

LEAVING

David Saxe reflects on his personal journey toward leaving the bench along with the challenges faced by New York State judges as they approach mandatory retirement age.

June 30, 2026 at 09:13 AM By **David Saxe**



David Saxe

[N.B. The Court of Appeals has just recently rejected a constitutional challenge to the judicial age-limitations placed on judges that are authorized by New York State's Constitution (Article VI, see 25(b) and that are contained in the New York State Judiciary Law (§ 23) and (§ 115). My

firm, Morrison Cohen LLP led by senior partner Y. David Scharf, Hon. David B. Saxe (ret.), Gayle Pollack and Tracy Burnett and Aidala, Bertuna & Kamins P.C., led by Hon. John M. Leventhal (ret.), Imran H. Ansari and Giovanni Orlando Conti represented the Petitioners, Hon. Robert J. Miller, Associate Justice, Appellate Division, Second Department and Supreme Court Justices Wayne Saitta and Richard J. Montelione in the challenge based upon the New York Equal Rights Amendment, known as the “NY ERA,” embraced by the voters of New York, that prohibited, among listed forms of discrimination, age discrimination. This essay does not attempt to explore the constitutional dimensions of this ruling but instead seeks to throw some light on the emotional and practical problems facing judges on their looming retirement from the bench. I frame the discussion with reference to my experiences and thoughts and emotions.]

The life of a judge in New York State is limited by our State Constitution which says you are out of a job at age 70 unless you can avail yourself of a process known as certification, that allows a 70-year-old retired Supreme Court justice to seek up to three two-year terms of additional judicial service and work until the end of your 76th year.

Just before I reached 70, I applied for my first certification; later on I applied for my second and my third one also and was approved each time, but I retired shortly after my third certification began.

For each certification, there was a screening process involving Bar Association committee appearances designed to make sure that the applying judge was not in some state of dementia or other advanced neurological condition.

Everyone seemed to want to get a piece of you at these screening events. I remember one interview conducted by someone from a sub-committee at the New York City Bar Association who asked me an unfriendly question based on an article I had recently written for the New York Law Journal. It was a sort of “gotcha moment” that all judges fear. This guy seemed rather proud of the fact that he had uncovered something negative to nail me. But the only problem was he had lifted what he thought the Law Journal article said from some secondary social media source, not the actual New York Law Journal article itself. Since I knew I had never written what he was questioning me about, I challenged him directly—and he was forced to admit his sloppy preparation. I wondered if he was some lawyer I had denied an adjournment to in the past.

A physical and mental examination was made mandatory and I was alarmed when I was asked to repeat in reverse order some mish-mosh of names and numbers. The doctor, who as I remember, was sweating profusely and appeared jittery, told me I passed but that I’d be surprised at the number of my colleagues who had experienced difficulty in the past.

At my physical exam for the first certification, I was fully expecting a really high-quality exam—the kind given to top corporate executives. After all, I and my confreres had been serving the court system for a long-time and I thought that the Office of Court Administration would think that we deserved such a benefit. Well, you can imagine my surprise when the venue of the examination was a virtual third-world clinic located on lower Broadway.

My judicial colleagues who moved on through the certification process were all able-bodied and mentally agile individuals who continued to handle the full workload to which they had been accustomed.

In my almost 36 years on the State Judiciary, I never served with a certificated judge who should not have continued in service. Well maybe one. There was t e exceptional situation when an upstate colleague of mine in the Appellate Division, First Department was permitted to continue service despite advancing neurological infirmities. He suffered from progressive dementia while on the Court which everyone was aware of and which apparently began even prior to the certification process. Because he was “one of the boys,” higher-ups in the court administration system, turned away from taking any responsibility about his condition. His law clerk admirably prepared notes for panels he was scheduled to sit on so he wouldn’t show up and say something off the wall.

