

State of the Judiciary

Chief Justice Stuart J. Rabner, New Jersey Supreme Court

Message to the Bar

May 17, 2024, at New Jersey State Bar Association meeting, Borgata Hotel Casino & Spa, Atlantic City, New Jersey

Good morning, everyone. Thank you, Bill, for welcoming Chief Judge Bumb and me to participate once again at this year's convention. We very much look forward to working with you and the Bar on various important issues this coming year.

Thank you also to Tim McGoughran. You promised one year ago that you would advocate for lawyers throughout the state. And you've done just that with a strong voice and a good heart. The Judiciary could not have asked for a better partner and friend, and we applaud your many accomplishments during your tenure as Bar president.

There are a number of things I planned to speak about this morning, beginning with the work of the Supreme Court Committee on Wellness in the Law. Jeralyn Lawrence helped inspire the initiative; Tim McGoughran strongly supported it this past year; and Associate Justice Lee Solomon spearheaded its vital work: to focus on the well-being of friends and colleagues in the legal profession. To listen, develop resources, facilitate access to them, and connect professionals in the law with mental health and well-being services, among other steps.

I could easily spend a good deal of time talking about Justice Solomon, a gifted colleague who will soon reach the age of mandatory retirement. Justice, we appreciate all that you have done throughout your remarkable career in public service.

The Judiciary's JOBS Program continues to grow and is worthy of attention. It connects probationers and Recovery Court participants with meaningful employment opportunities. In doing so, it offers a chance at a new start in life.

And the continued evolution and impact of Artificial Intelligence simply cannot be ignored. Judge Glenn Grant chairs a broad-based committee on AI along with retired Judge Katherine Forrest as the co-Chair. To date, the committee has issued a Statement of Principles and Guidelines for Use of AI by NJ Lawyers, and much work lies ahead on this subject.

But another topic demands our attention today -- one that is rooted in the Constitutional Convention of 1947. From June to September that year, a group of 82 distinguished delegates gathered to discuss, debate, and craft a new Constitution for New Jersey, only the third in our State's history. The delegates included members of the Legislature, the legal and business communities, the press and the League of Women Voters, as well as judges, educators, and others. Together, they charted a course for the future of our state.

The delegates heard from more than 70 witnesses over the course of 22 sessions -- giants like William J. Brennan, Jr., who would go on to become a member of the United States Supreme Court, Harvard Law School Dean Roscoe Pound, Judge Learned Hand of the Second Circuit, and others.

One of the primary reasons for the Constitutional Convention was the weak state of New Jersey's judicial system. Under the 1844 Constitution, the court system was comprised of 17 different courts with overlapping jurisdiction. As a result, it could take litigants years just to end up in the right court, let alone get a ruling on the merits. Delays were legendary, and New Jersey earned the reputation of having one of the worst legal systems in the nation.

The Constitutional Convention of 1947 grappled with how best to reform and restructure the Judiciary. And it succeeded. 17 different courts were streamlined into 5, with clear responsibilities and a straightforward appellate process. A unified, strong, independent judicial system replaced its predecessor.

Thanks to the foresight and wisdom of the convention delegates, and a commitment to judicial excellence fostered by all three branches of government since then, the New Jersey Judiciary today is recognized as one of the top court systems in the nation.

A key ingredient of its success is the state's Appellate Division. In a word, it is a gem. It is widely regarded as one of the finest -- if not the finest -- intermediate appellate courts in the nation. It is also a workhorse in our system of justice. Litigants have a right to appeal rulings from the trial court, and thousands do so every year. As a result, approximately 30 gifted judges on the Appellate Division handle all case types -- civil, criminal, family, and equity. Together, they issue 4,000 to 6,000 opinions and rule on thousands more motions every court year.

The crush of work is demanding, and the intense focus on writing is not for everyone. Fortunately, many talented judges aspire to serve on the Appellate Division after they have had a chance to gain experience in one or more trial divisions. And those who serve on our appellate court are the best of the best.

The Judiciary carefully evaluates which judges will be assigned to the Appellate Division -- judges who, of course, have already been vetted by the Governor and the Senate at least once, and in most cases, twice. I regularly speak with Assignment Judges and the Chief Judge and Presiding Judges of the Appellate Division about potential new members. Assignment Judges, of course, work closely with our trial judges and know their work well. Supervisory judges of the Appellate Division, as well as members of the Supreme Court, likewise read countless decisions by trial court judges on a daily basis and are very familiar with them. Together, our leaders have a strong sense not only of who has a keen interest in writing but also who wishes to serve on the Appellate Division.

