

TRANSCRIPTS

CHIEF JUDGE LAWRENCE H. COOKE SEVENTH ANNUAL STATE CONSTITUTIONAL COMMENTARY SYMPOSIUM

THE NEW YORK COURT OF APPEALS: THE UNTOLD SECRETS OF EAGLE STREET

ALBANY LAW SCHOOL
Dean Alexander Moot Courtroom
Thursday, March 21, 2013, 5:00 pm

WELCOME & OPENING REMARKS

*Michelle K. Mallette-Piasecki**

Good evening everyone. Welcome to the Seventh Annual Chief Judge Lawrence H. Cooke State Constitutional Commentary Symposium.

We are delighted to be joined tonight by such a prestigious panel. The six judges of the New York Court of Appeals; Chief Judge Jonathan Lippman, Judge Victoria A. Graffeo, Judge Susan Phillips Read, Judge Robert S. Smith, Judge Eugene F. Pigott, Jr., and the Court's newest member, Judge Jenny Rivera.

The entire Court also participated in the Second Annual Chief Judge Cooke Symposium in 2008, where the judges commented on their favorite judge in the Court's history.¹ We are ecstatic to once again feature the esteemed judges of the Court with tonight's

* Executive Editor, *State Constitutional Commentary*; J.D. Candidate, Albany Law School, 2013; United States Military Academy, B.S. American Legal System, 2006. I would like to thank my husband, Todd, and daughter, Maggie, for their constant support and encouragement.

¹ Vincent Martin Bonventre, *Editor's Foreword*, 71 ALB. L. REV. 1041 (2008).

introspective look inside the Court's secrets.

For those of you that don't know, the *Law Review's* faculty advisor, Professor Bonventre, runs a blog, the New York Court Watcher, that comments on the New York Court of Appeals and its judges. Before we asked the Court to grace us with their presence this evening, I was concerned that Professor B. would scare them away.

But thankfully as you can see, the judges graciously accepted our invitation, and we are thrilled to have them here. It is truly an honor for Albany Law School and the *Law Review* in particular to have such a strong relationship with one of our nation's most influential courts. We look forward to building upon that relationship this evening and to continuing it in the future.

I'd like to take this time to thank our faculty who are introducing the panelists today: Professor Patrick Connors, Professor Rosemary Queenan, Professor Michael Hutter, Professor Donna Young, our mentor and faculty advisor, Professor Vincent Bonventre, and our incredibly supportive and wonderful Dean, Penny Andrews. The *Albany Law Review* is extremely appreciative to have the support and participation of the faculty for today's event.

Lastly, and most importantly, I would like to thank Tammy Weinman, Administrative Services, the Communications and IT Departments, and the members of the *Law Review*. Without their tireless work and effort, today's event would not have been possible.

INTRODUCTION OF THE PANELISTS

*Penelope Andrews**
*Vincent Martin Bonventre***
*Patrick M. Connors****
*Rosemary Queenan*****
*Michael J. Hutter******
*Donna E. Young******

DEAN ANDREWS: Let me start by thanking the members of the *Albany Law Review* for putting together this program. You do a splendid job, and it's a great delight to work with you. Thank you. I also want to welcome all the esteemed guests, the members of the Court of Appeals, alums, staff, faculty, and students to this event.

This is a special occasion, not just because we have the full Court of Appeals bench here today, but also because the newest member of the bench, Judge Jenny Rivera was my friend and colleague at CUNY Law School for fifteen years. So I'm really, really thrilled that she's joining us today.

It is my task to introduce the Honorable Jonathan Lippman, who is the Chief Judge of the State of New York and the Chief Judge of the Court of Appeals. As you know from his biography, he was appointed by Governor Patterson in January 2009 and confirmed by the New York State Senate in February 2009.

I'm not going to read his biography. You have these biographies

* Dean, Albany Law School; LL.M., Columbia University School of Law, New York; LL.B., University of Natal, Durban, South Africa; B.A., Natal, Durban, South Africa, B.A.

** Editor, State Constitutional Commentary; Faculty Advisor, Albany Law Review; Ph.D., M.A.P.A., University of Virginia; J.D., Brooklyn Law School; B.S., Union College; Professor of Law, Albany Law School; Blog: New York Court Watcher.

*** Professor of Law at Albany Law School where he teaches New York Practice and Professional Responsibility.

**** Associate Lawyering Professor, Albany Law School; J.D., New York Law School; B.A., University of Maryland.

***** Professor of Law at Albany Law School; Special Counsel to the Albany law firm of Powers & Santola, LLP; B.S., Brown University; J.D., Boston College Law School; Commissioner of the New York State Law Revision Commission; Chair of the Board of Directors of the Capital Defender Office.

***** Professor of Law, Albany Law School; B.S., University of Toronto; LL.B., Osgoode Hall Law School of York University; LL.M., Columbia University School of Law.

in the program, but I think it is worth noting that Judge Lippman has a particularly deep and robust knowledge of the court system here in New York. I don't think I'm engaging in hyperbole when I state that no other person knows the court system like Judge Lippman. As you will note from the program, he has served over four decades in numerous roles, starting as an entry-level court attorney and making his way up through the court system. If we were so inclined—and as a good Catholic I'm so inclined—we could appoint him the judicial pope of New York.

In this contemporary moment in our society, in which the legal profession is often treated with disdain, sometimes with hostility, and sometimes contempt, Chief Judge Lippman's vision is a powerful antidote to such hostility, disdain and contempt. In his four years as Chief Judge, he has demonstrated in the most compelling ways what the law should mean and should be, not just for the powerful and privileged amongst us, but also those who are marginalized and disempowered. Access to justice, which is his clarion call to all of us, represents the finest of what the legal profession is all about.

There are many things about Judge Lippman's tenure that I can talk about to illustrate his commitment to access to justice, but I've been given two minutes to do this introduction, and I think I may have reached the limits here. So let me conclude by becoming personal here with Chief Judge Lippman, and to give you a few paparazzi-type snippets about him. And this is courtesy of Google, Twitter, and Michelle Mallette.

Chief Judge Lippman is an avid New York Yankees and Knicks fan. He once worked so late into the evening on a project that shortly after leaving the office, he couldn't remember if he was on his way home after a long day, or on his way back from a short respite at home, showing he's a very hard working man. And the third bit of Google and Twitter information, Stephen Colbert has invited Chief Judge Lippman countless times to be on his program, and Jon Stewart has done the same. Judge Lippman has not accepted their invitations, because he's a little nervous about their lack of decorum. This last fact is based on a true rumor.

So I'd like to say in closing that since Chief Judge Lippman was appointed as Chief Judge, he has spoken at Albany Law School four times, including this symposium, and he has a great relationship with the school and the *Law Review*. And we are very grateful for that. Thank you.

2012/2013]

The Untold Secrets of Eagle Street

1901

PROFESSOR BONVENTRE: Don't you just love that Dean? I don't know where she gets the accent from, I'm pretty sure she was born in Brooklyn.

As the Faculty Advisor for the *Law Review*, I'd like to welcome you all here tonight. And I'd like to give special thanks to the *Law Review* students, who always make me look good. I'd especially like to thank our Editor-in-Chief, Mary D'Agostino, who actually has been juggling her duties with being a mother of a newborn infant, Lucca, who by the way was just screaming down in the *Law Review* suite. I went down there and it was clear that he needed his dad to change his diaper.

And the State Constitutional Editor, Michelle Mallette, who also has been juggling her duties as State Con Editor with her motherly duties for her one-year old daughter, Maggie. And I'm told she's got another one coming in the cooker. So it has been an absolute delight to work with Michelle all year long. She reminds me of being in the Army, and that she's the general and I'm her private.

As you've heard, this is our seventh State Con Symposium. The past symposiums have brought to this school some of the most eminent judges, justices, chief justices, and chief judges in the entire United States, but to be brutally candid, it is never as thrilling as when we have the Court of Appeals.

This is just the best. And I tell you that in the years since we've been doing this symposium, the justices come from all over the country; whether it's Utah, Wisconsin, whether it's Florida, whether it's North Carolina, Connecticut, no matter where it is. And they tell me that this is the court that they read. This is the court that they follow. This is the best Court in the country. And we're so proud really to have them here as our neighbors and to have them here today.

Earlier this week, we had the Third Department and we had my colleague, Professor Hutter, arguing a case.² Professor Hutter is so awesome that his adversary did not show up. It's true. It's absolutely true. So really, I mean, the Third Department hears their cases here on Tuesday; you have the Court of Appeals here on Thursday. I mean, come on, this is worth the price of admission. Right?

Okay. Now to my special duties to introduce Judge Graffeo. And

² Bloom v Van Lenten, 965 N.Y.S.2d 661 (App. Div. 3d Dep't 2013).

1902

Albany Law Review

[Vol. 76.4]

I'm absolutely delighted and it's not just because in my view, she holds the Italian seat on the Court of Appeals, or as my mother says, no, she's Judge Graf-fé-o, it's the Sicilian seat on the court. But Judge Graffeo actually holds the Albany Law School seat on the Court of Appeals, one that was also held by Chief Judge Lawrence Cooke, after whom this symposium is named and who was our graduate in 1938. I think Judge Graffeo graduated a couple of years after that? Forty years after that.

She was born in Long Island, but her parents were smart enough ultimately to move up to God's country here in upstate New York. But in between, she actually lived in a hamlet in the Berkshires in Massachusetts. She and her family lived right next to the Victoria Motel, which was named after her. Now I bet Judge Pigott doesn't have a motel named after him, or Judge Smith. But it's true, right? Victoria Motel.

JUDGE GRAFFEO: My parents owned it.

PROFESSOR BONVENTRE: Well, when it came time to go to college, Cornell University tried to lure her there with a scholarship, but instead she chose to go to the State University of New York at Oneonta, and boy weren't they thrilled to get her.

After that, she came to Albany Law School, and I have to tell you, within four years, she argued a case before the New York Court of Appeals. I tell students all the time you've got to know about the Court, because you just might be arguing in front of them pretty soon. Four years out of Albany Law School, arguing in front of the Court—she also won. Right? You also won that case.

Right after that, she had a pretty meteoric rise. She was the Counsel to the Assembly Minority. Then she was appointed Solicitor General of the State of New York. Shortly after that, she ran for State Supreme Court and won. Shortly after that, she was appointed to the Appellate Division. And then, in the year 2000, she was appointed to the Court of Appeals.

Now what's responsible for this meteoric rise? Well, while she was here at Albany Law School, she had part-time work in the firm of International House of Pancakes. And I'm told that while she was a waitress at IHOP, apparently her sister got much better tips than she did, so she decided she might as well become a judge.³

³ Victoria A. Graffeo, *Victoria Ann Graffeo*, in *THE JUDGES OF THE NEW YORK COURT OF*

2012/2013]

The Untold Secrets of Eagle Street

1903

Anyway, we are so thrilled to have Judge Graffeo here. She's part of our Albany Law community; we love her, we admire her and we're very, very proud of her.

Thank you for being here, Judge Graffeo.

PROFESSOR CONNORS: I just want to thank all the members of the Court for coming. We're so lucky here at Albany Law School that you're so generous with your time year after year.

