

## [How Judges Learn](#)

New York Law Journal

October 17, 2024 Thursday

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### **New York Law Journal**

**Section:** PERSPECTIVE; Pg. p.6, col.4; Vol. 272; No. 76

**Length:** 1648 words

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### **Body**

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Members of the New York State Judiciary have the benefit of excellent and varied educational programs produced by its Judicial Institute located in White Plains. But sometimes the needs of judges to become conversant with new areas of law require an approach that deviates from the norms of established judicial education programs. The following is such an instance.

I write about the time when Chief Judge Judith Kaye was instrumental in assisting the Appellate Division, First Department in overcoming a deficiency with respect to an understanding of a certain type of commercial law appeal that began to pop up in the early 2000's. The subject of these appeals was a relatively new area of commercial law practice derivatives and currency swaps. To put it bluntly, these subject areas, at least to me, were complex and even after reading the polished briefs submitted by the white shoe advocates, things were not made much simpler.

The court attorneys bench memos prepared by members of the court attorney staff did not explain the mechanism behind these sophisticated currency maneuvers any better. The Wall Street counsel had the maddening habit of assuming all the readers of their product had the brilliance, training and understanding of their work that they did, which only continued the mystique of what they were writing about.

So, after preparing as best I could for an upcoming panel, I finally realized that I would have to stay silent and not ask any questions, because I had such a tenuous understanding of the subject matter and I didn't want to showcase my ignorance. And, so that afternoon when I took the bench for among other things a currency swap/derivatives/appeal, I was determined to let my more senior and experienced colleagues, Justice Joseph Sullivan and Justice Richard Wallach, both brilliant judges, decipher the mystery of these sophisticated commercial processes.

But, to my surprise and perhaps to the surprise of counsel, not a question was asked or comment made by any of the judges that afternoon on the panel and the other judges on that five-person panel were not slouches either, me included!

After arguments were over, the panel went to conference to vote on the cases of the day. When the currency swap/derivative appeal was reached, the Justice Presiding called on the reporting judge for that appeal (as is the custom) to give the initial vote.

At that juncture, I fully expected a discussion to begin that would expose the intricacies of the transactions involved. But, there was not a peep out of anyone. The reporting judge intoned "I'm for the recommendation on the Court Attorney's Report." "Me too" said the next in line and everyone else (me included) similarly jumped in line with the

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same result. If my memory serves me, the decision affirmed a short, uninspired and unedifying decision from the motion court as well.

I'm pretty sure we reached the right result but I was also sure that there was no one on the panel that afternoon that could offer even the most basic explanation of how these transactions worked including my two brilliant senior colleagues who apparently knew no more about this than I did. I left the panel-sitting that day disappointed but also relieved that I was at least among equals.

That experience stayed with me for some time but as time stretched out, the events of that day were forgotten. Some months later, the appellate judges from all over the state convened at a beautiful upstate resort, the Mohonk Mountain Lodge, for a few days of legal updates on topics of interest to appellate judges.

Chief Judge Kaye spearheaded these seminars which were a good way to build camaraderie among appellate judges sitting throughout the state and at the same time provide those judges with tutorials from some leading law professors and practitioners on current developments in the law.

Now, I need to provide a bit of background information regarding what happened on the first day of the program as it will provide the context for what would happen on the second.

My colleague Richard (Rick) Andrias and I had scoped out a nine-hole golf course at the hotel and decided on a plan to play the course on the first afternoon of classes. A special program has been planned under the supervision of Judge Kaye but the subject didn't hold interest for either of us certainly as compared to a round of golf.

We made our plans carefully. In advance, we left our golf bags outside the golf shack and proceeded to the convention room. Our plan was to leave our course materials at our desks, along with a jacket, to give the appearance once we walked out through the back, ostensibly to use the bathroom, that we would return. And then we left, me first and Rick five minutes after me. Our plan was to head directly to the golf course.