Based on those observations that extend over a period of years, I temporarily assign judges to work on the Appellate Division each spring for a ten-week period -- a try-out of sorts for all involved. Each temporarily assigned trial judge is placed on a panel with appellate judges. They hear cases together, conference the outcome together, and then draft opinions -- the same process that takes place year-round for appellate judges. Afterward, nearly all the trial judges are assigned to the Appellate Division on a full-time basis in the fall. On rare occasions, some express an interest to remain in the trial court. Others occasionally ask to return to the trial court

at a later point. The Constitution provides the Chief Justice the flexibility to accommodate both situations and ensure a good fit over the long run.

The results speak for themselves. The ranks of the Appellate Division are comprised of talented judges, with broad experience in various areas, who are interested in writing and serving on that court. And the public benefits from their exemplary service.

Under the current system, there are no vacancies on the appellate court, and the Chief Justice has the constitutional authority to adjust the size of the Appellate Division as needed. As a result, each court term starts with a full complement of needed appellate court judges, factoring in retirements expected in the months ahead.

The Appellate Division and the selection process both work well. There does not appear to be a problem that needs fixing, let alone a problem so serious that it requires us to ask the citizens of New Jersey to amend the State Constitution.

If the proposal now under discussion in the Legislature becomes a reality, though, what can we expect? Vacancies on the appellate bench, for one thing. On the trial court level, for the decade from 2014 to 2023, judicial vacancies ranged from about 10 to 15 percent for 8 out of 10 years. We should realistically expect the same results if we adopt the same political appointment process for the Appellate Division.

Yet with 10 to 15 percent vacancies on the appellate court handling the same heavy volume of cases, it will take longer for litigants to get rulings and resolve their disputes. It will take longer for justice to be done. And real people will suffer the consequences.

With direct appointments to the Appellate Division, we will also lose the benefit of experience that trial judges now bring to the Appellate Division from their time in the civil, criminal, family, and equity parts. Of the 27 judges now assigned to the Appellate Division, 20 served in 2 divisions of the trial court, and 6 served in 3 divisions. Broken down by division, 23 previously served in Family; 17 in Civil; 11 in Criminal; and 7 in General Equity. That experience is invaluable to reach informed decisions in thousands of those very cases each year.

In addition, we will lose the flexibility that allows judges to move between the trial and appellate courts when appropriate.

Unfortunately, those outcomes will not enhance our system of justice; they will diminish it.

The Appellate Division today is also well-balanced with nearly an even number of Democrats and Republicans, and women and men. Our State has a laudable tradition of maintaining partisan balance in appointments to the trial court and the Supreme Court. I strive to maintain that balance at the appellate court level as well. At the beginning of the upcoming court term this September, I anticipate there will be a total of 29 appellate judges – 14 Democrats; 14 Republicans; and 1 Independent; along with 15 men and 14 women. With 8 diverse judges today, we have the most diverse group of appellate court judges in the court's history.

Will we attract “better” candidates with direct appointment to the appellate court -- candidates who would prefer not to sit in Family before joining the appellate ranks? Starting with the latter point, more than one in ten cases that appellate judges decide are appeals from the Family Part. And those cases involve weighty questions. Should a temporary or permanent restraining order be entered in a domestic violence case? Has a child been abused or neglected? Who should get custody of a young child? Should a person’s parental rights be terminated? Experience in the trial court helps guide those life-altering determinations -- experience that most lawyers in private practice do not have.

Appellate judges also review challenging questions in other areas -- like whether defendants should be detained pending trial, because they pose a risk to public safety, or released on pretrial monitoring. Experience in the criminal part benefits those decisions as well.

Will the proposed change attract “better” candidates overall? Consider just these few legendary names, listed alphabetically: David Baime, Milton Conford, Mary Catherine Cuff, William Dreier, Howard Kestin, Michael Patrick King, Virginia Long, Sylvia Pressler, Stephen Skillman, and Edwin Stern. Any court would be hard-pressed to find more gifted judges than those exceptional individuals as well as many others we could add to the list. All of them dispensed justice on the Appellate Division with excellence and scholarship.

What about Justices of the Supreme Court -- who are appointed by the Governor, confirmed by the Senate, and include individuals who have not sat in the trial divisions? Unlike the Appellate Division, the Supreme Court has a discretionary docket. It selects matters that involve substantial legal questions and hears far fewer cases than the thousands handled each term in the Appellate Division. The Supreme Court also exercises rulemaking authority and regulates the practice of law. Its members often bring valuable experience from other walks of life, such as prior service in other branches of government, in cabinet-level positions, in private practice, as well as service in the trial and appellate courts.