Judge Read is to my right. She was born in Gallipolis, Ohio. Like me, she lives in Saratoga Springs with her husband, Howard. She went to Ohio Wesleyan University undergrad, and then the University of Chicago Law School.

She has had a very interesting and remarkable career. She was the Deputy Counsel for Governor Pataki, and then she went on one of the most interesting courts in the world, the New York State Court of Claims, and she served there for I believe five years, Judge. And then in 2003, you went on to the New York Court of Appeals.

And you've issued so many interesting, important decisions, but to me the big one was the case in 2007, the *Arons*⁴ decision, which we caress in New York practice and we study in legal profession, and it's the case that keeps giving, because so many issues have come out of that case. And there was a lot of controversy about it, Judge, but that case received early induction into the New York Practice Hall of Fame, and you should be very proud of that.

Many of you may go up north of here to the Saratoga Performing Arts Center (SPAC). Is anyone going to go up there for Dave Matthews' concert in a couple of months? Some of you, I know have been to the Zac Brown Band concert, Florence and the Machine, that's beyond me, but you've been up there. Well, if you're up there, you may see Judge Read, because she's also the Chairwoman of the Saratoga Performing Arts Center Board of Directors. And she really does so much for the community up there.

And one of my favorite things about seeing Judge Read around town, either at SPAC or at the race track, is we can have conversations about the *Arons* case. And then we can turn to music. And we can talk about Dave Matthews or the Bruce Springsteen concert, and then, we can turn around and talk about the ballet and

APPEALS: A BIOGRAPHICAL HISTORY 971 (Albert M. Rosenblatt ed., 2007) [hereinafter JUDGES OF THE NEW YORK COURT OF APPEALS].

⁴ *Arons v. Jutkowitz*, 880 N.E.2d 831 (N.Y. 2007).

whether George Balanchine's vision is being carried out.

And then, finally, we can talk about something really important, who's going to win this summer's Alabama. So Judge, thanks so much for coming, and they just released the futures pool for the Kentucky Derby, this is the third pool, and I like Shanghai Bobby.

PROFESSOR QUEENAN: I have the honor of introducing Judge Robert S. Smith. Judge Smith was born in New York, New York. He graduated with honors from Stanford University in 1965 and Magna Cum Laude from Columbia Law School in 1968. He served as the Editor-in-Chief of the *Columbia Law Review*.

It might surprise you to learn that when Judge Smith entered law school, he had no interest in becoming a practicing attorney. He wanted a career in politics, but there was a significant woman in his life, his wife, Dian, who wasn't fond of some aspects of politics, and gave Judge Smith an ultimatum, politics or her.⁵

Judge Smith wisely chose Dian. So we can thank her for Judge Smith's impressive legal career, which began after graduation with the prestigious law firm Paul, Weiss, Rifkind, Wharton & Garrison. Ironically, Judge Smith's son Ben is a political journalist and blogger.

During Judge Smith's thirty-five year tenure with Paul, Weiss, he made a name for himself as a brilliant litigator in complex corporate law. He was particularly adept at cross-examining expert witnesses.

After years in private practice, Judge Smith's ambition turned to pursuing a judicial career and in November 2003, he was appointed to the Court of Appeals. He was the first non-judge to rise directly to the Court in twenty years.⁶ As a judge, he is best known for his independent decision making and challenging oral argument questions, often testing the weakest aspects of a lawyer's position, by drawing the lawyer into a series of tough hypotheticals. Please join me in welcoming Judge Robert Smith.

PROFESSOR HUTTER: Judge Lippman, Associate Judges and especially the Albany Law students, it's great to see you here and taking advantage of what we can offer you.

⁵ Rosemary F. Smith, *Robert Sherlock Smith*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 3, at 988.

⁶ *Id.* at 987.

2012/2013]

The Untold Secrets of Eagle Street

1905

I was asked to say a few words about Judge Pigott and I think I can say safely, and looking at a couple of past *Albany Law Review* issues, we think here at Albany Law School he's great.⁷ And no doubt about it, his accomplishments and everything else have been really fine-tuned in some very good student pieces in the *Albany Law Review*.

What I thought I would do is, let's see what his alma mater thinks about him, at the University of Buffalo Law School, that other law school out in western New York somewhere. So I called a classmate of mine, Fred Konefsky, and I asked him about Judge Pigott. And he said, well, I joined the faculty after Judge Pigott, but if you want to know about his quote, unquote "academic achievements," you might want to talk with Ken Joyce.

Ken Joyce served as a member of the Albany Law School faculty for a couple of years and then went back to Buffalo. I got a hold of Ken, who's now retired on the Cape, and he said, "sure, I'd love to talk about Judge Pigott. He's a fine leader, a great representative." And I said, "well, what was he like as a student?" And Ken said, "well, I know he was enrolled in a couple of my classes, but whether he attended them, that may be another story."

But he then said to me that there's one fatal flaw in his character. I said, "what could that be?" Now you have to realize Ken Joyce, some of the faculty members here may remember, Ken is what we call a three hatter. He went to three Jesuit Schools: Boston College High School, Boston College Undergraduate, and Boston College Law School. So with that in mind, he said, "Judge Pigott started out at a Jesuit high school, McQuaid in Rochester, and then went to a Jesuit institution, Le Moyne in Syracuse, but then he blew it. He went to the University of Buffalo and he went there during the turmoil of the anti-Vietnam era." And he said, "just think what Judge Pigott could have accomplished if he had gone to a Jesuit school like Boston College or Georgetown." But then he said, "of course, he's accomplished much and they're quite proud of him."

It's interesting when I talk about the Buffalo connection. I was in Buffalo about a couple of months after the Judge was named to the Court of Appeals, and I was visiting a friend of mine in his old law firm, Offermann, Cassano, Greco, Slisz & Adams. And as I walked in—this firm had been at the Statler Hilton for fifty-three years

⁷ See, e.g., Benjamin L. Loeffke, *The Pert Perpenders: Associate Judge Eugene F. Pigott, Jr.'s Journey From Buffalo to Rochester and Albany*, 73 ALB. L. REV. 1081 (2010).

until it disbanded about two years ago—I ran into Frank Offermann, who then and still is the Dean of the Buffalo Bar.

I met Frank about twenty years earlier, and I just said hello to him. My friend was not there, and when I was talking with Mr. Offermann, and again I can't call him Frank, I mean, he's so well regarded. And just by chance I said, "you guys must really be proud of the fact now that you have a judge on the Court of Appeals in your office."

Now this is a firm, I don't think it ever had more than ten lawyers. They produced six judges, three Appellate Division judges, including Judge Pigott, and three supreme court judges, which is really remarkable.

But I asked him that because there's an old story, and I mentioned this last year when I introduced Chief Judge Lippman, about a desk and the Cardozo desk at the Court of Appeals. And I said to Mr. Offermann, I said, "well, where's the Pigott desk? Who now has claimed the Pigott desk?"

So he—with a little twinkle in his eye—he said, "I'll show you." So we go through this maze of rooms there, and there in the coffee room is Judge Pigott's desk, with all the coffee makers on it. And he simply said, "he was just one of us, just one of us."

As I think back to that distinguished stature of that firm, it's amazing how you develop six really terrific judges and probably one of the best lawyers in that firm was Frank Offermann, who never really wanted to practice law, and it leads to my final comment. One of the hallmarks of a great law firm is not so much the cases that the firm wins, because a lot of it depends upon the facts that are given to you and any lawyer can win a case with good facts or controlling law.

Rather, the hallmark of a good law firm is the lawyers, the men and the women who compose that firm. And when you think back now to the Offermann, Cassano firm producing six judges like that, obviously you have a lot of discussions among one another, you have some real brain power. It's that brain power that I think Judge Pigott has brought to the Court of Appeals. And it really gives him the ability to see issues and see things, and again each of the judges will look at something from their different perspective.

But Judge Pigott really brings that very broad perspective of the practitioner—whether it's on the private side or representing a Plaintiff or Defendant—representing the County of Erie with the perspective now that we want with diversity of judges on the Court

2012/2013]

The Untold Secrets of Eagle Street

1907

of Appeals to give an open view to everything.

And I think in that respect, Judge Pigott brings a true experience to the court, and I kind of got a laugh when he came in—I don't know if you noticed, he went right up to the jury railing, and as a former trial lawyer you saw him grabbing that railing, and he was ready to start a summation.

Judge Pigott, glad to have you.

PROFESSOR YOUNG: Judge Jenny Rivera, doesn't that have a beautiful sound? Those were the words of Albany Law alumnus Andrew Cuomo, announcing Judge Rivera's confirmation.

It's my pleasure to introduce Judge Jenny Rivera, who as you know, is the newest member of the Court of Appeals.

She's a graduate of Princeton University and New York University Law School. After graduating from law school, Judge Rivera clerked in the Second Circuit Court of Appeals Pro Se Law Clerk's Office. Then she went back to law school and received her LL.M from Columbia Law School, and that was shortly after Dean Andrews got her LL.M from Columbia Law School and the time that Professor Halewood got his LL.M from Columbia Law School and just before I got my LL.M from Columbia Law School.

And then, Judge Rivera clerked for Supreme Court Justice Sonia Sotomayor when she sat as the District Court Judge on the Southern District of New York.

Judge Rivera has a long history of public and community service. She served as the Associate Council for the Puerto Rican Legal Defense and Education Fund, as a Commissioner of the New York City Commission on Human Rights, as Special Deputy Attorney General for Civil Rights, and as a Bureau Chief of the Civil Rights Bureau of the State of New York, Office of the Attorney General.

Prior to Judge Rivera's nomination to the Court of Appeals, she taught as a law professor at Suffolk University School of Law, American University, Washington College of Law, and most recently, at CUNY School of Law, where she served as the Director of the Center on Latino and Latino Rights and Equality.

Judge Rivera's commitment to diversity and her service to the poor and to those who seek a voice in the legal arena is widely acknowledged, and is evidenced by her recent recognition by the New York State Bar Association, who awarded her the 2012 Diversity Trailblazer Lifetime Achievement Award.

Now it's pretty clear to most of us that looking at her impressive

1908

Albany Law Review

[Vol. 76.4]

list of accomplishments, she's eminently qualified to be a judge. But I'd like to turn for a moment to the title of this discussion, *The Untold Secrets of Eagle Street*. It's a bit ominous.

And then, I don't know if you noticed this, but there's a bit of a subtitle on the program and it says that the Court will talk about their inner workings.

So this got me wondering, not only about the sorts of secrets that will be revealed here today, but also what sorts of secrets were revealed to Judge Rivera when she showed up to work that first day. So we're going to ask you about that.

And so my mind kept going back to this image when I was thinking about these secrets about whether she's been taught the secret high court handshake. And then, I was thinking about whether there is a high court handshake and whether when Judge Rivera showed up, that the bench maybe changed the handshake to reflect this year's change in the judicial selection process. And for those of you who don't know, and many of you do know, the Senate Judiciary Committee gave her a real grilling, kind of unprecedented.

And so, I was thinking about the secret handshake. I know, it probably doesn't exist, but I like to think it does. So I thought, instead of this kind of relatively simple and straightforward secret handshake, I wonder whether the new secret handshake involves a much longer, more arduous procedure, requiring many different postures and expressions of puzzlement, you know, to reflect the Senate Judiciary confirmation process.

