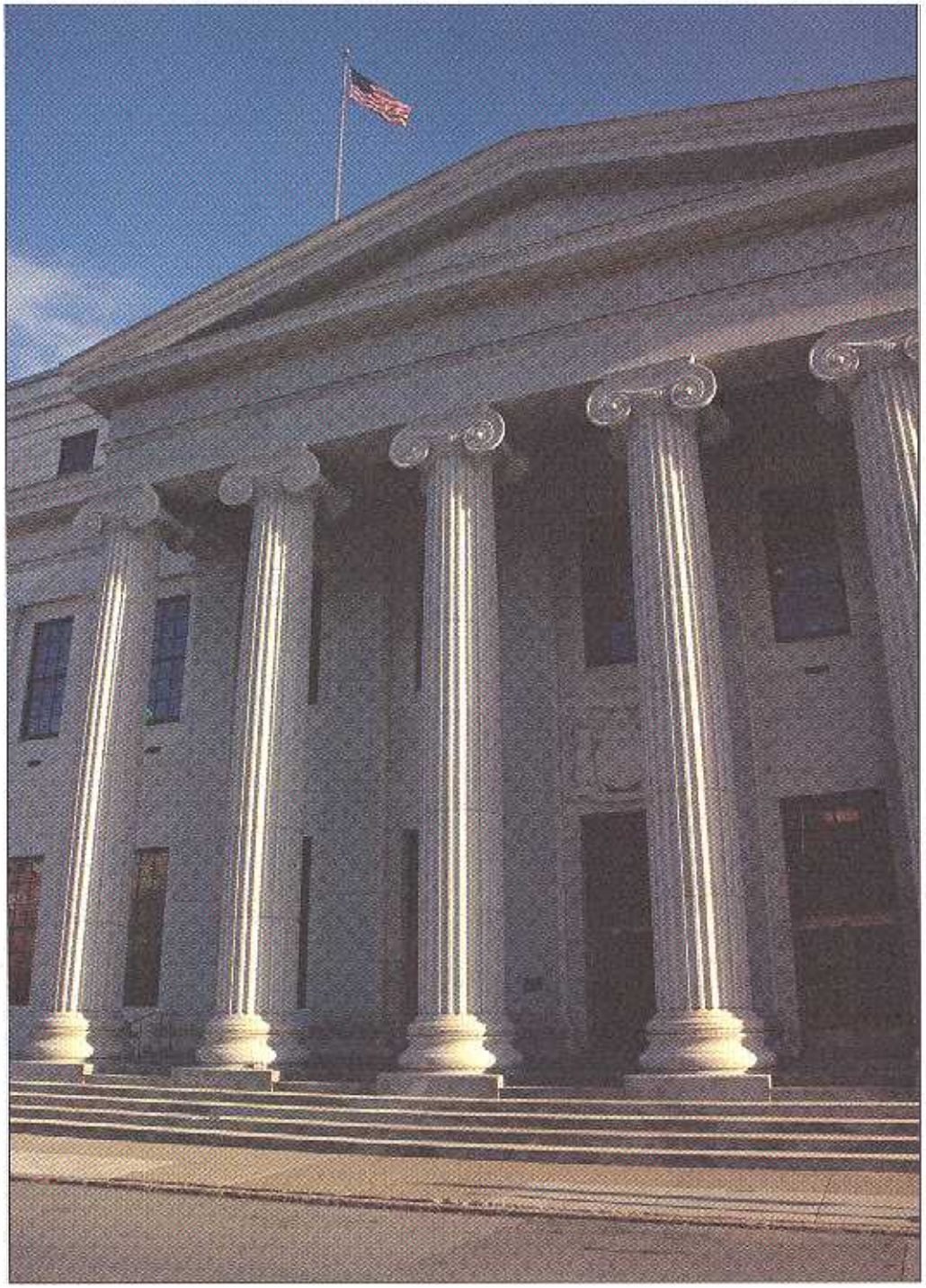

Annual Report of the Clerk of the Court 2005

2005

ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Stuart M. Cohen
Clerk of the Court
Court of Appeals

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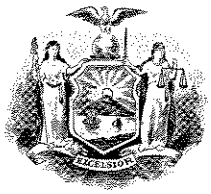

Court of Appeals Hall
Albany, New York 12207

Susan Phillips Read
Judge

April, 2006

2005 marked the second full year in our "new" old home -- freshly renovated Court of Appeals Hall. The historical significance of our beautiful surroundings and this institution lend a palpable sense of pride and pleasure shared by Judges and staff alike.

In February 2005, in celebration of African-American History Month, we honored Judge Harold A. Stevens, the first African-American to serve on the New York Court of Appeals. This milestone, achieved in 1974, was the capstone of a career of "firsts" for this exceptional lawyer and jurist. A native of South Carolina, Judge Stevens was the first African-American to graduate from Boston College Law School; the first African-American elected to the former Court of General Sessions of New York County; the first African-American appointed and then elected to New York State Supreme Court; the first African-American designated to serve on the Appellate Division; and the first African-American designated as Presiding Justice of the Appellate Division. Although his tenure on the Court of Appeals was brief, Judge Stevens made a lasting impression as the author of Matter of Pell v Bd. of Educ. (34 NY2d 222 [1974]), which clarified the scope of judicial review of administrative determinations. Pell is one of the Court's most enduring and widely cited precedents.

The Stevens tribute, which was enlivened by a filmed interview of Judge Stevens conducted in 1980 by Dr. Grace Jordan McFadden, a professor at the University of South Carolina, was reprised in the First Department in March 2005. The program took place in the First Department's ornate courtroom -- which New York City Mayor Michael R. Bloomberg rightly hailed as one of the grandest public rooms in New York

City -- where Judge Stevens sat for so many years as Associate and Presiding Justice.

The success of this multi-media program and a desire to share our landmark courthouse with a public broader than litigants and lawyers inspired Chief Judge Judith S. Kaye to develop "The New York Court of Appeals Lecture Series." Co-sponsored by The Historical Society of the Courts of the State of New York, the lecture series aims to engage a lay audience by presenting programs looking at the law from different perspectives. As I write this introduction, final preparations are furiously underway for the first lecture in the series, "New York Times v Sullivan and its Times: The Press and the Community," to be delivered by Dr. Kermit L. Hall, President of the State University of New York at Albany, in late March. Other lectures planned during 2005 for the 2006 series will explore the connection between law and literature, and law and architecture.

History also became more accessible on a workaday basis to Judges and staff in 2005 with the library's addition of two new online research tools -- The Making of Modern Law and Hein Online. These databases allow us to search legal texts and law reviews dating back to the 19th century, a capability that -- believe it or not -- is essential for the 21st century Court of Appeals.

In short, in 2005 we were again privileged to spend our days going about the extraordinary business of the Court -- hearing oral arguments, conferencing motions and appeals, and preparing and handing down written decisions to shape the law of our great State. Now comfortably ensconced in Court of Appeals Hall, we are every day reminded of this wonderful institution's connections to the past, and determined to look for new ways to share our heritage with the public in the future.

Susan Phillips Read

Former Associate Judge Bernard S. Meyer and former Associate Judge Vito J. Titone passed away in 2005.

Former Associate Judge Matthew J. Jasen died in February 2006.

We pay special tribute to the long and distinguished service of these exceptional jurists.

2005

ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Introduction

If an overall theme can capture the busy, active year just concluded, it is that -- over and apart from the prompt, effective resolution of cases -- the Court endeavored to improve public understanding of its role and work.

In April 2005, for example, the Court traveled to Buffalo to hear oral arguments, giving residents of the Niagara Frontier an opportunity to see the Court live for the first time since 1849. Also, in 2005, the Court adopted new Rules of Practice. The new Rules provide more detailed guidance for counsel and self-represented litigants in all non-capital matters. In conjunction with the revision of the Rules, the Court's web site was redesigned to include a variety of new practice aids. Throughout the fall and winter, members of the Clerk's Office staff participated in bar association-sponsored education programs to familiarize practitioners with the new Rules.

Six senior employees with a total of 156 years of service to the Court retired in 2005. Planning for each retirement, and each resulting transition, centered my attention on the Court's tradition of service. Our retired colleagues exemplified the core mission of the Court of Appeals staff: to support the Judges in their work and to serve litigants, counsel and members of the public with the utmost courtesy, skill and efficiency.

This Annual Report is itself a helpful Court of Appeals tradition, providing a yearly account of the work of the Court. The Annual Report is divided into four parts. The first section offers a narrative, statistical and graphic overview of matters filed with and decided by the Court in 2005. The second describes various functions of the Clerk's Office and summarizes the administrative accomplishments of the year. The third section highlights selected decisions of 2005. The fourth part consists of appendices with detailed statistics and other information.

I. The Work of the Court

The Court of Appeals -- New York's highest court -- is composed of its Chief Judge and six Associate Judges, each appointed by the Governor to a fourteen-year term.

Similar to the Supreme Court of the United States and other state courts of last resort, the primary role of the New York Court of Appeals is to unify, clarify and pronounce the law of its jurisdiction for the benefit of the community at large. Reflecting the Court's historical purpose, the State Constitution and applicable jurisdictional statutes provide few grounds for appeals as of right to this Court. Thus, the Court hears most appeals by its own permission, or *certiorari*, granted upon civil motion or criminal leave application. Appeals by permission typically present novel and difficult questions of law having statewide importance. Often these appeals involve issues in which the holdings of the lower courts of the State conflict. The correction of error by courts below remains a legitimate, if less frequent, basis for this Court's decision to grant review. By State Constitution and statute, the Appellate Division also can grant leave to appeal to the Court of Appeals in civil cases, and individual Justices of that court can grant leave to appeal to the Court of Appeals in most criminal cases.

In addition to appellate jurisdiction, the State Constitution vests the Court of Appeals with power to answer questions of New York law certified to it by a federal appellate court or another state's court of last resort. Also, the Court of Appeals is the exclusive forum for review of determinations by the State Commission on Judicial Conduct.

The Judges of the Court collectively decide all appeals, certified questions and motions. Individually, the Judges decide applications for leave to appeal in criminal cases and emergency show cause orders. For most appeals, the Judges receive written and oral argument, and set forth the reasons for their decisions in written opinions and memoranda.

The Court sits in Albany throughout the year, usually for two-week sessions. During these Albany sessions, the Court meets each morning in conference to discuss the appeals argued the afternoon before, to consider and vote on writings circulated on pending appeals, and to decide motions and administrative matters. Afternoons are devoted to oral argument, and evenings to preparing for the following day.

Between Albany sessions, the Judges return to their home chambers throughout the State, where they continue their work of studying briefs, writing opinions and preparing for the next Albany session. During these home chambers sessions, the Judges also decide the hundreds of requests for permission to appeal in criminal cases assigned annually to each Judge, prepare reports on motions for the full Court's consideration and determination, and fulfill many other judicial and professional responsibilities.

Each year, with the Appellate Division Departments, the Court of Appeals publishes a timetable for appellate review of primary election-related matters. In August of each year, the Court holds a session to consider expedited appeals and motions for leave to appeal in cases concerning the September primaries. The Court reviews primary election motions and appeals on the Appellate Division record and briefs, and hears oral argument of motions for leave to appeal. When the Court determines an appeal lies as of right or grants a motion for leave to appeal, oral argument of the election appeal is usually scheduled for the same day. Primary election appeals are decided expeditiously, often the day after oral argument is heard.

In 2005, the Court and its Judges disposed of nearly 4,000 matters, including 196 appeals, 1,289 motions and 2,383 criminal leave applications. A detailed analysis of the Court's work follows.

A. Appeals Management

1. Screening Procedures

The jurisdiction of the Court is narrowly defined by the State Constitution and applicable statutes. After the filing of a notice of appeal or receipt of an order granting leave to appeal to this Court, an appellant must file two copies of a preliminary appeal statement in accordance with Rule 500.9 of the Court's Rules of Practice. Pursuant to Rule 500.10, the Clerk examines all jurisdictional statements filed for issues related to subject matter jurisdiction. This review usually occurs the day a jurisdictional statement is filed. Written notice to counsel of any potential jurisdictional impediment follows immediately, giving the parties an opportunity to address the jurisdictional issue identified. After the parties respond to the Clerk's inquiry, the matter is referred to the Central Legal Research Staff to prepare a preliminary report for review and disposition by the full Court.

Of the 132 notices of appeal filed in 2005, 90 were subject to Rule 500.10 inquiries. All but 29 of those subject to inquiries were withdrawn, dismissed sua sponte or on motion, or transferred to the Appellate Division. Two inquiries were terminated after the Appellate Division granted appellants leave to appeal. Twenty-one inquiries were pending at year's end. The Court retained jurisdiction in six appeals. The Rule 500.10 sua sponte dismissal (SSD) screening process is valuable to the Court, the Bar and the parties because it identifies at the earliest possible stage of the appeal process appeals that are jurisdictionally defective and, hence, destined for dismissal or transfer by the Court.

2. Normal Course Appeals

The Court determines most appeals "in the normal course," meaning after full briefing and oral argument by the parties. In these cases, copies of the briefs and record are circulated to each member of the Court well in advance of the argument date. Each Judge becomes conversant with the issues in the cases, exploring questions or concerns prompted by the briefs

with counsel during oral argument. At the end of an afternoon of argument, each appeal is assigned by random draw to a member of the Court for reporting to the full Court at the next morning's conference. When, at conference, a majority of the Court agrees with the reporting Judge's proposed disposition, the reporting Judge becomes responsible for preparing the Court's writing in the case. If the majority of the Court disagrees with the recommended disposition of the appeal, the first Judge taking the majority position who is seated to the right of the reporting Judge assumes responsibility for the proposed writing, thus maintaining randomness in the distribution of all writings for the Court. Draft writings are circulated to all Judges during the Court's subsequent home chambers session and, after further deliberation and discussion of each proposed writing, the Court's determination is handed down, typically during the next Albany session of the Court.

