En Banc Review in New York Courts

A Report of the Committee on State Courts of Superior Jurisdiction

I. Introduction

A. The Issue

The New York City Bar Association Committee on State Courts of Superior Jurisdiction has become aware that, within each department of the New York Appellate Division, conflicts sometimes arise between decisions made by that department on particular legal issues.[1]

Generally speaking, if a panel of an intermediate appellate court finds that a prior panel of that court has erroneously decided an issue, the panel has no power to overrule the prior panel.[2]

The power to overrule is left to the highest level of appellate court, the New York Court of Appeals. But because the high court decides comparatively few cases and does not focus on intra-department conflicts, such conflicts persist, thereby promoting confusion and more litigation.

The Committee has spent a significant amount of time studying the issue and

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[1]Hon. D. Saxe, "En Banc Review In The Appellate Division," N.Y.L.J., Aug. 21, 2006, p. 4, col. 2.

[2]*Schultz v. State*, 241 A.D.2d 806, 807 (3d Dept. 1997). *Accord, Booth v. Maryland, 327 F.3d 377, 382-83 (4th Cir. 2003); In Re The Mediators, Inc.*, 105 F.3d 822, 828 (2d Cir. 1997); *Bonner v. City of Pritehard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

believes that such confusion is unacceptable because in most ordinary cases, the Appellate Division is the court of last resort.

The Committee further believes that the Appellate Division could resolve these intra-department conflicts if it were permitted to sit for en banc rehearings. Unlike a majority of the jurisdictions which have sizeable intermediate appellate courts that hear cases in revolving panel formats, New York does not provide for en banc rehearings by its Appellate Division.

B. Survey Results

Our survey has found that 23 states, the entire federal court system, and the District of Columbia all provide for en banc review by their intermediate appellate courts. En banc review is used in all of these jurisdictions to enable the intermediate appellate courts to resolve conflicts in their own decisions, thereby promoting clarity and the resolution of disputes.

C. Recommendations

For three reasons, the Committee believes that New York should adopt an en banc review provision.

First, the other states which do not provide for en banc review tend to be moderately-sized states which either: (a) do not have intermediate appellate courts; or (b) have intermediate appellate courts with small caseloads compared to that of the New York Appellate Division. The smaller intermediate appellate courts generally do not need an en banc review provision to ensure uniformity and consistency in their decisions.

Second, the historical reason for New York's position (certain of the Appellate Division departments formerly had no more than five justices) has long since become

irrelevant because each of the departments now has at least eleven justices.

Third, modern courts with burgeoning caseloads should be given the tools necessary to enable them to produce a consistently superior quality of judicial work. Intra-department conflicts promote confusion and litigiousness. The adoption in New York of an en banc review provision would provide each department of the Appellate Division with a tool to assist in the elimination of such conflicts.

Therefore, the Committee recommends that New York law be amended to permit each Appellate Division department to conduct rehearings en banc. While other jurisdictions sometimes permit their intermediate appellate courts to hold their initial hearing of an appeal en banc, we do not believe that it is necessary to adopt that type of en banc review in New York.

II. Background

A. Origins Of Modern En Banc Review

Modern en banc review at the intermediate appellate court level began in the federal court system approximately one hundred years ago.

Beginning with the Judiciary Act of 1789,[3] federal statute has provided that appeals pending in the circuit courts of appeals shall be heard in three-judge panels.[4]

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[3]Act of Sept. 24, 1789, 1 Stat. 73. See Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* §3503, at 9.

[4]The current statute is 28 U.S.C. § 46(b).

The prospect of rehearing an appeal by a court of more than three members first arose in 1911[5] when the restructuring of the federal circuits provided three circuits (Second; Seventh; Eighth) with four circuit judges each.[6] Previously, the federal circuit courts each consisted of just three members.[7]

In 1941, the United States Supreme Court upheld the authority of a circuit court of appeals to rehear a case en banc.[8] For a unanimous court, Justice William O. Douglas wrote that providing for such en banc rehearings at the intermediate court level:

> makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.[9]

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[5]Hon. J. Newman, "In Banc Practice In The Second Circuit: The Virtues Of Restraint," 50 *Brooklyn L. Rev*. 365, 366 (1984).