But whatever the secrets might have been in store for her on Eagle Street, I'm told on good authority that as long as Judge Rivera has her nieces, her dogs, Valencia cakes and is able to grab a good vegan meal every now and then, she'll do just fine.

So I'd like to welcome Judge Rivera as our newest member of the New York Court of Appeals.

And I'll now turn it over to Chief Judge Lippman who is the moderator for this evening.

DISCUSSION ON THE UNTOLD SECRETS OF EAGLE STREET

*Jonathan Lippman**
*Eugene F. Pigott, Jr.***
*Robert S. Smith****
*Susan Phillips Read*****
*Victoria A. Graffeo******
*Jenny Rivera******

CHIEF JUDGE LIPPMAN: We're going to reveal a lot of secrets but not the handshake, whether there is a handshake or not one.

Welcome. And it really is a delight here to be at the Lawrence H. Cooke State Constitutional Commentary Symposium at Albany Law School.

Lawrence Cooke, as you know, was a great Judge and Chief Judge of the New York State Court of Appeals. He hailed from Monticello, New York.

He was a great advocate for the use of the State Constitution to grant to New Yorkers rights beyond what they were entitled to under the Federal Constitution.

He was a very proactive Chief Judge, who attacked Court backlogs, promoted civil rights, was a champion of expanding the role of women in the courts and the profession, and he was very active in the National Center for State Courts that had been founded really at the urging of Chief Judge Burger of the United States Supreme Court.

He was a great intellect and he had a generosity of spirit, he was a good old country boy, could tell a good story, and to me, he had a personal meaning, because in my first real important job in the court system, which was to be the Chief Clerk and Executive Officer of the Supreme Court in New York County, there was a lot of

* Chief Judge of the State of New York and Chief Judge of the New York Court of Appeals.

** Associate Judge of the New York Court of Appeals.

*** Associate Judge of the New York Court of Appeals.

**** Associate Judge of the New York Court of Appeals.

***** Associate Judge of the New York Court of Appeals.

***** Associate Judge of the New York Court of Appeals.

1910

Albany Law Review

[Vol. 76.4]

dispute as to who was going to get that job, and they decided that the only one who could make the decision was the Chief Judge.

And I had to go and I was a young man. This was thirty plus years ago, and I had to see Chief Judge Cooke and I was scared to death, and he was just lovely and warm and friendly. I was terrible at the interview, but he gave me the job anyway.

And I was always grateful to him. And then, the first time that I became a judge, a judge of the Court of Claims, I came to the interview, and who was the Chair of the Interview Committee, but Judge Cooke, who was no longer the Chief Judge at the time, but he was the Chair of the Governor's Committee. And I was just hoping he wouldn't remember how terrible I was at the first interview I had with him. But he was again, warm and friendly and terrific, and I became a Court of Claims judge.

So I have very warm feelings about Judge Cooke, and it's really terrific of the law school that you honor Judge Cooke and you honor all of us by having this symposium.

We have had such a mutually supportive, wonderful relationship with Albany Law School. The Court loves being here, the Chief Judge loves being here, and the law school has so much energy and it really is a great place, and we're so delighted to be here tonight.

I also want to note that the law school provides us with great talent that in clerks past, present and future come from Albany Law School. And to do them all would take, you know, the entire couple of hours, but let me just give you a sense of the relationship of the law school to the Court. All three of Judge Graffeo's law clerks surprisingly enough, come from Albany Law School.

JUDGE GRAFFEO: One is right up there.

CHIEF JUDGE LIPPMAN: Lisa Lecours, Steve Sherwin, and Matt Dunn. One of Judge Pigott's law clerks, Kristie Stromecki, Deputy Chief Clerk of the Court Richard Reed, Assistant Deputy Clerk in Charge of Appeals, Susan Turturo, and she's somewhere here, I saw her right over there. Chief Motion Clerk Heather Davis, Senior Deputy Chief Court Attorney Margery Corbin Eddy, Court Attorney and Central Staff, Chelsea Cerutti and joining our staff next year, Albany Law graduate of 2012, currently a Law Clerk at the Appellate Division Third Department, Krysten Kenny, and an anticipated 2013 graduate, Kanika Johar. So we really do have a connection to Albany Law School.

2012/2013]

The Untold Secrets of Eagle Street

1911

And I want to thank, first of all, the wonderful *Albany Law Review*, which does such terrific work that we're all flattered at various times to be asked to contribute to the *Law Review*. There are so many terrific programs that you do that we're so grateful for, and the *Law Review* really represents the best in our law student population. And we're so pleased to be at another event sponsored by the *Law Review*.

I also want to thank your wonderful Dean, Penny Andrews, who really I so respect and admire. She brings such a terrific background to her job here. She has energy, she has great expertise, and she knows how to think out of the box.

And, you know, I think it's fair to say that the legal education in this country is at a crossroads, and it really requires creativity and new bold thinking, and I think you have that very much at this law school with Dean Andrews. And thank you, Dean, for inviting us, and we're so thrilled that you did.

I also want to thank the *Law Review's* advisor, President—not President. He's looking for a promotion, Dean Andrews. I don't know what for. But Professor Bonventre is just so terrific to work with and he has provided so much support for this symposium. He has provided so much scholarship on the Court of Appeals, and focus on our work by the Professor and by the students and by the *Law Review*, and it really flatters us, and it's so valuable for a court that we think leads the country, in terms of high courts and the Professor's work and the work of the law school really contributes so much to that.

And like I said, he's great to work with and he's so much fun to work with that we really have a good time, and I'm a great admirer of his. And tonight's program was kind of cooked up by myself, the Professor, and our clerk Andy Klein.

But we had a lot of fun putting it together, and we hope you enjoy it. As you know, the subject is the New York State Court of Appeals, *The Untold Secrets of Eagle Street*. And let me make crystal clear at the inception, that we are giving away the store tonight. I mean, everything—other than the handshake.

And those here tonight will hear things not even whispered any place else, and we're going to say it in the light of this room, and so keep it to yourselves.

We know that when you get out in the practice it will give you a leg up, knowing all these secrets. If not a leg up, at least we hope you'll find it interesting and entertaining. And we'll take it from

there.

So the format is this: each of our panelists will present a five to ten minute presentation on their subject matter. I will be a very strict timekeeper and, you know, I'm going to take copious notes and keep time.

And then I am going to cross-examine them after their five to ten minutes. And they're very fearful of that, and I'm very fearful of doing it. So that's going to be the idea. I'm going to try to be provocative, but not too provocative.

All in the spirit of collegiality and fun and to be informational to all of you, and we really do have a lot of fun at the Court of Appeals, and it is a collegial, wonderful court. And we're very fond of each other and you may or may not see that tonight, you know, a different side for tonight's event. But it's a terrific place, and we all so enjoy being there and we so enjoy being with you tonight.

So let me start. The first speaker will be Judge Pigott and his subject is pre-argument preparation, "Reading Too Many Briefs." And he's going to tell you the real skinny on all of that. Judge Pigott?

JUDGE PIGOTT: First of all, I want to thank you, Vin. If I'd known this was a roast, I would have had a drink before I begin. Kristie Haslinger, who is my law clerk, speaks very well of you. I'm totally amazed, but nevertheless I've kept her on. And Jon, those are very nice remarks you made about Vin. Please note he was not under oath when he gave all of those remarks.

My original topic was going to be the real story behind Judge Robert Smith. I was told I couldn't do that, so I was stuck with the briefs.

Now I want to tell you that when Vin was talking about Judge Lippman—oh, and before I forget anything else, we've talked about all of these law schools and all these schools. I have a secret connection that no one else has in this. One of my law clerks is a graduate of the University of Durban, South Africa. How many other people in this room have been to . . .

It's Gordon Lyon, who is one of my outstanding clerks and who was a clerk for Judge Rosenblatt before that, and just a great clerk and it's great to have him.

But when talking about Judge Lippman, they were mentioning that he's a Yankees and a Knicks fan. What they didn't tell you was he's a New York Jets fan. I'm a Bills fan, so I don't pick on anybody.

2012/2013]

The Untold Secrets of Eagle Street

1913

But I want to talk about briefs, not in so much of too much—too many briefs—but sometimes too much inter-brief. And I'll do it this way in terms of a sports analogy. Now one of the coaches for you who are sports fans, and I'm sure you've all played a sport, so this will fit in. But one of the coaches for the New York Jets a while back was Herman Edwards.

And in 2002, when the Jets were two and five, and one of the newspaper people asked him if they were going to quit he said "you don't just play the game to play the game." He says, "Hello! You [play] to [win] the [game]."⁸ And that has stayed with him the entire time that he's been a coach. He's been to a number of places, now he's an announcer, but he used to say that, "you play to win the game."

And I want to take that statement and apply it to brief writing. And if I do this right, you don't have to write anything down, but you don't read the rules of a game, and say I followed the rules, why didn't I win? You play to win the game.

Now one of the people that's here from the NRB is Bill Hooks and he and his staff are in charge of the Blue Book, and the official citator in all of that. And of course, you generally have to follow what's in there. But what you don't have to do is follow it so religiously that you've got id, id, id, ops id, id, supra and seven pages, and I'm still wondering what that case was on page two that you did.

And my theory about this, after reading all of these briefs is that there are people who really, when they write the brief they say, I've got to get this through to those, to that judge on one level, to those five on another level and to these seven. How do I do that?

And it's not just following the rules. For example, most briefs now have what's now called a preliminary statement, statement of the case, and summary of argument. They make these things—that's not in the rules. No one says you can't do it though.

And some of them are so effective by writing down and saying this is what this case is about, and I'm going to prove it in the next thirty pages or whatever—they don't say that, but it's like, here are the facts, here's what happened, and this is why I should win this case.

⁸ E.g., Matt Yoder, *Herm Edwards' 'Play to Win the Game' Rant Among Best Coach Press Conferences Ever (VIDEO)*, HUFFINGTON POST (updated Oct. 31, 2012, 10:21 PM), http://www.huffingtonpost.com/2012/10/31/herm-edwards-best-coach-press-conference-video_n_2050422.html.

And then, they go about setting out how they're going to do it. And I think I've been amazed at the effectiveness of many, many lawyers, who do things like that—who will attach something to a brief, a picture, the red cow case, as we used to call it. The things that say I've got to spoon-feed this to you, this judge or these judges, so that when they're done with my brief, they don't say: gee, he or she followed the rules so well; they say this person should win the game. And I want you to keep that in mind, even doing your pleadings or anything like that. You've got a point to make, make it. And don't just walk through like everyone does, as Professor Hutter would say, I did a lot of trial work.

And one of the things I would tell young trial lawyers is don't act like a lawyer. The reason you don't want to act like a lawyer is because those six people over there, they're not lawyers. They want to know the real story; they want to know what happened.

And it's the same thing in your brief. We don't know a darn thing about your client. We don't know if your client's a big corporation, a small one. We don't know what the underlying facts of a case are until you tell us.

And so many people overlook the fact that we don't know that much about the particular trade or industry or farming or whatever that's going on until you tell us. And then, you tell us why you should win the case.

And so in talking about too many briefs, there are too many briefs that forget that. And if you remember anything, the goal is to win the game. And as Dennis Green said from the Arizona Cardinals, "we are who you think we are."⁹

So thank you for that, and I hope you find that helpful.

