United States Court of Appeals for the Second Circuit, this Court upheld Niagara Mohawk's legal claim. In this case of first impression, the Court held that a party to a long term commercial contract, like the multi-million dollar contract for the sale of electricity at issue in this case, has the right to demand adequate assurance of future performance where reasonable grounds for insecurity exist. In so holding, the Court extended the doctrine of demand for adequate assurance of future performance, previously applied only to contracts for the sale of goods (UCC 2-609) or in cases of insolvency, to common law contract disputes.

Rooney v Tyson (91 NY2d 685)

Kevin Rooney trained boxer Mike Tyson from 1982 until Tyson fired him in 1988. Rooney sued Tyson in Federal court claiming that he had an oral contract to be Tyson's trainer for as long as Tyson remains a professional fighter. A Federal district court ruled in Tyson's favor and Rooney appealed to the United States Court of Appeals for the Second Circuit. In answering its certified question, this Court ruled in Rooney's favor. This Court held that an oral contract between a fight trainer and a professional boxer to train the boxer "for as long as the boxer fights professionally" delineates sufficiently ascertainable boundaries to overcome the presumption of at-will employment and to qualify as a contract for a definite term.

## TORT LAW

Burgos v Aqueduct Realty Corp.; Gomez v New York City Housing Auth. (92 NY2d 544)

A recurring issue before New York courts is the burden of proof a tenant must satisfy in order to establish a claim against a landlord for negligent building security

when the tenant is injured in a third-party criminal attack. In Burgos, the Court settled the issue: a plaintiff can establish proximate cause if the evidence renders it more likely, or more reasonable, than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance. This comports with the standard for proximate cause in other negligence cases.

Rust v Reyer (91 NY2d 355)

This case dealt with the popular phenomenon of "keg parties": is a statute imposing tort liability on persons unlawfully furnishing alcoholic beverages to under-age persons whose intoxication causes injuries applicable to a teenaged defendant who hosted a keg party when her parents were out of town? Defendant allowed local fraternity members to supply kegs of beer at the party and charge a one-time fee for unlimited access to that beer. Arrangements were also made for defendant to receive a portion of the proceeds collected at the party. While at the party, plaintiff was injured when another party-goer struck her in the face, and she sued for damages. Noting that the statute intended to use civil penalties as a deterrent against underage drinking, the Court held that, under these facts, defendant was more than an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink. Rather, the Court held that defendant played an indispensable role in a scheme to furnish alcoholic beverages to under-age persons and therefore could be held liable for damages under section 11-100 of the General Obligations Law.

Bethel v New York City Transit Auth. (92 NY2d 348)

A passenger sued the Transit Authority after he fell down in a bus. The trial court charged the jury, based upon precedent existing for over 100 years, that the bus company "had a duty to use the highest degree of care that human prudence and foresight can suggest in the maintenance of its vehicles and equipment for the safety of its passengers." The Court concluded that this rule of a common carrier's duty of extraordinary care is no longer viable and that a common carrier is subject to the same duty of care as any other potential tortfeasor -- reasonable care under all of the circumstances of the particular case.

## PRODUCTS LIABILITY

Liriano v Hobart Corp. (92 NY2d 232)

This Court had previously held that a manufacturer is shielded from liability in an action claiming a defect in design where a subsequent user has substantially modified a product, making it unreasonably dangerous. As certified to this Court by the United States Court of Appeals for the Second Circuit, this case presented the question whether a manufacturer must still warn subsequent users not to modify its

product where the dangerous modification is reasonably foreseeable. Relying on cases requiring manufacturers to warn of foreseeable misuses of their products, the Court held that manufacturers must warn against foreseeable, dangerous modifications to their products. In this case, a supermarket employee lost a hand while operating a meat grinder from which a safety guard had been removed by the previous user of the machine. The Court held that the manufacturer could be liable for failing to warn that the safety guard should not be removed.

Gebo v Black Clawson Co. (92 NY2d 387)

In this products liability case, the Court held that defendant, a seller of paper who manufactured a protective guarding system for an embossing machine intended for defendant's own use and not for the sale or transfer to others, was a "casual manufacturer" and could not be liable in strict products liability or for negligent design of the embossing unit to a plaintiff who sustained injuries while using the machine. Moreover, the Court concluded that, as the seller of the modified embossing machine, defendant was also not liable to plaintiff in ordinary negligence because defendant merely engaged in the one-time bulk sale of its paper mill and embossing unit and was not regularly engaged in the commercial sale of such embossing units. The duty of a casual manufacturer is to warn a person of known defects that are not obvious or readily discernible, a duty the Court concluded was discharged in this case.

## CIVIL PROCEDURE

Held v Kaufman (91 NY2d 425)

The Court held that additional grounds for dismissal may be raised in a reply affidavit without violating the rule permitting only a single motion for dismissal under CPLR 3211. The Court also explored the timeliness of a claim for fraud in the inducement, holding that the claim is timely when brought within six years after the alleged fraud if, at the time of the fraud, the underlying claim the claimant was induced to relinquish by reason of the alleged fraud was timely and otherwise viable.

