

Perspective

Expert Analysis

Former Justices on the Appellate Division, 1st Department, Reflect on Careers and Friendships

BY DAVID B. SAXE

Judges often need other colleagues as friends, not just as mere acquaintances; I have no doubt about that. The social isolation and the peculiar pressures of the judicial position informs this view. For the most part, trial judges work in separate courtrooms and except for perhaps lunch hours and certain evening bar association activities, they are cut off from each other. They work alone. They must also be wary of signs of friendship, flattery and flummery¹ from lawyers coming in and out of their courtroom as merely expression of self-interest.

Developing real friendships may be as difficult for judicial colleagues as it would be at any workplace venue perhaps even more so; judicial colleagues may find themselves competing with “friends” for better quarters and assignments and even advancement to prestigious appellate courts. The inevitability of these frictions may test any friendship.

Judges who serve on appellate courts are actually more isolated from the world than they were as trial court judges. They are cut off from lawyers more than they were as trial judges. However, unlike trial judges, these cloistered judges are placed together on regular appellate panels with other members of the court for the purpose



From left, **James McGuire** of Holwell Shuster Goldberg, **David Saxe** of Morrison Cohen and **James Catterson** of Arnold Porter are long time friends who routinely get together for breakfast.

of deciding appeals. It is an ever-changing bunch of relationships.

Being on a panel with a friend can really test a friendship—especially where there are sharp and divergent views presented and you and your friend find yourselves at opposite ends of writings that seem to get more pungent with each draft. That’s why the communal lunchroom at the Appellate Division, First Department, fulfilled such an important function when I served there and I am sure it still does. Somehow, when you break bread with a colleague that you have duked it out with, there

tends to be a lessening of the tensions and worse, that may come about from sharply divided positions.

The urge to be friends with others on the court is a powerful one but it may well get in the way of the work to be done. One well-known example of a friendship that endured in an appellate tribunal despite furiously different viewpoints was the close friendship between the late Justice Antonin Scalia and Justice Ruth Bader Ginsburg of the Supreme Court of the United States. Their disagreements remained intellectual; Ginsburg reflecting

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on Scalia's passing said, "We were best buddies."

It is difficult to have close friends on the bench; you are more likely best described as colleagues. There are those who you may be drawn to; others not so much. Collegiality is vital however.² I believe that a high form of civility must be maintained. There will be from time-to-time an iciness that may develop from the sharp elbows of competing positions. Coolness can exist and be tolerated because generally, it will subside.

But professional discourtesies cannot be tolerated: ignored responses to circulated writings, talking over a colleague on the bench during oral argument or unanswered emails between colleagues fray the civility that make an appellate tribunal work so well. The present presiding justice at the Appellate Division, First Department, Rolando T. Acosta, is an especially embracing and well-respected individual who is well-positioned to prevent any problem in this area from gaining traction, festering or boiling over.

What I have noted are merely reflections and observations gleaned from my own life as a trial judge and later as an Appellate Division judge. I miss the relationships I developed with many of my colleagues there. I sometimes miss the life of an appellate judge—but less so as time goes by and I become more and more comfortable with my life as a lawyer at Morrison Cohen.

And, from time-to-time, I get together with some former colleagues; Jim Catterson and Jim McGuire, both lawyers in private practice now—Catterson at Arnold & Porter Kaye Scholer and McGuire at Holwell Shuster & Goldberg. We occasionally have a meal or a drink—talk of our past court experiences, perhaps spin an anecdote about some case past or some humorous moment on the bench, analyze current court personnel and talk about matters involving our families—the stuff that friends talk about.

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Editor's Note: The New York Law Journal asked if these former colleagues and

friends would welcome an intrusion into a recent get-together and they were happy to share some of their thoughts about things past and present at the Appellate Division, First Department.

Q: What motivated you to become a judge in the first place?

Jim Catterson: Public service has been a family calling for a couple of generations, and I have been in public service most of my career; a litigator for all of my time as a lawyer. I was weaned on politics (another family business) and when the opportunity to run for Supreme Court presented itself, it seemed like the next step for a courtroom lawyer.

Jim McGuire: A passion for the law and public service. The prospect of serving in the judicial branch was particularly attractive because I had acquired considerable experience in the executive branch and in the legislative process as an assistant district attorney and chief counsel to the governor.

David B. Saxe: Starting out on my career, I taught law and practiced law but found something lacking in each for me. But I saw a judicial career as combining the best of each—enough of the academic and enough of the practical. I was right!

Q: Do you miss being a judge? What aspect do you miss the most? Were there aspects of judging that you didn't enjoy?

Catterson: Although I miss my former colleagues dearly, I can't say that I miss the bench. The work was always challenging, but the isolation from the profession that one experiences at the Appellate Division makes life somewhat monastic. The give and take with lawyers at oral argument was very fulfilling. The relentless pace of cases was difficult.

McGuire: I don't miss being a judge, but that reflects no dissatisfaction about having been a judge. And at all times

since I have left the bench I have continued to do what I loved most about being a judge: thinking and writing about complex legal issues. In addition, I was surprised to realize how much I enjoyed the people side of the practice of law. All that said, it is lovely to be your own boss.

