TWENTY EAGLE

A blog about the New York Court of Appeals

TwentyEagle Interview of Judge Fahey - Transcript

20: We wanted to catch up with you a bit before you retire. We know you've done other interviews; we want to focus a little bit more on Judge Fahey the judge than on Judge Fahey the person.

We thought we'd start with process. Most attorneys come to the Court of Appeals with a lot of experience in the trial courts, or even the Appellate Division, but not in the Court of Appeals, and so it might be their first case there. We were wondering what you think is the biggest difference between presenting a case in the Court of Appeals and presenting a case in the lower appellate courts or the trial courts.

JF: That feeds into the question of what is the difference in not just practicing, but in the courts themselves. I think a lot of times attorneys fail to recognize that difference if they aren't experienced in arguing with a court like the Court of Appeals. The Appellate Division—the primary burden of the Appellate Division is a factual review that we're not engaged in. So quite often I find that the biggest error that an inexperienced attorney will make is to come up and argue the facts to us and also not

jumping on the other side if the other side is arguing the facts to us, saying, "Judge, that's not your place here. Your place is to decide the law, and on the law and as a matter of public policy, we're right." So that distinction needs to be drawn.

The other thing is, when you're dealing with the Appellate Division, you don't always know who you're going to appear in front of. There's somewhere between 10 and 15 Appellate Division judges in each department—sometimes more. So, you don't know who the panel's going to be composed of, and you're not going to know who the personalities are that you're going to be appearing in front of.

In the Court of Appeals, you are going to know who your judges are, obviously. I always tell attorneys that there's a window into the mind of each Court of Appeals judge. And that window is usually their dissent. So, look at their dissents and you'll be able to tell what type of person they are, what's important to them, what kinds of things they're willing to go out on a limb to disagree with their colleagues over in a meaningful way and to challenge the assumptions of the law. And that's going to tell you about how successful you're going to be with that judge. That's what I would look at initially.

So those differences are very, very important, and they're usually not seen at the Appellate Division. I think you have to start with the assumption that judges are human beings, and it's important to not just know the law but to know the judges.

20: That's great advice, and this next question might be answered by something you just said, but if someone was coming and was just going to present their first case in

the Court of Appeals, and you could give them only one piece of advice, what would it be? To think of the judges as human?

JF: Yes, that's the most important thing they could do. We didn't all just arrive here from another planet. We all have a history; we all have a personality, a background. We strive to be fair and impartial; that doesn't mean that we don't have preferences, and those preferences are reflected in our writings. Each judge has a different degree of tolerance for how far they're willing to step outside the strict parameters of a policy area. People will do that by saying, "This judge is more conservative and won't do that" or, "This judge is more liberal and won't do that." Those constructs may apply to CNN or Fox News very, very well, but they don't necessarily apply to the judges, and to think that way is counterproductive.

So, I think you have to spend some time and really look at what the judges are like and in what areas of the law they are willing to step outside of what would be considered the strict parameters, and where your argument fits in that. The strict parameters of the law may be very good to you, or they may not. You have to make that judgment yourself.

20: We wanted to ask your view on leave applications. As I'm sure you know, it's very hard to get the Court to grant leave, and you're obviously someone who has handled your fair share of leave motions. We were curious what you think is the most effective argument to persuade the Court to grant leave.

JF: I'm probably something of a radical on this. I think the most effective argument is an unresolved area of the law where there's a difference between the Appellate Division departments, and the case is well briefed and outlines those differences both in the lower courts and when it comes up to us. So that's the most effective leave application. It doesn't necessarily need to be an argument that alters an area of the law profoundly. It can be a fine distinction—workers'-comp law, for example. If it's laid out correctly, I think that would be the ideal leave application for the Court.

Very rarely—it's frowned upon—but occasionally, if you're unsuccessful and you're able to get a judge to put something in writing about why they're not granting leave or objecting to a leave denial, that may provide fertile ground for future applications on different issues. Not too many judges have done that. Judge Robert Smith did some of that. I've done that occasionally. I think Judge Garcia maybe has. I've done it a few times. I objected twice to leave applications: once on the denial of leave to the Diocese of Albany on a leave application recently, and another time in a case called *Haug*—I just wanted my objection on the record.