3. Alternative Track Appeals

The Court also employs the alternative track of sua sponte merits (SSM) review of submissions pursuant to Rule 500.11. Through this SSM procedure, the Court decides a small number of appeals on letter submissions and the papers filed in the court below, without oral argument, saving the litigants the burden and expense of plenary briefing and oral argument. A case may be placed on SSM track, for example, if it involves issues decided in a recent appeal. As with normal-coursed appeals, SSM appeals are assigned on a random basis to individual Judges for reporting purposes, and are conferenced and determined by the entire Court. Of the 284 appeals filed in 2005, 27 (9.5%) were initially selected to receive SSM consideration, a slight decrease from the percentage initially selected in 2004 (11.1%). Twenty were civil matters and seven were criminal matters. Four appeals initially selected to receive SSM consideration in 2005 were directed to full briefing and oral argument. Of the 196 appeals decided in 2005, 29 (14.8%) were decided upon SSM review (9.7% were so decided in 2004; 14.2% were so decided in 2003). Twenty-two were civil matters and seven were criminal matters.

4. Promptness in Deciding Appeals

In 2005, litigants and the public continued to benefit from the prompt calendaring and disposition of appeals. The average time from argument or submission to disposition of an appeal decided in the normal course was 36 days; for all appeals, the average time from argument or submission to disposition was 32 days. The average period from filing a notice of appeal or an order granting leave to appeal to calendaring for oral argument was approximately 5.7 months, roughly the same as in previous years. This period includes approximately 1.3 months from readiness (all papers served and filed) to calendaring for oral argument, again about the same as in previous years.

The average length of time from the filing of a notice of appeal or order granting leave to appeal to the release to the public of a decision in a normal-coursed appeal decided in 2005 (including SSM appeals tracked to normal course) was 257 days. For all appeals, including those decided pursuant to the SSM procedure, those dismissed pursuant to Rule 500.10 SSD inquiries,

and those dismissed pursuant to Rule 500.16(a) for failure to perfect, the average was 182 days. Thus, by every measure, in 2005 the Court maintained its long tradition of exceptional currency in calendaring and deciding appeals.

B. The Court's 2005 Docket

1. Filings

Two hundred eighty-four (284) notices of appeal and orders granting leave to appeal were filed in 2005 (296 were filed in 2004). Two hundred and thirteen (213) filings were civil matters (235 were filed in 2004), and 71 were criminal matters (compared to 61 in 2004). The Appellate Division Departments issued 46 of the orders granting leave to appeal filed in 2005 (34 were civil, 12 were criminal). Of these, the First Department issued 29 (21 civil and eight criminal).

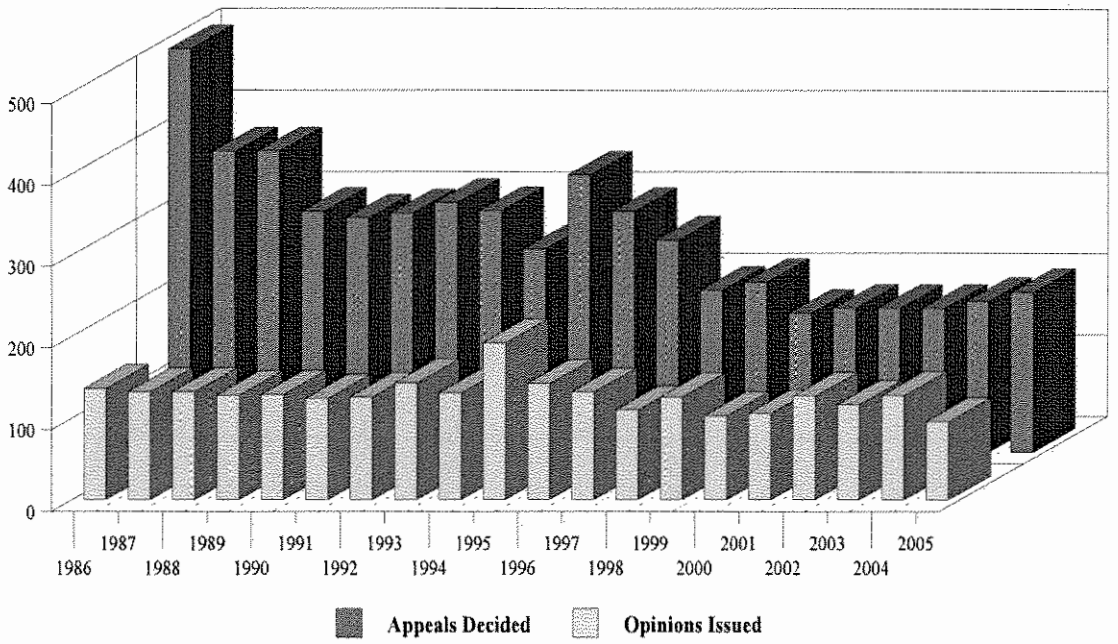
Motion filings increased in 2005. During the year, 1,344 motions were filed, 12.1% more than the 1,199 filed in 2004. Motions for leave to appeal also increased from 905 in 2004 to 967 in 2005. Criminal leave applications were down slightly in 2005. Two thousand four hundred seventy-three (2,473) applications for leave to appeal in criminal cases were assigned to individual Judges of the Court during the year, 97 less than in 2004. On average, each Judge was assigned 353 such applications during the year.

2. Dispositions

(a) Appeals and Writings

In 2005, the Court decided 196 appeals (137 civil and 59 criminal, compared to 136 civil and 49 criminal in 2004). Of these appeals, 142 were decided unanimously. The Court issued 126 signed opinions for the Court, six per curiam opinions, 43 dissenting opinions, 11 concurrences, 46 memoranda and 18 decision list entries. The chart on the next page tracks appeals decided and full opinions (signed and per curiam) issued in the twenty years since Laws of 1985, chapter 300 expanded the civil *certiorari* jurisdiction of the Court.

Appeals Decided and Opinions Issued
1986-2005

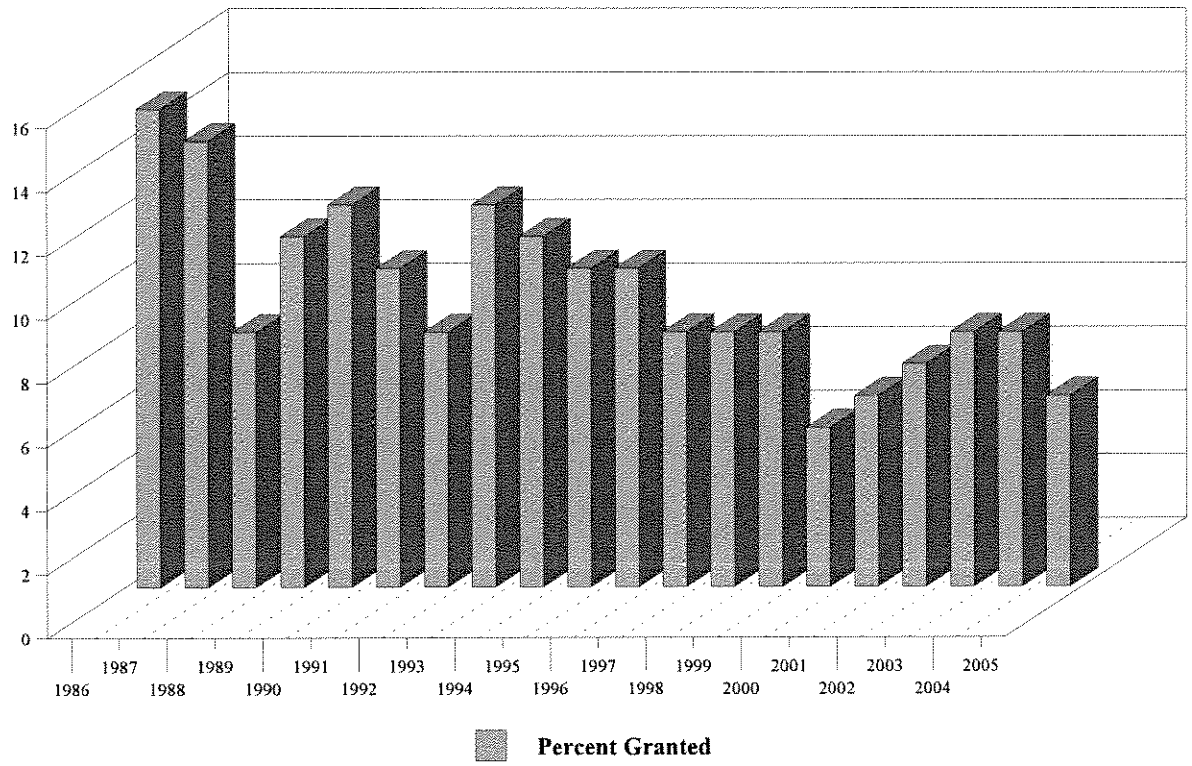


(b) Motions

The Court decided 1,289 motions in 2005 -- 67 more than in 2004. Each motion was decided upon submitted papers and an individual Judge's written report, reviewed and voted upon by the full Court. The average period of time from return date to disposition for civil motions for leave to appeal was 58 days, while the average time from return date to disposition for all motions was 48 days.

The Court decided 961 motions for leave to appeal in civil cases during the year, 60 more than in 2004. Of these, the Court granted 6.4% (down from 8.3% in 2004), denied 72.5% (up from 71.5% in 2004, and dismissed for jurisdictional defects 21.1% (up from 20.2% in 2004). The chart on the following page reflects the percentage of civil motions for leave to appeal granted since the expansion of the Court's *certiorari* jurisdiction in 1985.

Motions for Leave to Appeal Granted by Year
1986-2005



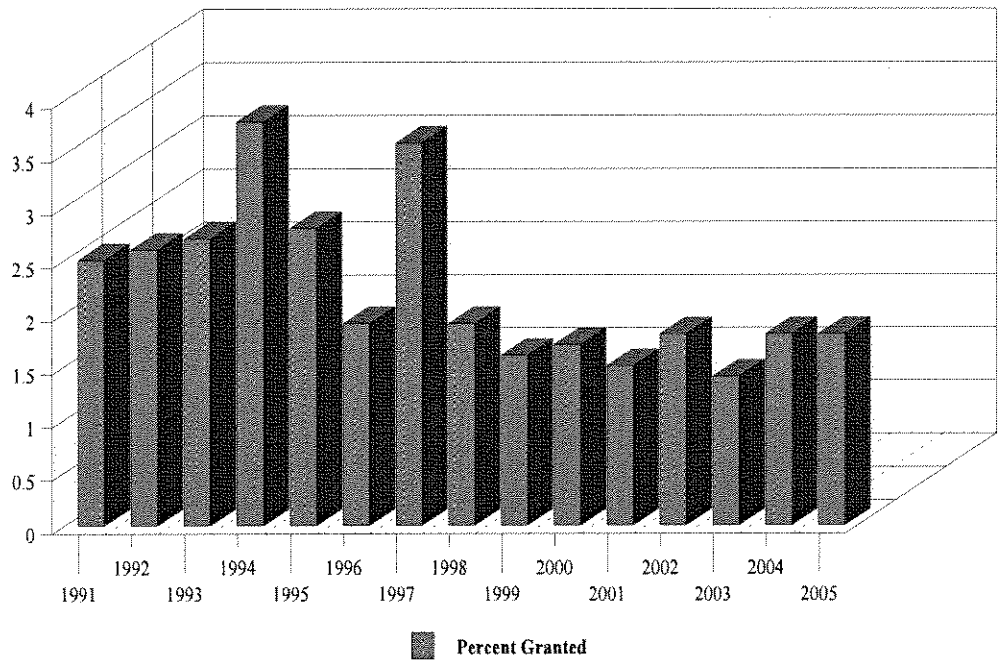
Sixty-one motions for leave to appeal in civil cases were granted in 2005. The Court's leave grants covered a wide range of subjects. In the family law context, the Court granted leave to address issues such as juvenile delinquency, derivative neglect, mootness and paternity by estoppel. Insurance issues included exclusions in homeowner's and automobile policies, contracts covering landlord's liability for lead paint exposure and breach of fiduciary duties by agents and brokers. Civil practice topics spanned res judicata in the context of an action for divorce, the statute of limitations in the Town Law, estoppel to plead the statute of limitations, an insanity toll of the statute of limitations, notice of claim, various standing issues, capacity to sue, the enforceability of a foreign judgment, abuse of process, pleading and purchasing an index number. Civil service issues included arbitration of General Municipal Law benefits and discipline of police officers. Numerous other issues concerned municipalities, taxation, Freedom of Information Law, Labor Law, Lien Law, workers' compensation, employment contracts and secured transactions.

In 2005, 95 motions for amicus curiae relief were filed, 93 of which were granted. Given that the Court hears the majority of appeals by its own permission, and that the questions presented are usually novel and of statewide importance, the Court encourages appropriate requests for permission to file amicus curiae submissions.

(c) CPL 460.20 Applications

Individual Judges of the Court granted 42 of the 2,383 applications for leave to appeal in criminal cases decided in 2005 -- down from 46 in 2004. Two hundred twenty-eight applications were dismissed for lack of jurisdiction, and four were withdrawn. Five of 44 applications filed by the People were granted. The chart below reflects the percentage of applications for leave to appeal granted in criminal cases over the past fifteen years.

Criminal Leave Applications Granted by Year
1991-2005



Laws of 2002, chapter 498 amended the criminal jurisdiction of the Court of Appeals to allow appeals by permission from intermediate appellate court orders granting or denying applications for writs of error coram nobis. In 2005, 242 applications for leave to appeal from such orders were assigned to Judges of the Court, up from 201 in 2004. None was granted.

