

## Judicial Profile

PHIL SCHATZ

# Hon. Richard C. Wesley U.S. Circuit Judge, U.S. Court of Appeals for the Second Circuit

SECOND CIRCUIT JUDGE Richard C. Wesley jokes that his résumé makes it look like he cannot hold a job. Since graduating from Cornell Law School in 1974, Judge Wesley has been, among other things, a partner in private law practice (doing both criminal and civil cases); a member of the New York State Assembly; a justice of the New York Supreme Court<sup>381</sup> (where he was supervising judge of the Criminal Court); a justice of the Appellate Division, Fourth Department; a

member of the New York Court of Appeals; and a member of the U.S. Court of Appeals for the Second Circuit. This is an extraordinarily broad base of experience, even in the rarified atmosphere of the Second Circuit.

Judge Wesley is a lifelong resident of Livonia, N.Y., a small, semiagricultural community of slightly more than 7,000 people in upstate New York, near Rochester. He and his wife, Kathy, who holds a master's degree in library science and teaches kindergarten at the Livonia Primary School (and is, in her sphere, an even bigger local celebrity than he) have two grown children: Sarah, a third-year student at the University of Buffalo Law School, who will join White & Case after graduation; and Matthew, a mortgage banker in New York City. Both Wesleys are intimately involved in community service. Over the years, they have regularly opened their home to troubled children. Judge Wesley drove the volunteer ambulance until recently and, even though his children have moved on, he still cheers at high school basketball and football games.

Although he is a Republican and bona fide conservative, Judge Wesley's collegiality and respect for the opinions of others has earned him unusually broad bipartisan support. Democratic Gov. Mario Cuomo nominated him to the Fourth Department, and Republican Gov. George Pataki nominated him to the New York Court of Appeals. President Bush nominated him to the Second Circuit, but the choice was applauded by Democratic Sens. Schumer and Clinton as a model for how the appointment process should work. Sen. Clinton wholeheartedly supported Judge Wesley as a "superb jurist" and a person who had, both personally and professionally, sought to improve the quality of justice and the lives of the people who appear before him. Sen. Schumer requested, and received, the unanimous consent of the Senate for the nomination. As Rep. Tom Reynolds observed, "Judge Wesley's devotion to the law transcends partisanship."

The words "enthusiastic," "caring," and "energetic" come up repeatedly in any conversation with people who know and work with Judge Wesley. Rep. Reynolds calls Judge Wesley "good company," and adds "[h]e enjoys the companionship of others regardless of their role; he listens with care to the words of those about him, and he exudes enthusiasm for the community in which he lives [and] he avoids condescension or



the appearance of aloofness.”

Good friend Mike Haugh, former principal of Livonia High School, echoes these comments: “There are no airs about Dick Wesley. Everyone in town knows him as ‘Dick.’ He has an enormous amount of energy and interest in people.”

Sarah Wesley says, “Dad is compassionate and very enthusiastic. He gives his all to everything he does.”

The Myers Foundation shows these characteristics in action. Haugh says that the foundation would never have happened without Judge Wesley’s inspiration and refusal to take no for an answer. In 1989, three teenage Livonia boys were orphaned by their father’s heart attack and mother’s death from cancer. They had limited resources and no nearby relatives. In a brainstorming session with Haugh, Judge Wesley came up with the idea of a foundation to support the boys and organized an enormously successful fund-raiser, with Buffalo Bills quarterback Jim Kelly, for the Myers Foundation. The foundation provided for the boys’ necessities and allowed them to continue to live together in their family home as they completed high school and college. Moreover, the foundation is still active today and has provided emotional and financial support anonymously to more than 40 needy families. “Dick thinks big, and when he gets his mind on a task he just doesn’t stop,” says Haugh. “Our school mascot is a bulldog. Dick Wesley is a true Livonia Bulldog.”

The innovations put into place by Judge Wesley as supervising judge of the criminal court system are yet another example of his hard work and dedication. The system was overburdened and slow, and there was a huge backlog of indictments. In consultation with prosecutors and public defenders, and over considerable skepticism (including some of his own), Judge Wesley instituted programs to simplify pretrial monitoring and evaluation, to expedite discovery and plea offers, and to screen defendants for alternatives to incarceration. The programs significantly reduced the backlog and led to more efficient and fairer prosecutions, and “everyone forgot they were initially skeptical,” says Judge Wesley.

Judge Wesley is very much a product of the New York state appellate system, and bears the imprint of the system’s most admired alumnus, Benjamin Cardozo. His published opinions are scholarly, clear, carefully limited in application to the particular facts before him, true to the spirit of prior precedents, and respectful of legislative prerogatives. “I try to write with clarity and in a style that a layperson can understand,” Judge Wesley explains. “My brother Donald is a principal and English teacher, and when I was at the Court of Appeals I would sometimes send my opinions to him after they were published for his critique and suggestions.” Another spur to clarity comes from his time on the New York Court of Appeals, which has a “strong cultural preference for unanimity. Unanimity provides



The judge and his current law clerks (l to r): Aaron Lavine, Dominick Barbieri, Judge Wesley, Beth Schonmuller, and Brian Feldman.

clarity, and clarity makes precedents of greater use to practitioners and the public.”