[6]Act of March 3, 1911, 36 Stat. 1087 (1911).

[7]Hon. J. Newman, supra note 5 at 366.

[8]*Textile Mills Sec. Corp. v. Commissioner of Internal Revenue,* 314 U.S. 326, 333-34 (1941).

[9]*Id*. at 335. Justice Douglas further wrote that en banc proceedings also "obviate the situation where there are seven members of the [circuit] court and, as sometimes

happens, a decision of two judges (there having been one dissent) sets the precedent for the remaining judges." *Id.* at 335 n. 14.

This power was confirmed by Congress in 1948.[10] The statute, 28 U.S.C. § 46(c), granted the en banc power to the circuit courts, but left it to the courts themselves "to establish the procedure for exercise of the power."[11] The en banc power extended to both original hearings and rehearings. The Supreme Court later confirmed this statutory grant in a 1953 decision entitled *Western P.R. Corp. v. Western P.R. Corp*.[12]

B. Restraint In Its Exercise

For busy intermediate appellate courts, en banc review can become a source of disruption unless there is restraint in its exercise. In the *Western P.R. Corp*. case, a concurring opinion by Justice Felix Frankfurter noted the dangers of allowing rehearings en banc too frequently:

> Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. * * * [I]n some circuits these petitions [for rehearing en banc] are filed almost as a matter of course. This is an abuse of judicial energy. It results in needless delay. It arouses false hopes in defeated litigants and wastes their money.[13]

C. Fed. R. App. P.35

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[10]Act of June 25, 1948, 62 Stat. 869 (1949). Since its 1949 inception, the statute has spelled the term "in bank." In 1998, Fed. R. App. P. 35 was revised to adopt the popular old French version, "en banc." 20A *Moore's Federal Practice* § 335 App. 04[1] (M. Bender 3d ed.). As yet, 28 U.S.C. § 46(c) has not been similarly revised.

[11]*Western P.R. Corp. v. Western P.R. Corp.,* 345 U.S. 247, 257 (1953).

[12]Id.

[13]Id. at 270 (Frankfurter, J., concurring). These sentiments appear to be shared by Judge Newman, who noted in his 1984 article that the Second Circuit only rarely heard cases en banc. Hon. J. Newman, supra note 5 at 371. In his 1994 biography of Circuit Judge Learned Hand, Professor Gerard Gunther noted that the judge "scorned" en banc review and considered it to be both disruptive and wasteful. Gunther, *Learned Hand: The Man And The Judge,* 515- 16 (Knopf 1994).

Justice Frankfurter's admonitions were later taken to heart when Fed. R. App. P. 35 was adopted by the federal courts in 1967. Entitled "En Banc Determination," the rule states that en banc proceedings "are not favored and ordinarily will not be ordered." Under sub-division (a) of the rule, en banc hearings or rehearings are authorized in just two circumstances:

> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; and
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> (2) the proceeding involves a question of exceptional importance.

Based on these two criteria, a majority of the circuit judges who are in regular active service may order that an appeal be heard or reheard before the entire court.[14]

D. En Banc Review In The State Courts

1. States Providing For En Banc Review

Twenty-three states and the District of Columbia provide some type of en banc review.[15] These states tend to have intermediate appellate courts which: (a) consist of four or more judges; and (b) typically hear cases in three-judge panels. Our survey has found that these states provide for en banc review for the same reasons as the federal court system.

2. States Which Do Not Provide For En Banc Review

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[14]Fed. R. App. P. 35(a).

[15]These states include: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Washington.