Review and determination of applications for leave to appeal in criminal cases constitute a substantial amount of work for the individual Judges of the Court during home chambers sessions. The period during which such applications are pending usually includes several weeks for the parties to prepare and file their written arguments. In 2005, on average, 53 days elapsed from assignment to Judges to disposition of applications for leave to appeal in criminal cases.

(d) Review of Determinations of the State Commission on Judicial Conduct

By Constitution and statute, the Court of Appeals has exclusive jurisdiction to review determinations of the State Commission on Judicial Conduct, and to suspend a judge, with or without pay, when the Commission has determined that removal is the appropriate sanction, or while the judge is charged in this State with a crime punishable as a felony. In 2005, the Court reviewed one determination of the State Commission on Judicial Conduct, accepting the recommended sanction of removal. Pursuant to Judiciary Law § 44(8), the Court ordered the suspension of six judges, all with pay, later terminating the suspension of one of those judges.

(e) Rule 500.27 Certifications

In 1985, to promote comity and judicial efficiency among court systems,* New York voters passed an amendment to the State Constitution granting the New York Court of Appeals discretionary jurisdiction to review certified questions from certain federal courts and other courts of last resort (NY Const, art VI, § 3[b][9]). Thereafter, this Court promulgated 22 NYCRR 500.17, providing that whenever it appears to the Supreme Court of the United States, any United States Court of Appeals or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it for which no controlling precedent from this Court exists, that court may certify the dispositive questions of law to this Court. The Annual Report for 1998 contains a detailed discussion of the history of Rule 500.17 certifications to this Court. In September 2005, Rule 500.17 was recodified as Rule 500.27.

After a court certifies a question to this Court pursuant to Rule 500.27, the matter is referred to an individual Judge, who circulates a written report for the entire Court analyzing whether the certification should be accepted. When the Court of Appeals accepts a certified question, the matter is treated as an appeal. Although the certified question may be determined in the normal course, by full briefing and oral argument, or pursuant to the Court's alternative procedure (*see* Rule 500.11), the preferred method of handling is full briefing and oral argument on an expedited schedule. In 2005, the average period from receipt of initial certification papers to the Court's order accepting review was 29 days. The average period from acceptance of a certification to disposition was eight months.

Two cases involving questions certified by the United States Court of Appeals for the Second Circuit remained pending at the end of 2004. In 2005, the Court answered the questions certified in both those cases. Also in 2005, the Court accepted four cases involving questions certified by the United States Court of Appeals for the Second Circuit. One case was decided and two remained pending at the end of 2005. After the United States Court of Appeals for the

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*As an additional aid to comity and judicial economy, the Chief Judge of the New York Court of Appeals and the Chief Judge of the United States Court of Appeals for the Second Circuit reactivated the New York State-Federal Judicial Council to address issues of mutual concern and sponsor educational programs for the Bench and Bar. Associate Judge Albert M. Rosenblatt currently serves as the Chair of the Council.

Second Circuit withdrew its certification, the questions certified in the fourth case were marked withdrawn.

(f) Capital Appeals

The State Constitution and the death penalty statute (L 1995, ch 1) provide a direct appeal to the Court of Appeals from a judgment of conviction and capital sentence. No notices of capital appeal were filed in 2005.

In June 2004, in *People v Stephen LaValle* (3 NY3d 88), the Court declared the death penalty could not be imposed in New York until the Legislature remedied a fatal defect in the "deadlocked jury" instruction. In 2005, following the *LaValle* decision, the prosecution acknowledged that the capital sentence imposed in *People v Robert Shulman* (6 NY3d 1 [2005]; *see* page 23 of this Report) would not stand. The Court upheld that defendant's conviction of first degree murder and remitted the matter to the trial court for resentencing.

Also in 2005, the Capital Defender Office filed the 65-volume record on appeal in *People v John Taylor*. Briefing by both parties is scheduled to be complete in January 2007.

C. Court Rules

In September 2005, an entirely new version of Court of Appeals Rules of Practice (22 NYCRR part 500), which govern all civil and noncapital criminal appeals, certified questions, motions and applications for leave to appeal in criminal cases, became effective. Organized into broad categories to eliminate duplication and provide a logical sequence, the new Rules incorporate substantive changes and additions to the former Rules of Practice.

II. Administrative Functions and Accomplishments

A. Court of Appeals Hall

In 2005, the Judges and staff were able to enjoy the newly renovated and reconstructed Courthouse in relative quiet. All major renovation projects had been completed by 2004, leaving only the hanging of the last of the Courthouse draperies and judicial portraits and other pictures from the Court's collection. In 2006, the remainder of the Court's large historic portraits will be rehung in the first floor public rooms, following restoration of canvases and frames. The Building Manager and the Deputy Building Superintendent oversee maintenance operations performed by Court staff and outside contractors. I commend the entire maintenance staff for its extraordinary efforts during the past year.

Also in 2005, the Court published an illustrated history of the Courthouse entitled *Court of Appeals Hall: Construction, Restoration and Renovation - 1842-2004*, available on the Court's web site (http://www.nycourts.gov/courts/appeals).

B. Case Management

The Clerk, Deputy Clerk, Consultation Clerk, Assistant Consultation Clerk, two Assistant Deputy Clerks, Chief Motion Clerk, Prisoner Applications Clerk, several secretaries, court attendants and service aides perform the myriad tasks involved in appellate case management. Their responsibilities include receiving and reviewing all papers, filing and distributing to the proper recipients all materials received, scheduling and noticing oral arguments, compiling and reporting statistical information about the Court's work, assisting the Court during conference and preparing the Court's decisions for release to the public. In every case, multiple controls insure that the Court's actual determinations are accurately reported in the written decisions and orders released to the public. The Court's document reproduction unit prepares the Court's decisions for release to the public and handles most of the Court's internal document reproduction needs. Security attendants screen all mail. Court attendants deliver mail in-house and maintain the Court's records room, keeping track of and distributing all briefs, records, exhibits and original court files. During the Court's Albany sessions, the court attendants also assist the Judges in the Courtroom and in conference.

In 2005, all members of the Clerk's Office staff assisted in the transition from case management procedures under the Court's former Rules of Practice to those under the new Rules of Practice, effective September 1, 2005. Clerk's Office staff also continued to work with the Office of Court Administration to update the Court's electronic case management system. I extend my particular thanks to Clerk's Office personnel for their outstanding work on both these projects.

In addition, many members of the Clerk's Office staff respond -- in person, by telephone and in writing -- to inquiries and requests for information from attorneys, litigants, the public,

academicians and other court administrators. Given that practice in the Court of Appeals is complex and markedly different from that in the Appellate Division, the Clerk's Office encourages such inquiries. In 2005, in conjunction with the promulgation of the new Rules of Practice, the Court's web site was enhanced to include a variety of appellate practice aids for counsel and self-represented litigants. Members of the Clerk's Office staff also regularly participate in, and consult on, programs designed to educate the Bar about Court of Appeals practice.

C. Public Information

The Public Information Office distributes the Court's decisions to the media upon release and answers inquiries from reporters about the work of the Court. For each session the office prepares descriptive summaries of cases scheduled to be argued before the Court. The summaries are posted on the Court's web site and are available in print at Court of Appeals Hall. The office arranges for live television coverage of certain oral arguments at the Court.

The Public Information Office also provides information concerning the work and history of New York's highest court to all segments of the public -- from school children to members of the Bar. Throughout the year, the Public Information Officer and other members of the Clerk's staff conduct tours of the historic Courtroom for visitors. The Public Information Office maintains a list of subscribers to the Court's "hard copy" slip opinion service and handles requests from the public for individual slip opinions.

Under an agreement with Albany Law School's Government Law Center and Capital District public television station WMHT, the Public Information Office supervises the videotaping of all oral arguments before the Court and of special events conducted by the Chief Judge or the Court. The tapes are preserved for legal, educational and historical research in an archive at the Government Law Center, and copies are available for purchase by the public. The videotapes may be ordered from the Law Center at (518) 445-3287.

The Court's Internet web site offers information about the Court, its Judges, history, summaries of pending cases and other news, as well as more than a year's worth of Court of Appeals decisions. Decisions are posted within minutes after their official release. The web site contains helpful information about the Court's practice -- including its rules, civil and criminal jurisdictional outlines, session calendars, and a form for use by pro se litigants -- and it provides links to other judiciary-related web sites. The text and web cast of Chief Judge Kaye's 2006 State of the Judiciary address is posted on the home page, and the text of prior addresses can be reached through the "Court News" link. Archived webcasts of selected oral arguments, prior Annual Reports and other materials are also available through that link. The address of the Court of Appeals web site is: http://www.nycourts.gov/courts/appeals.

The Historical Society of the Courts of the State of New York was incorporated in 2002. Among its purposes are to foster scholarly understanding and public appreciation of the history of the New York State courts and to collect and preserve artifacts of the State's judicial history. The Society's web site address is http://www.courts.state.ny.us/history.

D. Office for Professional Matters

The Court Attorney for Professional Matters manages the Office for Professional Matters, supported by a secretary. The office has access, via computer terminal, to information on each attorney admitted to practice in the State. The Court's records complement the official registry of attorneys maintained by the Office of Court Administration, which answers public inquiries about the status of attorneys. The Office prepares certificates of admission upon request and maintains a file of certificates of commencement of clerkship. Additionally, the Court Attorney drafts preliminary reports to the Court on matters relating to (1) attorney admission and disciplinary cases, (2) petitions for waivers of certain requirements of the Court's Rules for the Admission of Attorneys and Counselors at Law and the Rules for the Licensing of Legal Consultants, and (3) proposed rule changes ultimately decided by the Court. The Court Attorney for Professional Matters continues to serve on the New York State Bar Association's Committee on Legal Education and Admission to the Bar. The Court did not amend any of its rules related to professional matters in 2005.

E. Central Legal Research Staff

Under the supervision of individual Judges and the Clerk of the Court, the Central Legal Research Staff prepares draft reports on motions (predominantly civil motions for leave to appeal), requests to answer certified questions and selected appeals for the full Court's review and deliberation. During 2005, Central Staff completed 951 motion reports, 73 SSD reports, 19 SSM reports and four reports regarding certified questions. Throughout 2005, Central Staff maintained excellent currency in its work.

Staff attorneys also write and revise research materials for use by the Judges' chambers and the Clerk's Office and perform other research tasks as requested. In 2005, under the direction of the Deputy Chief Court Attorney, Central Staff again revised and updated the civil jurisdictional outline for internal and external use. Also in 2005, the staff assisted the Court in work on a biography project involving all Judges of the Court of Appeals. During 2005, the Chief Court Attorney began his one-year term as Chair of the American Bar Association's Council of Appellate Staff Attorneys.

Attorneys usually join the Central Legal Research Staff immediately following law school graduation. The staff attorneys employed in 2005 were graduates of Albany, Brooklyn, Fordham University, St. John's University, Southern Illinois University, the State University of New York at Buffalo, Syracuse University, Western New England College, Willamette University and the University of California at Davis law schools. Staff attorneys hired for work beginning in 2006 will represent Albany, New York, St. John's University, the State University of New York at Buffalo, Syracuse University and University of Connecticut law schools.

F. Library

The law library supports the legal information needs of the Court. The Chief Legal Reference Attorney provides extensive legal and general research and reference services to the

Judges of the Court, their law clerks and the Clerk's Office staff, using a full range of traditional and technologically-enhanced strategies that provide timely, accurate and efficient access to the sources of law. The Chief Legal Reference Attorney also identifies emerging legal issues and, by anticipating the Court's future research needs, ensures that the necessary resources are in place when such matters come before the Court.

Collection development in the Court of Appeals Hall library and in the home chambers libraries continued in 2005. Newly-published works falling within the Court's collection development policy were acquired, and seldom-used and superseded materials were deaccessioned. Current awareness bulletins listing the contents of recent law reviews and newly-acquired titles were issued each session, and the election law digest was updated and distributed prior to the election session.

The Court of Appeals library collection was greatly expanded by the purchase of two new research databases. *The Making of Modern Law* contains the text of all British and American law and law-related books published prior to 1926. The database supports full-text searching, thus extending the reach of electronic research back to the early 19th century. The *Hein Online* database, which became accessible to the Court of Appeals in 2005, contains the full text of complete runs of virtually all American law review titles published since the mid-nineteenth century. A basic full-text search capability provides electronic research access to law review articles published prior to the commencement of law review coverage on Lexis and Westlaw. Because the format of retrieved documents from both these databases is a scanned image of the original text, the databases can also be used to verify citations.

The creation of in-house specialized full-text databases allowing desktop access to the vast collection of the Court's internal documents has proved crucial to the work of the Court. There are now several internal databases, the most important of which is the full-text reports (1996-2006) database now containing over 12,000 documents. As each decision list is released, the library staff compiles the relevant internal reports by merging documents from several in-house databases. The resulting files are then added to the reports database, and transmitted electronically to the Law Reporting Bureau to facilitate the work of the Law Reporting Bureau legal editors. Work continued on a library project to scan the 1900-1995 reports, and on the bill jackets database which now contains 1,975 electronic images of the Court's bill jacket files. The bill jacket files are also transmitted to Office of Court Administration for inclusion in the Library and Information Network (LION) system.

The Chief Legal Reference Attorney revised and updated a three-hour program on Constitutional, Statutory and Regulatory Intent, and Common Law Derivation. This program, together with a one-hour interactive presentation on ISYS:web databases, has been certified under the Office of Court Administration's Continuing Legal Education (CLE) regulations, and both were offered to Judges' law clerks and staff attorneys in September 2005. The Chief Legal Reference Attorney coordinated the CLE training provided by vendors of on-line legal research services to the Court's law clerks and staff attorneys, and is a member of the Court's CLE Committee.