The limiting of holdings to particular facts is the conservative impulse of all common-law judges, and one that was sharpened in his time on the Court of Appeals. “Judges Bellacosa and Levine were particularly good at seeing the potentially problematic consequences of dictum — what I call ‘beyond the horizon radar,’” says Judge Wesley. “Loose language is the most dangerous thing in the world.” The same limitation applies to precedents, which must be considered in their specific factual and legal context. “Cases are born in a particular context, and the rule of the case is textured and shaded by that context. For me, at least, it is best to have an appreciation of how a case came before the court and why the court decided the case as it did.” Judge Wesley’s considerable respect for legislative bodies comes out of his time with the assembly. “Judges don’t have access to the data and forces at play when policy is being formulated.” A final notable aspect of Judge Wesley’s style comes from his days as a practicing lawyer before New York Supreme Court (later Appellate Division) Justice David O. Boehm, whom he particularly admires. “When you appeared before Judge Boehm,” Judge Wesley remembers, “you knew that he had read and considered your briefs and really thought about the issues of the case.” Judge Wesley therefore makes a conscious effort in his opinions to fairly state and respond to the arguments he is rejecting. “When I was a lawyer, and the judge really considered and dealt with my arguments, I felt that I got a fair shake out of it, even if the judge disagreed.”

Judge Wesley has become an energetic advocate of judicial clerkships, particularly at his alma mater Cornell Law School, where he has been a jurist in residence. “Clerking is enormously useful, and not only for teaching” because it gives lawyers the “opportu-

nity to see the judicial process behind the veil.” Judge Wesley involves his law clerks in a dialogue about cases — “I spend a lot of time with my clerks discussing the significance of each case, the theories of the parties, and the hot topics of the day” — and forms close bonds that extend well past the clerkship. According to his daughter Sarah, “Law clerks are pretty much incorporated into the extended family the minute they sign on.” Former law clerk Katy Cole, now a litigation associate at Davis Polk & Wardwell in New York City, says that Judge Wesley is an extraordinary teacher who “can explain the most complex concepts in a way that is simple and understandable.” She also notes that the judge takes a genuine interest in his law clerks as people. In addition to getting together with Judge Wesley individually, former clerks bring their families to Livonia every August for a collective clerkship barbecue.

In reaching a decision in a case, Judge Wesley seeks first to “know a case as well as the practitioners.” For this, he says, oral argument is crucial. Although he reads all the briefs personally, “briefs can’t talk back.” A good oral argument provides “a much better appreciation of what a case is actually about.” And oral argument can be outcome determinative: “Oral argument can change my mind much more often than you might expect, something like 15 percent of the cases.” His advice for practitioners is to come to oral argument with a good understanding of both “the case and what you want to accomplish.” When they do, “I love oral argument. It is fun to have a conversation with good advocates who really know their cases.”

Since 1891, when the current Second Circuit was formed, no other judge has served on both the New York State Court of Appeals and the Second Circuit (let alone served on all three state judicial levels and in the state legislature). The two courts are historically among the most respected in the country, but operate differently: “In the New York Court of Appeals, we were always together,” says Judge Wesley, “and we knew everything about each other. I had breakfast with George Bundy Smith every morning. In the Second Circuit, there are fewer opportunities to intersect and interact. We get together for court meetings only four times a year.” The courts are alike, says Judge Wesley, in sharing a strong bond of collegiality and respect for the intellectual abilities and good will of fellow judges, even in cases of profound disagreement: “I assume complete good faith of my colleagues. In all my time on the bench, although I have been involved in many distinct disagreements, I have never had occasion to question the intellectual honesty of another judge.”

Although Judge Wesley brings to the Second Circuit a profound appreciation, born of experience, of the legislative and judicial processes in New York state, his most important qualification may be his infectious good will. Sarah Wesley accredits his enthusiasm and optimism to the pleasure he takes from others and

from his work. In short, “Dad loves his job.” **TFL**

---

*Phil Schatz is a member of Wrobel & Schatz LLP in New York City, where he practices commercial litigation. He has been a member of the Criminal Justice Act Panels for the Southern District of New York and the Second Circuit and is a volunteer mediator for the U.S. District Courts for the Southern and Eastern Districts. He appears frequently before the Second Circuit.*

#### **Endnote**

<sup>1</sup>The names of the various New York state courts can be confusing. The New York Supreme Court is the trial level court — “supreme” because it can hear any case, not because it has the last word. The intermediate, first-level appeals court is the Appellate Division, of which there are four departments. New York’s highest appeals court — the “supreme” court in most nomenclatures — is called the Court of Appeals.