CHIEF JUSTICE LIPPMAN: Before I grill Judge Pigott, I will say that the two of us are so sad when it comes to football, and there are two Giant fans over here (Read and Smith) and the two of us share our tales of futility about the Bills and the Jets, and it's sad. Isn't it true?

JUDGE PIGOTT: Our big day is draft day.

CHIEF JUSTICE LIPPMAN: Okay. So now for the grilling.

⁹ See, e.g., Darren Rovell, *Dennis Green: No Problem Cashing in on Rant*, CNBC (Sept. 4, 2008), <http://www.cnbc.com/id/26546210>.

2012/2013]

The Untold Secrets of Eagle Street

1915

Judge Pigott, you've been known to read the briefs really early in the game. Tell everybody how early do you prepare? In other words how much before the sitting do you start digging into those briefs?

JUDGE PIGOTT: Well, we sit at two o'clock. I'm usually on those briefs by 1:45.

CHIEF JUSTICE LIPPMAN: You know what—

JUDGE PIGOTT: I'm digging into April or May during the March session. And I'd like to say to people, you know, you're a lawyer, you're going about your business, you know, you say, gee, I've got a case coming up in the Court of Appeals in about two or three months. And all the time you're doing that, I'm digging into your case, and you don't have a clue. And that's why I think briefs are so important. I think briefs are ninety-five percent of most cases. Oral argument, you know, maybe you can rescue something, maybe you can make a point and maybe you can emphasize a point. But I think the briefs—I think the record, of course, is very important—but the brief is the deal.

And I was reading one this afternoon that is coming up in April, and so often when I read them I think they don't have any idea that I'm now working on their case. They're off doing something else. It's just a connection that I make. But the earlier the better for me.

CHIEF JUSTICE LIPPMAN: And I asked that question admiringly, because, you know, most of us are just scattering around trying to make sure we've done everything by the court date, and he tells us he's working two months ahead.

JUDGE PIGOTT: That's because I don't have a life, Jon.

CHIEF JUSTICE LIPPMAN: Okay. For the next difficult question. Now tell the truth, Judge Pigott, on this question. Does every judge—let's not say every judge—do you read every brief? I mean, read it, or do you scan it or sometimes you don't even—you have a good sense what it's about, and you don't need to read it. I ask you that in sincerity.

JUDGE PIGOTT: I read all the briefs, mainly because I don't want to read the record. If you have a record that's 1,600 pages, I

1916

Albany Law Review

[Vol. 76.4]

mean, that's too much.

CHIEF JUDGE LIPPMAN: But Gene, do you feel the necessity though to pick up every brief?

JUDGE PIGOTT: Yeah. And the one thing that I warn people about, or suggest to them, if I don't understand your brief, I'm going to go to your opponent and find out what the hell's going on here.

And so, if all of a sudden I'm asking your opponent, the Respondent in your case let's say, what the case is about, you're in trouble already.

And sometimes I'll go all the way to the reply brief to get down to what the big issue is, because it get's winnowed down. But I do, I do read them. I can't say I read every word, because some of them get very redundant and repetitive. But I do read them all, because I think it focuses—at least hopefully it focuses the issues, and I don't have to read all of the record.

CHIEF JUDGE LIPPMAN: And after you read it Gene, you know, when you read it and you're prepared, do you come in on certain cases and say, boy I'm loaded for bear. I've read these briefs. They've raised so many questions. You come and you're just ready to do it all, or do you take it all in and digest it and then sort of react, you know, once you get in the courtroom or do certain cases sort of excite you before there?

JUDGE PIGOTT: Oh yes. There's some—in fact, you know, I get off the bench and it's well, I was way over the top on that one.

I worry about it, you know, getting too enthusiastic about a case, but absolutely. There are cases that catch your eye and there are those that don't.

CHIEF JUDGE LIPPMAN: And what about length? Are you impressed by length? Does it turn you off or do you say, gee, this is a big brief. It must have something to say?

JUDGE PIGOTT: That's a good question and not that your others weren't but I don't think making nine points, having nine issues in a brief, you know, issue is—I think after about issue four, you know, if you've got nine issues, that means you don't have any. That's not literally true, but it looks like you're floundering, you know. But if

2012/2013]

The Untold Secrets of Eagle Street

1917

you've got one, two, three, four and you really want to make it, that's—I think that's a smart idea. I don't like to say that, you know, it's called a brief for a reason. It's not true, but I do think that focus is a key on that, and that's the way you're going to win. If you go all over the place with it, I think that's a waste. So, yeah. I think shorter is probably better, but I understand long ones too.

CHIEF JUDGE LIPPMAN: Okay. Two other brief questions. One, when you come in, do you usually feel, based on the kind of lawyering we get at the Court of Appeals, that you have a really good sense of what this case is about, or do you come in and say, not only I can't wait for argument, because I'm excited about the case, but, gee, I don't really get it all, and argument's going to fill in the blanks?

JUDGE PIGOTT: Generally, the quality is so good—and this is true of the Appellate Division too. I think the quality is so good that I generally know, I think most of us know.

There have been cases—I remember one that was an insurance case, having to do with the setting of rates. And the lawyers were talking about how this was happening, and we had no idea what they were talking about.

And one of the judges said, when you keep talking about this organization. What are you talking about? And the two lawyers looked at each other, and realized they had not made it clear enough to us what they were talking about to make the arguments that were based on what it was.

But that's rare. Generally speaking, people I think do a nice job. But remember, we don't—we're not experts on this stuff. We had a case involving One Call, I remembered. It was a question of, you know, call before you dig. And you're supposed to—so you don't cut up all the lines. And there was a big fight over that with the water district, talking about, you know, they didn't want to have to pay this monthly charge that is assessed on all of these people, because they were not a municipality by the definition of the law.

And it wasn't until about two-thirds of the way through the argument that the lawyer for this organization said that they were a multimillion dollar organization, that they're huge.

And we had no idea. I thought it was like the Maytag Repairman, sitting by a little phone, you know, they're going to put in a pool. Can you call somebody to put out those little flags. It's a massive

1918

Albany Law Review

[Vol. 76.4]

and very important industry. We didn't have a clue. At least I didn't.

And it was because they assumed that we know stuff. So when you're putting a brief together, it's a good idea to remember that you're talking to people who may be dilettante in the area in which you have that expertise that you want to make clear.

CHIEF JUDGE LIPPMAN: And the last question, Judge Pigott. Just so everyone understands that we've joined the modern age, when you prepare and you're reading the briefs and you're reading the cases, how much do you do it by paper and how much electronically when you're preparing?

JUDGE PIGOTT: Like you folks, my law clerks think that we ought to go into the wallpaper business. It looks like a library, because nobody's using those books at all that are in there, and we could save a lot of money just by doing wallpaper instead.

I'm still in the books. I like them. I'm a luddite. I enjoy computers. I'm dangerous on them; I can break them. But I enjoy them and obviously, that's the way we're going and it's terrific. But right now, I'm still about, oh I'd say, two-thirds the written word.

CHIEF JUDGE LIPPMAN: Okay. Thank you, Judge Pigott.

At the end, you'll have your chances to ask everybody questions, but we're going to go through everyone's topic.

The next presenter will be Judge Smith, and he's going to talk about "What to Expect at Oral Argument, Prepare for Hypotheticals." Judge Smith?

JUDGE SMITH: And of course, I'm not going to talk about anything of the kind. I mean, whose bright idea was it, after all, The Secrets of Eagle Street, oral arguments. I'll tell you the secret. The oral argument is not secret.

You want to know how to do oral arguments, you walk over there. The doors are open, or if that's too far a trip, go to our home page on your computer and go to the archives.

There are no secrets. So you're not going to find out any secrets of oral argument from me. I have a note that I made during Judge Pigott's presentation about how to begin. It says, say something insulting about Judge Pigott.

I'm quite practiced in that, but I just can't think of anything

2012/2013]

The Untold Secrets of Eagle Street

1919

that's really worthy at the moment. I'm—as he knows—I'm almost always annoyed with him, but I'm even more annoyed with him for giving an excellent presentation before I gave mine.

He's said a good deal of what I had to say, since the secrets of brief writing and the secrets of oral argument aren't all that different. So if you just want to do yours again.

I guess I can give some tips on oral argument. I've done it quite often. I teach, once a year, a law school class in Appellate Advocacy. And of course, before I was a judge, I argued quite a few appeals myself. So I know something about this.

I always begin my class by telling the students, as I will now tell you, that I may well be wasting my time and yours, because it's true in another sense, there are no secrets.

Oral argument—the rules of oral argument are not rocket science. Yeah, prepare, use good judgment, answer the questions, be respectful of the court, but do not be afraid to disagree, and do not be intimidated. Be partisan, but not too partisan. You've got to be fair, you've got to know the weak points in your case, but you are not expected to be neutral.

And I don't—the judges will actually be dismayed, if you seem not to believe in your case. So that even if you don't in your heart believe in it, you've got to get yourself to believe in it while you're there.

And there are a lot of other tips like this. And when I get done saying it, I realize that what I'm mainly saying is use good judgment, be smart, don't be dumb, pick out your best arguments, not your worst arguments. Be a good lawyer. And it's very, very easy to say. It's not so easy to do. And I've—as I argued a lot of appeals in my life, and I've probably violated every rule, every time.

I guess the one thing I can say that may be a little less self-evident, and if it sounds like an echo of Judge Pigott, it's really because he's not as bad as I make him out to be. But it's to remember that you're a human being, talking to other human beings. Oral argument is not a performance art; it's a conversation. And what you do is you—the only thing you're there to do is stand up and tell them why you should win the case.

You're somebody who knows you should win the case. You've got seven people in front of you, who may not be as convinced. And the case may not seem as clear to them as it does to you. Your job is to make it that clear. There are some obvious things you've probably heard before. When the judge asks you a question, you answer it.

1920

Albany Law Review

[Vol. 76.4]

You don't say, oh, I'll get to that later; sort of, not yet, Judge, that's in part two.

You don't say that's not this case. I remember once, Judge Rosenblatt saying in a sympathetic way, yes, that's a hypothetical. We do that here.

I mean, try to have good manners, but then why am I telling you that? Your parents should have taught you that. And don't go too far with the good manners. I mean, you should not begin an answer with the words, "no idiot."

But if you think the judge has said something really dumb, you can't say, "you've said something really dumb, Judge." But you should not hesitate to say, "no, Judge. I think that's completely wrong. You've got this the wrong way around. I mean, let me—I didn't explain it right. Let me explain it again." And you will not give offense, as long as you can do that with good manners. Now I can rattle on this subject forever, but I think I'll spare you.

Just ask me a few questions.

CHIEF JUDGE LIPPMAN: Okay. I get the chance to ask him a few questions. This is good, you know. Okay. So Judge Smith, you are known for asking a lot of hypotheticals. Do you think of the hypotheticals based on what's going on in the argument, or do you come in thinking, gee, I have a good hypothetical in this case?

JUDGE SMITH: I certainly don't come in with a list of questions, either written or in my head. I think the first argument I sat on, I was actually nervous and innocent enough to be able to write down some questions to ask beforehand.

I never do that. I ask them as they come into my head. That doesn't mean I haven't thought about the case. And in the process of preparing for argument for a judge and for a lawyer, as I've done it both ways, it's not really that different. It's essentially, for me anyway, it's just a process of immersion.