Karasek v LaJoie (92 NY2d 171)

When plaintiff alleged malpractice in the provision of mental health services by her licensed psychologist, the defendants in the case claimed that plaintiff was time-barred under the Statute of Limitations for medical malpractice claims. The Court concluded that the professional services rendered by the psychologist were not medical in character for the purposes of determining the appropriate limitations period, however, and held that the CPLR 214(6) three-year period for "malpractice, other than medical, dental or podiatric" applied. In reinstating the complaint against

the psychologist, the Court noted that while it may be reasonable to infer that the diagnostic and treatment services provided by medically trained psychiatrists are medical in nature, the same cannot be said of services rendered by psychologists and other mental health care professionals.

Whalen v Kawasaki Motors Corp. (92 NY2d 288)

In this personal injury action, plaintiff settled with several defendants before trial and proceeded to trial against the one remaining non-settling defendant who, along with plaintiff, was found to share responsibility for plaintiff's injuries. The Court construed General Obligations Law § 15-108 and CPLR 1411 to hold that plaintiff's recovery should first be reduced by the amount of monies he received in pre-trial settlements, and only then be further reduced in proportion to plaintiff's share of fault in causing his own injuries.

### CRIMINAL LAW & PROCEDURE

People v Benevento (91 NY2d 708)

In this case, the Court reiterated that the standard for determining whether a defendant received effective assistance of counsel is that first enunciated in People v Baldi (54 NY2d 137), namely, "meaningful representation." Under this standard, a reviewing court considers whether counsel's performance deprived the defendant of a fair trial.

People v Stirrup (91 NY2d 434)

For purposes of calculating the amount of time allowed the People to become ready for trial, the Court ruled that, under CPL 30.30(5)(b), a criminal action is deemed commenced when the defendant physically appears in the courthouse in response to a desk appearance ticket. This is so even where the People have technically not yet commenced the action by filing an accusatory instrument. The Court further held that where the People's unreadiness for trial necessitated an adjournment, and thus caused the "speedy trial clock" to begin running against them, the People can avoid responsibility for the remainder of the adjournment period by issuing a record notice of readiness.

People v Hidalgo (91 NY2d 733)

Defendant pleaded guilty to first degree attempted assault, without a sentence promise, and was sentenced to one to three years in prison. On appeal, defendant attempted to contest the sentence as harsh and excessive, despite having agreed at the plea colloquy to waive her right to appeal the conviction. This Court held that defendant's unrestricted and generalized waiver was sufficient to bar her sentencing

challenge on appeal because defendant was aware that her sentence was left to the sentencing court's discretion. The Court's decisions on waiver of the right to appeal have constituted a significant body of law in recent years.

People v Hues (92 NY2d 413)

This appeal questioned the propriety of juror note-taking during trial. Recognizing the need to respond to contemporary challenges facing our jury system and the overwhelming authority of Federal and other State courts, and employing "a healthy dose of common sense," the Court held it within the sound discretion of trial courts to allow note-taking by jurors during a trial. If a trial court determines that a particular case warrants note-taking, the court can sua sponte instruct jurors that they are permitted to take notes during the trial. In light of potential perils that note-taking can present during trial, the Court indicated that this discretion must be tempered by cautionary instructions at the commencement of trial and also at the conclusion of trial as part of the court's charge prior to jury deliberations.

People v Kramer (92 NY2d 529)

The defendants in two gambling-related criminal investigations involving race-fixing at Yonkers Harness Track sought to suppress eavesdropping evidence by challenging the legality of certain underlying pen register and "trap and trace" orders. The Court held that where telephone numbers are captured by a pen register or "trap and trace" device, individuals who are a target of the investigation -- whether named or later disclosed and identified -- have standing to question the legality of the orders in a court proceeding. The Court also clarified its holding in People v Bialostok (80 NY2d 738) as requiring courts to evaluate the ease of technological conversion of audio-capable pen register devices when determining whether the more rigorous legal standard for an eavesdropping warrant is required.

People v Stevens; People v Smith (91 NY2d 270)

These two defendants had pleaded guilty to sex offenses and were sentenced to prison. When "Megan's Law" was enacted requiring the registration of sex offenders after release from incarceration, the defendants were designated "risk level three" offenders -- the most serious classification. They attempted to appeal the risk level determinations. This Court held that risk level classifications are neither amendments to the original judgment of conviction nor re-sentencings. The Court noted that a defendant's right to appeal is purely statutory, and no appeal is authorized in either "Megan's Law" or the Criminal Procedure Law. Thus, a convicted sex offender has no right to appeal a risk level determination under the procedures followed.

## FAMILY LAW

### Bast v Rossoff (91 NY2d 723)

This case presented the issue of child support calculation when parents share custody of their child. Balancing the policy considerations underlying enactment of the Child Support Standards Act ("CSSA") against the practical challenges of applying this statute in shared custody situations, the Court held that the CSSA applies to cases of shared custody. In determining the noncustodial parent's support obligation, a court must first calculate the basic child support obligation pursuant to the three-step statutory formula; a court may then utilize the statute's "paragraph (f)" factors. The Court explicitly rejected use of the "proportional offset formula" for calculating child support in shared custody arrangements.