Due to renovations at the New York State Archives and at the request of its personnel, no Court materials were transferred to the Archives during 2005. At the request of the State Library, the Court continued to ship the depository copy of records and briefs to a vendor which creates a digital microfiche copy of each document. This program facilitates widespread dissemination of the Court's records and briefs and fulfills a disaster preparedness function for the Court, the State Library and the Archives. The vendor now makes available, on its online research service, selected briefs from this collection.

The Chief Legal Reference Attorney continues to serve as a trustee of The Historical Society for the Courts of the State of New York. She is secretary of its Board of Trustees, and chairs its Special Committee on the Web Site (http://www.courts.state.ny.us/history/).

I express my appreciation to the State Library, the State Archives, the Albany Law School Library, the Legislative Library, the University at Albany libraries, the Albany Public Library and the Capital District Library Council, which continued to facilitate the Court's access to materials not part of its collection.

G. Continuing Legal Education Committee

The Continuing Legal Education (CLE) Committee was established in 1999 to coordinate professional training for Court of Appeals and Law Reporting Bureau attorneys. The membership of the Committee varies from year to year. In 2005, Lisa LeCours, Principal Law Clerk to Associate Judge Graffeo, completed her term as chair of the Committee. I thank her for her leadership of the Committee and her continued service. The Committee is now chaired by Margery Corbin Eddy, Principal Court Attorney. Other members include the Deputy Clerk, the Chief Court Attorney, the Chief Legal Reference Attorney, two Judges' law clerks, and a Senior Legal Editor from the Law Reporting Bureau. A Central Legal Research Staff secretary manages CLE records, and coordinates crediting and certification processes with the Office of Court Administration. Specifically, the secretary maintains three databases to track CLE classes offered by the Court, the attorneys eligible to attend classes, and the number of credits each attorney has earned at Court-sponsored programs. In addition, she prepares the paperwork necessary to comply with the rules of the Office of Court Administration and the CLE Board.

During 2005, the CLE Committee provided 14 programs totaling 25 credit hours for Court of Appeals and Law Reporting Bureau attorneys. Court of Appeals and Law Reporting Bureau attorneys also participated in classes offered by the New York Supreme Court, Appellate Division, Third Department, and the New York State Judicial Institute (JI). Through the JI's monthly simulcast programs, an additional eight programs totaling eight credit hours were provided to Court of Appeals and Law Reporting Bureau attorneys.

H. Management and Operations

Aided by a Management Analyst and two secretarial assistants, the Director, Court of Appeals Management and Operations is responsible for supervising fiscal and personnel systems and functions, including purchasing, inventory control, fiscal cost recording and reporting,

employees' time and leave management, payroll document preparation, voucher processing, benefit program administration and annual budget request development. A supplies manager is responsible for comparison shopping, and purchasing and distributing supplies and equipment.

I. Budget and Finance

The Director, Court of Appeals Management and Operations is responsible for initial preparation, administration, implementation and monitoring of the Court's annual budget. The proposed annual budget is reviewed by the Clerk and Deputy Clerk before submission to the Judges of the Court for their approval.

1. Expenditures

The work of the Court and all its ancillary agencies was performed within the 2005-2006 fiscal year budget appropriation of $14,184,554, which included all judicial and non-judicial staff salaries (personal services costs) and all other cost factors (non-personal services costs), including in-house maintenance of Court of Appeals Hall.

2. Budget Requests

The total request for fiscal year 2006-2007 for the Court and its ancillary agencies is $14,681,024, an increase of 3.5% over the current year's appropriation. The 2006-2007 personal services request of $11,936,433 reflects an increase of $342,938 from the current year's appropriation, which includes funding for salary increases for all eligible non-judicial employees in accordance with collective bargaining contracts, administrative provisions, and temporary and overtime services.

The 2006-2007 non-personal services request of $2,744,591 is $153,532, or 5.9%, over the current year's adjusted appropriation. The non-personal services request includes adjustments in Judges' staff travel expense ($25,166), in court administration and support services ($34,841), legal reference materials ($92,775) in which a high level of inflation prevails, and building maintenance operations ($750).

Notwithstanding necessary increases in building maintenance operations, staff travel and legal reference materials, the budget request for fiscal year 2006-2007 illustrates the Court's diligent attempt to perform its functions and those of its ancillary agencies economically and efficiently. The Court will continue to maximize opportunities for savings to limit increases in future budget requests.

3. Revenues

In calendar year 2005, the Court reported filing fees of $315 for each of 97 civil appeals, totaling $30,555. Also, the Court reported filing fees of $45 for each of 880 motions, totaling $39,600. The $70,155 realized was reported to the State Treasury, Office of the State Comptroller and Office of Court Administration pursuant to the Court Facilities Legislation

(Laws of 1987, chapter 825). Additional revenues were realized through the slip opinion distribution service ($4,202) and miscellaneous collections ($11,227.51). For calendar year 2005, revenue collections totaled $85,584.51.

J. Computer Operations

The Information Technology (I.T.) Department oversees all aspects of the Court's computer and web operations under the direction of the Principal PC Analyst, assisted by a LAN Administrator and a PC Analyst. These operations include all software and hardware used by the Court, and a statewide network connecting six remote Judges' chambers with Court of Appeals Hall. Also included are two web sites: an intranet site available to Court employees only and the Court's internet web site located at http://www.nycourts.gov/courts/appeals.

The redesigned web site offers immediate access to the latest decisions on cases and motions handed down by the Court, and other pertinent information of interest to the public, including the Rules of the Court and the Court's calendar. Nearly 446,000 visits to the web site were recorded, averaging more than 1,200 visits per day, up by almost 46,000 visits from the previous year. In 2005, the I.T. Department produced four live web casts. The I.T. Department also arranged for simulcast presentations and teleconferences throughout the year to bring meetings and Continuing Legal Education (CLE) information from all over the State to Court employees in Albany.

The I.T. Department participated in multiple hardware and software projects. To keep hardware current, the department upgraded and replaced the Court's internal intranet web server. A network server was added to meet the surveillance needs of Court of Appeals Hall. In addition, I.T. began to consolidate remote network servers, moving toward a more centralized solution.

The Court's electronic mail system was upgraded and expanded from a closed internal system to a more readily available worldwide system. The department also assisted the Office of Court Administration in implementing and training Court staff in the new employee time-management system.

Software and hardware training is provided as needed, within the Courthouse or via outside agencies. A hands-on help desk assists employees with hardware and software issues as they arise. Calls to the help desk numbered approximately 300 for the year.

K. Security Services

Comprised of uniformed court officers and certified building guards, the Court's Security Department performs a variety of functions, including screening all visitors, mail and packages entering Court of Appeals Hall and conducting regular patrols of the Courthouse and its immediate surroundings. During 2005, staff members participated in various security training sessions, including court officer certification training and firearms requalification. New members of the building guard staff were certified in mandatory security guard training. During

2005, the Fire and Safety Committee continued to monitor building safety requirements in all Court locations. Security Attendants maintain first aid equipment and a cardiac automatic defibrillator for the protection of Judges, staff and visitors, and are trained to administer CPR and first aid to ill and injured staff and visitors.

I acknowledge with appreciation the presence and professionalism of the State Police Investigators assigned to Court of Appeals Hall in 2005.

L. Personnel

The following personnel changes occurred during 2005:

APPOINTMENTS:

Shaw, Linda M. - was employed as Court Building Guard in January 2005.

Atwell, Angela M. - was employed as Service Aide in April 2005.

Heaney, Denise C. - was employed as Security Attendant, Court of Appeals in April 2005.

Doyle, John E. - was employed as Security Attendant, Court of Appeals in May 2005.

Bauman, Susan R. - was employed as Local Area Network Administrator in June 2005.

Leonard, Donna M. - was employed as Court Building Guard in August 2005.

Strait, Donald R. - was employed as Court Building Guard in August 2005.

VanDeloo, James F. - was employed as Assistant Building Superintendent I in September 2005.

Austin, Louis C. - was employed as Court Building Guard in November 2005.

PROMOTIONS:

Warenchak, Andrew R. - was promoted to Principal Custodial Aide in March 2005.

Byrne, Cynthia D. - was promoted to Criminal Leave Applications Clerk in April 2005.

Lawrence, Bryan D. - was promoted to Principal PC Analyst in May 2005.

Davis, Heather A. - was promoted to Chief Motion Clerk in June 2005.

Shaw, Linda M. - was promoted to Senior Court Building Guard in July 2005 and to Stenographer, Court of Appeals in August 2005.

Atwell, Angela M. - was promoted to Senior Service Aide in October 2005.

Doyle, John E. - was promoted to Senior Security Attendant, Court of Appeals in November 2005.

Heaney, Denise C. - was promoted to Senior Security Attendant, Court of Appeals in November 2005.

RESIGNATIONS and RETIREMENTS:

Conklin, Elmer - Clerical Assistant, Court of Appeals, retired on January 26, 2005.

Capitini, Lori Ann - Security Attendant, Court of Appeals, resigned on March 9, 2005.

DiLeva, Terry J. - Criminal Leave Applications Clerk, retired on April 16, 2005.

Goldstein, Scott A. - Senior Security Attendant, Court of Appeals, resigned on May 5, 2005.

Aiardo, Suzanne - Chief Motion Clerk, retired on May 31, 2005.

Kleemann, Sarah W. - Principal PC Analyst, retired on May 31, 2005.

Faulkner, Cedric K. - Court Attendant, Court of Appeals, retired on June 30, 2005.

Muller, Joseph J. - Senior Assistant Building Superintendent, resigned on July 11, 2005.

Kehn, Patricia Ann - Principal Stenographer, Court of Appeals, retired on July 29, 2005.

Paglia, Paul J. - Senior Court Building Guard, resigned on September 26, 2005.

Wasielewski, John P. - Chief Security Attendant, Court of Appeals, resigned on November 30, 2005.

Hurd, Cindy J. - Senior Court Building Guard, resigned on December 1, 2005.

III. 2005: Year in Review

This section presents a snapshot of Court of Appeals decisions handed down in 2005. These decisions highlight the range of constitutional, statutory, regulatory and common-law issues reaching the Court each year.

Constitutional Law

New York Civ. Liberties Union v State of New York (4 NY3d 175)

The Court upheld the dismissal of a complaint involving 27 public schools around the State, concluding that a claim under the Education Article of the State Constitution requires an allegation of school district-wide failure, not merely of deficiencies in individual schools. The Court reasoned that a contrary rule would subvert principles of local control enshrined in the Constitution.

Maybee v State of New York (4 NY3d 415)

Article III, § 14 of the State Constitution requires a three-day waiting period between presentation of a bill to the Legislature and a vote on the bill. The Governor may bypass the waiting period, however, by certifying facts that, in his or her opinion, necessitate an immediate vote. In this case, plaintiff sought to invalidate a bill on the ground that the facts stated in the certificate were insufficient to justify immediate legislative action. Looking to its prior decisions on this question and to the history of the constitutional provision, the Court held that the factual sufficiency of the certificate was to be determined by the legislative and executive branches, and that a determination of sufficiency was not a matter subject to judicial review.

Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003 (4 NY3d 665)

The constitutional privilege against compelled self-incrimination is personal, i.e., it cannot be invoked on behalf of any organization, such as a corporation (*see United States v White*, 322 US 694, 699 [1944]). In this case, individual partners of a small law firm sought to invoke the privilege against compelled self-incrimination in response to a grand jury subpoena duces tecum, served upon the custodian of records of the firm, seeking production of firm records and statements. Adopting the United States Supreme Court's decision in *Bellis v United States* (417 US 85, 88 [1974]), the Court of Appeals held that "an individual partner of a law firm, whose firm was served with a subpoena duces tecum seeking the production of firm records, cannot rely on the constitutional privilege against compelled self-incrimination 'to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records incriminate him personally.'"

Court Tel. Network LLC v State of New York (5 NY3d 222)

The Court held that Civil Rights Law § 52, which prohibits television cameras and other audiovisual coverage in the courtroom during trial court proceedings, did not violate either the First Amendment of the United States Constitution or article I, section 8 of the New York State

Constitution. There was no denial to the press of access to court proceedings, because the press does not have rights to court proceedings superior to those of the general public.

Dalton v Pataki; Karr v Pataki (5 NY3d 243, *cert denied* __ US __, 126 S Ct 742)

Addressing the constitutional validity of commercial gambling, the Court of Appeals held that the Indian Gaming Regulatory Act of 1988 (IGRA) preempts State law and that, since the State allows certain types of Class III gaming for charitable purposes, such gaming must be permitted on Indian land when appropriately authorized by tribal ordinance and conducted according to a tribal-State compact. The Court further held that video lottery gaming is a valid lottery within the meaning of the New York State Constitution. The reinvestment of net proceeds from video lottery terminals (VLTs) also is constitutional. The Court likewise held the Mega Millions lottery constitutional because the State operates that lottery within the meaning of the Constitution, and its proceeds were properly applied exclusively for the support of education within the State.

Election Law

Matter of McGuire v Gamache (5 NY3d 444)

In this Election Law § 16-102 proceeding, the Court extended its holding in *Matter of LaBrake v Dukes* (99 NY2d 913 [2001]) -- that State residents who do not live in the same district as the candidate they support have a constitutional right to circulate designating petitions for that candidate -- to independent nominating petitions. The Court noted the need for the Legislature to amend the preprinted subscribing witness statement on petition forms to facilitate the inclusion of non-resident witnesses.