20: *Haug* was the university case, about the admissibility of hearsay in administrative proceedings?

JF: Yes, I won't go into the details because it would reveal private conversations, but I did think we should grant leave there.

Most famously, I wrote a concurrence on the denial of a writ of habeas corpus on the chimpanzees' case that came up. And now—I won't reveal how any voted—but the Court has granted leave in—

20: The elephant case!

JF: Yes, Happy the Elephant. Unfortunately, I won't be there, and I'll miss that case, but I'll enjoy the arguments. I did write on the chimpanzee case—I wrote a concurrence. That's the only time I've done that in seven years I've been there. And Judge Smith, as I mentioned, is the only one who's ventured outside the Court decorum and done that.

20: Do you think that should happen more?

JF: No. I don't think it should happen more. I think it should happen very, very rarely because the danger in it is that you're having confidential conversations with your colleagues about the case, and by writing something, you may be revealing their position or your position on the case should it come before you. Judges should avoid premature adjudication.

20: Yeah.

JF: You know, here's the thing about being the judge and the decision-making process: The rules are in place for a good reason. They protect the process of judging, and they also protect the litigants on both sides. But I'm one of those people that thinks that you have this body of law that's like a pool of water, and sometimes you need to throw

a rock into it and create some small waves and ripples, and force people to think about things differently. And if that's the only way you can do that, I can see it as being justified. But it has to be a rare occurrence and one that you recognize is a rare occurrence. So, I don't think that it should be done more, but I don't think that it should not be done at all.

20: New York is kind of a unique state in that the high court doesn't solely control its own docket; the Appellate Division can also grant leave. We were curious whether you had any reaction to the Chief Judge's remarks a few years ago trying to dissuade the Appellate Division from granting leave as often is it had been.

JF: I don't have any reaction. The Chief Judge has a job to do. It's a thankless and difficult job. I respect her, and I like her. I haven't noticed the First Department being constrained in any way since she said those things to them. At the same time, she has legitimate reasons for her point of view, and they have legitimate reasons for theirs.

I try not to let the process of picking the docket become an overwhelming factor in the Court itself and try to focus on the cases. Throughout my whole career, I've tried to spend less time on the administrative side of the court, and more time on the legal side of judging.

20: That makes perfect sense. We wanted to talk for a moment about the Court's jurisdictional rules. As you know, those rules can be sometimes opaque. Everyone seems to turn to treatises for them.

JF: Karger. We turn to Karger also.

20: We understand that there's this arcanum in the Court of Appeals Clerk's Office. Would you favor making that available to the public, or do you think that the Court should resolve jurisdictional questions in the open, rather than just dismissing appeals, so that the public could better understand the jurisdictional rules?

JF: No, I would not favor opening that up at all. Those are private conversations and private deliberations between the judges.

As far as expanding the entries to give a reason, I think that should be a case-by-case determination. I wouldn't be opposed to, in a case where the Court thinks it's appropriate, to say, "We deny leave because of issues of finality," and state what the reason was—say, you're beyond the 35 days when you should have filed. Those kinds of reasons, I think are legitimate, and that's something for the Court to decide on a case-by-case basis, particularly if there's a pro se litigant in that scenario or a prisoner. There would be occasions when you could do it.

I would not be in favor of making the arcanum public.

20: That's good to know.

JF: I know you talked to Judge Stein about that also, so I know you're working your way around it, and it's an interesting question because there's a lot of thought and intellectual energy that goes into that.

But the things that should speak for the Court are not internal discussions about whether jurisdiction can be granted in a particular case. The things that should speak for the Court are the writings in a particular case and the opinions that we release. The opinions that we release should be the voice of the Court. Any background deliberations could undermine the opinions themselves. Ultimately, it is the opinion that matters.

20: We think that's right, and we were really just curious about it as an intellectual matter because we've obviously spent a lot of time thinking about the jurisdictional rules.

