“Meet Your PJ:” Hon. Alan D. Scheinkman, Appellate Division, Second Department

John Caher: The Honorable Alan D. Scheinkman presides over the busiest appellate court in the State of New York and possibly the nation. Last year, the Appellate Division's Second Department took in 4,300 records on appeal. To put that in perspective, the Appellate Division, First Department, in Manhattan took in 2,742. The Appellate Division, Third Department, and Fourth Department, *combined* took in 2,742. The Second Department hears more oral arguments and decides many more motions than any other appellate court in the state.

Welcome to part two of a four-part series, “Meet Your PJ,” created and sponsored by the New York State Judicial Institute. I'm John Caher, senior advisor for strategic communications, and today I'll be chatting with Justice Scheinkman.

Judge Scheinkman was appointed the Presiding Justice by Governor Andrew Cuomo on January 1, 2018. He was previously the Administrative Judge for the Ninth Judicial District and he served an on the Appellate Term and he was a trial judge in state Supreme Court. Justice Scheinkman, thank you for joining us. As I said at the beginning, your court is the busiest in the state. Why is your caseload so enormous?

Justice Scheinkman: John, thank you for giving me the opportunity to chat with you today. When the Appellate Divisions were created in the 1890s the four departments were designed to have roughly similar caseloads. The First Department in Manhattan, which was the most urban part of the state, just had the Bronx. The Second, Third and Fourth departments were comparatively rural counties.

In the Second Department, while Brooklyn may have had a significant urban area, there were parts of Brooklyn that were still rural and the rest of the department was almost entirely rural. Starting particularly in the aftermath of World War II, the population explosion in Queens, Staten Island, Nassau, Suffolk, Westchester, Rockland, Orange Counties into Duchess County has just been remarkable.

As a result, the Second Department now has about one half of the state's population. With that comes business activity and human interaction, so business disputes, zoning matters, divorces, car accidents, criminal offenses. All of these have led to an explosion in our caseload.

John Caher: So, over the decades, there have been various proposals to split the Second Department into two and create a Fifth Department. The devil in the details has always been how to split that into two and who gets what. And can you just speak to whether there is a need for a Fifth Department, without getting into the logistics of how that would look?

Justice Scheinkman: I think there is. At present, with one vacancy, we have 21 judges including myself on the court. It's hard for the court of 21 judges to speak consistently and with one voice without having panel conflicts. We do our best to try to avoid that, but inevitably it does happen. And it's hard particularly now of course with the COVID to get 21 judges around the table to have a discussion about common issues and themes and try to resolve panel inconsistencies.

A smaller court would work. However, to be effective it wouldn't be just dividing the existing 21 judges into a second court. To really accomplish reform there would have to be more judges. If we didn't add more judges then all we'd be doing is rearranging the deck chairs so to speak without really making an improvement. So, I think two smaller courts out of the existing large court would be a help, but only if it was accompanied by an increase in the total number of judges over what we have now.

John Caher: You mentioned panel inconsistencies and I think what you're saying is there's a potential of different panels on the same Appellate Division to come to different conclusions of law.

Justice Scheinkman: Correct.

John Caher: How do you reconcile that internally?

Justice Scheinkman: Well, we actually have a rigorous internal process under which our decisions department reviews all the decisions before they're sent for publication and as a last clear chance I have a regular weekly meeting with representatives from the decisions department, the deputy clerk and two law clerks and the five or six of us, depending upon the composition, and we go through every decision and we sometimes find inconsistencies. Sometimes we even find inconsistencies within decisions within that handout. And then what happens is we hold them back and we ask the panels to get together and take a look.

John Caher: That sounds like a systemic inefficiency.

Justice Scheinkman: Well, it's better than the alternative,which is to put out decisions that are internally inconsistent. What happens is we have a law department that

helps draft proposed decisions and gives us reports and that law department has about 60 people in it and sometimes the law has changed since the attorneys, particularly in backlogged civil appeals, wrote the briefs. Sometimes laws even change since the court attorney initially drafted a report. So, we constantly have to be on the lookout for inconsistencies and I think as a whole we do a very good job of catching things before they go out.