## TAXATION

### Matter of FMC Corp. v Unmack (92 NY2d 179)

In these proceedings, separately commenced by two petitioners pursuant to article 7 of the Real Property Tax Law, the Court examined whether substantial evidence existed to rebut the established presumption of validity of tax assessments. In both appeals, collectively decided in one opinion, the Court held that petitioners proffered different, yet substantial, documentary and testimonial evidence to overcome the presumption of validity. The Court noted that both petitioners presented detailed appraisal reports authored by experienced and licensed real estate appraisers along with other relevant data affecting the value of each site. Petitioners having met their initial burden of tendering substantial evidence, the Court remitted the matter to the Appellate Division to determine whether petitioners demonstrated by a preponderance of the evidence that their respective properties were overvalued.

## EMPLOYMENT RELATIONS

### Matter of Roma v Ruffo (92 NY2d 489)

After receiving an unfavorable determination in a grievance procedure provided in the collective bargaining agreement with their public employer, employees of a public school district commenced an article 78 proceeding challenging the employer's unilateral change of a term and condition of employment expressly covered by their collective bargaining agreement. On appeal, this Court held that the trial court properly exercised jurisdiction because the dispute was essentially contractual in nature, involving a previously bargained-for term of the contract, and therefore the matter was not within the exclusive jurisdiction of the State's Public Employee Relations Board.



## ENTITLEMENT PROGRAMS

### Matter of Murphy v Office of Voc. and Educ. Serv. (92 NY2d 477)

Plaintiff, disabled after a work-related accident, received financial assistance to complete her undergraduate education through the New York State Department of Education's Office of Vocational and Educational Services for Individuals with Disabilities (VESID), which administers funding to qualified individuals with disabilities pursuant to the Federal Rehabilitation Act of 1973. Plaintiff then sought financial assistance to attend law school, despite the fact that her application for undergraduate assistance had acknowledged her ability to find law-related work in a law firm after college. Plaintiff had also agreed to save her own money toward her law school education. Tracing the legislative history of the pertinent provisions of the Rehabilitation Act, this Court held that the purpose of the Act was to empower individuals with disabilities and provide them the opportunity for meaningful and gainful employment, not to fund each individual's quest for maximum employment. The Court held that VESID was not required to fund plaintiff's law school education.

### Seittelman v Sabol (91 NY2d 618)

The Court declared invalid a State regulation limiting Medicaid reimbursements for expenses incurred by eligible individuals during the three months preceding a Medicaid application for services rendered by Medicaid-enrolled providers. In addition to holding Medicaid applicants eligible for retroactive reimbursement if they were eligible for Medicaid during that three-month period, the Court determined that Medicaid applicants would be reimbursed at the Medicaid rate or fee in effect at the time the care or service was rendered, and not for all out-of-pocket expenses.

## INSURANCE

### McCarthy v Aetna Life Ins. Co. (92 NY2d 436)

The Court was called upon to determine whether a decedent-insured effected a change in designation of a beneficiary of his life insurance policy without complying with the requirements stated in the policy. The Court held that a testamentary disposition leaving any insurance benefits to the insured's father was, by itself, an insufficient manifestation of the insured's intent to change the designation of his former wife on the insurance policy. Thus, absent evidence establishing that the insured attempted to comply with the policy's procedures and requirements to change the beneficiary, or evidence demonstrating that the insured was physically or mentally incapable of complying with the policy, the Court was bound by the designation of the beneficiary in the insurance policy.

## TRUSTS AND ESTATES

### Matter of Bieley (91 NY2d 520)

On this appeal, the Court clarified the doctrine of gift by implication, noting that this case presented one of those rare and exceptional circumstances where common sense and justice compelled application of the doctrine to redress an obvious omission. Focusing on the overriding objective in construction proceedings to carry out the testator's purpose, the Court concluded that a clause which provided that the residuary estate be placed in trust for the testatrix's mother, if her mother survived her, and then upon her mother's death to two named beneficiaries, should be given effect so that the residuary estate passed to the named beneficiaries, even though the testatrix's mother did not survive her.

## PROPERTY RIGHTS

### Lewis v Young (92 NY2d 443)]

In this dispute between neighbors, the Court was asked to determine whether a landowner, without consent, could relocate a driveway long used by the easement holder. New York courts had not previously addressed that particular question, but had decided cases involving other unconsented-to alterations of easements. After considering those precedents and their underlying policy considerations, the Court concluded that, in the absence of a demonstrated intent to provide otherwise, a landowner, consonant with the beneficial use and development of its property, can move a driveway without the easement holder's consent. The landowner, however, must bear the expense of the relocation; the change must not frustrate the parties' intent or object in creating the right-of-way; it must not increase the burden on the easement holder; and it must not significantly lessen the utility of the right-of-way.

### Adirondack League Club v Sierra Club (92 NY2d 591)

In this case, the Court held that recreational use is properly part of the analysis when determining whether a river or waterway is navigable-in-fact. If a river is navigable-in-fact, the public retains an easement over which it can travel. Plaintiff had sued defendants in trespass after they canoed down the 12 miles of the South Branch of the Moose River that course through property owned by plaintiff. Defendants, joined by the State of New York as intervenor, claimed that the South Branch was navigable-in-fact and that they were only making use of the public easement. In light of modern necessities and usage, the Court agreed with defendants that recreational use, and not just the ability to carry goods to market, fits within the traditional analysis whether a waterway had practical utility for trade or travel. In addition, the Court held that occasional obstacles do not destroy a

river's navigability and, as incidental to the navigational right, those traveling on the river can make use of the banks or bed -- that is, portage -- where necessary to circumvent those obstacles.