But, just as I made it through the back door of the lecture room and was intending to proceed to the outer door where I would wait up to meet Rick, who do I see standing almost directly in front of me but Judge Kaye holding a clipboard. "Where are you going, David?" she said in a none too friendly tone. And just at that time Rick appeared and Judge Kaye motioned him over. I babbled some excuse that Rick and I had some personal issue to discuss that needed to be attended to. I'm pretty sure she didn't believe me and ushered us back inside to hear this special program. The two of us slunk back to our places in the lecture room under the watchful eye of the Chief Judge. We managed to get in about an hour of golf much later in the afternoon, after the program concluded not the leisurely round we had hoped for.

By the next morning, after breakfast, we were all back at another lecture in the same hall. Around 10:30 a.m., a coffee break was announced and most of the bleary-eyed judges gathered for infusions of coffee and danish.

I was standing in a small group of First Department judges that included Presiding Justice John Buckley, Associate Justice Ernst Rosenberger and my golfing buddy Rick, all imbibing our morning nourishment. For some reason, I was talking to the group about the observations I had made about our court's lack of understanding of currency swaps and derivatives that had become the subject area of recent appeals. My colleagues continued munching on their danish and sipping their coffee and didn't seem to have much of an interest in my rant.

Suddenly, out of the corner of my eye, I saw Judge Kaye and our eyes locked. She approached our little group and the first words out of her mouth were, "David, what are you talking about?"

I was frozen. I knew that yesterday when asked what I was doing leaving the lecture hall, she didn't believe my stammering answer. But, I also quickly became aware that if I told her exactly what I was talking about, it might not reflect well upon the continuing stewardship of our Presiding Justice ("PJ"), John Buckley. But my previous interaction with Judge Kaye the day before was the determining factor in my response and I repeated verbatim the nature of my observations about the ability of our First Department court members to adequately respond to these

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type of commercial cases and how we needed, as a court, to do something about it. "I agree with you David," Judge Kaye intoned. "John, (to the P.J.), let's do it," and she turned and walked over to another group.

At that moment, I don't think that P.J. Buckley was overly pleased with my directness because his comment to me was "You do it; get it done." knowing well that once the Chief Judge had an idea, she had a reputation for following up with the people who were directed to respond.

So when the appellate program was over and we were back at our court, I went to work on this project.

I contacted a number of business schools in the metropolitan area looking for an academician familiar with such financial matters and identified a professor at NYU's Gallatin School of Business who fit the bill. Judge Kaye had informed me that she had a fund, if necessary, that could be dipped into to pay the professor's fee, but I was able to convince her to provide a lecture gratis in return for the privilege of joining all the First Department jurists for a tuna fish sandwich luncheon in our court lunchroom. Second Department justices were invited but since their inventory wasn't peppered with these cases, I don't remember any of my colleagues from across the river attending.

I kept in touch directly with Judge Kaye about my progress and a side benefit was my improved standing in her mind.

Finally, the day was set, the Professor (I have long-forgotten her name) gave her lecture as part of a luncheon hour on the subject of derivatives and currency swaps. It was a success at least those were the prevailing comments afterward, and she even provided some explanatory written material.

Judge Kaye had indicated she would have liked to attend if her schedule permitted but at the last minute some scheduling glitch made it impossible for her to leave Albany. I filled her in on the nature of the talk and the involvement of my colleagues which was spirited and appreciative.

Judge Kaye was very pleased, it seemed. She wrote separate notes of appreciation to be me and P.J. Buckley. And she asked me for the mailing address for the Professor. And being familiar with Judge Kaye's style for fashioning wonderfully personal and gracious notes, I am sure the Professor framed that note.

Importantly, though now that I was in good standing with Chief Judge Kay and P.J. Buckley, more importantly, through her involvement and interest, the judges of the Appellate Division, First Department had become educated about a new, complex and developing area of commercial law.

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## Classification

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**Language:** ENGLISH

**Publication-Type:** Newspaper

**Subject:** EDUCATION & TRAINING (90%); JUDGES (90%); COMMERCIAL LAW (89%); SWAP TRANSACTIONS (89%); APPEALS (78%); APPELLATE DECISIONS (78%); DECISIONS & RULINGS (78%); LEGAL EDUCATION (78%); APPEALS COURTS (76%); COPYRIGHT (73%); EDITORIALS & OPINIONS (59%)

**Industry:** SWAP TRANSACTIONS (89%)

**Geographic:** NEW YORK, USA (93%)

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**Load-Date:** October 17, 2024

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