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1. [What Makes an Effective Appellate Judge?](#)

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What Makes an Effective Appellate Judge?

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Body

Presently, there are no vacancies on the Appellate Division, First Department although word has it that there will be one at the end of the year. But, as a member of the Governor's Judicial Screening Committee for the Appellate Division, First Department, I find that trial court judges elected to the Supreme Court are nevertheless constantly interested in learning about the appointment process.

More often than not, these conversations turn into a discussion regarding the qualities that we are looking for in an appellate judge. I have given some thought to this issue in the past (Saxe, "What Makes a Good Appellate Judge?" New York Law Journal, Dec. 2, 2013, pg. 6, col. 4 (Perspective) and believe that a limited return to this topic is warranted at this time.

First, I think that it should be pointed out that life on an appellate court is not for everyone. For starters, on an appellate court, the "I" is basically submerged in the "we." Appellate courts function in panels or group of judges and compromise is often the pathway for proper functioning. If you as a trial justice, are happy with the hurly-burly of a trial part, the relative solitude of an appellate assignment might not suit you. (See Saxe, "Would You Really Like It Here?" New York Law Journal, Feb. 11, 2014, pg. 6 (Perspective))

So as not to overwhelm you with a listing and discussion of all the many characteristics that the ideal appellate court judge should have, let me highlight just a few of those qualities.

The Ability To Write Clearly And Communicate

Writing skills are vital; effective appellate judges must be more than mediocre scribes. If you aspire to an appellate assignment and feel that your writing skills need work, sign up for a writing course or read one of the many books on improving your writing skills. Equally important is the ability to listen carefully. Judges are accustomed to do the talking and often shut down the attorneys before them. Allowing a more open dialogue will prepare for the cross-currents of conversation that will be part of your appellate experience.

Collegiality

The need to be able to work with your colleagues on an appellate bench is uniquely critical to the proper functioning of an appellate court. Collegiality is said to involve the ability to understand and respect differing views and be able to give and receive constructive criticism with grace. (See generally, Goldschmidt, Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise? Merit Selection: Current Status, Procedures and Issues, 40 U. of Miami, L Rev 1, 29 [1994].

What Makes an Effective Appellate Judge?

The emphasis on Collegiality ties in with the view expressed by former Court of Appeals Judge Hugh Jones who said that the appellate process is a pursuit not of individual achievement, but of institutional responsibility to articulate the law. (Richard Wesley, "Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now," [65 Albany L. Rev 1123, 2225 \(2002\)](#). Collegiality is therefore at the essence of the proper functioning of an appellate court. Jones acknowledged that being an effective appellate judge was "the submergence of individual image and status to the good of the court (Id.)

This is not a simple task because we all bring diverse backgrounds and experiences to our collegial responsibilities. But, as Judge Benjamin Cardozo noted: "The eccentricities of judges balance one another." One judge looks at problems from a point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another latitudinarian, one is timorous of change, another dissatisfied with the present, out of the attrition of diverse minds there is beaten something which has a consistency and uniformity and average value greater than its component elements" (Cardozo, "The Nature of the Judicial Process," at 177).

Circuit Court Judge Harry T. Edwards has developed an encompassing view of collegiality and how it affects the decision-making process (Edwards, "The Effects of Collegiality on Judicial Decision Making," 151 U. of Pa. L. Rev. 1639 (2003). Edwards parts company with Cardozo's attrition theory. He finds that in a collegial court judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, they are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.

Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Specifically, collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways. (Id.) Dissents under this view are not a sign of breakdowns in civility but instead a reflection of the comfort of a collegial environment in permitting a full airing of all relevant viewpoints.

Compassion

I would add compassion as an important characteristic of appellate judging. In an appellate environment, the parties and their conflicts are removed from real time judicial viewing but the emotion and pathos of the circumstances are buried nevertheless in the cold written pages of the Record. They often need to be exhumed through a compassionate analysis (see Brennan, Reason, Passion and "The Progress of the Law," 10 Cardozo L. Rev 3 [1988]; Kaye, The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern, 73 Cornell L Rev 1004, 1007 [1988]).

As former Chief Judge Judith Kaye explained, we need judges who will "bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them" ([Kaye, supra at 1015](#)).

Principled Decision Making

The requirement of principled decision-making, is, beyond doubt another worthwhile aspiration and is essential to the credibility and success of appellate judicial functioning (See, generally, Edwards, The Judicial Function and the Elusive Goal of Principled Decision Making," [1991 Wis L Rev 837](#)). The judge "must first extract from the precedents the underlying principle, the ratio decidendi, [and] must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die" (Cardozo, The Nature of the Judicial Process, at 28).

The neutral application of precedent and the need to convince one's colleagues on the appellate bench generally serve to prevent judges from deciding cases in a manner that accords with their ideological or partisan preferences ([Id. at 838](#)). Yet, as Judge Richard Posner points out, "Through self-awareness and discipline, a judge can learn not to allow his sympathies or antipathies to influence his judicial votes, unduly. But the qualification in "unduly" needs to be emphasized.

Many judges would say that nothing outside "the law" influences their judicial votes at all. Some of them are speaking for public consumption, and know better. Those who are speaking sincerely are fooling themselves" (Richard A. Posner, "Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's View," [51 Duq. L. Rev 3 \(2012\)](#)).

A Fair and Balanced Temperament

What Makes an Effective Appellate Judge?

A good appellate judge gives counsel a reasonable opportunity to explain her positions and doesn't permit bullying of a lawyer to take place during a panel sitting. If a member of a panel eats up precious argument time of counsel through a hectoring approach, another judge should make sure that the lawyer gets additional time.

There are many other qualities that also go into the mix an unblemished ethical record as a trial judge, the courage and integrity to do what the law requires, an interest in continuing education, the ability to handle a heavy and always challenging work load and a dollop of humility as well as others.

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