Public Officers Law

Matter of New York Times Co. v City of N.Y. Fire Dept. (4 NY3d 477)

The New York *Times* requested under the New York Freedom of Information Law (FOIL) (Public Officers Law article 6) that the New York City Fire Department disclose tapes and transcripts of certain conversations that occurred on and shortly after the events of September 11, 2001, but the Fire Department denied those requests in part. The *Times* brought a special proceeding to compel disclosure. The case required the Court of Appeals to consider the applicability of several exceptions to FOIL. With respect to 911 calls made on September 11, the Court held that FOIL's privacy exception could prevent disclosure of words spoken by the callers even if the callers had died, unless their families had requested disclosure. The Court determined that in this circumstance the privacy interest outweighed the significant public interest in disclosure of the 911 calls. With respect to dispatch calls within the Fire Department's internal communications system, the Court held applicable the FOIL exception that protects intra-agency materials because an opinion expressed in a dispatch call, even though not made in an official policy meeting or a memorandum, was nonetheless the sort of statement that should be protected from the chilling prospect of public disclosure. With respect to oral history interviews given by firefighters in the days following September 11, the Court held that neither

the privacy nor the intra-agency exception would prevent disclosure because the record suggested the understanding that these oral histories were destined for public disclosure.

Matter of Newsday, Inc. v State Dept. of Transp. (5 NY3d 84, *cert dismissed* __ US __, 126 S Ct 410)

Federal law requires states to maintain priority lists of hazardous intersections and locations, but provides, in 23 USC § 409, that those records are exempt from discovery and inadmissible as evidence in lawsuits arising out of traffic accidents. *Newsday* sought disclosure of those records under FOIL. Although FOIL provides an exception for records that "are specifically exempted from disclosure by state or federal statute" (Public Officers Law § 87 [2] [a]), the Court granted *Newsday* the disclosure it sought, holding that 23 USC § 409, which exempts items from discovery in litigation only, rather than from disclosure in all contexts, does not fit within the FOIL exception.

Matter of Beechwood Restorative Care Ctr. v Signor (5 NY3d 435)

After the Department of Health failed to timely and fully respond to FOIL requests submitted by a nursing home, the facility sought attorneys' fees under FOIL and the New York State Equal Access to Justice Act (CPLR article 86). The Court of Appeals clarified that attorneys' fee claims stemming from FOIL requests are governed exclusively by FOIL, and upheld the decision denying fees in this case because the records sought were not of "clearly significant interest to the general public" (Public Officers Law § 89[4][c]), a prerequisite to recovery of attorneys' fees under FOIL.

Matter of Perez v City Univ. of N. Y. (5 NY3d 522)

The Court of Appeals held that the Hostos College student-faculty legislative body designated to make policy recommendations and proposals to the City University of New York Board of Trustees and possessing power to appoint members to various committees exercises sufficient governmental functions to bring that body within the purview of the Open Meetings Law (OML) (Public Officers Law article 7) and FOIL. Consequently, the meetings of the body must be open to the public, pursuant to the OML, and the voting cannot be anonymous, pursuant to FOIL.

Death Penalty

People v Shulman (6 NY3d 1)

A jury convicted defendant, a confessed serial killer, of several offenses, including one count of first-degree murder for intentionally causing the death of three women in "separate criminal transactions . . . committed in a similar fashion" (Penal Law § 125.27[1][a][xi]). Because the People filed a notice of intent to seek the death penalty, a separate sentencing proceeding followed in which the jury concluded unanimously that defendant should be executed. By the time the appeal reached the Court, the death penalty was no longer an issue due to the Court's prior decision in *People v LaValle* (3 NY3d 88 [2004]). Defendant still pressed numerous grounds for reversing his convictions, including that the trial court improperly instructed the jury as to the meaning of first-degree "similar fashion" murder. Defendant argued

that the trial court erred by rejecting his request to instruct the jurors to disregard his postmortem conduct (specifically, the mode of dismembering and discarding his victims' bodies) when determining whether the committed first-degree "similar fashion" murder. According to defendant, the element of "similar fashion" could be established only by reference to the "nature and type of injuries" inflicted and the "instrumentality that was used or not used" when committing the crime. The Court concluded that there was no reason to hold that similarity had to be shown by the act of killing alone. What counted was the similarity of the conduct, not whether it occurred before or after the victim's death. The Court rejected defendant's other arguments as well, and affirmed his convictions.

Criminal Law

People v Nazario (4 NY3d 70)

In this case, the Court of Appeals held that defendant's right to a public trial had been violated when the trial court, after deciding it necessary to close the courtroom, refused to allow defendant's drug counselor to remain without inquiring as to defendant's relationship with his drug counselor. The Court agreed that the prosecution does not bear the burden of showing the need to exclude a proposed spectator where that person is not a family member. But where a defendant has shown that the proposed spectator could provide the kind of moral and emotional support that might be expected from a family member, the trial court should admit that spectator to the closed courtroom unless the prosecution shows a specific reason for exclusion.

People v Hardy (4 NY3d 192)

Applying the recent United States Supreme Court decision in *Crawford v Washington* (541 US 36 [2004]), the Court overruled *People v Thomas* (68 NY2d 194 [1986]) to hold that allowing an unavailable co-defendant's statements -- made in a plea allocution -- into evidence violated the Confrontation Clause because those statements were not subject to cross-examination. The Court reversed defendant's conviction because the error in admitting the co-defendant's allocution was not harmless beyond a reasonable doubt.

People v Catu (4 NY3d 242)

The Court of Appeals held that post-release supervision is a direct consequence of a criminal conviction, and that a guilty plea entered without advice from the court concerning such supervision must be vacated as involuntary without the need to show that defendant would not have pleaded guilty had the advice been given.

People v Pitts; People v Barnwell (4 NY3d 303)

In unrelated rape cases, defendants brought post-conviction motions under the original version of CPL 440.30(1-a), long after their respective direct appeals were exhausted, requesting forensic DNA testing on evidence recovered in connection with the crimes of which they were accused. The Court held there is no time limit for bringing a post-conviction motion requesting the performance of forensic DNA testing; a defendant may move for DNA testing at any time (CPL 440.30[1-a]). Additionally, since the People serve as the gatekeeper of evidence recovered in connection with a crime or at a crime scene, defendant does not bear the burden of showing

that the specified DNA evidence exists and is available in quantities suitable to make testing feasible; that burden rests with the People.

People v Aiken (4 NY3d 324)

In this manslaughter case, the Court held that the doorway in a multi-unit building between an apartment and the building's common hallway is not part of an individual's dwelling for purposes of self-defense. Accordingly, if attacked while in such a doorway, a person has a duty to retreat prior to resorting to the use of defensive deadly force.

People v Combest (4 NY3d 341)

Defendant attempted to subpoena a videotape of his police interrogation, which had been filmed by a documentary production company making a television series about the police precinct where defendant was questioned. The Court of Appeals determined that defendant overcame the journalist's privilege in nonconfidential information, codified in the Shield Law (Civil Rights Law § 79-h[c]), because the videotape he sought was highly material and necessary to his defense.

People v Williams (4 NY3d 535)

This criminal prosecution arose after defendant was stopped for a traffic infraction by two Buffalo Housing Authority officers on a roadway outside the officers' geographical jurisdiction. The Court rejected the People's argument that the stop and subsequent arrest should be upheld as a citizen's arrest under CPL 140.30, holding that a police or peace officer acting under color of law and with all the accouterments of official authority cannot effect a citizen's arrest.

People v Van Buren (4 NY3d 640)

The Court was called upon to define the authority of the New York City Department of Environmental Protection Water Supply Police in areas located within the city watershed but outside New York City. Considering the history of this specialized police force and its mission, the Court concluded that DEP officers have full authority to protect the public within the watershed, which includes the power to issue speeding tickets, even though such activity is not their core function.

People v Rivera (5 NY3d 61, *cert denied* __ US __, 126 S Ct 564)

Here, the Court of Appeals rejected defendant's challenge to the judge's determination of his persistent felony offender sentence. The Court held that the statute required all relevant facts to be found by a jury, as constitutionally required, and that the statutory procedure requiring the judge to set the sentence based on stated criteria did not violate the right to a jury trial because no judicial fact finding was required before the judge adopted a sentence.

People v Paulman (5 NY3d 122)

In a case involving successive interrogations of a defendant by police, the Court concluded that the failure to give *Miranda* warnings prior to eliciting one of the statements did not require suppression of the remainder. The Court adhered to the rule first articulated in *People v Chapple* (38 NY2d 112 [1975]) that suppression is warranted where an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a single

continuous chain of events, but not when there is a definite and pronounced break in the interrogation that dissipates the taint from the preceding *Miranda* violation.

People v Caban (5 NY3d 143)

In analyzing various out-of-court statements made by co-conspirators, the Court explicated the distinction between hearsay and nonhearsay declarations. The Court also rejected defendant's claim of ineffective assistance of counsel, explaining that the State constitutional standard for ineffective assistance, which requires meaningful representation, affords greater protection than its federal counterpart.

Matter of Katherine B. v Cataldo (5 NY3d 196)

Petitioners participated in a disruptive political demonstration in midtown Manhattan, staged at the height of the morning rush hour. A jury found them guilty of one count of obstructing governmental administration in the second degree and two counts of disorderly conduct. In connection with formulating sentencing recommendations, the People successfully moved ex parte under CPL 160.50(1)(d) to unseal orders related to petitioners' prior acts of civil disobedience. That statute provides that records sealed upon termination of a criminal action in favor of the accused may be made available to a law enforcement agency upon a demonstration that justice so requires. The Court of Appeals determined that the exception permitting unsealing does not authorize a superior court to make sealed records available to a prosecutor for purposes of making sentencing recommendations in a subsequent criminal action involving the accused.

People v Gomez (5 NY3d 416)

The issue presented in this appeal was whether a motorist's general consent to search the automobile he was driving permitted a police officer to pry open the floorboard covering the fuel tank. Distinguishing the issue of consent from that of probable cause, the Court held that a general consent alone does not justify a destructive search. Where probable cause does not exist, an officer must seek specific consent prior to inflicting damage that would necessitate substantial repair to the automobile.

People v Green (5 NY3d 538)

The Court ruled that a defendant in a robbery prosecution is not entitled to a specific jury instruction on the claim-of-right defense, regardless of the nature of the property taken, because the Legislature limited the statutory defense to prosecutions for larceny by trespass and embezzlement, and the Legislature did not want to encourage forceful self-help.

People v Carvajal (6 NY3d 305)

In a case where both the defendant and the drugs were located in California, the Court concluded there was sufficient New York conduct to establish a conspiracy to commit first-degree criminal possession of a controlled substance, and that jurisdiction over the underlying substantive offenses was therefore properly obtained in this State.

People v Robbins (5 NY3d 556)

The Court of Appeals ruled that satisfaction of the requirement that a sale have occurred within a 1000-foot distance from a school (which elevates the degree of a drug-sale crime) is to

be measured, not as a pedestrian would actually walk to the school, but rather in a straight line "as the crow flies." Accordingly, the trial court in this case did not err in permitting the prosecution to use the Pythagorean theorem to calculate the relevant distance.

People v Jacobs (6 NY3d 188)

The Court held that a criminal defendant who was unknowingly represented at trial by both an admitted attorney and a person unlicensed to practice law must show prejudice before his or her conviction will be reversed. In this case, because the nonlawyer's participation was minimal and the admitted attorney was present throughout the trial, the conviction was affirmed.

People v Suarez; People v McPherson (6 NY3d 202)

Speaking again to a recurring issue, the Court of Appeals made clear that depraved indifference murder is not a fallback crime for intentional murder, and may not properly be charged in the overwhelming majority of homicide prosecutions. Rather, the depraved indifference murder statute requires that the killing be committed under circumstances evincing depraved indifference to human life -- that is, through cruel or callous conduct reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts.

People v Turner (5 NY3d 476)

In this case, trial counsel failed to raise a statute of limitations defense to submission of a manslaughter count, and appellate counsel then failed to raise a claim of ineffective assistance of trial counsel. Reasoning that the statute of limitations defense was a winning argument, the Court held that this was the rare case in which a single lapse by otherwise competent counsel leads to the conclusion that a defendant was deprived of his constitutional right to effective assistance of counsel. The Court concluded both counsel had committed such a lapse, rejecting the People's argument that trial counsel was not ineffective because a reasonable attorney might have welcomed submission of the manslaughter count.

People v Goldstein (6 NY3d 119)

This appeal required the Court of Appeals to determine whether the admission of statements obtained from non-testifying witnesses by a prosecution forensic psychiatric expert violated the Confrontation Clause of the United States Constitution. In *Crawford v Washington* (541 US 36 [2004]), the Supreme Court of the United States established that the Confrontation Clause generally prohibits the introduction of "testimonial" hearsay, even if the hearsay statements are reliable, unless the hearsay declarant is subject to cross-examination. Here, the Court held that the witness interviews, conducted by an expert retained by the prosecution to testify at trial, were not materially distinguishable from interviews conducted by investigating officers in *Crawford.* Admission of the hearsay statements of the interviewees had, therefore, violated the Confrontation Clause.

Native American Law

People v Patterson (5 NY3d 91, *cert denied* __ US __, 126 S Ct 1045)

In a prosecution for fishing with an improperly tagged ice-fishing tip-up, defendant asserted that as a member of the Tuscarora Indian Nation, he had treaty-based fishing rights. The Court held that the Treaty of Canandaigua did not protect Native American fishing rights off reservation lands, and affirmed the conviction.

Civil Practice

Andrew Greenberg, Inc. v Sir-Tech Software, Inc. (4 NY3d 185)

In an appeal concerning New York's long-arm statute, the Court held that, under CPLR 302(a)(1), a non-domiciliary successor to a New York business could be deemed to be transacting business in the State so as to allow a New York court to exercise personal jurisdiction.