Historically, many individuals have been appointed to the Supreme Court from the trial and appellate level. When I joined the Court, three members had previously served as trial and appellate court judges. Two members of the current Court have similar prior judicial experience. In practice, that matters a great deal. Because the Court acts as a collaborative body of 7 when it decides cases, it is able to draw on prior trial and appellate expertise in every case. Plus the vetting of nominees to the Supreme Court is quite intense, as it should be -- something that would be impractical for the political branches to replicate at the appellate court level.

This is not the first time leaders of our State have considered how best to assign judges to the Appellate Division. When delegates gathered for the Constitutional Convention of 1947, they had many models to choose from -- including the one under consideration today. Instead, they sought to improve upon other approaches and selected what they believed was a superior model.

Among other issues, witnesses and delegates debated two related topics: whether judges could be transferred by the Chief Justice among different parts of the Superior Court; and how to appoint judges to the intermediate appellate court. Governor Alfred Driscoll testified about both subjects at the Convention. On the afternoon of July 10, 1947, he offered the following insights:

I would prefer that the members of . . . intermediate courts of appeal were drawn from the General [or Trial] Court. I would hope that that would give to the members of our General Court not only the unique experience that comes to a trial judge, but also the very important and entirely different type of experience that comes to a [person] who is called upon, in the absence of witnesses, to review a record and to make the kind of decisions that are required to be made when causes are brought from a trial court to an appellate court on appeal.

. . . .

Whether a [person] should be permanently assigned or temporarily assigned to hear a specific type of cause should, in the final analysis, it seems to me, be left to the judgment of the responsible head of our judicial system. . . . [A]s a result of his review of appeals, he will quickly come to know the varying talents of the trial judges. And he and his associates, better than anyone else, or any other group, will be in a position to determine whether a man or a woman, or men or women, should be permanently assigned to a particular division or whether they should be temporarily assigned for an experimental period.

Other witnesses echoed Governor Driscoll's words and spoke of the benefits of a unified, flexible system that gave substantial authority to the Chief Justice. A minority took the opposite position and voiced concerns that are being raised now again.

George Smith, the President of Johnson & Johnson and a convention delegate, favored a system in which judges could be transferred rather than assigned permanently to a position. He responded to concerns about "the possibility of indiscriminate assignments" and noted, "I suppose the suggestion is that the time may come, or may even be here now, when the Chief Justice would improperly or capriciously move judges about. If that were to be done, I would believe that the Chief Justice would be derelict in his duty and subject to removal from his post." Those words are relevant today to address hypothetical concerns that have not come to pass in three-quarters of a century.

Sigurd Emerson, a practicing attorney and delegate, opposed the transfer of judges and offered a simple observation: "We don't know how this will function." Today, 75 years later, we know. With the benefit of experience, we know that the system of assigning judges from the trial court to the Appellate Division has enabled it to flourish.

Governor Driscoll's leadership stands out in yet another way. Not only did he oppose giving governors the power to nominate appellate judges under the new Constitution, subject to advice and consent, he also initiated the tradition of bipartisan balance that continues to this day in appointments to the trial court and the Supreme Court. The Constitution gave Governor Driscoll, a Republican, the power to nominate all 7 members of the newly constituted Supreme Court. Rather than select 7 individuals from his own party, he nominated 4 Republicans and 3 Democrats. Once again, I have strived over the years to maintain the same balance on the Appellate Division. Not counting 4 judges temporarily assigned at this time, I have assigned 52

trial court judges to the Appellate Division since 2008: 27 Republicans, 22 Democrats, and 3 Independents.

Governor Driscoll's thoughtful positions have withstood the test of time. He advocated for and then supported an independent, strong, balanced, and flexible Judiciary, with trial judges moving to the Appellate Division based on demonstrated skill and experience. His example -- and the results we have witnessed -- offer helpful guidance for today's discussion.

A Constitution is a foundational document in a democracy. It should not be amended lightly. When serious problems exist, it is certainly appropriate to debate how best to address and resolve them. That took place in 1947 over the course of many months of discussion and deliberations.

Even more important, no problem has been identified that needs to be fixed. Our system works well on behalf of the people of New Jersey, as it has for 75 years. We should not amend the Constitution in a way that I fear would be a serious mistake -- that would likely delay justice and harm the public.

One final thought. We have reason to be proud of the ongoing, longstanding dialogue between the Judiciary and the State Bar Association. It has been a partner in many endeavors to enhance the quality of the justice system in our State. Its strong voice on this issue is another example of its deep concern over the cause of justice.

I thank the Bar again for hosting this convention and for inviting judges to participate, many of whom are here today. We look forward to continuing to work with you in the year ahead.

Thank you all very much.