John Caher: I'm sure you do, and by "inefficiency," I meant that because of the volume of the cases, you have to do a whole lot of homework to make sure there isn't any inconsistency.

Justice Scheinkman: It takes a lot. We have a really strong team here and it takes a real team effort to try to put out a quality product. Particularly with our civil cases, the attorneys have been waiting for argument dates and waiting for their decisions and we want to try to get them heard and decided in a timely manner, but we have to balance the need for expedition with the need of making sure that we're getting the final result. You know, you mentioned the thousands of appeals that the Second Department decides and the collective 10,000 or more that the Appellate Divisions decide each year.

The Court of Appeals hears about 200 cases a year, at a maximum. So, even though the Court of Appeals is known, deservedly, as our "supreme" court, as our court of last resort, the fact of the matter is that because they hear about 200 cases a year and the Appellate Divisions hear over 10,000 collectively, the Appellate Divisions are, for most matters, the court of last resort, and we have to respect that. We have to be mindful that people are counting on us to deliver not just a timely decision but a correct decision.

John Caher: And the Court of Appeals is always the same seven judges sitting on the case, so they don't have to worry about panel inconsistencies as you have to deal with all the time.

Justice Scheinkman: That's certainly an advantage. It's the same seven judges and also usually because they're focused on matters of law of statewide importance they're often confronted with cases where there are differences between departments and they have the benefit of looking at competing opinions. We are trying to develop an internal body of law for ourselves, guided of course by matters of federal law, the decisions of the United States Supreme Court, and on matters of state law. Our primary sources of authority are the Court of Appeals and the statutes, as given to us by the state Legislature.

John Caher: How are the panels of judges composed? And is there any attempt to make sure that all of the judges at least some of the time sit with all of the other judges?

Justice Scheinkman: When our clerk, April Agostino, makes up the calendar, she does it primarily first by looking at the scheduling issues that particular judges have, starting in order of seniority. So, when the time comes to set up the calendar, April will come to me and ask me whether, say, it's a given two month period, when I would like to sit or when I would like to avoid sitting. And then I tell her, “Well I have an Administrative Board meeting on such and such a date. I'm unavailable on such a date. These are the days when I want to sit or when I can't sit.”

And then she'll proceed down the seniority list to Judge Mastro and then all the way through to our most junior judge, Judge Wooten. When she has the scheduling requests, she endeavors to accommodate as many judges as possible. Of course, the judges with the most seniority will have the greatest likelihood of having their wishes accommodated. That's one of the benefits of seniority. We endeavor overall to have diversity in our panels in terms of both background and experience.

Background encompasses a number of issues. Some of us are more experienced and have greater knowledge or are known for our expertise in criminal or in certain aspects of civil law and I've frequently been asked, “Why don't you have a special panel that just hears matrimonial cases with judges who have an interest in that? Or criminal cases with judges who just have an interest in that?”

And the problem is two-fold. First, there may be a perception by certain lawyers that some judges have inherent predilections that may make them pro-plaintiff or pro-defendant in particular types of cases and we want to avoid that. Additionally, we are blessed with a diversity in our department of backgrounds both geographic, community and it's important that we bring that diversity to the cases that we hear. So, having a diverse panel where judges come from different communities, from different walks of life with different experiences, helps with that.

Bearing in mind that in our calendars we will have a range of cases in every calendar. Typically, our calendar has criminal cases, Family Court cases, and civil cases of all sorts. So, having a diverse panel helps us deal with our diverse caseload.

John Caher: Now, you most of the time, I believe, sit with four-judge panels, which of course always creates a potential of a tie vote. How often does that happen and what do you when your court is two to two?

Justice Scheinkman: So, the Second Department for decades sits in panels of four and there's a very simple reason for that. Groups of four can hear more cases than groups of five because you can spread the judges out a little better. Four being the constitutionally required quorum. We cannot go below four. I did a paper that the *New York Law Journal* ran a number of years ago called "Finding the Perfect Number," which analyzed the number of times there have been dissents or double dissents in the Appellate Divisions, and there are very, very few.