Matter of National Gypsum Co., Inc. v Assessor of Town of Tonawanda (4 NY3d 680)

CPLR 403(a) provides that "[a] notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition." In this tax certiorari proceeding, petitioner inserted an appropriate time and place on its notice of petition for the hearing; however, court personnel changed the petition return date after a Supreme Court Justice was assigned. The Court of Appeals determined that, under the particular circumstances of this case, petitioner fully complied with CPLR 403(a). Reasoning that "[a]ny other interpretation of the statute would be patently unfair to a party attempting to commence such a proceeding," the Court held that the notice of petition was not jurisdictionally defective.

Iacovangelo v Shepherd (5 NY3d 184)

In *Addesso v Shemtob* (70 NY2d 689 [1987]), the Court held that where a defendant files a motion to dismiss without raising the defense of lack of personal jurisdiction, the defense is waived under the CPLR. In this case, defendants omitted the jurisdictional defense not from a motion but from their answer; defendants then served an amended answer that included the defense before the time for amending the answer without leave of court had expired. Approving of the reasoning in *Solarino v Noble* (55 Misc 2d 429 [1967]), the Court held that defendants had not waived their jurisdictional defense.

Arbitration

Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp. (4 NY3d 247)

In this matter, a building owner and contractor entered into a contract for waterproofing and masonry work that provided for arbitration of any dispute. Belatedly, the building owner discovered cracks in the work and commenced an arbitration proceeding. The contractor challenged the proceeding as untimely because it was initiated after the applicable six-year statute of limitations had expired. The building owner asserted that the matter was governed by the Federal Arbitration Act ("FAA"). The Court of Appeals reasoned that the FAA covers a

contract that evidences a transaction "affecting commerce." This contract concerned a project involving numerous out-of-State entities. The Court held that the contract was governed by the FAA which, as the Court also determined, provides that timeliness is an issue to be decided by the arbitrator.

Torts

Toefer v Long Is. R.R.; Marvin v Korean Air, Inc. (4 NY3d 399)

In these two cases, the Court determined that Labor Law § 240(1) does not permit a plaintiff to recover for injuries sustained in a fall from the surface of a flat-bed truck. Labor Law § 240(1) requires an employer to provide safety devices to protect workers against the extraordinary risks involved when work must be performed at an elevated height. The truck beds, which sat only four or five feet from the ground, did not present the type of elevation-related risks against which the statute protects.

Tikhonova v Ford Motor Co. (4 NY3d 621)

The owner of a motor vehicle is liable, under Vehicle and Traffic Law § 388, for the negligence of a diplomat whom it permits to drive the vehicle, even though the diplomat would be immune from suit. Moreover, 28 USC § 1364 is not an exclusive remedy that restricts a plaintiff to a federal court action against the diplomat's insurance carrier.

Sheppard-Mobley v King (4 NY3d 627)

In *Broadnax v Gonzalez* and *Fahey v Canino* (2 NY3d 148 [2004]), the Court of Appeals had held that medical malpractice resulting in a miscarriage or stillbirth must be construed as a violation of the duty of care to the expectant mother, entitling her to damages for emotional distress. In this case, an expectant mother, whose fetus was born alive despite sustaining devastating injuries *in utero* due to alleged medical malpractice, sought to recover damages for emotional harm related to the injuries suffered by the child. The Court held that, under *Broadnax* and *Fahey*, she could not recover such damages. The child born alive could recover for its injuries.

Matter of New York City Asbestos Litigation (5 NY3d 486)

The issue on this appeal was whether the Port Authority of New York and New Jersey owed a duty of care to plaintiff-wife, who was allegedly injured by exposure to asbestos dust that her husband, a Port Authority employee, introduced into the family home on soiled work clothes the wife had laundered. Relying significantly on its recent decision in *Hamilton v Beretta U.S.A. Corp.* (96 NY2d 222 [2001]), the Court concluded that the Port Authority's duty as both employer and landowner was limited to its employee and did not extend to his spouse.

Gilson v Metropolitan Opera (5 NY3d 574)

While returning to his seat in a dimly-lit theater during an opera performance, an elderly and apparently infirm patron fell into plaintiff, causing her injury. Plaintiff alleged that the theater's duty to protect its patrons extended to protecting her from the patron who fell, and that

this duty was breached by the theater's failure to escort the elderly patron to his seat in violation of the theater's internal policy. The Court held that a theater's duty to protect its patrons does not bestow upon the theater a duty to escort patrons to their seats in a dimly-lit theater, regardless of the apparent condition of the patron, and that the theater's internal policy does not create a duty above that required by ordinary care.

Copyright Law

Capitol Records, Inc. v Naxos of Am., Inc. (4 NY3d 540)

In this dispute between two record companies, the Court answered a question from the United States Court of Appeals for the Second Circuit asking whether there is common-law copyright protection in New York for sound recordings made prior to 1972. Detailing the history of the development of copyright law from the 15th century forward, the Court concluded that New York law provides copyright protection to such recordings, which protection will continue until preempted by the Federal Copyright Act in February 2067.

Matrimonial Law

Chen v Fischer (6 NY3d 94)

The Court of Appeals determined that personal injury tort actions and divorce actions do not form the basis of a convenient unit for trial, and it would not be within the reasonable expectations of the parties that such cases would be tried together. The Court recognized that policy considerations also supported separating the two types of actions in order to accomplish the goal of expediting divorce proceedings. Although the plaintiff's personal injury claim could have been litigated along with the matrimonial action, the subsequent personal injury action was not barred by res judicata, as the fault allegations in the matrimonial action had been withdrawn by stipulation of the parties.

Estates and Trusts

Matter of Hunter (4 NY3d 260)

In this case involving the multi-million dollar estate of a Rochester resident who died in 1972, the Court of Appeals held that the doctrine of res judicata can be applied to trust and estate proceedings and concluded, under the circumstances of this case, that objectants were barred from litigating issues they could have raised in a 1977 proceeding settling the estate account and in a 1981 trust accounting proceeding.

Zoning Law

Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of the Town of Moreau (5 NY3d 407)

Reaffirming its holding in *Cornell University v Bagnardi* (68 NY2d 585 [1986]) that a church or school seeking to expand its facilities in a residential neighborhood is not required to establish a "need to expand," the Court explained that if, after weighing the religious or educational use against neighboring land uses, zoning officials conclude that the proposed use will detract from the public health, safety or welfare, a limited special use permit mitigating the impact of the expansion may be issued.

Landlord Tenant Law

Thornton v Baron (5 NY3d 175)

In an effort to circumvent the rent stabilization law, the owner of a Manhattan residential apartment building (the Apthorp) entered into a lease that falsely provided that the subject apartment would not be used as a primary residence. The Court determined that, although the statute of limitations applicable to rent overcharges prohibits a challenge to a rent registration statement filed more than four years before the bringing of a complaint, a statement reflecting an illegal rent charged in an illusory lease is a nullity and cannot be used to fix the stabilized rent. In that circumstance, the prospective rent must be established based on a default formula used by the Division of Housing and Community Renewal.

KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. and Community Renewal (5 NY3d 303)

In this case, the Court addressed whether former Mitchell-Lama buildings are subject to rent stabilization by the Rent Stabilization Law of 1969 (RSL) or the Emergency Tenant Protection Act of 1974 (ETPA). Constructed in 1967 and 1968, the buildings left the Mitchell-Lama program in 1998, and the owners sought rent increases pursuant to ETPA for "unique and peculiar" rent adjustments, which took into account market rates for similar units in surrounding areas. DHCR rejected the owners' applications, and argued that the buildings were subject to rent stabilization by virtue of the RSL and that the landlord would be required to apply for rent increases under the Rent Stabilization Code and receive less than under EPTA. The Court of Appeals reasoned that when the buildings were built, they were exempt from the RSL, but the Legislature intended that those buildings remain within the rent stabilization system upon withdrawing from Mitchell-Lama. Those units vacated after July 1, 1971, however, were subject to the RSL by virtue of ETPA due to the Vacancy Decontrol Law of 1971 and subsequent ETPA enactment. Therefore, units vacant after July 1, 1971 were subject to ETPA and "unique and peculiar" rent adjustments.

Entitlement Programs

Matter of Visiting Nurse Serv. of N. Y. Home Care v New York State Dept. of Health (5 NY3d 499)

Interpreting and applying Department of Health regulations, the Court of Appeals held that a home health care provider is entitled to notice and an opportunity to be heard before the Department may recoup Medicaid overpayments the Department claims were improperly paid to the provider. The Court clarified that, at the overpayment proceeding, the burden is on the provider to establish that it timely sought reimbursement and properly determined which funding program (Medicaid or Medicare) covered the services provided.

Insurance Law

State Farm Mut. Auto. Ins. Co. v Mallela (4 NY3d 313)

On a certified question from the United States Court of Appeals for the Second Circuit, the Court held that when patients have assigned their claims to a fraudulently incorporated entity, the insurance carrier need not pay that entity for medical services provided to the patient.

Rekemeyer v State Farm Mut. Auto. Ins. Co. (4 NY3d 468)

Re-examining the "no-prejudice rule" in the supplementary uninsured/underinsured motorist context, the Court of Appeals held that where a plaintiff has given its insurer timely notice of an accident, the insurer must show prejudice from a late notice of claim before it will be allowed to disclaim coverage. In this case, because plaintiff had made no-fault claims and the insurer had undertaken an investigation of the accident and had required plaintiff to undergo medical examinations, the insurer must establish prejudice.

Pommells v Perez; Brown v Dunlap; Carrasco v Mendez (4 NY3d 566)

On these appeals, the Court ruled that, in determining whether a plaintiff claiming "serious injury" under the No-Fault Law has raised a triable question of fact on causation, a court may consider additional events that interrupted the chain of causation -- such as subsequent unrelated surgery, pre-existing medical conditions and an unexplained cessation of therapeutic treatment -- in evaluating a defendant's request for dismissal as a matter of law.

Maroney v New York Cent. Mut. Fire Ins. Co. (5 NY3d 467)

This matter focused on whether the policy's "uninsured premises" exclusion precluded coverage for plaintiff's injury because the infant plaintiff was seriously injured on a premises other than the premises insured under the subject policy. The issue was whether the exclusion's requirement that the injury "arise out of" the uninsured premises applied to conduct occurring on the premises that caused the injury or to a condition of the premises that caused injury. The Court held an injury may "arise out of" a premises when the injury-causing conduct is causally related to the purposes for which the premises is used, as well as out of an injury caused by a condition of the premises.

Goldman v Metro. Life Ins. Co.; Franco v Guardian Life Ins. Co. Of Am.; Katz v American Mayflower Life Ins. Co. of N.Y. (5 NY3d 561)

Plaintiffs brought a putative class action suit against insurers for breach of contract, unjust enrichment, and deceptive business practices because the policy date on the respective insurance contracts was set prior to the date of coverage. The policy date governed for purposes of annual renewal. Under the contracts, insureds were offered two payment options: pay at the time of the application and receive temporary coverage until the date of delivery of the policy, or pay at the time of delivery and receive no coverage prior to the date the premium is paid. In all three cases, plaintiffs chose to pay at the time of delivery. The Court of Appeals held that the payment options did not constitute a breach of contract because the policies were clear and unambiguous. Further, a claim for unjust enrichment lies only in quasi-contract cases and not in contract and, thus, the claims for unjust enrichment were dismissed as a matter of law. Finally, the claim for deceptive business practices under General Business Law § 349 was improperly pleaded and was properly dismissed below.

Municipal Corporations Law

Matter of Buffalo Police Benevolent Assn. (City of Buffalo) (4 NY3d 660)

Public employers are statutorily permitted to select any one of the top three candidates for promotion to clerical and secretarial positions, but the Court had previously held that some public employers are permitted to waive that authority and require themselves to select the top-ranked candidate on the list. In this case, the Court held that a police department may not waive its statutory authority to select any of the top three candidates for promotion to detective, and that an arbitrator's award finding such a waiver was contrary to public policy.

Matter of Bello v Roswell Park Cancer Inst. (5 NY3d 170)

Civil Service Law § 77 entitles State employees who have been wrongfully terminated to back pay. In this case, the Court of Appeals held that this provision, which permits compensation without regard to mitigation, does not also provide for an award of predecision interest.

Not-for-Profit Corporation Law

Consumers Union of U.S., Inc. v State of New York (5 NY3d 327)

Plaintiffs challenged legislation authorizing the conversion of a not-for profit health care insurer to a for-profit corporation, arguing that the assets were not going to be used to further the not-for-profit's historic charitable purposes. The Court determined that plaintiffs -- subscribers and organizations that worked with chronically ill individuals -- had standing to prosecute the action solely for purposes of protecting the not-for-profit's assets in light of the Attorney General's, and the not-for-profit board's, inability to pursue their traditional roles as protectors of these assets. Plaintiffs' allegations were, however, insufficient to support their causes of action claiming various constitutional violations, as well as those claiming the board's failure to follow the procedures in the Not-For-Profit Corporation Law and breach of fiduciary duty.

Securities Law

EBC I, Inc. v Goldman, Sachs & Co. (5 NY3d 11)

The unsecured creditors of now-defunct internet-based eToys brought various claims against Goldman, Sachs, the underwriter of its Initial Public Offering (IPO). The Court of Appeals dismissed the claims for breach of contract, professional malpractice and unjust enrichment. However, the Court held that allegations that Goldman, Sachs, which had rendered advice on the setting of the IPO price and had received compensation from investors based on profits on the sale of the shares, created a conflict of interest. Because this conflict of interest, which was not disclosed, could have created an incentive for Goldman, Sachs to advise eToys to set the IPO price artificially low, a cause of action for breach of fiduciary duty was properly pleaded.