Twenty-seven of the states do not provide for en banc review.[16] Of these twenty-seven states:

a. nine have no intermediate appellate court (and therefore have no need for an en banc review provision);[17] and

[16]These states include: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

[17]These states include: Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

b. six have small intermediate appellate courts which, compared to the large intermediate appellate courts, have little need for en banc review to maintain uniformity and consistency in their decisions.[18]

c. Twelve other states in this category have large intermediate appellate courts.[19]

However, with the lone exception of New York, each of these states maintains the uniformity and consistency of its intermediate appellate courts' decisions by allowing its courts to issue two types of opinions: published and unpublished. Generally, the published decisions are considered "precedential" and require a majority vote of the courts' judges to approve such publication. Unpublished decisions are not considered to be precedential.

New York law does not permit the New York Appellate Division to issue unpublished opinions. Under Judiciary Law §§ 431 through 433-a, every case decided by the Court of Appeals and Appellate Division must be reported to the New York State Law Reporting Bureau.[20]

Therefore, New York *stands alone* amongst the fifty states in that it: (a) maintains a large intermediate appellate court; (b) does not provide for en banc review; and (c)

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[18]These states include: Alaska, Hawaii, Idaho, Nebraska, New Mexico, and Utah.

[19]These states include: Arizona, California, Colorado, Illinois, Indiana, Kentucky, Minnesota, New Jersey, New York, North Carolina, Oklahoma, and Wisconsin.

[20]*Williams Press, Inc. v. Flavin,* 35 N.Y.2d 499, 503-05 (1974). See 28 N.Y.Jur.2d Courts and Judges § 201, at 251-52 (1997).

prohibits unpublished decisions by its appellate courts. As a result, by not authorizing en banc review or unpublished opinions, New York places the heaviest burden of any state on its intermediate appellate court when it comes to maintaining the uniformity and consistency of its decisions.

III. Procedural Considerations

A. When The Request For En Banc Review Should Be Made

To minimize disruption to the Appellate Division's workflow, the request for an en banc rehearing should be made at the same time as the motion for a reargument. For example, in the First Department, 22 NYCRR 600.14 could be supplemented to require that en banc rehearing requests be made: (a) within thirty days of the subject decision (just as reargument motions are now so required); and (b) in the same motion that seeks reargument. Page limits could be imposed on the motion briefs, just as they are now with respect to appellate briefs under 22 NYCRR 600.10.

B. CPLR 5513-5514

An en banc rehearing feature could be adopted so that it would not affect the timing of any notices of appeal or motions for leave to appeal governed by CPLR 5513-5514.

C. CPLR 5601

An en banc rehearing provision should have only positive effects on the case load of the New York Court of Appeals, which is a certiorari-type of court established to articulate statewide principles of law, not decide individual factual disputes.

Currently, most appeals as of right pursuant to CPLR 5601 come from two types of cases: (a) where an Appellate Division decision finally determines an action and two justices

have dissented; or (b) where an Appellate Division decision finally determines an action and the case directly involves the construction of the state or federal constitutions.

If the en banc revision provision can be utilized to eliminate one or both of these grounds in a particular case, the provision will not only assist in resolving the case in a more expeditious manner but it will also lighten the burden of the Court of Appeals, whose docket is supposed to be reserved for only the most important issues of statewide importance.[21]

On rare occasions, an appeal as of right may develop for the first time from the en banc decision, such as when two justices file dissents. The language of CPLR 5601(a) is broad enough to encompass such a result. No amendment of CPLR 5601 would be necessary. For those who are concerned that an en banc review provision might lead to a material increase in the Court of Appeals's docket, we suggest that a companion provision could be adopted amending CPLR 5601(a) wherein two-fifths of the justices voting in an en banc case ought to dissent before an appeal as of right is triggered.

D. CPLR 5602

Discretionary appeals to the Court of Appeals are governed by CPLR 5602. Each year, significant judicial resources are expended by the appellate courts in ferreting through thousands of motions for leave to appeal, only a fraction of which are ever granted. An en banc rehearing provision would assist in identifying the truly leaveworthy

[21] Newman, *New York Appellate Practice*, § 11 :02[2][a] at p. 11-11 (Matthew Bender, ed. 2006), citing MacCrate, Hopkins & Rosenberg, *Appellate Justice In New York* 63 (Am. Judicature 1982).

cases.