So, for example, even for the First Department, which sits in panels of five in deciding about 2,500 cases in 2018, they only had 16 cases where there was a single dissent and 16 cases where there were two judges dissenting. So, 32 dissents out of 2,500 or so appeals, a very small number, but it does happen. We have a rule which provides that when a case is submitted for decision, the lawyers, unless they object, are deemed to have consented to our bringing in a fifth judge. And if there is a tie, then a fifth judge is brought in to basically be the tiebreaker.

The lawyers on that case will know who it is because they'll see that there's a fifth name on the decision when that decision comes out. We generally don't have re-arguments when this happens. When a fifth judge is brought in the judge is given, obviously, access to the briefs and records, to the views of the parties and also the judge reviews the videotapes that we have of all of our arguments. So, unless there's some question that the fifth judge would like to ask the lawyers, the judge is fully prepared to then consider and vote, but this is a very rare instance.

John Caher: It sounds like it's not really an issue. So, the judges come out on the bench a certain day to hear X number of cases, then what? How does it get from there to a decision? What's the process?

Justice Scheinkman: So,typically, we hear from 20 to 24 cases a sit. Each judge, unlike the Court of Appeals, where the judges don't know what cases they'll be assigned to report on in advance of the argument, we do. So, on a 20-case calendar, each judge will be assigned to be the reporting judge on five cases. So we start at 10:00, if things go relatively smoothly we're usually done with argument by 1:00 or 2:00. The judges will have a quick lunch together and then we'll retire to begin deliberating. The Justice Presiding—when I sit, I'm always the Justice Presiding—will start by

saying, "Okay, case number one. Judge so and so is reporting on that." And then judge so and so would then lead the discussion on that case.

So, as the JP I would also be reporting on five cases and I know which of the ones I will be reporting on. It really wouldn't work with 20 cases for the judges not to know in advance what they were going to be asked to report on. The Court of Appeals, with a smaller calendar, it's an easier task to manage. I would say that the majority of the cases can be disposed of during the course of the after-argument consultation, meaning that we're all pretty much in agreement as to what should be done.

There are some cases where judges may reserve their votes and say, “Look, I'd like to think about this one and do more research or consider it further.” And those will be held aside for either a supplemental report by the reporting judge or a supplemental decision or a revised decision and occasionally an opinion.

John Caher: How is it decided if there is a written opinion, assigned opinion, a per curiam opinion, or simply a terse order?

Justice Scheinkman: Well, most of our cases are decided by memoranda decisions that are not signed by any particular judge. The reason for that is, with deciding almost 3,500 cases a year, we couldn't possibly write opinions in every single case and many of them don't warrant it. So, those can be disposed of by memoranda. The cases that involve signed opinions usually involve issues of law that need to be thrashed out. Sometimes it's a way that we resolve internal conflicts.

So, for example, we may see in a particular case that there's one line of authority from our court that leads us one way and a different line of authority and we use an opinion as a way of straightening that out and expressing ourselves, and we may say, "Don't follow these cases anymore. This is really our view." Typically, opinions are written by the judge who was the reporting judge. If, however, the reporting judge has a different view than the majority, meaning three judges say we want to do one thing and the reporting judge is in the minority, then the majority writing will be by the senior-most judge in the majority. So that would mean, if I was not the reporting judge on a panel, and we disagreed with the reporting judge, then I would get that writing.

John Caher: Now, what is your personal approach to dissents? Do you dissent every time you disagree or is there a threshold, a standard that will prompt you to publicly break from your colleagues?

Justice Scheinkman: Well, I probably have sat on two or three-thousand appeals as Presiding Justice. I've dissented once because I felt very strongly about that case.

John Caher: But is that the only time you've disagreed?

Justice Scheinkman: There are times when I have not necessarily agreed in its entirety, but the question is, is it going to elucidate an issue of law? And more often than not, we try to accommodate each other, so that if I say, "Look I have a problem with your saying this." Then the majority says, "Well, look, would you go along if we change this to say this?" We try to work with that and occasionally we alter results that way.

Take for example a simple case where we're reviewing a criminal sentence as to whether a sentence is excessive or not. Well, one judge may think that the sentence is excessive and it should be reduced from 10 years to five. Somebody else may say, "Well no it really should be two years." And we'll try to work with each other to try to come up with something that would represent a consensus of our views. We try very much to be a consensus court.