Saxe: I miss being a judge—especially being on the Appellate Division, First Department. As much as I enjoy my work at Morrison Cohen, my time at the Appellate Division was a dream job—the best law job around. I miss the excitement of cracking open the briefs on an appeal just brought up to chambers on a matter of first impression. I didn't enjoy dull run-of-the-mill cases but slogged through them anyway.

Q: Are there any highlights in your judicial career that come to mind?

Catterson: My former and current colleagues have teased me for my penchant for "legal archaeology." The opportunity to combine history with law culminated my discourse on the right of sepulcher in *Melfi v. Mount Sinai Hospital*. It was, perhaps, a fitting eulogy for the decedent playwright Leonard Melfi, and one of my favorite cases.

McGuire: I wrote so many decisions on issues that fascinated me that I can't single out any cases in particular. But the highlight was the day I first sat on a panel of the First Department, figuratively pinching myself at the notion that I had been so fortunate.

Saxe: I remember an important and controversial case I wrote as a trial judge around 1987—*Seawald v. City of New York* dealing with an important constitutional issue involving "takings." The Appellate Division, First Department, reversed me 5-0 in what I thought was a rather nasty decision written by then-Associate Justice David Ross. But then the case went up to the Court of Appeals and in a 5-2 decision written by Judge Joseph Bellacosa, the Appellate

Division was reversed. Judge Bellacosa mentioned me twice by name in his writing in rather laudatory terms. Incidentally, I took a copy of that decision and sent it to Judge Ross with the notation fyi.

Q: What qualities do you think a lawyer needs to have in order to be a good judge? Any special qualities for an appellate judge?

Catterson: For the trial bench, the single most important traits are patience, because everyone's case is important to that person, and the ability to make decisions. Right or wrong, the system only works when disputes move to a conclusion. For the Appellate Division, however, I think that above all else, you need to take joy in the challenge of getting the right result consistent with the court's precedent, all the while convincing four other independent thinkers to go your way.

McGuire: The ability and willingness to listen are critical. They, in turn, are dependent on another trait. To paraphrase (perhaps accurately quote) Learned Hand, "The spirit of liberty is the spirit that is not too sure of itself."

Saxe: I think to be a good trial judge, in general, you need to develop the ability to listen rather than to talk first. Judges who talk too much tend to make mistakes and often wind up in trouble. For effective service on the appellate bench, I think the ability to submerge your ego—to be able to bury the I and concentrate on the we, is a most valuable characteristic.

Q: How was your transition from the bench to private practice? Any advice as to how to make such a transition more seamless than it was?

Catterson: The first year was probably culture shock for both me and the firm, but the firm could not have been more welcoming or dedicated to integrating

me into a busy commercial litigation shop.

McGuire: It was, to say the least, smooth. That I had spent time as a litigator in big firms no doubt helped make it so smooth. The only advice I have for others who leave the bench is to do what you did on the bench: lean on your colleagues.

Saxe: My new firm [Morrison Cohen] has been very understanding during the transition. I would advise other judges who are making the transition to not be fearful of asking questions.

Q: How did you make up for your "rustiness"?

Catterson: The biggest challenge was entering the modern age of digital communication. Imagine my dismay to discover that few people wrote letters anymore and that lawyers now love to litigate in emails. The secret to getting past this was to work with young associates; they don't know any other way than email and hyperlinks.

McGuire: I may well have been much mistaken, but I didn't feel rusty at all.

Saxe: I took a bunch of CLE courses and asked (and still do) a lot of questions.

Q: How are you treated as an ex-judge by your colleagues, other lawyers, judges still on the bench?

Catterson: The last category is the easiest. The reception from the bench has been uniformly gracious and entirely professional from Riverhead to 60 Centre Street. Similarly, my colleagues at the firm have all been accepting and usually far more receptive to active collaboration than I deserve. Similarly, most lawyers that I encounter have been just great. It doesn't mean that I still don't twitch when a lawyer says to me on first meeting, "I argued a case in front of you ..."

McGuire: The legal profession treats judges with great respect, and I've come

to appreciate that former judges also are accorded great respect by colleagues, other lawyers and judges who are still on the bench. And many a prospective client does, too!

Saxe: Someone told me that when you took off your robes for good, no one would laugh at your jokes anymore. All I can say is that since I went into private practice—everyone has treated me with great respect. In fact, in my own firm, everyone still calls me Judge and I can't stop it!

Q: What advice can you offer judges still on the bench who are nearing retirement age or feel the necessity for a change of career?

Catterson: Don't wait until you reach the point where the decision is made for you. If you still love the practice of law, there is a great universe of new challenges out there beyond the bench.

McGuire: The most important bit of advice I can offer is that current judges who loved the work of being a judge should be undaunted by leaving the bench. You'll still get to do what you love most.

Saxe: If you want to practice law after leaving the bench, don't wait until the very last day on the bench to make the move. Looking for employment before you are out of a job gives you more leverage. Also, start taking a few CLE practice-oriented courses.

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1. Saxe "Flummery," *New York Law Journal*, 10/3/1989, pg. 2.

2. Saxe "Collegiality on an Appellate Court," *New York Law Journal*, 12/30/2008, pg. 6.