JF: I believe you. Before I came to the Court, it was really something I had very little awareness of. I had argued cases at the Court of Appeals before, a couple of times, and I had no idea that there was an arcanum and that there was this preservation of knowledge. But the arcanum, more than anything, deals with the subtleties of jurisdictional matters and whether or not leave should be granted. I think it reflects the best intellectual efforts of our staff—our Chief of Staff and the people who work directly under them.

When you come to the Court of Appeals, you don't come there knowing these things; you learn them as you're there. That's been my experience, anyway. Unless you've actually clerked at the Court of Appeals before—and some of the judges here have done that, like Judge Garcia and Judge Cannataro. The things that go into making a

decision shouldn't really be revealed to the public. What the public and the legal community should be relying on is what we write in our opinions.

20: Totally understandable.

JF: Think of the nightmares that would result—all the back-and-forth discussions to finally come to an agreement. And then they say, "They didn't really mean that, because in the arcanum, there was some disagreement about a particular point." You're creating a bottomless problem if you ever revealed those kinds of discussions. The public deserves clarity.

20: Sure. So, we wanted to turn to talking about the bread and butter of advocacy before the court: briefs and oral argument. You've obviously read a lot of briefs. It sounds like you might be writing some briefs too after you leave the Court. We wanted to know what makes a great brief?

JF: A great brief? I kind of think it's simpler than you think. I can tell you what makes a bad brief first. A bad brief is one that's cluttered with issues that are unnecessary to your argument. You see it quite often in criminal briefs. You'll see, "Well, I'll throw all my issues up there." There may be an argument that there was ineffective assistance of counsel because these three arguments weren't made, and they could have been made. And I just used that one because it's a common one in a criminal brief. But that may not be the best argument you have. I would always narrow it down, get to the point, and come in with your best arguments and do not think that

seven arguments are better than two. And that's a common mistake that's made in practice on all sides.

The other thing is that I think you need to respect your adversary. And I don't mean just respect them in terms of how you treat them. Respect them intellectually. Take on their strongest points. If you don't take on the strongest points, which will necessarily be your weakest points, it looks like you're avoiding the issue. In all forms of advocacy before an appellate court, what you want to establish is intellectual credibility with the Court, and you do that by being honest about your strengths *and* your weaknesses. When you try to answer those questions, you may not always be as respectful as you want, but I always respect the attempt.

And I think you have to think of advocacy—particularly in the Appellate Division, but even in a place like Court of Appeals—as earning respect. It's for the next time that you're arguing for. So, if I respect how you've dealt with the weakest parts of your argument by being honest about them and trying to deal with them, the next time I'm going to listen to you. I'm going to say that you respect me enough to know that I know what's wrong with your argument. And if you don't address it, then how am I going to see your argument in its best light? I think that having the strength and the intellectual ability to do that—and the strength of character to do that—is going to always serve you well. So, I'd always encourage everyone to do that.

The core of it all is intellectual integrity. You're not going to trick us into ruling in your favor. What you should say is, "I'm right, and this is why: the law favors me,

public policy favors me. The needs of the people of the State of New York favor my argument." That's how you're going to win your case.

20: How about amicus briefs? I think there's probably been an uptick in recent years.

JF: Well, you know, our court, we're pretty easy on accepting amicus briefs. I think it was Chief Judge Lippman who changed the policy, and I think it's a good thing. I find amicus briefs—not always—but I find them to be helpful. People bring a broad range of experience. It helps me to hear what they think. That's as true in the right-to-die cases, and the broad range of amicus briefs that we received in a case like that, all the way to a narrower case that deals with mortgage financing, and the people that work in that particular industry and tell us why this is important to their industry and tell us what effect either decision we would make would have. Those things are very helpful. So, I'm in favor of the amicus briefs.

You don't want someone who's just repeating the arguments that are in the main briefs. Avoid that. Show me what's unique about your experience that makes the particular position you're advocating essential.

20: That seems to be great advice and rings true from what Judge Stein said too.

JF: Judge Stein was very good about that and very thorough about her approach to all the briefs.

20: In terms of oral argument, you have a pretty distinctive style. You don't seem shy about showing the parties or your colleagues about your views.