E. Current Impediments To En Banc Review In New York

The modern Appellate Division was created at the 1894 Constitutional Convention.[22] Since that time, the New York State Constitution has stated that no more than five justices shall sit in any case heard by the Appellate Division.[23]

As noted in a 2006 article published by Appellate Division Justice David B. Saxe, this five-justice rule was adopted at an earlier time when the downstate departments of the Appellate Division had seven justices while the upstate departments had just five.[24]

Nothing in the record of the 1894 Constitutional Convention rejects the idea of limited en banc review. The record indicates that the issue was never discussed, much less contemplated.

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[22]Hon. F. Bergan, *The History of the New York Court of Appeals, 1847-1932,* 201 (Columbia University Press, 1985).

[23]N.Y. Const., Art. 6, § 4.b. The same five-justice rule is also contained in Judiciary Law § 82.

[24]Hon. D. Saxe, supra note 1 at 2.

Each department of the Appellate Division now consists of at least eleven justices.[25] Thus, there is no legitimate reason for the strict five-justice rule to stand in the way of permitting a limited en banc review.

IV. Recommended Action

[25] As of February 19, 2008, the First Department had nineteen seats (three vacancies), the Second Department had twenty-three seats, the Third Department had twelve seats (two vacancies), and the Fourth Department had eleven seats. D. Wise, "Spitzer Announces Four Picks," N.Y.L.J., Jan. 16, 2008, p. 1, col. 3; J. Stashenko & D. Wise, "Spitzer Fills Two Vacancies On First Department Bench," N.Y.L.J., Jan. 2, 2008, p. 1, col. 3. The website of the New York State Office of Court Administration contains rosters of Appellate Division justices which have not been updated since December 2007. It can be found at http://www.courts.state.ny.us/courts.

The New York Appellate Division cannot engage in en banc rehearings unless Article 6, Section 4.b. of the New York Constitution is amended to modify the strict five-justice rule.[26] The Committee believes that this can be accomplished with a minor amendment to Article 6, Section 4.b., which appears in the underlined phrase below:

> b. The appellate divisions of the supreme court are continued, and shall consist of seven justices of the supreme court in each of the first and second departments, and five justices in each of the other departments. In each appellate division, four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case, except when a majority of the justices of any department votes to rehear en banc a case originally heard by that department. If a case is reheard en banc, the concurrence of a majority of the department's justices eligible to sit on the case shall be necessary to a decision.

Because the size and challenges of the four Appellate Division departments vary, the Committee also recommends that each Appellate Division be granted the discretion to implement its own procedures for en banc rehearings. Most of the jurisdictions which permit en banc review have allowed the courts to devise their own procedural rules on the subject.

However, the Committee does not recommend that en banc hearings be permitted with respect to the initial hearing of an appeal. Such a provision is not needed to ensure the uniformity and consistency of the decisions of New York's intermediate appellate court. Moreover, it would likely prove to be disruptive to the courts' workload, which is

[26]The amendment procedure is explained in Article XIX of the New York Constitution. Judiciary Law § 82 will also have to be amended.

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Respectfully Submitted,

Hon. Andrea Masley (Chair)
Amy K. Adelman
Alvin Bragg
Kevin Brennan
Frederick A. Brodie
Darryll A. Buford
Hon. Cheryl E. Chambers
Louis A. Craco
Marilyn B. Dershowitz
Sylvia E. DiPietro
Jeffrey Eilender
Sherri L. Eisenpress
Cecilia L. Fanelli
Janis M. Felderstein
Peter G. Goodman
Donna Gordon
Thomas Hall
Fran R. Hoffinger
Katherine B. Huang
Andrea Brustein (Secretary)
Erin K. Hurley
Hon. Shirley W. Kornreich
Edward Liu
John N. Orsini
Crystal Parham
Cynthia B. Rubin
David Schulz
David H. Sculnick
Monica J. Stamm
Paul M. Tarr
Gabriel Torres
Takemi Ueno*
Raymond Leonard Vanderberg
Jeffrey M. Winn*
Elizabeth M. Young

*Principal authors of report