## IV. Appendices

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APPENDIX 1

**JUDGES OF THE COURT OF APPEALS**

**COURT OF APPEALS  
20 EAGLE STREET  
ALBANY, NEW YORK 12207-1095**

**Hon. Judith S. Kaye  
Chief Judge of the Court of Appeals  
230 Park Avenue, Suite 826  
New York, New York 10169-0007  
Telephone: (212) 661-6787**

**Hon. Joseph W. Bellacosa  
Senior Associate Judge of the Court of Appeals  
Court of Appeals Hall  
20 Eagle Street  
Albany, New York 12207-1095  
Telephone: (518) 455-7730**

**Hon. Carmen Beauchamp Ciparick  
Associate Judge of the Court of Appeals  
Chanin Building  
122 East 42nd Street, Suite 3700  
New York, New York 10168-0002  
Telephone: (212) 661-2144**

**Hon. George Bundy Smith  
Associate Judge of the Court of Appeals  
61 Broadway - 29th Floor  
Room 2900  
New York, New York 10006-2704  
Telephone: (212) 363-5990**

**Hon. Richard C. Wesley  
Associate Judge of the Court of Appeals  
Livingston County Government Center  
6 Court Street  
Geneseo, New York 14454-1030  
Telephone: (716) 243-7910**

**Hon. Howard A. Levine  
Associate Judge of the Court of Appeals  
County Judicial Building  
612 State Street, 2nd Floor  
Schenectady, New York 12305-2113  
Telephone: (518) 388-4497**

**Hon. Albert M. Rosenblatt  
Associate Judge of the Court of Appeals  
10 Market Street, 2nd Floor  
Poughkeepsie, New York 12601-3228  
Telephone: (914) 486-6444**

APPENDIX 2

**PERTINENT CLERK'S OFFICE TELEPHONE NUMBERS**

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

**Questions Concerning Motions:**

**Suzanne Aiardo, Esq. (518) 455-7705**

**Questions Concerning Criminal Leave Applications:**

**Terry DiLeva (518) 455-7784**

**Questions Concerning Civil and Criminal Appeals:**

**Laurene Tacy, Esq. (518) 455-7701**

**Martin Strnad, Esq. (518) 455-7702**

**Hope Engel, Esq. (518) 455-7703**

**Questions Concerning Attorney Admission and Discipline:**

**Hope Engel, Esq. (518) 455-7703**

**General Information and Building Tours:**

**Paul J. Browne, Public Information Officer**

**(518) 455-7711**

**SUMMARY OF TOTAL APPEALS DECIDED IN 1998 BY JURISDICTIONAL PREDICATE**

January 1, 1998 through December 31, 1998

BASIS OF JURISDICTION	ALL APPEALS					
	TYPE OF DISPOSITION					
	Affirmance	Reversal	Modification	Dismissal	Other	Total
Dissents in Appellate Division.....	5	6	1	1	--	13
Permission of Court of Appeals or Judge thereof.....	63	38	7	1	--	109
Permission of Appellate Division or Justice thereof.....	20	17	--	4	--	41
Constitutional Question.....	7	3	--	--	--	10
Stipulation for Judgment Absolute.....	--	1	--	--	--	1
Other.....	<u>1</u>	<u>2</u>	<u>1</u>	<u>--</u>	<u>20</u>	<u>24*</u>
Totals.....	96	67	9	6	20	198

BASIS OF JURISDICTION	CIVIL APPEALS					
	TYPE OF DISPOSITION					
	Affirmance	Reversal	Modification	Dismissal	Other	Total
Dissents in Appellate Division.....	5	6	1	1	--	13
Permission of Court of Appeals.....	27	23	6	--	--	56
Permission of Appellate Division.....	10	10	--	--	--	20
Constitutional Question.....	7	3	--	--	--	10
Stipulation for Judgment Absolute.....	--	1	--	--	--	1
Other.....	<u>1</u>	<u>2</u>	<u>1</u>	<u>--</u>	<u>20</u>	<u>24*</u>
Totals.....	50	45	8	1	20	124

BASIS OF JURISDICTION	CRIMINAL APPEALS					
	TYPE OF DISPOSITION					
	Affirmance	Reversal	Modification	Dismissal	Other	Total
Permission of Court of Appeals Judge.....	36	15	1	1	--	53
Permission of Appellate Division Justice.....	10	7	--	4	--	21
Other.....	<u>--</u>	<u>--</u>	<u>--</u>	<u>--</u>	<u>--</u>	<u>--</u>
Totals.....	46	22	1	5	--	74

\*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 Court Rule 500.17).