The best preparation is not writing out a careful script. It's not thinking up great zingers to get in. It's knowing your case. Knowing it better than anyone possibly can.

And of course, in the process of doing that, if you're preparing, if you're the judge preparing to ask questions, you'll think of some questions that you might want to know the answer to or more often, questions that you think there is no good answer to, but you want to be sure.

2012/2013]

The Untold Secrets of Eagle Street

1921

That's a lot of what I do. A lot of what we all do when we ask questions. It's not—we ask questions, we sound like we already know the answer, and we think we do. But every now and then, we're surprised, and that's why we ask.

But there's no substitute as a judge, as a lawyer, for knowing and knowing all there is to know about a case. Spend all the time you have preparing yourself, reading the facts, reading the law. If you have time, read it again.

When I was arguing, I would indeed prepare an argument with about the same elegance as I prepared this talk. But I would do that last, sometimes, of course, I'm not one of those guys like Judge Pigott who's thinking about April. I mean, if you'd asked me yesterday morning what cases were on today, I might have been seriously embarrassed.

When I was arguing, I would do that last, and sometimes so last that when there's a case ahead of me being argued, I'm writing madly on a pad. But that is best done after you really, really, really know the case.

CHIEF JUDGE LIPPMAN: Okay. Let me ask you another question, Judge.

JUDGE SMITH: My answer didn't have much to do with your question. Actually, don't worry, the next one won't either.

CHIEF JUDGE LIPPMAN: Okay. You know at the Court of Appeals, if you watch the arguments, sometimes the judges interrupt each other. Sometimes we interrupt the lawyers, sometimes the lawyers interrupt the judges. Judge Smith, are there any protocols in arguments?

JUDGE SMITH: Oh yeah. Yeah. Sure. I'll say that interrupting the lawyers is fine, and the other two are forbidden. Yeah. You really shouldn't interrupt the judge. I can understand the temptation sometimes.

And it does happen that the judges will start talking to each other. I think our court's pretty good about that. I argued once years and years ago in the Fourth Circuit en banc, before eleven judges, and Judge Ervin and Judge Wilkinson and a couple of others start going at each other, and I'm standing there like this. (moves head back and forth)

And finally, Judge Ervin asks some question that I took as a rhetorical question. I stood there silent, and he had to convey that he was asking me.

“And Mr. Smith? Oh, oh, you mean me? You weren’t talking to me. I thought I was just a spectator.” You know, it’s happened once.

I do remember the time when a lawyer reserved one minute for rebuttal, and a judge, who shall be nameless, began the rebuttal by asking a question, and I decided to be spiteful and time it. Fifty seconds for the question.

But despite all those temptations, you really shouldn’t interrupt the judge. And if the judge interrupts you, you should be pleased, because that means he has a question that he actually wants, or at least it’s supposed to be, that he has a question that he wants an answer to, and that is your opportunity. That means there is something that you can tell him that will help him or her, and that’s what this is for. It is not the purpose of the oral argument for you to give a brilliant prepared speech to show off your speech making skills. The purpose is for you to talk to the judges, and when the judge has a question you answer it.

CHIEF JUDGE LIPPMAN: Okay. Two other quick questions, Judge Smith, and then you’re off the hook. What percentage of the time does the argument actually change your mind, your legal opinion about a case?

JUDGE SMITH: Not very often, but more often than I would have thought when I was an advocate. If I’m picking a percentage, five. Usually, you come in knowing how you’re going to decide a case, or at least thinking you know. And usually you walk out thinking the same thing you did. But it has happened. Of course, it’s never true in my mind that it was the brilliance of the lawyer that did it, because this isn’t a moot court.

I’m trying to figure out who’s right here. And if my mind is changed, it’s not because the lawyer was so brilliant. It’s because I finally saw what was always true to begin with, because the lawyer pointed it out to me. But it does happen. I have been switched in the course of the argument. It’s almost always true that I walk out—that I come back off the bench understanding each case significantly better than I went out.

So I find that despite the fact that actually switching my vote is

2012/2013]

The Untold Secrets of Eagle Street

1923

rare, oral argument is immensely useful. It's useful for another reason too. Even on the ninety-five percent of the times when I come out thinking the same way that I did, if the argument is good, especially if the argument for the losing party is good, then I really feel comfortable that I've confronted the tough issues and that I know I'm right.

It's kind of an ironic thing to say to lawyers, and it wouldn't give me much pleasure, if I were a practicing lawyer, but maybe in a way, the most valuable thing you do for the system of justice, is if you lose a case and give a good argument losing a case, then you have really fulfilled your function in the adversary system. So get out there and lose those cases.

CHIEF JUDGE LIPPMAN: Okay. Last question. When you're asking questions or you're making comments during the oral argument, are you always speaking to the lawyers, or are you sometimes speaking to the other judges?

JUDGE SMITH: Oh, no. You're sometimes speaking to the other judges. I can tell you a secret of Eagle Street. It's a little known fact, but my colleagues are fallible. They are. They make mistakes. They're very good, very smart people, but they don't always get it right. I really want to be helpful, and make sure that they understand the case correctly. And yes, I do sometimes ask questions with that in mind.

CHIEF JUDGE LIPPMAN: Okay. Thank you, Judge Smith.

The next presenter will be Judge Read, who's going to talk about "The Inside Story Around the Round Table." Judge Read?

JUDGE READ: Okay. I didn't expect to receive a copy of the Derby Futures Field tonight. I want to thank Professor Connors, but Shanghai Bobby, really?

PROFESSOR CONNORS: Yeah. Fifteen to one.

JUDGE READ: He did win the Hopeful Stakes.

Anyway, conference the inside story around the round table, I'm not going to be talking about Thomas Malory's, *The Death of King*

Arthur,¹⁰ but about what happens in the conference room on the second floor of Court of Appeals Hall.

But before I go there, let me take you to the red room, which is the room in the southeast corner of the building, behind the courtroom. That is where we gather after arguments.

The Clerk of the Court, our wonderful Clerk of the Court, Andy Klein, places little white index cards with the names of the cases that have been heard that day, face down so we can't see them. And he has very fast hands, like those people you see in the streets of New York City. Shuffles the cards, and we pick.

And of course, we don't have seven cases every day. So every judge doesn't pick every day. So for example, those who are up on the wheel today knew who they were, and you knew you were going to get one of the cases today if you were up on the wheel.

So we pick the cases. And then after we go out to—

CHIEF JUDGE LIPPMAN: Judge Read, this is after arguments. The Judge doesn't know—

JUDGE READ: Yes.

CHIEF JUDGE LIPPMAN: —going into arguments—

JUDGE READ: That's right. This is after we get off the bench. We gather after the arguments. Then we spend that evening, each of us who's picked a case, to prepare a report. And then, you go into the conference room the next morning, and the Chief Judge calls on you, in the order in which we've heard the cases the day before, and you present your report.

And you present your report with your preferred disposition. And your preferred disposition may be more or less emphatic. Maybe you can say I can write this up either way. Because after all, we do have some cases that are quite close.

You also then go through the line of reasoning that you would propose to follow, in your opinion. And then we go around the round table, and everyone gets a chance to put in their two cents worth.

We start with the junior judge. That is the custom in our court. The junior judge gets to speak first. I loved being the junior judge.

¹⁰ THOMAS MALORY, *THE DEATH OF KING ARTHUR* (1971).

2012/2013]

The Untold Secrets of Eagle Street

1925

I loved being able to speak first, because I believe that I swayed some people.

You know, the reporting judge maybe will say we should affirm in this case, and you don't agree, you make a really strong presentation to reverse, and you get to make that presentation before anybody else kind of goes on record, you know, or puts their toe in the water and offers their view of the case.

So it's really wonderful to be the junior judge. Our beloved late colleague Judge Jones was the junior judge for almost six years. I was the junior judge for one year. Judge Rivera's not going to get three full terms.

JUDGE RIVERA: Thank God.

JUDGE READ: So now, what happens if the reporting judge makes a report, and says I think we should affirm this case. Here's the line of reasoning or the rationale I would follow when I write it up. And the reporting judge gets at least three other votes. Well, then that judge goes home for the writing, which is what Judge Graffeo's going to talk about, and I'll let her talk about that.

But then, what if the judge doesn't carry the court? Well, you've got two options; you can switch, or you can dissent. And I think that's pretty apparent what I mean. You can say—sometimes the Chief Judge has been known to say, well, Susan, do you think you can write it up the other way? I mean, you know, do you think you can do that?

So you can switch. Again, as I said, a lot of our cases are very, very close, and maybe you think you can. You may have heard arguments around the discussion at the round table that has perhaps shaken your conviction, in any event. So you may be willing to do that.

The reporting judge may also conclude that they'd rather switch and control the writing, the dissent, and by that I mean if you control the writing, presumably you can narrow it a little bit, and you may decide that the advantages of controlling the writing and narrowing the writing outweighs any benefits to be gained by dissenting.

Because there are risks in dissenting. One of our illustrious colleagues, Judge Hugh R. Jones, in a great article he wrote once

called, I think, "*Cogitations on Appellate Decision Making*,"¹¹ put it this way, a dissenting writing exposes beyond peradventure—I love that word, that it's author has been unable to persuade the members of the majority of the correctness or wisdom of his articulated analysis and rationale.

So there's a risk in a dissent. A dissent may drive the majority to harden or extend its position, which is another way of saying, the reporting judge might decide that caution is the better part of valor. Rather than dissent, I will hang onto this writing, and try to make it as narrow as possible.

But of course, there are always instances in which your responsibility to your own sense of integrity compel that you just can't do it. You just have to dissent. There may be a matter of high principle, as far as you're concerned, or where Mr. Justice Holmes phrased it, the blood rushes to the back of one's neck.¹²

And in that event, you say, well, okay. I'll take the dissent. So all right. The reporting judge hasn't carried the court; the reporting judge has made the decision to write a dissent. Who gets the majority writing? Well, on our court, we have what we call the rule of the right. That sounds like a secret handshake, doesn't it?

The rule of the right. And the rule of the right means that the judge—we sit around the round table, in order of seniority. It means that the first judge sitting to the right of the reporting judge, who is in the majority, gets the writing.

So those are kind of the secrets of conference. If you're very clever, knowing the rule of the right, you can kind of figure out sometimes how the discussion has gone, and you can kind of figure out that in a lot ways where you sit controls how many of the divided cases you get to write on. And that's putting aside cases where there's a simple dissent.

And so, those are my not tales from the crypt, the inside story around the round table.

CHIEF JUDGE LIPPMAN: Okay. Couple of quick questions. I'm always bragging about how collegial the court is. What is the ambience in the conference room? Do we fight; do we kiss? Are we civil? Are we horrible? What really happens around that round

¹¹ See Hugh R. Jones, *Cogitations on Appellate Decision-Making*, 52 N.Y. ST .B. J. 189 (1980).

¹² *Id.* at 219.

2012/2013]

The Untold Secrets of Eagle Street

1927

table?

JUDGE READ: All of the above. All of the above. There can be some very contentious arguments, but I don't think any of us are grudge holders or anything of that sort. So we can really duke it out verbally around the conference table, and sometimes those feelings do get a little bruised. I can think of occasions when I've been pretty bruised. But in general, you know, we are a very collegial gathering, a very collegial group.