JF: I don't know if it's a style. Sometimes I think it's a failure. [Laughter]

20: No—transparency is good. How do you see the role of oral argument in deciding cases, and what do you see as the Court's role in oral argument?

JF: I think that the role of oral argument is to take on each side's arguments and challenge them; "This is what's wrong with your case. Why do you say that this isn't what's wrong with your case?" That's what I see as its fundamental purpose—to undermine the intellectual underpinnings of each argument. Now, sometimes, for instance, when I'm forceful on a particular argument, that isn't necessarily where I'm going to end up. But if they can't answer those questions, then it gives me pause.

I find quite often at oral arguments that people are reluctant to say, "This is why I think you're wrong, Judge," and show me the way. And there's a way to do that without saying, for instance, "Judge, I think you're an idiot, and this is why I disagree." That's a bad approach.

There was very good advice I had from a judge, I think he was in the First Department, and he had a particular way of phrasing it. He said that when he disagreed with another judge on the law, he would say, "Judge, my understanding of the law is somewhat different from yours. I think this." And my advice to any lawyer arguing before the Court of Appeals is not to say, "Judge, I think you're wrong," but to say, "Judge, I understand the law differently. This is what I see it as. This is why I think your particular point of view doesn't apply here." Rather than saying, "Judge, I think you're wrong." That's never going to win anybody over. We're still human beings.

We're pretty insensitive and thick-skinned, but nonetheless, I would approach it that way.

Here's the thing in appellate advocacy. The range of appellate advocacy, in terms of quality, is broad. But as you move up the appellate ladder, the complexity of the cases and the degree of specialization necessary to argue them effectively becomes greater. The bar becomes higher the higher you go. The Court of Appeals is one of the preeminent state courts in the nation. It requires that significant degree of specialization and complexity. Sometimes we have it, and sometimes we don't. But if you answer the question and try to be honest, and if you try to address the weaknesses in your case and you maintain a degree of intellectual integrity, I think you have a strong chance of being successful.

20: As for the Court's role in argument—do you see it as trying to unearth the weaknesses or elicit the advocate's view on how to deal with those weaknesses?

JF: I personally feel that way. I don't know if all the other judges feel that way. Sometimes during oral arguments I'll say to them, "This is what I feel is wrong with the argument; this is why I disagree. Tell me why I'm wrong." And I wait for a response and see if I get it. But there should be—at least if I were an advocate—and as a judge, what I hope for, is a dialog. Not so much a scoring-points dialog, but someone says to me, "No, judge, this is why I think you're wrong. I recognize that argument, but this is why you should consider my point of view," and convince me.

The best thing I can do for them is be honest about my thoughts; to reveal my mind to them. Then they have a chance to say, "Judge, this is why you're wrong." If I sit there like a stone, and I don't tell them what I think is wrong with their case, then I'm not being fair to them. They don't have a chance to address it. They may never know why I voted the way I did, and they may never have had any chance at all to say, "This is how you can find a way to our point of view, Judge." We owe them that from the Court of Appeals. I feel, honestly, that I owe them the truth of the way I see it.

I know that that isn't done by all the judges, and they have a legitimate point of view. In fairness to some of the other judges, they feel like they should hold back and appear balanced. And there's a legitimacy to that point of view. I just take a different approach. And you know what, it's probably more a reflection of my personality.

20: You can tell all the judges have different styles. You're a lot of fun to watch on the bench; you'll be missed.

JF: You need to get a life. [Laughter.]

20: Turning to substance, there's been some recent back-and-forth between judges on the Court of Appeals about the role of legislative history in statutory interpretation. And in general, the Court seems much more willing to consider legislative history than, for instance, the U.S. Supreme Court. Why do you think that is, and what role do you think legislative history should play in statutory interpretation?

JF: Well, I think the correct and the standard response is that you should only consider legislative history when dealing with a statute if the statute in and of itself isn't clear.