Certification is also a way of reminding all of us that our days are numbered on the court. The first certification is a breezy matter; you have just turned 70 and still have time. But as you go on, the realization sets in—time is moving toward your eventual departure from the bench. If you are a certificated judge, serving on the Appellate Division, you might have been designated in the past to what is termed a “constitutional judge” slot because you were one of the six senior judges on the court.

But, once you reached 70, your seat at the conference table at the Appellate Division, First Department for the weekly agenda conference, determined by strict seniority, was changed and you were moved to a place at the table after the constitutional judges, one of whom had assumed your previous seat. Your seniority was looming downward. It is the starkest notice of termination that you had yet received. Everything done at the Appellate Division, First Department is done like that, on strict, exacting seniority. And even during your last certification you probably won’t be permitted to sit on any new panels much after Labor Day because appeals are often not finished by the end of the year. By Labor Day or at least by the beginning of October, you are truly an appendage.

Certification came under attack during Chief Judge Janet DiFiore’s tenure through her institution of a review of the entire certification process that applied even for certificated Appellate Division

judges. The message was—no longer would certification be automatic, as she must have thought it had been. DiFiore asked for statistics to determine how dissents of an Appellate Division judge seeking certification fared at the Court of Appeals.

This statistical search was discussed endlessly and with concern at our lunchroom table at the Appellate Division, First Department. Many were alarmed that there was a message being delivered by the Chief Judge that there was a price to pay for what DiFiore might term wasteful and unneeded dissents that were the precursors for leave applications to the Court of Appeals raising the possibility of increased work for that Court.

Judges at the Appellate Division were properly concerned that this was an opening salvo in a possible homogenization of the intermediate appellate courts. All judges, not only certificated judges, got this message.

She initially dumped four judges seeking certification including Appellate Division, Second Department Justice Tom Dickerson who had made the mistake of making a sexist comment to a woman attorney but for which he promptly apologized. This was not good enough for DiFiore who was probably running interference for her amanuensis Governor Andrew Cuomo even though Justice Dickerson was probably one of the most productive and most erudite members of the Appellate Division, Second Department.

But, as I navigated the pathways of the first, second and eventually third and last certification, I gave more and more attention to what I would do when I was out of time. It always seemed like it was just the other day when I was in my first year as a judge and the entire judicial world was ahead of me.

I knew I had done pretty well—Civil Court to Acting Supreme Court, then being designated by Governor Mario Cuomo to an interim Supreme Court vacancy and then being elected to a full 14-year term that same year and after that making a name for myself in the Matrimonial Division of the Supreme Court; then, being designated to the Appellate Division, First Department by Governor George Pataki and spending 19 years on that wonderful court.

At the same time, I became one of the most fabled opinion writers on the state judiciary. All in all, it was a dream job even if there were long droughts in pay raises. I knew that I would miss everything about it.

So, sometime during the early certification periods, I began to reach out to a few law firms. JAMS, the leading alternate dispute resolution outfit tried to solicit me and I probably should have grabbed onto their early interest because I might have experienced the financial success of some of the early judicial arrivals there.

But I wasn't yet ready to leave the court. I simply didn't want to spend my days mediating what I thought were dull cases or reviewing endless documents in an arbitration. I still wanted to be involved in the law, dealing with hotly contested litigation matters. Nevertheless, I discovered that the marketplace wasn't exactly ready to embrace a 70-year-old plus Appellate Division judge. Yes, the lawyers who interviewed me were extremely courteous but the few that were interested all seemed to ask me the same question toward the end of the meeting: "Judge, I'm a little embarrassed to ask you this, but could you give us a "guess imate" of approximately how much business you might be able to generate by the end of the year?"

I knew it was a perfectly legitimate question, but of course, I had no business. If I already had a book of business in place, I probably would have been a candidate for prosecution by the State Commission on Judicial Conduct. The few firms that seemed to emphasize this point were obviously not for me although I began to get the idea that no matter what, every law firm expected you to go up on the scoreboard, one-way or the other. They were not hiring me for my pretty face.