APPENDIX 4 (A)

COMPARATIVE STATISTICAL ANALYSIS FOR 1998 DECIDED APPEALS

ALL APPEALS - % CIVIL AND CRIMINAL

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Civil	62% (154 of 249)	57% (193 of 340)	59% (174 of 295)	73% (190 of 260)	63% (124 of 198)
Criminal	38% (95 of 249)	43% (147 of 340)	41% (121 of 295)	27% (70 of 260)	37% (74 of 198)

CIVIL APPEALS - TYPE OF DISPOSITION

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Affirmed	55%	48%	52%	47%	40%
Reversed	26%	31%	32%	37%	37%
Modified	13%	13%	10%	5%	6%
Dismissed after Argument	1%	--	--	2%	1%
Other (e.g. judicial suspension; Rule 500.17 certified question)	5%	8%	6%	9%	16%

CRIMINAL APPEALS - TYPE OF DISPOSITION

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Affirmed	75%	59%	63%	67%	62%
Reversed	16%	25%	24%	21%	30%
Modified	6%	9%	9%	3%	1%
Dismissed	3%	7%	4%	9%	7%

Civil Appeals - Jurisdictional Predicates

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Appellate Division Dissents	12% (19 of 154)	13% (25 of 193)	10% (18 of 174)	12% (22 of 190)	11% (13 of 124)
Court of Appeals Leave Grants	52% (80 of 154)	63% (122 of 193)	60% (104 of 174)	59% (112 of 190)	45% (56 of 124)
Appellate Division Leave Grants	22% (34 of 154)	11% (20 of 193)	14% (25 of 174)	12% (23 of 190)	16% (20 of 124)
Constitutional Question	7% (11 of 154)	5% (10 of 193)	7% (12 of 174)	7% (14 of 190)	8% (10 of 124)
Stipulation for Judgment Absolute	--	--	1% (1 of 174)	--	1% (1 of 124)
CPLR 5601(d)	1% (2 of 154)	--	1% (2 of 174)	1% (2 of 190)	2% (3 of 124)
Supreme Court Remand	1% (2 of 154)	.5% (1 of 193)	--	--	1% (1 of 124)
Judiciary Law §44	3% (4 of 154)	.5% (1 of 193)	5%* (9 of 174)	7% (13 of 190)	4%* (5 of 124)
Certified Question from Federal Court (Rule 500.17)	1% (2 of 154)	3% (6 of 193)	2% (3 of 174)	2% (4 of 190)	12%** (15 of 124)
Other	--	4% (8 of 193)	--	--	--

\* Includes judicial suspension matters

\*\* Includes decisions accepting/declining certification

APPENDIX 4 (B)

APPENDIX 4 (C)

Criminal Appeals - Jurisdictional Predicates

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Permission of Court of Appeals Judge	79% (75 of 95)	65% (96 of 147)	74% (89 of 121)	70% (49 of 70)	72% (53 of 74)
Permission of Appellate Division Justice	21% (20 of 95)	35% (51 of 147)	26% (32 of 121)	30% (21 of 70)	28% (21 of 74)

**SUMMARY OF DISPOSITIONS BY JURISDICTIONAL PREDICATE**

(showing percentage of type of disposition within each category of jurisdictional predicate)

January 1, 1998 through December 31, 1998

ALL APPEALS

Type of Disposition

<u>Jurisdictional Predicate:</u>	<u>Affirmance</u>	<u>Reversal</u>	<u>Modification</u>	<u>Dismissal</u>	<u>Other</u>
Dissents in Appellate Division	38% (5 of 13)	46% (6 of 13)	8% (1 of 13)	8% (1 of 13)	--
Permission of Court of Appeals or Judge thereof	58% (63 of 109)	35% (38 of 109)	6% (7 of 109)	1% (1 of 109)	--
Permission of Appellate Division or Justice thereof	49% (20 of 41)	41% (17 of 41)	--	10% (4 of 41)	--
Constitutional Question	70% (7 of 10)	30% (3 of 10)	--	--	--
Stipulation for Judgment Absolute	--	100% (1 of 1)	--	--	--
Other (e.g. Judiciary Law § 44[7], Remand from U.S. Supreme Court)	4% (1 of 24)	8% (2 of 24)	4% (1 of 24)	--	84%* (20 of 24)

\*Dispositions other than affirmance, reversal, etc., such as question certified by U.S. Court of Appeals (Rule 500.17); State Commission on Judicial Conduct matters.

APPENDIX 5 (B)

SUMMARY OF DISPOSITIONS BY JURISDICTIONAL PREDICATE

(showing percentage of type of disposition within each category of jurisdictional predicate)

January 1, 1998 through December 31, 1998

CIVIL APPEALS

Type of Disposition

<u>Jurisdictional Predicate:</u>	<u>Affirmance</u>	<u>Reversal</u>	<u>Modification</u>	<u>Dismissal</u>	<u>Other</u>
Dissents in Appellate Division	38% (5 of 13)	46% (6 of 13)	8% (1 of 13)	8% (1 of 13)	--
Permission of Court of Appeals	48% (27 of 56)	41% (23 of 56)	11% (6 of 56)	--	--
Permission of Appellate Division	50% (10 of 20)	50% (10 of 20)	--	--	--
Constitutional Question	70% (7 of 10)	30% (3 of 10)	--	--	--
Stipulation for Judgment Absolute	--	100% (1 of 1)	--	--	--
Other (e.g. Judiciary Law § 44[7], Remand from U.S. Supreme Court)	4% (1 of 24)	8% (2 of 24)	4% (1 of 24)	--	84%* (20 of 24)

\*Dispositions other than affirmance, reversal, etc., such as question certified by U.S. Court of Appeals (Rule 500.17); State Commission on Judicial Conduct matters.