CHIEF JUDGE LIPPMAN: Susan, when you come in, most of the time, have you figured out what's going to happen in a case? Are you surprised by the discussion around the conference table? It's different than you thought?

JUDGE READ: That happens both ways too. I have certainly gone in on cases that I'm reporting on. Usually, I think I have mostly for oral argument, frankly, and some of the questions that are asked, a pretty good notion perhaps, of how things are going to go, but I'm certainly not infallible in predicting that.

And there are times when I'm flat out surprised. Judge Smith can do that to me a lot. Flat out surprised as to how someone votes or how something is reported.

CHIEF JUDGE LIPPMAN: Okay.

JUDGE READ: It's always something to look forward to in the early morning.

CHIEF JUDGE LIPPMAN: Two quick questions. And then you're finished. Okay. When it's going around the table, depending on where you sit, do you sometimes, even though you've come in with a particular position, as the discussion is going on, as sort of a tactical issue or because you've changed your mind, do you—when it comes out of your mouth, when it's your turn, is it often very different than what you thought you were going to say when it came to you?

JUDGE READ: Well, all of these questions are all of the above. Both ways. I mean, there are times certainly when the discussion—I mean, you're sitting with six usually, right now five, very fine lawyers. And when the discussion after I'm now—it's me, Judge

1928

Albany Law Review

[Vol. 76.4]

Graffeo and you, so I'm towards the end, and you get to hear what everybody has to say, and certainly when you hear what everybody has to say, that can legitimately change your mind, or you might decide tactically too that you want to switch.

CHIEF JUDGE LIPPMAN: Okay. Now this is one of the real great secrets, this last question that I'm going to ask Judge Read. In this round table, in the middle of this round table, is what looks like kind of a lazy Susan or something. And people walk in and say, what could that possibly be. It's like a round, I don't know what you'd call it, a lazy Susan is the only thing. What is that and what do people do with that thing?

JUDGE READ: You know, since you folks haven't been in the conference room, I guess maybe you don't have a vision of it, but it does look like a lazy Susan. I happen to love to cook and to entertain, so the first time I went in there, I said, that looks like a lazy Susan. What in the world is that?

But it's apparently been there since time immemorial. And it's this round sort of a leather thing. And it's where we throw all the papers after we go through them, and our archivist's retrieve some things from that. The others go into the shredder.

This is a question, by the way, that whenever I've taken a school group through the court, they always ask about that and they always ask about the little round brass things at our feet on the bench, which are spittoons. We still have the spittoons from a day when I guess judges would use spittoons during oral argument. I'll never forget one time, a little ten-year-old girl said, judge, what's that? And I said a spittoon. And I got this look that let me know that she had no clue what a spittoon was. And then, I described it to her, at which point I got a real look. And she went "eww" . . .

CHIEF JUDGE LIPPMAN: Thank you, Judge Read.

Judge Graffeo, the next presenter, will discuss "Home Chambers, the Who, What and How of Opinion Writing at the Court." Judge Graffeo?

JUDGE GRAFFEO: Well, I guess I don't have as many secrets, because I have the smallest piece of paper, looking at my colleagues, but I'll see what I can do here.

Let me start by saying, because you're probably not familiar

2012/2013]

The Untold Secrets of Eagle Street

1929

entirely with our calendar, but after session, we have a three week inter-session, so all the work that we have to do on the cases that we've heard that session has to be done in the next three weeks.

I think we are all very proud of that time-honored tradition of the Court of Appeals, which is that the next month, we are going to vote those cases down, so that the litigants and the attorneys are going to find out the result of the case within six-weeks of when the case is argued.

And I think that's quite an exceptional kind of tradition that we have. I don't want to say anything about the Federal Courts, because our U.S. Attorney in the northern district is here.

But, you know, there are times when you wait months and months and months for decisions from certain courts, and so I think that we work a really kind of a—we chug right along, in order to do this, because we think it's very important that people get a timely response to their case.

So anyway, opinion writing I think is when the rubber hits the road. You've gone through this whole process that my colleagues have talked about, and now you've got to sit there and you've got to actually decide what you're going to do, and what points you're going to make in crafting the opinion.

And I think a lot depends on the type of case that it is. We sometimes have decisions that are thirty, forty, fifty pages. We sometimes have decisions that are two pages. It depends on the type of case, the number of issues that are involved, and also whether we're crafting a new rule of law or we're expanding on a rule of law, we're doing some kind of substantial change, or maybe our court hasn't addressed that issue for twenty or thirty years and there needs to be a major explication of the issue.

And other times, we're just affirming pretty much what the Appellate Division did below. We're not making any new laws, so there's no reason to write twenty pages.

So a lot depends on the type of case, and that's the thought process that we're going to when we go back to chambers. I think what a lot of people don't realize is that we are a very collaborative court. As you've heard Judge Read talk about, you know, we're at conference, where anyone can talk as long as they want to talk about a case, until, you know, people start kind of moving in their chair. But for the most part, we have a pretty good idea of what our colleagues feel about the case. I know I take some brief notes while my colleagues are talking.

I can't speak for everyone. We probably all prepare our writings a bit differently. But I try to think about what points my colleagues made, so that when I'm putting the writing together, I can address some of their concerns. Both what they thought was important or what they thought was a problem in the case, we'll try to address that in the writing.

Because the fact is, just because you're going back to chambers and drafting a proposed majority opinion, that doesn't mean that's going to be the opinion that's published in the book, because any of us can change our vote during the three-week inter-session.

It's not what we call—or at least in the legislature we used to call the bill is out of the house. It's not out of the house until we go back into session the next month, and that case gets voted down.

So you want to be sure that you're somehow addressing what has come up, both in oral argument, as well as what you know have been some of the aspects of the case that may have troubled or have been of interest to your colleagues.

And then you do—at least I do—I would do a very extensive editing, probably much to the chagrin of my law clerks. We always will do at least four to six versions. I'm constantly editing it. Sometimes, I'll get up to twelve, thirteen, fourteen versions. By then, I think they're ready to bop me over the head with it.

But I like to sleep on it for a day or two, because I always find when I go back and read it again I can make something clearer. I feel very strongly that we're writing not just for lawyers, but we're writing for the parties who have this issue. And I think it's important that they understand the logic of the decision, and that takes a bit of finessing. So I like to sleep on it. Sometimes it's almost literally. At night, you feel like you're actually sleeping on it, but I think it makes a better product.

And then, the magic moment comes when the send button goes down. And that's still not the end of the game yet, because we're a collaborative court, we comment on each other's work of all different kinds of natures. Whether we mark it up, whether we send general comments, they can come by e-mail, they can come by phone call. We even do memos to colleague if we feel additional research was necessary.

And we begin to—there are certain cases that a great deal of comments are going to go back and forth, the decision's going to be kind of up in the air. You may have to draft some other versions of this and there may be times when another writing is done and that

2012/2013]

The Untold Secrets of Eagle Street

1931

writing may end up acquiring the majority vote. So you never quite know. You're always trying to address this.

When it comes to writing dissents, usually I think most of us probably wait until the majority writing comes out. I know that if I'm in the dissent, I really won't start my writing until I see the majority writing, because frankly, for me, and I can't speak for my colleagues, but I prefer to have some input into the majority writing. And make some recommendations that would make me comfortable, as opposed to immediately sending out a dissenting opinion.

Because in the long run, I feel that that way the law then reflects more what I'm comfortable with. But as Judge Read said, there are always times when you absolutely have to express yourself, and you do the writing in a dissent.

So when the dissent comes, then if you have the majority writing, you have to also respond to that in your writing if you feel—and you maybe have to do a great deal of editing or you may just put a couple of footnotes in it. So it all depends on the case and the types of issues that are in contention between us.

So we only have three weeks. So it's quite a bit of paper that's going back and forth. But amazingly, we manage to get almost all of our cases, I would say in the high ninety-percent down, without holding a case over another month. So I think that's a tribute to how hard my colleagues work, and how much we respect each other's work.

CHIEF JUDGE LIPPMAN: Okay. A couple of quick questions, Judge Graffeo. What does the clerk do? You know a lot of the students want to clerk in chambers. What's their role in the opinion writing process?

JUDGE GRAFFEO: I think everybody probably handles their chambers differently. Certainly, I think all of our clerks work on bench reports for us. You know, they're doing research. Every once in a while, we will find cases that neither of the attorneys mentioned in their briefs, and they may be something that has addressed the point.

Also, in many of the cases, we'll look at what other state high courts have done, what the Federal Circuit Courts have done, and sometimes the parties' briefs don't address these things, because they have a bit of blinders on. They think they're writing only for

1932

Albany Law Review

[Vol. 76.4]

their case.

And of course, we have to have a broader view of that. We're also crafting a rule that's going to affect a lot of future cases.

So our clerks are kind of doing a dual thing. They're working on the bench reports for the next month's cases, and they're also helping us prepare our opinions that we're going to be circulating between us. So basically, I hate to say tied to their computer, but between doing research and writing it takes a lot of analytical ability for what they do, but it's a great deal of research.

CHIEF JUDGE LIPPMAN: Okay. Now, you know, again, I'm always bragging about how collegial the court is. During this process where drafts are going back and forth, do you ever get kind of angry with your colleagues or disappointed or want to say something like, you know, during this collaborative process, which it really is, is it always collegial or is it sometimes kind of, gee, you know?

JUDGE GRAFFEO: I don't know. I always collegialize.

CHIEF JUDGE LIPPMAN: I mean, the way you feel about it, not necessarily the way you expect it.

JUDGE GRAFFEO: You know, I may throw my pen around the room a few times, and—

CHIEF JUDGE LIPPMAN: That's what I meant. Yes.

JUDGE GRAFFEO: —I think my law clerks know that. I may huff and puff and, you know, oh my goodness, how did this happen, but . . .

CHIEF JUDGE LIPPMAN: But it isn't always so smooth, right? Sometimes it's difficult.

JUDGE GRAFFEO: Yeah. I mean, you get very invested in what you think about a case, and you've spent hours, you know, thinking about it. You drive home thinking about it; you wake up in the middle of the night thinking about it. You go to the gym and you're thinking about it. You live with these cases.

And so, yes. You do get I think emotionally invested in them. So

2012/2013]

The Untold Secrets of Eagle Street

1933

sometimes, you do kind of sit there, and maybe what you say couldn't be published in the *New York Times*, but you know, that's part of the process. And also sometimes you have some pretty heated discussions with your own staff.

CHIEF JUDGE LIPPMAN: Yes.

JUDGE GRAFFEO: Because that's their job. Their job is to keep testing me. So, I mean, we've never come to fisticuffs, but you know, I'm sure they've left some nights, you know, wishing.

CHIEF JUDGE LIPPMAN: I don't know about fisticuffs in chambers, but I can say, and I say it sincerely, that before I ask Judge Graffeo that last question, we pride ourselves that even when we do, as Judge Graffeo will say, get very invested in it, we never—I think, maybe Judge Read used the expression, it never lasts more than the five minutes that you're dealing with the case, and we really do have this very generous relationship towards each other. Judge Read?

JUDGE READ: Let's just remember, that this person, you don't want to alienate somebody that could be your fourth vote the next time.