AG Capital Funding Partners, LP v State St. Bank & Trust Co. (5 NY3d 582)

This action stemmed from a debt offering by Loewen Group that was underwritten by Salomon Smith Barney and UBS Warburg. Loewen Group ultimately filed for bankruptcy, and the security for the debt was left uncertain as nothing indicated that the Additional Secured Indebtedness Registration Statements (ASIRS) were properly filed and recorded. State Street, the indentured trustee, was sued by the holders of the debt. In response, State Street sued the underwriters and Loewen's counsel, arguing that if a duty to file the ASIRS existed, it was assumed by those parties. The Court of Appeals held it was improper to dismiss State Street's third-party complaint, as industry custom and the documentary evidence indicated that the underwriters and counsel for the issuer may have assumed that duty, regardless whether State Street was contractually obligated to file and record the ASIRS.

Uniform Commercial Code

Regatos v North Fork Bank (5 NY3d 395)

In response to questions certified by the United States Court of Appeals for the Second Circuit, the Court held that commercial bank customers must receive actual notice of electronic funds transfers to trigger the statutory time limit on challenging the transfers, and that the statutory period of one year could not be shortened by agreement.

Contracts

Quantum Corporate Funding, Ltd. v Westway Indus., Inc. (4 NY3d 211)

In this dispute arising from a public works project, the Court held, in accordance with the general rule that claims are transferrable, and given the statute's purpose to protect the financial viability of subcontractors, that State Finance Law § 137 allows the assignee of a subcontractor, including a factor, to sue on a payment bond issued to a general contractor.

Kralik v 239 E. 79th St. Owners Corp. (5 NY3d 54)

Holders of unsold shares in a cooperative apartment corporation are exempt from some of the restrictions applicable to other shareholder-residents -- most notably, the restriction on sublets without the cooperative board's approval, and the payment of a sublet fee. The Court of Appeals concluded that whether plaintiffs were holders of unsold shares was to be determined solely by applying ordinary contract principles to interpret the controlling documents defining the parties' contractual relationship, and not by regulations promulgated by the Attorney General under article 23-A of the General Business Law (the Martin Act). Plaintiffs' compliance with those regulations was not required unless and until plaintiffs offered the apartment's shares for sale to the public and, in that event, only the Attorney General could enforce his regulations.

Remedies

JMD Holding Corp. v Congress Fin. Corp. (4 NY3d 373)

Plaintiff sought to recover a fee defendant charged to its loan account for early termination of the parties' $40 million commercial revolving loan agreement. The Court of Appeals determined that plaintiff failed to satisfy its prima facie burden to show that the early termination fee was an unenforceable penalty rather than an enforceable liquidation of damages. Defendant had terminated the agreement because of plaintiff's multiple breaches, which the Court held were material inasmuch as they deprived defendant of the kind of information that an asset-based lender requires to track the movement and quality of its borrower's collateral, and to determine loan availability accurately. Further, plaintiff did not demonstrate either that damages flowing from a prospective early termination were readily ascertainable at the time the parties entered into the agreement, or that the termination fee was conspicuously disproportionate to these foreseeable losses.

Tax Law

New York Tel. Co. v Supervisor of Town of Oyster Bay (4 NY3d 387)

In this challenge to the town's special ad valorem levy, the Court held that, because plaintiff's telephone poles and wires were situated on land incapable of human occupation and created no refuse of any kind, the town lacked authority to impose a tax for garbage collection.

Huckaby v State Div. of Tax Appeals (4 NY3d 427, *cert denied* __US__, 126 S Ct 546)

This appeal revisited New York's "convenience of the employer" test, which provides that when a nonresident is employed by a New York employer, income derived from work in another state is taxable by New York unless performed out of State for the necessity of the employer. Here, the taxpayer spent roughly 25% of his workdays in New York and 75% of his workdays in Tennessee for his own convenience, and New York taxed 100% of his income. The Court of Appeals upheld the tax as applied to the taxpayer, relying on the statute's direction to tax nonresidents on all New York source income. Further, the tax complied with the due process requirement for a minimal connection because the taxpayer worked in New York 25% of the time, and the income the State sought to tax was rationally related to values connected with the

State in light of the tangible and intangible protections and benefits afforded by the State to the taxpayer and his employer. Equal protection was satisfied because, in distinguishing between those employees who work out of State for personal convenience and those who work out of State as a necessity, New York properly taxed nonresidents only on income sourced to New York, and therefore avoided taxing income derived from interstate commerce.

IV. Appendices

APPENDICES

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11. **Nonjudicial Staff**

APPENDIX 1

JUDGES OF THE COURT OF APPEALS

Hon. Judith S. Kaye
Chief Judge of the Court of Appeals

Hon. George Bundy Smith
Senior Associate Judge of the Court of Appeals

Hon. Carmen Beauchamp Ciparick
Associate Judge of the Court of Appeals

Hon. Albert M. Rosenblatt
Associate Judge of the Court of Appeals

Hon. Victoria A. Graffeo
Associate Judge of the Court of Appeals

Hon. Susan Phillips Read
Associate Judge of the Court of Appeals

Hon. Robert S. Smith
Associate Judge of the Court of Appeals

APPENDIX 2

PERTINENT CLERK'S OFFICE TELEPHONE NUMBERS

Court of Appeals Switchboard: (518) 455-7700

Questions Concerning Motions:
Heather Davis, Esq. (518) 455-7705

Questions Concerning Criminal Leave Applications:
Cynthia D. Byrne (518) 455-7784

Questions Concerning Civil and Criminal Appeals:
James A. Costello, Esq. (518) 455-7702
Susan S. Dautel, Esq. (518) 455-7701

Questions Concerning Attorney Admission and Discipline:
Hope B. Engel, Esq. (518) 455-7758

General Information and Courthouse Tours:
Gary Spencer, Public Information Officer
(518) 455-7711

Court of Appeals Internet web site
http://www.nycourts.gov/courts/appeals

SUMMARY OF TOTAL APPEALS DECIDED IN 2005 BY JURISDICTIONAL PREDICATE
January 1, 2005 through December 31, 2005

BASIS OF JURISDICTION: ALL APPEALS	TYPE OF DISPOSITION					
	Affirmance	**Reversal**	**Modification**	**Dismissal**	**Other**	**Total**
Dissents in Appellate Division	14	2	1	0	0	17
Permission of Court of Appeals or Judge thereof	67	43	9	0	0	119
Permission of Appellate Division or Justice thereof	20	10	4	1	0	35
Constitutional Question	6	1	1	0	0	8
Stipulation for Judgment Absolute	1	0	0	0	0	1
Other	0	0	1[1]	0	15	16[2]
Totals	**108**	**56**	**16**	**1**	**15**	**196**

BASIS OF JURISDICTION: CIVIL APPEALS	TYPE OF DISPOSITION					
	Affirmance	**Reversal**	**Modification**	**Dismissal**	**Other**	**Total**
Dissents in Appellate Division	14	2	1	0	0	17
Permission of Court of Appeals	31	31	7	0	0	69
Permission of Appellate Division	15	8	4	0	0	27
Constitutional Question	6	1	1	0	0	8
Stipulation for Judgment Absolute	1	0	0	0	0	1
Other	0	0	0	0	15	15[2]
Totals	**67**	**42**	**13**	**0**	**15**	**137**

BASIS OF JURISDICTION: CRIMINAL APPEALS	TYPE OF DISPOSITION					
	Affirmance	**Reversal**	**Modification**	**Dismissal**	**Other**	**Total**
Permission of Court of Appeals Judge	36	12	2	0	0	50
Permission of Appellate Division Justice	5	2	0	1	0	8
Other	0	0	1[1]	0	0	1[1]
Totals	**41**	**14**	**3**	**1**	**0**	**59**

[1] People v Shulman, capital appeal.
[2] Includes anomalies which did not result in an affirmance, reversal, modification or dismissal (e.g. judicial suspensions, acceptance of a case for review pursuant to Rule 500.27).

APPENDIX 4

COMPARATIVE STATISTICAL ANALYSIS FOR APPEALS DECIDED IN 2005

ALL APPEALS - % CIVIL AND CRIMINAL

	2001	2002	2003	2004	2005
Civil	76% (134 of 176)	62% (109 of 176)	74% (130 of 176)	74% (136 of 185)	70% (137 of 196)
Criminal	24% (42 of 176)	38% (67 of 176)	26% (46 of 176)	26% (49 of 185)	30% (59 of 196)

CIVIL APPEALS - TYPE OF DISPOSITION

	2001	2002	2003	2004	2005
Affirmed	40%	40%	42%	51%	49%
Reversed	37%	37%	32%	33%	31%
Modified	7%	8%	8%	4%	9%
Dismissed after Argument	1%	2%	--	1%	--
Other **(e.g. judicial suspension; Rule 500.27 certified question)**	15%	13%	18%	11%	11%

CRIMINAL APPEALS - TYPE OF DISPOSITION

	2001	2002	2003	2004	2005
Affirmed	69%	69%	67%	76%	69%
Reversed	29%	28%	20%	14%	24%
Modified	2%	1.5%	9%	4%	5%
Dismissed	--	1.5%	4%	6%	2%

CIVIL APPEALS DECIDED - JURISDICTIONAL PREDICATES

	2001	2002	2003	2004	2005
Appellate Division Dissents	11% (14 of 134)	16.5% (18 of 109)	16% (20 of 130)	22.75% (31 of 136)	12.4% (17 of 137)
Court of Appeals Leave Grants	47% (63 of 134)	55% (60 of 109)	50% (65 of 130)	51.5% (70 of 136)	50.4% (69 of 137)
Appellate Division Leave Grants	19% (26 of 134)	8.25% (9 of 109)	7% (9 of 130)	9.5% (13 of 136)	19.7% (27 of 137)
Constitutional Question	6% (8 of 134)	4.5% (5 of 109)	6% (8 of 130)	4.5% (6 of 136)	5.8% (8 of 137)
Stipulation for Judgment Absolute	--	--	--	--	.8% (1 of 137)
CPLR 5601(d)	2% (3 of 134)	3% (3 of 109)	2% (3 of 130)	.75% (1 of 136)	--
Supreme Court Remand	--	--	--	--	--
Judiciary Law § 44	4%[1] (5 of 134)	8.25%[1] (9 of 109)	6%[1] (8 of 130)	3%[1] (4 of 136)	5.1%[1] (7 of 137)
Certified Question from Federal Court (Rule 500.27)	11%[2] (15 of 134)	4.5%[2] (5 of 109)	12%[2] (16 of 130)	8%[2] (11 of 136)	5.8%[2] (8 of 137)
Other	--	--	1% (1 of 130)	--	--

[1] Includes judicial suspension matters
[2] Includes decisions accepting/declining certification

APPENDIX 6

CRIMINAL APPEALS DECIDED - JURISDICTIONAL PREDICATES

	2001	2002	2003	2004	2005
Permission of Court of Appeals Judge	74% (31 of 42)	73.1% (49 of 67)	90% (41 of 46)	65% (32 of 49)	85% (50 of 59)
Permission of Appellate Division Justice	26% (11 of 42)	25.4% (17 of 67)	8% (4 of 46)	29% (14 of 49)	13% (8 of 59)
Other		1.5% (1 of 67)	2% (1 of 46)	6% (3 of 49)	2%[1] (1 of 59)

[1] Includes People v Shulman, capital appeal

MOTION STATISTICS (2001 - 2005)

Motions Undecided as of January 1, 2005 - 118

Motion Numbers Used in 2005 - 1344

Motions Undecided as of December 31, 2005 - 170

Motion Dispositions During 2005 - 1289

	2001	2002	2003	2004	2005
Motion Numbers Used for Calendar Year	1439	1381	1363	1199	1344
Motions Decided for Calendar Year	1474	1352	1377	1222	1289
Motions for leave to appeal	1115*	1013*	1053*	905*	967*
granted	72	71	86	75	61
denied	824	724	774	644	697
dismissed	215	213	187	182	203
withdrawn	4	5	6	4	6
Motions to dismiss appeals	5	10	13	6	6
granted	3	2	7	3	3
denied	2	8	6	2	2
dismissed	0	0	0	0	0
withdrawn	0	0	0	1	1
Sua Sponte and Court's own motion dismissals	102	100	89	98	81
TOTAL DISMISSAL OF APPEALS	105	102	96	101	84
Motions for reargument of appeal	20	11	7	14	21
granted	0	0	0	0	0
Motions for reargument of motion	64	52	59	44	38
granted	1	3	0	1	1
Motions for assignment of counsel	48	40	38	43	44
granted	45	37	36	41	43
Legal Aid	17	10	12	8	10
denied	3	2	2	2	1
dismissed	0	1	0	0	0

APPENDIX 7 (continued)

	2001	2002	2003	2004	2005
Motions to waive rule compliance	4	2	0	1	1
granted	2	1	0	0	0
Motions for poor person status	64	53	82	122	140
granted	1	0	0	0	0
denied	0	0	0	0	1
dismissed	63	53	82	122	139
Motions to vacate dismissal/preclusion	1	1	1	1	1
granted	1	0	0	0	0
Motions for calendar preference	4	3	1	0	4
granted	1	1	0	0	0
Motions for amicus curiae status	110	112	105	93	95
granted	94	91	93	88	93
Motions for Executive Law § 71 Order (AG)	1	3	4	1	0
Motions for leave to intervene	1	1	4	2	2
granted	1	0	1	0	1
Motions to stay/vacate stay	23	21	26	14	22
granted	2	1	2	5	1
denied	2	4	3	0	4
dismissed	19	16	21	9	17
withdrawn	0	0	0	0	0
Motions for CPL 460.30 extension	32	37	37	26	33
granted	26	34	27	24	25
Motions to strike appendix or brief	0	8	5	10	7
granted	0	2	1	2	2
Motions to amend remittiur	2	0	0	0	1
granted	0	0	0	0	0
Motions for miscellaneous relief	20	14	15	14	5
granted	2	1	2	4	1
denied	14	9	8	6	4
dismissed	3	3	5	4	0
withdrawn	1	1	0	0	0
Withdrawals/substitution of counsel	1	0	3	1	2
granted	1	0	3	1	1
denied	0	0	0	0	1

* Because more than one relief request may be decided under a single motion number, the total of decisions by relief requests is greater than the total of motions decided.