**SUMMARY OF DISPOSITIONS BY JURISDICTIONAL PREDICATE**

(showing percentage of type of disposition within each category of jurisdictional predicate)

January 1, 1998 through December 31, 1998

**CRIMINAL APPEALS**

**Type of Disposition**

<b><u>Jurisdictional Predicate</u></b>	<b><u>Affirmance</u></b>	<b><u>Reversal</u></b>	<b><u>Modification</u></b>	<b><u>Dismissal</u></b>	<b><u>Other</u></b>
<b>Permission of Court of Appeals Judge</b>	68% (36 of 53)	28% (15 of 53)	2% (1 of 53)	2% (1 of 53)	--
<b>Permission of Appellate Division Justice</b>	48% (10 of 21)	33% (7 of 21)	--	19% (4 of 21)	--

APPENDIX 6

MOTION STATISTICS (1995 - 1998)

Motions Undecided as of January 1, 1998 - 193

Motion Numbers Used in 1998 - 1513

Motions Undecided as of December 31, 1998 - 138

Motion Dispositions During 1998 - 1550

	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Motion Numbers Used for Calendar Year	1683	1785	1583	1513
Motions Decided for Calendar Year	1716	1778	1628	1550
Mos. for leave to appeal	1265*	1309*	1215*	1202*
granted	124	126	96	91
denied	896	903	853	867
dismissed	242	275	261	238
withdrawn	3	5	5	6
Mos. to dismiss appeals	14	15	15	11
granted	7	11	10	5
denied	7	3	4	6
dismissed	0	0	0	0
withdrawn	0	1	1	0
Sua sponte and Court's own motion dismissals	158	148	163	119
<b>TOTAL DISMISSALS OF APPEALS</b>	165	159	173	124
Mos. for reargument of appeal	24	26	28	8
granted	0	2	0	0
Mos. for reargument of motion	65	89	88	82
granted	1	5	2	0
Mos. for extension of time to move for reargument				
granted	2	2	0	1
	1	1	0	0
Mos. for assignment of counsel	99	59	54	55
granted	97	57	54	51
Legal Aid	55	36	27	15
denied	2	2	0	4
dismissed	0	0	0	0

	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Mos. to waive rule compliance granted	7 4	1 0	6 1	4 0
Mos. for poor person status granted denied dismissed	91 1 0 90	69 3 0 66	61 0 0 61	61 2 1 58
Mos. to vacate dismissal/preclusion granted	2 2	5 0	4 1	4 3
Mos. for calendar preference granted	11 4	8 1	6 1	7 0
Mos. for amicus curiae status granted	100 69	114 92	88 68	88 71
Mos. for Exec. Law 71 order (AG)	1	0	2	1
Mos. for leave to intervene granted	3 1	0 0	3 1	0 0
Mos. to stay/vacate stay granted denied dismissed withdrawn	46 5 4 36 1	37 0 4 32 1	50 5 5 39 1	39 6 3 29 1
Mos. for CPL 460.30 extension granted	24 20	25 21	28 22	23 21
Mos. to strike appdx or brief granted	11 2	8 2	9 3	7 0
Mos. to amend remittitur granted	8 2	4 1	2 2	2 0
Mos. for miscellaneous relief granted denied dismissed	26 5 20 1	25 1 21 3	32 6 19 7	23 2 14 7
Withdrawals/substitution of counsel denied	4 0	0 0	2 0	2 0

\*Because more than one relief request may be decided under a single motion number, the total of decisions by relief requests is greater than the total of motions decided.

APPENDIX 6 (continued)



APPENDIX 7

CRIMINAL LEAVE APPLICATIONS ENTERTAINED  
BY COURT OF APPEALS JUDGES IN 1998

TOTAL APPLICATIONS ASSIGNED:	2953
TOTAL APPLICATIONS DECIDED:	2982*
TOTAL APPLICATIONS GRANTED:	57
TOTAL APPLICATIONS DENIED:	2709
TOTAL APPLICATIONS DISMISSED:	209
TOTAL APPLICATIONS WITHDRAWN:	7
TOTAL PEOPLE'S APPLICATIONS:	67
(a) GRANTED:	5
(b) DENIED:	59
(c) DISMISSED:	1
(d) WITHDRAWN:	2
Average number of applications assigned to each Judge	451
Average number of grants of leave to appeal by each Judge	9

\*Includes applications assigned in previous year.

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

	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
TOTAL APPLICATIONS ASSIGNED:	2962	3164	2797	3064	2953
TOTAL APPLICATIONS DECIDED:	2798*	3140*	3018*	2944*	2982*
TOTAL APPLICATIONS GRANTED:	113	89	53	110**	57
TOTAL APPLICATIONS DENIED:	2489	2793	2711	2587	2709
TOTAL APPLICATIONS DISMISSED:	180	240	241	238	209
TOTAL APPLICATIONS WITHDRAWN:	16	18	13	9	7
TOTAL PEOPLE'S APPLICATIONS:	136	128	112	63	67
(a) GRANTED:	23	15	13	8	5
(b) DENIED:	105	106	90	51	59
(c) DISMISSED:	1	2	1	1	1
(d) WITHDRAWN:	7	5	8	3	2
Average number of applica- tions assigned to each Judge	423	452	400	438	451***
Average number of grants for each judge	16	13	8	16	9

\*Includes some applications assigned in previous year.