CHIEF JUDGE LIPPMAN: Well, and let me end Judge Graffeo's presentation. I'm going to ask you a question.

You know when you're going back and forth with the drafts, and that's what happens electronically. We send the drafts, we make suggestions, you know. How often does it happen where you've made some suggestions, you're on the same side with somebody, and your suggestions really aren't followed, or they don't take enough of it, something that bothers you. How often is that, when you actually switch sides, because you're just not happy with the writing that you were originally on that side, but during this collaborative process do you often just say, no. I can't. I'm not comfortable with this, and you go over to the other side?

JUDGE GRAFFEO: I think it happens rarely, but it can happen. You know, there's something between the majority and dissent, because statistics don't always tell the whole story. As Judge Read talked about in conference, a lot depends on where you sit and what

your seniority is.

So the longer you've been on the court, you're going to have less dissents, because it pretty much means by the time it gets around the table to the Chief Judge or I, that nobody else agrees with you.

So you're going to have less dissents. It doesn't necessarily have to be a reflection of what you do. But on occasion, where something in the writing really does I think trouble some of us, or we think it's not making the correct point, or it's too broad and it should be narrower, then you have the choice, you can write a concurrence perhaps, or you write a dissent. You want to point something else out that wasn't there.

So, you know, you try to work together, but every once in a while, like, I guess people kind of draw the line in the sand; this is what I'm going to do, this is what it is. And then, you have to make a decision how important is it to speak separately.

CHIEF JUDGE LIPPMAN: Thank you, Judge Graffeo.

All right. Our last presenter will be Judge Rivera, who's going to relate her experience as the "New Kid in Town, Confessions of a Novice Judge." Judge Rivera?

JUDGE RIVERA: Not so many confessions. Thank you. Thank you, Chief Judge.

First of all, thank you to Dean Andrews for inviting us and of course, the *Law Review* for inviting us, and for, of course, this wonderful attendance. You should know—here's one of the secrets. You should know we were saying, at least I was asking, how many people are going to be there? Is anybody going to show up for this?

So there's a little bit of that. The other secret which you—I don't have to say it, because now you've seen it, we have quite the group of comics on the court. I had no idea that they have such wonderful senses of humor. We have seen some inkling of it over the last month or so, but they are in rare form tonight. How wonderful. Thank you.

Thank you also, Albany Law School, for letting me see that. I'm going to keep that and use that at some point for leverage, I'm sure on some case in the near future.

But what I have to say are things that I think may not be so obvious, if you've just come into the Court or don't know someone who works in the Court or ever had the opportunity to hear this kind of discussion.

2012/2013]

The Untold Secrets of Eagle Street

1935

But I think in terms of the work of the Court, if you really think about it, you say, well, that seems natural and that makes sense. First, as I think of some of my colleagues have already said, the judges are people. We're people. We come to the issues trying to do our best; trying to look at the case, read the law, understand the arguments, see if there are arguments or cases, as Judge Graffeo mentioned, Judge Smith also mentioned that perhaps have been missed, but that are important to really get through the issue and make some sense of it.

So we're people that way. And we're also human beings, with that sense of humor you just heard, but also in the sense of we're looking to not make an error, like trying to do what you think is right by the law and justice. And so, I would say that that may not appear to you to be a secret, but I think sometimes people don't think about that, that we are indeed people.

And the other thing I would say, and I know that members of the Court said this to me before I was actually sworn in and almost every day since, and it's absolutely true, it is a family. It really is a family, and you've heard the Chief Judge introduce some members, and of course, some of the clerks are here; my clerks are here. But it is a family. We're sort of in this enterprise, if you will, together, care about the Court, the reputation of the Court, and that justice is done.

So very much there is that sense of family and I have said publicly and privately to my colleagues, I really feel that they are very welcoming and that the Court is very welcoming and embraced me. And so it is a family in that way, and that's really—it makes it a very special place, not only reputationally, as you heard for the Court, but as a place to work in. It's a great, great job. Something that perhaps some of you in the room have been thinking of aspiring, to and that would be wonderful. And for those of you who have not been thinking about it, I say why not? You should. It is a wonderful, wonderful job.

I would say the other newbie secret is that you really are working all the time on issues that are—at least for me as a newbie, I feel like everything is of such momentous, right? It's just of the moment. This is the highest court and everything is of the moment and everything is so important.

And the reality is, as you go through time, of course, every case is of singular importance to those litigants and those parties, but I think Judge Graffeo was saying this before, you know, there are

some cases where you are breaking new ground. It is really a rule that you're addressing for the first time. It's novel issues. And then, there are other cases where they fit somewhere. You're just kind of working it through and bringing perhaps a little clarity to it. So it is that balance of the way the cases come forth. For me, at least as a newbie, I see everything, and I know they're tolerating me. Everything is big, right now. The most important issue, whatever that one issue was in that footnote 39, in that brief, that's the brief that Judge Pigott was talking about when you have footnote 39, but it must be the most important issue. And so I have approached it in that way, and that's the way I've been thinking about everything on the Court.

I'll say the other, you know, as the new kid on the block, so to say, I think the other thing is that I have been certainly struck by the ability of my colleagues to really crystalize on the bench and in conference some very, very complex matters, in a way that is really true to what the issues are, and make them accessible, even when I have—I've walked in certainly. Certainly got on the bench, and walked into conferencing.

You know, I'm not—I didn't get that argument, what was that argument? And I've really been so pleasantly—not surprised, but been so thrilled that I'm with colleagues who just find the right way to say that, and the light bulb clicks and the light bulb may be, I knew I was going to disagree with him or her on that, now I know why.

You know, that kind of a thing. But more often than not, they have really helped in that going around, and I am the first one, so I will tell you it—I know that Judge Read said the thrill of that, to control that.

The flip side of that is always weighing whether or not to be very curt. Yes. I agree. That's all I have to say.

Try to say, well, should I say more or should I say less. Especially by the time you've gotten to the last case, and we've been in conference for two hours, and you're wondering if you really have that much more to add to what may very well have been a wonderful report by the reporting judge.

So I would say that. And then, I know I stand between I guess the Q & A from the audience, and these last few things that the Chief Judge will ask. But I would say the other thing that is now so very clear to me—it was clear to me beforehand, but it is now so very clear to me of the singular importance of having, on a collegial

2012/2013]

The Untold Secrets of Eagle Street

1937

court, members who do have different perspectives, different experiences, because I think that enriches the dialog. It enriches the debate when it's a debate, and does bring something very special to a collegial court like our Court of Appeals.

And so, when I said before I really do encourage you to think about applying. I do think that people coming from different places, different experiences, really does make this at the end of the day, the end product—the experience is terrific, but the end product, my own belief is that it ends up being better.

So I think I'll leave it at that.

CHIEF JUDGE LIPPMAN: Okay. A couple of grueling questions, before we go to the questions.

JUDGE RIVERA: Please. Because I'm the junior. This is it.

CHIEF JUDGE LIPPMAN: So what did it feel like sitting in that majestic courtroom the first time you sat on the bench?

JUDGE RIVERA: It's the biggest kick in the world. I think it was even better than winning the first case. All right. As a junior lawyer, that first case where you come back and you say, I won it for my client. I believe it was really that kind of a kick. It's wonderful, you know, to walk in, but the other side of that, which is still a thrill, is when you don the robe, to understand the incredible responsibility that you have on that court being, well, one of six now. We will be one of seven shortly. And that it's thrilling and it's scary, but you really understand that sense of the obligation.

CHIEF JUDGE LIPPMAN: And in talking about scary, what's been the most intimidating part? What is—well, aside from the Confirmation Hearing—what has been the most intimidating part?

JUDGE RIVERA: Don't you love him?

CHIEF JUDGE LIPPMAN: Yeah. Whether you're coming from the Court, all the things you've done since you've been here—

JUDGE RIVERA: Today. Right now. The scariest, I think it was that first conference, the first time to speak is right up there. I would say the other one is the first writing when you press the send,

1938

Albany Law Review

[Vol. 76.4]

and especially when you don't know how people will react to it, and you're sending, you know, your words and before coming to the Court, I'd certainly written a lot.

My colleagues in academia, you know, you write a lot. So it was very strange. It was almost like being a junior law professor, that first thing you've written, and you say, I'm going to actually show it to someone. So, yes. I would say that's right up there too.

CHIEF JUDGE LIPPMAN: Okay. And the last grueling question—

JUDGE RIVERA: Please.

CHIEF JUDGE LIPPMAN: —is we're here in this law school, and you have all these academic people here, why does an academic want to sit on a court? What's the attraction, coming from this world of ideas, to come to this judicial thing, this justice business. What's the attraction?

JUDGE RIVERA: Yeah. That's actually a great question. Nobody ever asked me that one on the commission.

Anyway, well, you know, there is clearly a transition. There's no doubt, moving from being an academic to being a member of the bench, without a doubt.

There are many similarities, of course, as you've already heard, like the sitting and thinking deeply about the issues, writing of course, the research and reading many, many cases, and working that through reading those briefs is sort of like reading all the materials you might read to put together a law review article or a presentation.

So there's many, many similarities in that way, but that transition—I think the hardest part of that transition would be as a law professor, even as a junior law professor, you have the freedom of choosing originally the topic. I want to write about that. This really jazzes me up. I want to write about that, or that's an injustice, I have to write about that.

Initially, of course, as Judge Read already described, you draw and you've got a case, it may be the case you wanted; it may not be. It may be the one you didn't want. It is what it is. And then you in the writing, and of course, you're absorbed with that. But the—that flexibility—and that opportunity as an academic to choose, and to

2012/2013]

The Untold Secrets of Eagle Street

1939

choose all the time is something that is not exactly the same. There is a transition in that.

But I would say, well, at least for me, there were two reasons; one is I've been a public interest lawyer, and tried certainly as an academic to focus on justice issues and public interest and public service issues through my writing. I wrote a lot about women's rights, civil rights, domestic violence, those kinds of issues.

And so it was certainly the attraction to be able to continue that public interest career by serving on the bench on one of the highest courts. I don't know that every academic would see it that way, but I certainly saw it that way.

I think, you know, it's one thing, I'll give that away for the truly academics, sorry this is the secrets of academia. You know, sometimes you write, in the hopes that you will influence the law, the trend in the law. You'll influence the bench. When one of us is quoted by a court, that gets circulated. I'll tell you, it gets right on that e-mail, congratulations to colleague so-and-so, court so-and-so cited their article on page blah, blah, right. We all know immediately.

But it is sort of another, of course, wonderful opportunity, and as I've said, a very serious obligation. To now be on the other side of that, and my clerks know, because I've asked too many times, is there a *Law Review* article on that? I guess I've got a little bit of an homage to academia still.

CHIEF JUDGE LIPPMAN: Okay. Thank you, Judge Rivera.

Okay. Questions? It's up to you. I know there are a lot of questions. Who wants to start?

QUESTION: What value, if any, do you find in amicus briefs?

CHIEF JUDGE LIPPMAN: That's interesting. Who wants to take that?

JUDGE READ: I find them to very valuable and almost invariably valuable. In the cases that we get and we do—we are very friendly, open to amicus briefs, as you probably know, and it's usually the really big, important cases always do have amicus briefs and they're almost invariably well done, and often, they do just repeat what the parties say, but often not. Often they bring new things to light.