Here's what happens, though: At the time a statute is written 40 years ago, it was clear to everyone at the time what that statute meant. The meaning of particular words will change over time, and the change in them comes about as a result of seeing how they're experienced in the real world, and you say, "God, I never even thought that this word could mean that in this public setting." Yet they do, and that experience is then incorporated back. Then you say, "The meaning itself seems to be ambiguous." Maybe it wasn't ambiguous in 1965, but it is ambiguous in 2021. And that's how you end up, looking at the legislative history in a way that you wouldn't have, say, in 1975.

20: That brings us to our next question, which is about agency deference. There's been some real back and forth about that in recent cases too. Is it ambiguity that you're thinking about? What are you thinking about in striking the right balance between performing the judicial role in interpreting a statute or regulation and deferring to the agency in its interpretation?

JF: In New York we still have a strong series of cases that enforce a legal precedent supporting agency deference. It's not an absolute rule, and it shouldn't be an absolute rule.

My opinion is that fair democratic governance requires agency deference. Let me explain: You elect a governor, and that person is publicly elected, democratically elected, and every four years somebody else has a shot at it, and they can control how the agencies work. People are entitled to the government they elect, and the people they put in to implement their policies make the decisions that reflect that democratic process. Agency deference grows out of the voice of the people. It's not an absolute one, but I think it's one we should respect in New York.

20: It's an interesting point about elections, and we were musing on this a little bit too. A lot of lower-court judges in New York are elected, and sometimes elected by a greater number than state senators, because they're from a bigger geographic area.

JF: Yes, but most of them don't have contested elections. I hate to let reality impinge on you, but I don't think that there's been a contested election in the City of New York for Supreme Court for quite some time. A meaningfully contested election.

20: On Long Island, there are some contested judicial elections.

JF: On Long Island there are—that's true. And where I'm from, in Western New York, there are quite often. Both times I ran for Supreme Court it was in a contested election.

20: Do you think that in those areas, or anywhere, that the popular will makes any difference to judging, or is the judicial role sort of set from top to bottom?

JF: Of course it does. That doesn't mean that it's determinative, but I do believe that the culture that you live in affects the decisions that you make. However, very often judges go the other way because they think the law requires them to do that, and we have a great tradition in our country of our judges doing that. And I think we all try to uphold that the best way we can. That's why we have an appeals process: if a judge goes too far one way or the other, he can be restrained in a review of the law. But I would never fault a judge for that kind of a decision.

20: That's a good view of the appeals process.

JF: It's essential.

20: Moving on to talk about the Court and how the judges interact. A couple of years ago, in one of the mortgage-backed-securities cases, you and Judge Wilson disagreed pretty sharply about whether the Court should engage with arguments that the parties didn't advance. But despite that sharp disagreement, we hear that you and Judge Wilson get along quite well. On a Court with seven fairly opinionated people, how do you manage to maintain good friendships and collegiality even when people disagree?

JF: Well, like everybody else, we have a lot in common, all of us. Justice Scalia used to have a great answer to that. People would ask, "How can you and Justice Ginsburg get along? My god, you disagree about everything." And he said, "If you can't get along with people, you shouldn't be on an appellate court." He was correct.

Judge Wilson and I are a good example. Rowan is a good friend. I have respect for him. I think he's a great judge and a superior writer. I hate it when he's on the other side because I know that I'm going to be tortured with the quality of his writing and trying to match him in his intellectual arguments, because he's a very bright man. But neither of us takes it personally. And we also have the kind of relationship where if I think he's gone too far in a particular situation, I'll say, "Hey, that's personal; take that out." And he always does. He's a very decent person.

And that's true with all the judges. It's always been my experience on the Court—and in the Appellate Division, the Fourth Department. You have to strive to maintain that mutual respect for each other. It's kind of like being in an extended family: You might not always agree with everything your cousin says, but, you know, it's your cousin; he's part of your family. You'll always love him. And that's the approach I try to take with the judges that I work with.

20: Do you feel that the Covid pandemic has affected the informal interpersonal interactions between the judges, or have you all been able to keep that up?