\*\*Includes grants of 54 separate applications handled as a single appeal below and handled as a single appeal in this Court.

\*\*\*This average was calculated by dividing the total number of applications assigned during six months of the year by seven and dividing the total number assigned during six months of the year by six, because for half of the year only six Judges were being assigned applications.

APPENDIX 9

1998

THRESHOLD JURISDICTIONAL REVIEW OF  
SUBJECT MATTER JURISDICTION BY THE COURT OF APPEALS

SSD (sua sponte dismissal) - Rule 500.3

Total Number of Inquiry Letters Sent in 1998	99
Appeals Dismissed on Motion	11
Appeals Dismissed on Consent	0
Appeals Withdrawn or Discontinued on Stipulation	1
Dismissed by Court <u>sua sponte</u>	71
Transferred <u>sua sponte</u> to Appellate Division	1
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
Jurisdiction Retained - appeals decided	3
Inquiries Pending	<u>5</u>
	99

**COMPARATIVE ANALYSIS OF ATTORNEYS' ROLL OFFICE STATISTICS**

1994 - 1998

<u>TOPIC</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>
Attorneys Admitted (OCA)	6626	6824	6913	7087	7339 <sup>1</sup>
Certificates of Admission	266	183	243	226	235
Clerkship Certificates	14	10	3	5	9
Petitions for Waiver	326	309	456	463	479 <sup>2</sup>
Written Inquiries	215	220	218	224	257
Disciplinary Orders and Name Change Orders	970	879	1078	848	1689 <sup>3</sup>

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<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> After the May 27, 1998 effective date of the Rule changes, 41 petitions were either denied or dismissed as academic or abandoned, and 13 petitions were withdrawn.

<sup>3</sup> Includes orders involving multiple attorneys' violation of the registration requirements (Judiciary Law § 468-a).

**APPENDIX 11**

**NONJUDICIAL STAFF**

**Aiardo, Suzanne - Chief Motion Clerk**

**Albanese, Anthony J. - Senior Law Clerk to Judge Bellacosa**

**Ali, Vivian - Telephone Operator, Court of Appeals (temporary)**

**Andrews, Barbara J. - Secretary to Judge Smith**

**Asiello, John P. - Assistant Consultation Clerk, Court of Appeals**

**Azzara, Florence C. - Secretary to Judge Titone**

**Baker, David A. - Senior Assistant Building Superintendent (retired 12/10/98)**

**Beachel, Sue E. - Secretary to Judge Wesley**

**Bielawski, Julia S. - Senior Law Clerk to Judge Levine**

**Bohannon, Randy A. - Court Building Guard**

**Browne, Paul J. - Public Information Officer**

**Bruce, Teresa A. - Senior Court Attorney, Court of Appeals**

**Buel, Theresa A. - Secretary to the Clerk, Court of Appeals**

**Cadalso, Mary Ellen - Secretary, Court of Appeals**

**Calacone, June A. - Principal Stenographer, Court of Appeals**

**Calacone, Stephen F. - Senior Custodial Aide**

**Carro, Christine - Secretary to Judge Ciparick**

**Carroll, Frederic J. - Supervising Court Attendant, Court of Appeals**

**Chaudhry, Zainab A. - Court Attorney, Court of Appeals**

**Cleary, Lisa M. - Principal Stenographer, Court of Appeals**  
**Cohen, Stuart M. - Clerk of the Court of Appeals**  
**Conklin, Elmer - Clerical Assistant, Court of Appeals**  
**Conley, Paul F. - Senior Clerical Assistant, Court of Appeals**  
**Connair, George P. - Senior Services Aide**  
**Connelly, Lisa M. - Principal Law Clerk to Judge Bellacosa**  
**Costello, James A. - Senior Court Attorney, Court of Appeals**  
**Davison, Mark C. - Principal Law Clerk to Judge Wesley**  
**Declet, Rafael A., Jr. - Senior Law Clerk to Judge Ciparick**  
**DiLeva, Terry J. - Prisoner Applications Clerk**  
**Donohue, J. Matthew - Court Attorney, Court of Appeals**  
**Donnelly, William E. - Senior Custodial Aide**  
**Dragonette, John M. - Court Building Guard**  
**Duthiers, Erika - Senior Court Attorney, Court of Appeals**  
**Emigh, Brian J. - Building Manager**  
**Engel, Hope B. - Court Attorney for Professional Matters**  
**Faulkner, Cedric K. - Court Attendant, Court of Appeals**  
**Federman, Jonathan L. - Law Clerk to Judge Wesley**  
**Feinberg, Jeremy R. - Principal Law Clerk to Chief Judge Kaye**  
**Fitzpatrick, J. Brian - Administrative Services Assistant, Court of Appeals**