That's not because anybody's cracking the whip and saying you can't speak out of turn. It's really more because we all want to try to get it right and we do have a great deal of mutual respect for the views of our colleagues.

John Caher: To build on that concept I would imagine there are times in conference when the argument gets rather spirited and I wonder how you, as the Presiding Justice, prevent these professional, intellectual, legal disagreements from devolving into personal disagreements.

Justice Scheinkman: Well, I think it was Judge [Richard] Posner,who was a well-known federal judge who sat on the Seventh Circuit and once described being on an appellate court like being in a shotgun marriage in that you get married but you don't get to necessarily choose who you're married to. So here we all wanted to be on the Appellate Division. Some of us were appointed by different governors than others. We all come from different backgrounds, but we all make an effort to be friendly and to not let a professional disagreement get in the way of our personal relationships.

So, one of the things that we do, we do regularly meet. Typically, in a non-COVID setting, meet in person two to three times a month, typically on Wednesdays. And we all sit around and we discuss common issues, we discuss matters relating to the administration of the court and we have

an opportunity during that period to talk about what's going on in our lives, events that we're celebrating.

We invite each other to each other's events. We congratulate each other. If one judge is getting an award the other judges make it a point to try to come and show their support by going to that event. So, we try to support each other in a personal way. If a judge is ill, we try to help that judge out. If there's some circumstance where a judge needs assistance, we all try to help out that judge. So, we have a deep intimate personal connection with each other and that helps tide over professional disagreements that do happen from time to time. It's inevitable. We've got 21 strong-willed personalities, people with clear views and opinions, but we try to forge a consensus.

John Caher: So, I think what you're saying is you're able to disagree without being disagreeable.

Justice Scheinkman: That is our goal and I would tell you that there's no one on the court who I would consider anything other than a dear, dear friend, and part of the experience of being on this court is the opportunity to work so closely with so many fine judges. There isn't anyone here who I wouldn't want to have the opportunity to work with.

John Caher: Well, that's great to hear. Now, how much attention are you able to pay to the work of the other three departments with the volume you have? I mean, it’s entirely possible that the Fourth Department will have addressed a novel issue that is now before you. You mentioned you have a large legal staff, is that part of their responsibility, to monitor what the other departments are doing?

Justice Scheinkman: We are always looking at what the other departments are doing, although I can't say that we are as intimately associated with their internal issues and comparing their cases because I'm sure to some degree they have a similar problem. If the First Department is deciding 2,500 appeals a year, there are going to be times when even sitting in panels of five there are going to be panel disagreements. So, I'm not sure that we're particularly versed with the nuances of what the voting patterns might be in the individual Appellate Divisions, but we are very mindful of what the other Appellate Divisions do.

I would say there are certain subject areas that are probably more sensitive that require us to pay a lot more attention to what the other departments do. For example, attorney disciplinaries. A number of years ago, an effort was made to assure that the procedures and the substance

of the law that's applied to attorney disciplinaries is relatively uniform among the departments. Why should a lawyer who commits an act of professional misconduct in Buffalo have a significantly different sanction than a lawyer who commits that same act of professional misconduct in Smithtown, Long Island?

So, we do pay attention very closely to what the other departments are doing in attorney grievance matters because we know that it's important for the Appellate Divisions to try to be consistent.

John Caher: Now to shift gears a little bit, most of the time a case gets to the Court of Appeals on the permission of the Court of Appeals. Of course, the Appellate Division can also refer a case to the Court of Appeals and basically thrust a case onto the court's lap. This Chief Judge, and really all of them in my memory, were not particularly enamored with that practice. What are the circumstances when your court, the Appellate Division will basically tell the Court of Appeals that they have to take a case?

Justice Scheinkman: So I'm very familiar with this because, as you may know, I served for two years as a law clerk to Judge [Matthew] Jason, who was the Senior Associate Judge of the Court of Appeals and I can remember as a law clerk there was a particular judge on the Appellate Division who was always granting leave in criminal cases and the court was not particularly receptive about a number of the cases that we were getting.