JF: I noticed in Judge Stein's interview that she talked about how we don't go out to lunch or dinner anymore. She's totally right. Those kinds of interactions really help depersonalize the legal disagreements that you have. So, I think it's made it harder for everybody. It's made it harder for the practice of law. All the nuance in your relationship is lost if you're speaking over a screen the whole time, or you're speaking through a telephone. And, you know, in your relationships between people, it's the

spaces in your conversations where you tend to become comfortable with each other. Those are all lost when all of your communications are compressed, either through video or through telephones, or when they are restricted to the structured environment of a courtroom.

20: Right. Well, it seems to be getting somewhat back to normal.

JF: It is—it's getting better. I think the court system is trying to bring that nuance back. The practice of law itself I think that's slowly coming back. We're probably another year away from having it where we need to have it. But we're on the way.

20: In terms of the legal disagreements, there seem to be a lot of separate writings, whether concurrences or dissents, maybe more in recent years than in the past. Do you think there are too many separate writings nowadays, or are you comfortable with the output?

JF: I don't know whether it's too many. There are more, definitely, and it may be the issues, or it may be the personalities, or it may be both. And that may be a reflection of an inability to compromise, which is something that all of us could be accused of. But the other part of that is that I think that judges who write separately feel that they need to preserve a particular intellectual argument, and the only way to do that is not to compromise, but it may be through concurrence. Or it may go further, maybe through dissent. And I respect that because I've done it. Every one of the judges at some point has felt the need to do that.

I think we have to be careful in the long run not to become like every other institution in society right now—so polarized that we can't find common ground. I think the Court still strives to be that way among ourselves, even when we disagree, and I think it has a tradition of always trying to do that. Even if we can't speak with one voice, we can also always speak respectfully to each other about how we disagree.

20: Something a little bit different. You're the last person on the current Court who has an Appellate Division background. Do you think it's important that the Court have at least one person on it with Appellate Division experience?

JF: Yes. Unequivocally yes. I think that there should be more than one person.

This isn't a job that you learn overnight. And this is not a job where you want to have someone come in where they have to do a lot of on-the-job training. A good way to get that experience is through practicing at all the different levels within the judiciary.

On the other side, I think it would be very bad to have a Court that is just made up of Appellate Division judges who have worked their way through the system and haven't had a lot of significant, personal trial experience as an attorney, or if they haven't had a broad range of private practice in other areas. I think it's good to have people that are both public defenders and have worked as district attorneys. That broad range of experience, particularly on the Court of Appeals, is essential to really understand the cases in front of us.

It is important because in New York, all of the appellate courts are filled with judges who are State Supreme Court judges who have moved up to the Appellate Division. There are no appointees from a big private law firm. There are no appointees who taught at a law school or were a public defender. You don't have that kind of diversity or range of experience at any of the Appellate Division departments. At your highest court, you need that range of experience.

However, I don't think the Court would function very well without any people who have significant appellate-court experience, to have a sense of how things work there, why decisions are made the way they are.

20: We're curious to know what you think it was about your Appellate Division experience that best prepared you for the Court of Appeals. As you've noted, it's in some ways a different job: you can present facts to the Appellate Division; there are many more cases; the issues are maybe a little less winnowed down to the pure legal questions you get on the Court of Appeals.

JF: Well, it's funny. I was a City Court judge first, and then I went to State Supreme Court. I found that the biggest transition for myself—I don't know if it's true for everyone else—but for me, the biggest transition was moving from the trial court to the Appellate Division. I thought that was the most challenging. The work was totally different. The volume of work was huge. And I had just come from the Commercial Part; that was a heavy-duty party. I was used to a large volume of work. And the quality of advocates in the Commercial Part was very, very high. The papers were

good. There was a lot of motion practice. And the issues were intellectually challenging and interesting.

When you come to the Appellate Division, inevitably you're going to come across a large area of the law that you have not either practiced in or dealt with as a judge. I never practiced in Family Court; I never practiced in Surrogate's Court. So, I had to learn a great deal to do a fair job on the cases I had in front of me that covered those areas. That appellate experience—once you have that experience and make that transition, I think, moving from the Appellate Division to the Court of Appeals isn't as difficult as moving from a trial court to the Appellate Division. You're just ready for it.