CRIMINAL LEAVE APPLICATIONS ENTERTAINED BY COURT OF APPEALS JUDGES

	2001	2002	2003	2004	2005
TOTAL APPLICATIONS ASSIGNED:	2827	2605	2557	2570	2473
TOTAL APPLICATIONS DECIDED[1]:	2840[1]	2724[1]	2601[1]	2644[1]	2383[1]
TOTAL APPLICATIONS GRANTED:	43	46	37	46	42
TOTAL APPLICATIONS DENIED:	2604	2493	2365	2407	2109
TOTAL APPLICATIONS DISMISSED:	187	179	191	176	228
TOTAL APPLICATIONS WITHDRAWN:	6	6	8	15	4
TOTAL PEOPLE'S APPLICATIONS:	62	59	44	48	44
(a) GRANTED:	10	9	4	9	5
(b) DENIED:	49	45	36	33	37
(c) DISMISSED:	1	4	1	1	1
(d) WITHDRAWN:	2	1	3	5	1
AVERAGE NUMBER OF APPLICATIONS ASSIGNED TO EACH JUDGE	404	388[2]	397[3]	367	353
AVERAGE NUMBER OF GRANTS FOR EACH JUDGE	6	7	5	7	6

[1] Includes some applications assigned in previous year.

[2] This average was calculated by dividing the total number of applications assigned during nine and a half months of the year by seven and dividing the total number assigned during two and half months of the year by six, because only six Judges were being assigned for the last two and one half months.

[3] This average was calculated by dividing the total number of applications assigned during five months of the year by seven and dividing the total number assigned during seven months of the year by six, because only six Judges were being assigned for the last seven months.

APPENDIX 9

2005

THRESHOLD REVIEW OF SUBJECT MATTER JURISDICTION BY THE COURT OF APPEALS

SSD (sua sponte dismissal) - Rule 500.10

	2001	2002	2003	2004	2005
Total Number of Inquiry Letters Sent	91	94	76	73	90*
Appeals Withdrawn or Discontinued on Stipulation	5	3	2	4	1
Dismissed by Court sua sponte	64	55	42	53	55
Transferred sua sponte to Appellate Division	2	3	2	1	5
Appeals allowed to proceed in normal course (A final judicial determination of subject matter jurisdiction to be made by the Court after argument or submission)	6	9	3	5	5
Jurisdiction Retained - appeals decided (or withdrawn)	2	0	4	2	1
Inquiries Pending	9	13	14	8	21

* Following inquiry letters sent in For the People Theatres of New York, Inc. v City of New York and Ten's Cabaret, Inc. v City of New York, the Appellate Division, First Department, granted appellants leave to appeal and the Court of Appeals discontinued the review of subject matter jurisdiction.

OFFICE FOR PROFESSIONAL MATTERS STATISTICS

TOPIC	2001	2002	2003	2004	2005
Attorneys Admitted (OCA)[1]	7440	8006	8247	8415	8515
Certificates of Admission	150	82	118	128	119
Clerkship Certificates	4	10	6	10	3
Petitions for Waiver	144	170[2]	149[3]	171[4]	191[5]
Written Inquiries	150	132	93	98	102
Disciplinary Orders/Name Changes	954	1636	796[6]	1469[6]	1375

[1] The Office of Court Administration maintains the Official Register for Attorneys and Counselors at Law (*see* Judiciary Law § 468). The Departments of the Appellate Division oversee the admission and discipline of attorneys and notify the Court as to admission and disciplinary activity (*id.* § 90).

[2] Includes correspondence to eight law schools reviewing their LL.M. programs under Rule 520.6.

[3] Includes correspondence to three law schools reviewing their LL.M. programs under Rule 520.6.

[4] Includes correspondence to three law schools reviewing their LL.M. programs under Rule 520.6.

[5] Includes correspondence to seven law schools reviewing their LL.M. programs under Rule 520.6.

[6] Includes orders involving multiple attorneys' violation of the registration requirements (Judiciary Law § 468-a).

APPENDIX 10

APPENDIX 11

NONJUDICIAL STAFF

Acri, Gabriel - Principal Law Clerk to Judge Ciparick (resigned 3/24/05)

Aiardo, Suzanne - Chief Motion Clerk (retired 5/31/05)

Alexander, Jr., Carroll B. - Senior Court Building Guard

Ali, Vivian - Principal Stenographer, Court of Appeals

Andrews, Barbara J. - Secretary to Judge G. B. Smith

Arnold, Fawn A. - Senior Court Attorney, Court of Appeals

Asiello, John P. - Assistant Consultation Clerk, Court of Appeals

Atwell, Angela M. - Senior Service Aide

Austin, Louis C. - Court Building Guard

Barrett, Sebrina - Senior Court Attorney, Court of Appeals (resigned 8/20/05)

Bauman, Susan R. - Local Area Network Administrator

Benett, Megan Wolfe - Senior Law Clerk to Chief Judge Kaye

Benigno, Veronica Ann O. - Senior Court Attorney, Court of Appeals

Betha, Laury A. - Senior Law Clerk to Judge G. B. Smith

Bezio, Kevin T. - Senior Court Attorney, Court of Appeals (resigned 8/19/05)

Bohannon, Lisa Herriman - Principal Stenographer, Court of Appeals

Bowler, Anne Marie - Principal Law Clerk to Chief Judge Kaye (resigned 8/13/05)

Branch, Jr., Clifton R. - Senior Law Clerk to Judge G. B. Smith

Brousseau, Cara Johnson - Principal Law Clerk to Judge Read

Burstein, Devin J. - Law Clerk to Chief Judge Kaye

Byrne, Cynthia D. - Criminal Leave Applications Clerk

Calacone, Stephen F. - Clerical Research Aide

Capitini, Lori Ann - Security Attendant, Court of Appeals (resigned 3/9/05)

Carro, Christine - Secretary to Judge Ciparick

Choy, Victoria L. - Court Attorney, Court of Appeals

Cleary, Lisa M. - Principal Stenographer, Court of Appeals

Cohen, Stuart M. - Clerk of the Court of Appeals

Coleman, Lillian M. - Principal Custodial Aide

Conklin, Elmer - Clerical Assistant, Court of Appeals (retired 1/26/05)

Conley, Paul F. - Senior Clerical Assistant, Court of Appeals

Costello, James A. - Assistant Deputy Clerk, Court of Appeals

Curley, Maria E. - Principal Law Clerk to Judge Read (resigned 7/1/05)

Dautel, Susan S. - Assistant Deputy Clerk, Court of Appeals

Davis, Heather A. - Chief Motion Clerk

DiLeva, Terry J. - Criminal Leave Applications Clerk (retired 4/16/05)

Donnelly, William E. - Assistant Building Superintendent I

Doyle, John E. - Senior Security Attendant, Court of Appeals

Dragonette, John M. - Senior Court Building Guard

Duncan, Priscilla - Secretary to Judge Read

Dunn, Matthew R. - Principal Law Clerk to Judge Graffeo

Eddy, Margery Corbin - Principal Court Attorney, Court of Appeals

Edwards, Kevin P. - Senior Court Building Guard

Emigh, Brian J. - Building Manager

Engel, Hope B. - Deputy Chief Court Attorney, Court of Appeals; Court Attorney for Professional Matters

Farber, Evan K. - Law Clerk to Judge R. S. Smith

Farrell, Laurence - Deputy Chief Security Attendant, Court of Appeals

Faulkner, Cedric K. - Court Attendant, Court of Appeals (retired 6/30/05)

Fillion, Gail M. - Secretary to Chief Judge Kaye

Fitzpatrick, J. Brian - Director, Court of Appeals Management and Operations

Fitzpatrick, Rosemarie - Assistant Secretary to Chief Judge Kaye

Fitzpatrick, William J. - Assistant Printer, Court of Appeals

Fix-Mossman, Lori E. - Principal Stenographer, Court of Appeals

Fludd, Christopher - Senior Court Building Guard

Fraser, Dionne A. - Law Clerk to Judge G. B. Smith

Gerber, Matthew L. - Senior Security Attendant, Court of Appeals

Gilbert, Marianne - Principal Stenographer, Court of Appeals

Goergen, Erik A. - Court Attorney, Court of Appeals

Goldstein, Scott A. - Senior Security Attendant, Court of Appeals (resigned 5/5/05)

Griggs, Linda M. - Senior Court Attorney, Court of Appeals (resigned 6/10/05)

Groff, Janice L. - Principal Stenographer, Court of Appeals

Haas, Tammy L. - Principal Assistant Building Superintendent

Heaney, Denise C. - Senior Security Attendant, Court of Appeals

Heffron, Elaine J. - Secretary to Judge Graffeo

Herrington, June A. - Principal Stenographer, Court of Appeals

Hurd, Cindy, J. - Senior Court Building Guard (resigned 12/01/05)

Ignazio, Andrea R. -Principal Stenographer, Court of Appeals

Jacobson, Joshua D. - Senior Law Clerk to Judge R. S. Smith (resigned 7/30/05)

Joyce, Jean - Principal Law Clerk to Chief Judge Kaye

Kaplan, David J. - Law Clerk to Judge Ciparick

Kearns, Ronald J. - HVAC Assistant Building Superintendent

Kee, Norman W. - Senior Court Attorney, Court of Appeals

Kehn, Patricia Ann - Principal Stenographer, Court of Appeals (retired 7/29/05)

Kernan, Thomas M. - Senior Court Attorney, Court of Appeals (resigned 8/20/05)

Kerr, Timothy M. - Law Clerk to Judge Rosenblatt

Kleemann, Sarah W. - Principal PC Analyst (retired 5/31/05)

Klein, Andrew W. - Consultation Clerk, Court of Appeals

Kong, Yongjun - Principal Custodial Aide

Lawrence, Bryan D. - Principal PC Analyst

Lawrence, William A. - Senior Court Attorney, Court of Appeals

LeCours, Lisa A. - Principal Law Clerk to Judge Graffeo

Lenart, Margaret S. - Principal Stenographer, Court of Appeals

Leonard, Donna M. - Court Building Guard

Levin, Justin C. - Court Attorney, Court of Appeals

Long, E. Andrew - Court Attorney, Court of Appeals

Long, Justin R. - Senior Law Clerk to Judge Rosenblatt

Lyon, Gordon W. - Law Clerk to Judge Rosenblatt

Maier, Sr., Joseph J. - Assistant Building Superintendent I

Mandelbaum, Robert M. - Principal Law Clerk to Chief Judge Kaye

Mattiske, Kristin A. - Senior Court Attorney, Court of Appeals (resigned 9/10/05)

Mayo, Michael J. - Deputy Building Superintendent

McCormick, Cynthia A. - Management Analyst, Court of Appeals

McCoy, Marjorie S. - Deputy Clerk of the Court of Appeals

McGrath, Paul J. - Chief Court Attorney, Court of Appeals

McMillen, Donna J. - Secretary to the Clerk, Court of Appeals

Mistishen, Barbara B. - Principal Court Attorney, Court of Appeals

Moore, Travis R. - Senior Security Attendant, Court of Appeals

Morales, Emily - Principal Law Clerk to Judge Ciparick (resigned 9/22/05)

Muller, Joseph J. - Senior Assistant Building Superintendent (resigned 7/11/05)

Murray, Elizabeth F. - Chief Legal Reference Attorney, Court of Appeals

O'Friel, Jennifer A. - Principal Law Clerk to Judge Ciparick

Paglia, Paul J. - Senior Court Building Guard (resigned 9/26/05)

Paisley, Daniel J. - Principal Law Clerk to Judge Rosenblatt (resigned 8/20/05)

Pepper, Francis W. - Principal Custodial Aide

Prois, Barbara A. - Court Attorney, Court of Appeals

Quinn, Brian M. - Senior Court Attorney, Court of Appeals

Rajan, Deepa - Principal Law Clerk to Judge R. S. Smith (resigned 7/30/05)

Rath, Gerard S. - Law Clerk to Judge Ciparick

Ravida, Tina - Principal Custodial Aide

Rubinstein, Jason C. - Principal Law Clerk to Judge Rosenblatt (resigned 8/16/05)

Salazar, Dana Lynn - Law Clerk to Judge Read

Seeliger, Bruce - Principal Law Clerk to Judge Read

Shaw, Linda M. - Stenographer, Court of Appeals

Sherwin, Stephen P. - Principal Law Clerk to Judge Graffeo

Shufelt, Sr., Theodore J. - Senior Assistant Building Superintendent

Smith, Reed A. - Law Clerk to Judge R. S. Smith

Somerville, Robert - Senior Court Building Guard

Spencer, Gary H. - Public Information Officer, Court of Appeals

Spiewak, Keith J. - PC Analyst

Steward, Priscilla I. - Law Clerk to Judge G. B. Smith (resigned 4/13/05)

Strait, Donald R. - Court Building Guard

Tierney, Inez M. - Secretary to Judge Rosenblatt

VanDeloo, James F. - Assistant Building Superintendent I

Warenchak, Andrew R. - Principal Custodial Aide

Wasielewski, John P. - Chief Security Attendant, Court of Appeals (resigned 11/30/05)

Welch, Joseph H. - Clerical Assistant, Court of Appeals

Wodzinski, Esther T. - Secretary to Judge R. S. Smith

Yotam, Avshalom - Senior Law Clerk to Judge R. S. Smith