So, I think we have to make a distinction here between civil cases and criminal cases, and in civil cases, we also have to make a distinction between non-final cases and final cases. In an appeal from a final judgment in a civil case, the Court of Appeals has the ability to grant leave to appeal. And while the lawyers can also ask us to grant leave to appeal, we typically will look at it and say, "Well why should we decide that for the Court when the Court can decide that for itself?"

So, typically we're not that receptive to granting leave to appeal in civil cases that involve final judgments. Where there's a non-final judgment, however, meaning let's say for example summary judgment has been denied and somebody wants to take that issue up to the Court of Appeals. The Court of Appeals doesn't have the authority to grant leave and there we will give that consideration because there may be issues in the non-final circumstance that are worthy of the Court of Appeals' consideration.

So, for example, let's suppose that there's a discovery dispute and the discovery dispute involves whether certain materials are subject to attorney/client privilege and that involves a unique legal analysis. That might require the Court of appeals to get involved and so we are more sensitive to granting leave where we are the only authority where we can do so.

On the criminal side, it's a unique problem. A judge of the Appellate Division who sat on the case can grant leave to appeal and a judge of the Court of Appeals can grant leave to appeal, but only one application can be made. So, if somebody asks the Appellate Division justice to grant leave and the judge says “no,” then that person cannot then go to a Court of Appeals judge and say, "I would like leave."

Typically, what lawyers will do is, if there is a dissent in a criminal case in the Appellate Division, the lawyer will go and make the application to the judge who dissented. There, the dissenting judge certainly does have an incentive to say, "Gee I think I was right. My colleagues disagreed with me, why can't I get vindication at the Court of Appeals?" But even there, we try to be sensitive to the fact that we have certain review powers that the Court of Appeals doesn't.

So, for example, at the Appellate Division, we can review weight of the evidence where the Court of Appeals can't. So, if the dissent at the Appellate Division is on a factual issue that the Court of Appeals can't consider, we might say to the lawyer, "Look maybe you might want to make this application to the Court itself rather than to us." So, we try to be respectful of our role in the system and while we do have the authority to do it, we're most likely to grant leave in civil cases involving non-final decisions where no one else can do it but us.

John Caher: I'm sure the chief judge appreciates that. Shifting to your administrative role as a Presiding Justice you are, of course, a member of the Administrative Board, the four PJs and the Chief Judge who make statewide policy. How often are you meeting? What sort of things do you do? What sort of issues do you undertake?

Justice Scheinkman: We typically meet every six to seven weeks. So, over the course of a year, let's say there would be roughly 10 meetings a year. What the agenda typically includes are requests for amendments or changes to the rules, primarily the Rules of the Chief Administrative Judge relating to practice and procedure in the various courts. They also may consist of rule amendments to the Rules of Professional Conduct, which lay the predicate for attorney grievances.

The State Bar Association has had an ongoing project to reform aspects of the Rules of Professional Conduct, so we regularly consider those. We have uniform rules of the Appellate Divisions, so that the Appellate Divisions have made an effort to try to unify their practices. But if those rules need revision, we discuss them first at the Administrative Board level. They're used as an opportunity for the Appellate Division PJs to communicate with each other about issues that they're seeing that affect the other departments and to try to help give the Chief Judge a statewide perspective on matters involving the court system.

They're really educational. My fellow PJs, Judge [Rolando] Acosta, Judge [Elizabeth] Garry, Judge [Gerald]Whalen, I've really gotten to know them very well. Judge [Lawrence] Marks joins us, the Chief Administrative Judge, and of course, the Chief Judge and typically the meeting will be about three or four hours and then we have an opportunity to have lunch together and to talk about common issues and it's really a great learning experience and an invaluable opportunity to exchange ideas and information.

John Caher: Let's shift back to your judicial role. If an attorney is about to argue before your court for the first time, what should they know? Let's give them some inside baseball. What do you want to hear, like to hear, from an attorney — what drives you nuts?

Justice Scheinkman: Okay, the first useful suggestion is, ever since I became Presiding Justice, we have put up on our website the oral arguments that our court has held typically. They're available publicly for up to a year. So, I would say for any first-time attorney who's coming in to argue, watch, and if I'm Presiding, you might want to take a look at other cases that I've sat on and other judges are going to be on. Watch how they do it so you can kind of get a feel for how things go.