What is different is the writings and the effect of your decisions; the size of the stage. You're on the Court of Appeals, and everything you do there has a much larger effect than anything you could have experienced by working at the Appellate Division.

20: That seems right—all of a sudden, you go from a semi-specialist to an absolute generalist.

JF: You know, you're no longer making decisions by yourself, and you're making decisions with a different mix of judges every time—you have a different panel. You're reviewing the factual findings of a variety of cases that, as I said, you've never really seen before. So, it's a big leap.

20: For sure. You'll forgive us for using this term, but you're also the last "upstate judge." You're from Western New York, and the nomenclature can mean different things, depending on where you're from.

JF: Well, your nomenclature—from what I understand from my friends on the Court, they refer to Westchester County as "upstate." People in Buffalo kind of roll their eyes at that.

So yes, I'm the last upstate judge. Governor Hochul will make that decision. I have confidence in her. Whoever she appoints will be a great appointee. The people I've seen on the lists before have been all really highly qualified people. So, I have confidence that whoever replaces me will do a good job. I hope it's someone from the western part of the State, but whoever it is will be an excellent person.

20: Do you think that geographic diversity, though, brings something to the Court?

JF: Yes, I do. Nobody's ever one thing, though. We're complex creatures. A judge, of anybody in the world, should realize the subtleties of the constructs of human personalities. There's a combination of experiences that each of us brings that is important. For instance, Judge Stein, who you interviewed before, had a big practice in matrimonial law. Myself, I was in-house counsel to Kemper Insurance Company. So, I had done defense negligence for about eight years before I was elected as a judge and was involved in politics before that.

Those combinations of experiences and where you sat make up the person, and where you're from is part of what counts. Every area in the State doesn't operate the same way. The volume of the work is much higher in a place like New York City Criminal Court than it will be in the City of Buffalo City Court. So, the practices are going to be different, and the people who have had experience in those areas can teach each other. That's what an appellate court is like. You draw on the experiences, in an appellate court, from the differences between you and your colleagues. They help guide you. You learn from each other's experiences. Geographic diversity is important, as is race, gender, intellectual background, even your interests in life.

After law school, I went and got a master's in European history. I didn't think much of it; that was just a labor of love. It's funny—when I was on the interviewing committees for the Court of Appeals, people would always focus on that. They'd say, "What'd you do? What'd you study? What'd you write your papers on?" And I think that my rule in life is that nothing is wasted. All of the things that you put in the pot—particularly when you're in a job like this, in the Court of Appeals—become very important.

20: That's interesting. Have you ever decided a case and drawn on the European history master's or the process you learned for researching and studying when you were getting the master's?

JF: Sure, you can see that sometimes when I'm waxing eloquent in a writing—or not so eloquent—or also putting in quotes with references to historical cases or quoting

historians themselves. There's one case coming up, I won't tell you what it is, where I wanted to quote Tacitus, but then I found out it wasn't going to be on the calendar when I'm here. I said, "Ah, I'm going to miss out on that." [Laughter.]

I'm not one of those guys who quotes Bob Dylan in an opinion. I love music, but there is a broad intellectual history in Western civilization that we should draw on in coming to conclusions in our cases. That broad range of human experience repeats itself over and over and over again, and I think it's valid to reach into that—not to decide our decisions, because I think we need to decide it based on what our own law is, but to illustrate how it applies and how you reach the conclusions you reach. It is important to be able to do that.

20: Totally. As someone who enjoys Bob Dylan references in opinions, I get it.

JF: I stay away from Bob while on the bench.

20: Well, it's certainly *a* style.

JF: That's right.

20: When you came to the Court, not that long ago, was there one piece of advice that you got that you thought was most helpful?

JF: Yes. I won't tell you who gave it to me, but it was a friend of mine on the Fourth Department who told me to shut up and be patient. "Try to listen to people around you, Fahey, before you've made up your mind." And that was good advice. That was Judge Centra who told me that.

20: Is that the same piece of advice you'd give your replacement, or has your time on the Court convinced you that there's something even more important for someone who's starting?