1940

Albany Law Review

[Vol. 76.4]

CHIEF JUDGE LIPPMAN: Yeah. I think they're very influential. I think we all feel that way.

Okay. What's the next question? Yeah?

QUESTION: Unlike the federal bench, where it's a lifetime appointment, you guys have terms. How do you think that affects the jurisprudence here in New York, since you know you only have a certain amount of time to make your influence on New York laws?

CHIEF JUDGE LIPPMAN: Well, before I ask one of my colleagues, remember, these are pretty long terms in New York. If you get to serve a full term, it's fourteen years, which is a long time.

Gene, you want to . . .

JUDGE PIGOTT: It doesn't bother me. I will not finish my term. I'll turn seventy before my term is up. We've had this debate though.

When I came on the Court, I think it was a majority of women, and I think we got that turnover, because of terms and because of the age limit, and things like that. And I think that's a great thing.

As you know on the Supreme Court, you know, they're all from the same law school, they all went to the same grammar school, they all are going to be there forever, and what are you going to do? I think it's an energizing factor, and of course, I like it a lot.

CHIEF JUDGE LIPPMAN: Anybody else on that? Okay. Bob?

JUDGE SMITH: I'm convinced that I worked harder than I would have worked if I hadn't known that my term was finite.

CHIEF JUDGE LIPPMAN: And that is what got you to come here.

JUDGE READ: I'm with Judge Pigott. I guess I have this philosophy. To me, we all have different philosophies. I like turnover in my law clerks, because I think it's refreshing. As Gene says, I think it keeps the institution from becoming stodgy because you can—if you have turnover, you have new people, and everybody's not eighty years old.

CHIEF JUDGE LIPPMAN: Not that there's anything wrong with

2012/2013]

The Untold Secrets of Eagle Street

1941

being eighty.

Okay. Who else has a question that we can answer? Yeah?

QUESTION: Professor Bonventre told me he was a clerk at the Court of Appeals—

CHIEF JUDGE LIPPMAN: He tells that to everybody.

QUESTION: —many, many, many years ago. And he would tell me about red cards and about how he would frantically have to write up a brief, and he cursed the name all of his judges that he had. And I'm wondering if the red card still exists?

CHIEF JUDGE LIPPMAN: Judge Graffeo is going to talk to you about red cards and blue cards.

JUDGE GRAFFEO: We still have red cards and blue cards, but I don't think we use them in quite the same ways as they did years ago.

They're motions for leave to appeal in civil cases, and we get hundreds and hundreds and hundreds of these a year. I call it the hidden work of the Court, because besides doing the cases that are orally argued and then opinions come out, we each are also working in chambers, reviewing motions for leave. And then, when we go to conference on the civil cases, we are voting on what cases we feel should be heard by our court.

So blue card just means it's in the ordinary course of business. We've got to get those blue cards done by the time we have a new session coming up. A red card means that it needs immediate attention. What it basically means, is we have expedited the case. We do that a lot in cases involving children, custody situations. You know, you don't want a custody case to be hanging out there for the summer, and the child doesn't know what school it's going to go to, what parent it's going to live with, that type of thing. So we use red cards for cases that are time sensitive.

JUDGE PIGOTT: And they're kept on a table right below the Vin Bonventre dart board.

CHIEF JUDGE LIPPMAN: He's only kidding. Okay. Who else has a question?

QUESTION: I want to compliment the law school, the faculty, and the Dean for a wonderful, just a wonderful symposium and all of you.

My question is this; what does it take to become a law clerk for a New York State Court of Appeals Judge? Now I graduated somewhere in the middle of my class, maybe the lower end. Would somebody like me ever have a chance?

CHIEF JUDGE LIPPMAN: Well, it's a good question. All right. Let me start that and see if anyone else wants to.

We all have our own systems of picking clerks. It's not necessarily the people at the very, very top of the class who get the jobs. We all interview and I think we all look at a wide—cast a wide net.

And I think it's really a chemistry. To me, what's most important when I interview someone is whether I feel a chemistry with the person applying. And sometimes to be sure people with—students who have an absolutely stellar resume may, you know, look better on paper, but it's not always the case that when you come in and do the interviews that the person with the best resume gets the job.

So I think it's mixed, and I will say this, that with the economy that we've had in the last years, we're getting great resumes on paper, let me tell you. Jobs are more scarce than they were a few years ago, but I think there's a mix at the court. I don't think it's all of, you know, one type of person. Anybody else want to add to that?

JUDGE RIVERA: I'm going through the process, so I'd like to give some thoughts about that—comments about that.

I think it is true that having been also a teacher that some of the best students are not necessarily the ones who have gotten every best grade in every course, because really some of the best students are those who are willing to take a course in an area they're not familiar with, and willing to take a risk. And I like risk takers, and that's my own kind of sense about that.

But I'm interested, yes, in the chemistry. That's absolutely true, but not just with me. I'll be looking to see, okay, the three, because I'll have three. How are these three going to interact and work well, because it's the three clerks, judge, judge secretary, and then we're up here again.

We're very cloistered in that way. You've got to be able to really

2012/2013]

The Untold Secrets of Eagle Street

1943

work well. You can't always make a good call on that, if you will, but I am thinking about that as I go through the papers, and then, obviously at the interviews.

But I think one of the most important things of the course is that ability to show the strong research and writing. So someone who's done a lot of writing, and who has that to show that it's their own writing, not the writing that was edited by, you know, the three law professors, right? That is something that I'm looking for. And I do—I would test that, so now you're going to get a secret, right? I'll test that by asking about what you wrote, how you got to it.

Questions, because I'm going to be checking to make sure that's your writing and not someone else's writing. You know, because that's really important to me. I need the confidence of—in terms of that person being able to prepare the writing for me, whether it's the bench writing or something else that I may be doing a presentation of something else. But I need—and I have to say, I don't want to be so—I don't want to read something when I don't understand what you wrote.

Unless that it's a complex issue, and we're working it through, it can't be that you're not able to articulate it in the writing, and I'm trying to get through so much material, and I've got to get through my own clerk's materials, and I don't understand what this person has written. How is it that I ended up with it, that's my problem. Just being totally candid.

CHIEF JUDGE LIPPMAN: Okay. A few more questions?

QUESTION: I would imagine from time to time the court questions its decision of granting a leave to appeal.

CHIEF JUDGE LIPPMAN: Yes. That's true. You can keep going though.

QUESTION: It is my understanding that the Supreme Court has the power to dismiss a case improvidently granted. I honestly don't know why the Court of Appeals doesn't have a similar power. And I was wondering whether there was some sort of constitutional limitation on its' ability to have such a rule?

CHIEF JUDGE LIPPMAN: This is a very interesting question, but I'm going to have Judge Smith answer that.

JUDGE SMITH: That's an easy question. I have no idea.

We've never done it before, and we never do anything we've never done before.

JUDGE READ: That's not—that's your point of view. Some of us wouldn't agree with that, but yeah. We sometimes—we often—well, not often, but we do sometimes wish we had that power, or that we could do that, but we just don't.

CHIEF JUDGE LIPPMAN: But we do often know that we shouldn't have granted the leave in many, many cases.

JUDGE READ: And another secret—Judge Graffeo keeps score. She keeps score, so if there's a case that—you know, if it's one that she's really argued against granting leave, it comes up, we come out, and she says I told you so. She keeps good track.

CHIEF JUDGE LIPPMAN: Okay. Who else? Yeah?

QUESTION: I have another question about law clerks. Does every judge have the same number of clerks and do they have staggered terms?

CHIEF JUDGE LIPPMAN: Everyone has the same number in the Court of Appeals. Three, and the Chief Judge has four. I'd say most of the clerks in the court rotate, although some of the judges, either in part, or all of them do have permanent clerks.

So I'd say the majority of clerks in the building, we follow the federal system of hiring, and then rotating either every year or two years, but there are some clerks who are kind of semi-permanent clerks with the judge. It's really up to the discretion of the individual judge.

And in relation, just the thinking ahead of what you're saying, where we do rotate, different judges have different systems. It's not as uniform—you know, in the federal courts they try to make very uniform. You start the application process at this time and we make our picks at that time.

It's a little more flexible with us, but don't hesitate if anyone's interested in a clerkship to write to the judge, and, you know, see what kind of response you get. And send in your resume.

2012/2013] The Untold Secrets of Eagle Street 1945

Gene?

JUDGE PIGOTT: Do you want to mention pool clerks too?

CHIEF JUDGE LIPPMAN: Oh, yes. We have a wonderful central staff program that we've had many Albany Law School students who come into our central pool.

It's a group of lawyers, who basically do a lot of the civil leave applications. And it's a great place. We think it's a great program. Again, Albany is very prominent in that and all—I know it happens. I know I've had that. Sometimes the law clerk is taken from the pool. The judge will take a central staff person and make them their own law clerk. So that's a great program also.

QUESTION: This is an open question for any of the judges. I would like to know what you would pick as the title for your biography?

CHIEF JUDGE LIPPMAN: Anyone want to answer that question?

JUDGE SMITH: Talk to my agent.

CHIEF JUDGE LIPPMAN: I think we'd all—speaking for everybody, but I know everyone has their own views, but I think we all want to do justice, and I think that, you know, if it has something to do with accomplishing that, I think everyone would be happy to be thought of in that way.

But you know, if we had a little time, we probably could think of a more provocative—

JUDGE PIGOTT: I think it could be Judge Robert Smith, The Lean Years.

CHIEF JUDGE LIPPMAN: I know that I have to tell you that's a joke.

JUDGE SMITH: Well, then how come it's not funny?

CHIEF JUDGE LIPPMAN: Who else has a question? Anybody? We're running out of time, but let's have one or two more.

QUESTION: You mentioned that you look to the decisions of other states' high courts and federal decisions, and I was just wondering what influence that has on your decisions, and how you allocate that influence between other states and federal decisions?

CHIEF JUDGE LIPPMAN: Well, I'll give you the quick answer, and anybody else can chime in.

I mean, obviously, we look at our own jurisprudence. For the most part, that's what guides us. But certainly it can be very influential, and, you know, certainly the federal courts, you know, there's a lot of cross-referencing.

And as you know, we have the cert process. We get a lot of cases sent to us by the federal court, because they have a problem that relates to New York State jurisprudence, and they want us to opine on it.

But I think, like any high court, I think we certainly in certain types of cases, especially when you're breaking new ground here in New York, you want to see what other states have done, and, you know, the feds obviously are of interest to us. Anybody else on that?

JUDGE READ: The Second Circuit or, you know, New York's federal courts, but particularly in the Second Circuit, I think there's a little bit of a thumb on the scale there.

CHIEF JUDGE LIPPMAN: Yes.

JUDGE READ: That gets a lot of attention.

CHIEF JUDGE LIPPMAN: I think that's true that we do, because we're so familiar with it and it's I think the—just like the high court in New York, it's the premiere high court in the country. We certainly look to the Second Circuit a lot. What else? No one?

Thank you all. I appreciate it.

DEAN ANDREWS: Thank you, everybody. There's a reception in the gym, and before we go, I want to thank the judges for their candor and I want to apologize in advance for the blog post that I know Professor Bonventre's going to post tonight. Thank you everybody.