**APPENDIX 11 (Continued)**

**APPENDIX 11 (Continued)**

**Fitzpatrick, Rosemarie - Principal Stenographer, Court of Appeals**

**Fitzpatrick, William J. - Assistant Printer, Court of Appeals**

**Fix-Mossman, Lori E. - Principal Stenographer, Court of Appeals**

**Florio, Lisa M. - Principal Law Clerk to Judge Titone**

**Fludd, Christopher - Senior Court Building Guard**

**Friedman, Kathryn Bryk - Law Clerk to Judge Wesley**

**Gilbert, Marianne - Senior Stenographer, Court of Appeals**

**Groff, Janice L. - Principal Stenographer, Court of Appeals**

**Hallenbeck, Kenneth A. - Senior Custodial Aide**

**Harrison, Lisabeth - Principal Law Clerk to Judge Titone**

**Harvey, Joanne M. - Senior Court Attorney, Court of Appeals**

**Heyman, Amy - Secretary to Chief Judge Kaye**

**Hurley-Leslie, Craig A. - Senior Court Attorney, Court of Appeals**

**James, Vaughn E. - Court Attorney, Court of Appeals**

**Kaczmarek, Linda T. - Clerical Research Aide**

**Karmel, Jonathan B. - Law Clerk to Judge Levine**

**Kehn, Patricia Ann - Principal Stenographer, Court of Appeals**

**Kleemann, Sarah W. - Reference Clerk**

**Klein, Andrew W. - Consultation Clerk, Court of Appeals**

**Kong, Stephen D. - Senior Law Clerk to Chief Judge Kaye**

**Kruzansky, Barbara J. - Court Attorney, Court of Appeals**

**Laubscher, Jay C. - Law Clerk to Judge Titone; Judge Ciparick**

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

**Lee, Tiffany H. - Senior Court Attorney, Court of Appeals**

**Lenart, Margaret S. - Principal Stenographer, Court of Appeals**

**Leveille, Vania J. - Senior Law Clerk to Judge Smith**

**Lilac, Jeffrey - Court Building Guard**

**Loffredo, Carmel M. - Secretary to Judge Levine**

**Lorah, Tim O'Neal - Senior Law Clerk to Judge Levine**

**MacPhee, Concetta J. - Senior Assistant Building Superintendent**

**Maier, Sr., Joseph J. - Senior Custodial Aide**

**Markel, Jason E. - Senior Court Attorney, Court of Appeals**

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

**McClymonds, James T. - Deputy Chief Court Attorney, Court of Appeals**

**McCormick, Cynthia A. - Secretary to Judge Bellacosa**

**McCoy, Marjorie S. - Deputy Clerk of the Court of Appeals**

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

**McMillen, Donna J. - Principal Stenographer, Court of Appeals**

**Moore, Travis R. - Senior Services Aide**

**APPENDIX 11 (Continued)**

**APPENDIX 11 (Continued)**

**Moser, Theresa B. - Senior Court Attorney, Court of Appeals**



**Murray, Elizabeth F. - Law Librarian, Court of Appeals**

**Nolan, Michael J. - Senior Law Clerk to Judge Wesley**

**O'Leary, Elizabeth - Senior Court Attorney, Court of Appeals**

**Olsen, Buraige S. - Senior Assistant Building Superintendent (resigned 1/15/98)**

**Osborne, Melissa E. - Senior Court Attorney, Court of Appeals**

**Paglia, Paul J. - Court Building Guard**

**Pam, Aaron R. - Law Clerk to Judge Smith**

**Pepper, Francis W. - Custodial Aide**

**Pressman, Carol B. - Court Attorney, Court of Appeals**

**Ragonese, Carmela - Custodial Aide**

**Ravida, Tina - Custodial Aide**

**Ryneski, Paul - Senior Court Attorney, Court of Appeals**

**Saavedra, Narciso - Senior Law Clerk to Judge Smith**

**Salvinski, Mildred A. - Custodial Assistant**

**Sanderson, Ralph W. - Assistant Building Superintendent**

**Schechter, Jennifer G. - Law Clerk to Chief Judge Kaye**

**Shufelt Sr., Theodore J. - Assistant Building Superintendent**

**Sims, Ural - Assistant Building Superintendent**

**Sinatra, John L. - Senior Court Attorney, Court of Appeals**

**Sommer, Christina D. - Senior Law Clerk to Chief Judge Kaye**

**Soule, Leah M. - Court Attorney, Court of Appeals**

**Sowah, Margaret O. - Senior Law Clerk to Judge Ciparick**  
**Strnad, Martin F. - Assistant Deputy Clerk, Court of Appeals**  
**Tacy, Laurene L. - Assistant Deputy Clerk, Court of Appeals**  
**Torre, Joseph R. - Court Building Guard**  
**Troisi, Kimberly A. - Law Clerk to Judge Bellacosa**  
**Turner, Minnie - Custodial Aide**  
**Vakiener, Kathleen M. - Telephone Operator, Court of Appeals (temporary)**  
**Vasquez, Consuelo A. - Senior Law Clerk to Judge Bellacosa**  
**Voerg, Patricia Mullery - Secretary to Judge Bellacosa (on leave)**  
**Wager, Charles C. - First Assistant Building Superintendent**  
**Weissman, Kenneth I. - Law Clerk to Chief Judge Kaye**  
**Welch, Ann M. - Custodial Aide**

**APPENDIX 11 (Continued)**