But, there was one firm that seemed to have more than a passing interest in me, Morrison Cohen, a highly respected mid-size, civil litigation firm in Manhattan. The deal was cemented at the funeral of one of their long-time partners, who had been an influential Democratic District Leader for many years and someone I was personally close to as I navigated the political process to become a Supreme Court Justice—Jerry Tarnoff.

For the longest time, I ruminated over the fact that Jerry's departure was my beginning. I now had the opportunity to join the litigation team helmed by Morrison Cohen's premier appellate litigator, David Scharf, who had argued many appeals before panels on which I had served.

I was also fortunate to have the assistance of well-known real estate attorney, Scott Mollen, a partner at Herrick, who acted as an intermediary for me with various law firms and who negotiated my arrangement with Morrison Cohen. I strongly suggest from both an ethics perspective and a practical one, that judges beginning the process of seeking post-certification employment retain a consigliere as a buffer, advisor and counsel.

I also suggest that judges seeking a return to the private sector obtain a contract of employment, often called a Memorandum of Understanding ("MOU") spelling out in detail your compensation package and your duties. Ask for a two-year initial term of employment because after spending a lifetime on the bench, it usually takes some time to develop your sea-legs.

Leaving was very, very hard and I had to will my way through the process. Quite frankly, I think I was frightened about a new world that I had been shielded from for the many years I had been in the cocoon of the court system.

I knew I would miss my colleagues, even the ones who I battled with, who hardly ever would vote my way. I knew I would miss the familiar faces I would see in the clerk's office who kept the place running and the court officers who brought each week's assortment of new briefs up to chambers on a cart. I knew I would miss the lunchtime walks with colleagues around Madison Square Park and I would, of course, miss my law clerk who had been with me for many years.

Being a judge meant everything to me as I'm sure other judges facing the end would also say and as I know it is for Bob Miller of the Appellate Division, Second Department an extremely accomplished and dedicated judge whom we represented and whose career has been cut short by the artificial age limitations we challenged, albeit unsuccessfully.

Additionally, these artificial age limitations will, in about six months put an end to the judicial careers of two former colleagues of mine at the Appellate Division, First Department—Associate Justices David Friedman and Ellen Gesmer, both brilliant and productive jurists. The loss to the Commercial and Matrimonial Bars will be immeasurable. Their career endings resonate with me.

Being a judge was what I was, who I was. I was also, very, very good at it. I had a style; I was extremely fair. I was down the middle; I didn't owe anything to anybody regarding my becoming a judge. Lawyers liked me and as a rule, they were pleased when I was on their panel at the Appellate Division.

I decided to leave the bench early because I felt that if I waited until a date closer to my mandatory retirement, I might not get as good an offer and if I decided to continue the search after retirement, I would have lost all leverage. The safer route was to bite the bullet and as frightened as I was of leaving, to just do it—leave early and that is precisely what I did. I left the Appellate Division, First Department on Feb. 28, 2017, and the very next day began my new life at Morrison Cohen. My judicial colleagues threw me a lovely lunch and my friend and colleague Justice Rolando Acosta, later on to become the presiding justice, presented me with, as a parting gift on behalf of my colleagues, two beautiful golf wedges—sure to improve my game.

And that is how it ended—suddenly, with a great send off from my colleagues and a front page, above the fold article in the New York Law Journal announcing the end of my judicial career and the start of another.

But, if you asked me then, or if you would ask me today, for my preference, no matter how many wonderful people that I have met and worked with at Morrison Cohen, and there are many, if I had the choice, I would still prefer to be sitting in my chambers on 25th Street, pouring over briefs, talking back and forth with my colleagues and figuring out how I was going to vote on the appeal that had me stumped for the moment and how I might be able to put together a panel vote favorable to my position and then to be able to write the law. It was for me, the job of a lifetime.

David Saxe served as a member of the New York State Judiciary for 36 years, the last 19 as an Associate Justice of the Appellate Division, First Department. He also served in a Matrimonial Part of the Supreme Court, New York County. He is currently a partner at Morrison Cohen. Any views expressed herein are solely those of the author.

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