JF: No, I think that's the best advice I can give them: Be patient. Give both sides a chance. Listen. But once you've made your mind up, you have to have the courage of your convictions. You are not going to just agree with everyone all the time, and that's going to make people unhappy. You have to just accept that. Being a judge is not a popularity contest. By the time people get here, they're prepared for that; they're tough enough for that. It's still always hard to accept, but it's just the nature of the job.

20: We're in the middle of that now.

JF: It's the tough love that's the hardest and perhaps the most essential. I think that's the lesson we all have to apply while we're in a job like this. The other rule is, take the law very seriously; don't take yourself seriously.

20: That's definitely sound advice. A few wrap-up questions. What, if anything, is one thing you'd change about the Court? It could be nothing.

JF: I have no criticisms of the Court. In the selection process, I think in New York we've achieved a good balance between appointed and elected—maybe some more appointments in certain positions like State Supreme Court could be considered. But

the balance between merit selection and elected officials has been achieved, and I think there's a fair balance between the way judges are selected

In terms of the internal workings of the Court, yes there are things, but I don't think it would be right for me to talk about it, so I'm reluctant to do that.

20: Understood.

JF: In terms of the way the Court operates publicly, I do think that there should be some changes, but I don't want to say them, because I think that it's for the Court itself to make those changes. And it's not for me, as a soon-to-be outsider, to criticize the Court. I think that's a mistake. I think the Court, right now the way it's constituted, has the ability to make the changes that it needs to make, and it'll do that when it deems it appropriate. I should be very careful about stepping into that area, so I'm going to decline to really comment beyond that.

20: Understood. We respect that. What's the decision, if you have one, that you're most proud of?

JF: Oh, I've got a couple. One of the ones I wrote early on was called *People v. Boone*, and that was about cross-racial identification and requiring that charge in a jury charge in criminal cases where the defense asks for it.

Another one was *People v. Williams*, a recent one I had about low-copy-number DNA and the correct application of the *Frye* standard. The reliance on science in courtroom settings is increasing exponentially. How we examine the validity of that science is

very important. Scientific truth is accepted as a mathematical certainty to the layman in a courtroom setting. If we don't have control over how that science is presented to them and assurances of the validity of that science, we undermine the truth-seeking function of a jury, ultimately the process itself can be corrupted.

Most recently, I wrote on a case called *Greene v. Esplanade*. The decision expanded those who are considered part of the immediate family. You should look at that case.

20: That's the negligent infliction of emotional distress.

JF: Yes.

20: We know that case. A sad but interesting case.

JF: You know what's interesting about it? In my lifetime, the definition of what constitutes family has changed a great deal. That change reflects how we live our emotional lives. The most important person in your life may not be your father, who's been divorced from your mother and who you haven't seen in 10 years. It may be your second cousin. And that person may be part of your immediate family in a way that other people aren't. There have been changes in the way we approach the commitment of marriage and the way we look at grandparents. This expansion is small—and appropriately so, given the nature of the common law—but a recognition that the definition of family is slowly changing is something I was proud of our Court being able to do. Maybe there will be more—that's for other courts to decide. We need to recognize those changes in our lives and incorporate them into the law.

The one issue that is particular to myself is the concurrence in the denial of the writ of habeas corpus in the chimpanzee case. I have a personal affection for that one. I can say that now that I'm leaving.

20: You got to see that one come full circle, so that's nice. What will you miss the most about judging?

JF: You know what I'll miss the most? Being engaged with life on this scale. Life's a wonderful gift, but this job is an incredible job. You're engaged with issues that affect the nation, the State, the world, in a way that you really couldn't have possibly imagined when you began your legal career. So that engagement and being part of that world has been a great experience. I've been lucky to have it. I'm going to enjoy my last two months of judging and be thankful for the opportunity that I was given to be here and just do the best I can.

20: Anything you'll miss the least?

JF: No.

20: Thank you so much. This was really a treat for us. It's always great to speak with judges.

JF: It's great for you to have us on here. You know, Gary [Spencer, the Court's Public Information Officer] said, "You'll like these guys, Judge; they're Court of Appeals geeks. They know all about you." And I said, "There aren't many of them." So, it's good to meet some.