That said, every judge comes in really incredibly well prepared for oral argument. Everyone has read the briefs, the salient points of the record, the decision below, and more often than not a staff attorney report, which gives some guidance, and oftentimes as well, the judges may have exchanged views in advance. Typically, we call each other up, "Hey what do you think about this? What do you think about that?" We may exchange emails. I may email another judge in advance of the argument, "What do you think about this issue on this case? What do you think about that issue?"

So, we have the dialogue. So, when the attorneys come in, don't act as if we know nothing about the case. What we want to hear is a cogent

explanation for the party's position. We don't want to be read to, so please don't come in with a yellow pad and start reading. It won't happen that way. Typically, what we try to do is we give an attorney the opportunity to express himself or herself and then typically you get a lot of questions.

Now, we can't give everybody an unlimited amount of time, but we typically allow an attorney, even if the attorney's gotten questions from the get-go. an opportunity to assemble his or her thoughts. It is more likely than not that a respondent will get a question right out of the box rather than get into a pre-existing argument. Lawyers should welcome the opportunity to get a question.

If you don't get a question from the bench that means one of two things—everybody's in complete agreement with what you're saying, or everyone is in complete disagreement with what you're saying. As an advocate, because I had an active appellate practice before I went on the bench, I'd welcome the opportunity to hear from a judge what might be troubling or of concern to that judge. I'd like to know what the judge was thinking about my case.

So, I would welcome the opportunity to discuss it. It is generally not good when you get a question for the lawyer to say, "Well, I was getting to that, let me say this before I get to that." If a judge has a question, it's because the judge wants to know what the attorney's answer is to that question. So, don't say, "I'll get around to it."

John Caher: Get around to it now!

Justice Scheinkman: And what I would also say is don't repeat yourself. We've heard what you've had to say in your writings. When you start repeating, we tend to turn off and, all right, we've heard that before, we either accept it or we don't accept it. So, try to say something at oral argument that's engaging, that puts a human context on the dispute that's involved. It does happen that, and you haven't asked me this but I'm often asked by lawyers at bar events does oral argument change anything?

John Caher: I was about to ask you that, so thank you.

Justice Scheinkman: Okay, so I'll answer that question by saying it can. Often I don't know, I think in some cases it's pretty clear what the answer is and it's hard for an oral argument to change a judge's mind. But there are times when it makes a difference and you get the impression from talking with the

lawyer and hearing what the lawyer had to say that maybe you misunderstood something.

Or that there's more of a point here than we'd grasped from the writing. It may be that the facts are complicated and that there's a nuance to those facts that we didn't grasp from reading the written page. So, an oral argument is an opportunity to make a clear point, and don't assume going in if you're the respondent that you're coming in with a chip on their shoulder. Meaning you won below, so therefore, you're going to get upheld. We don't look at it that way. I would say for an appellant there is sort of a burden in that you have to convince us that there was an error that was made.

If we're not convinced that there was an error that's made, then we're probably not going to interfere with it. But for a respondent, don't assume that you get the benefit of a presumption of correctness. Come in as if you were arguing it fresh.

John Caher: Now let's turn to the trial judges. What do you wish they better understood about the appellate process? And if you could, maybe a little bit explain the importance of the record on appeal and how it is developed.

Justice Scheinkman: Okay, so one of the things, and I've addressed this with trial judges when I meet with them is for us to have a clear understanding of why the trial judge did what the trial judge did. That doesn't mean that the trial judge has to write a law review article on every case, but it's very frustrating for us when we get, for example, a motion, a decision that says, "Summary judgment denied there's an issue of fact." Period.

What were you thinking? What's the issue of fact? Clue us in. I will tell you, I start my own preparation for getting ready on an appeal [by reading] the trial judge's decision first before I read anything else. What's the case about? If I don't have an explanation from the trial judge, then I have a problem and it also tends to foster more appeals because, if lawyers don't understand why they lost, then they're going to try to take it up on appeal.

That relates to decisions, it also relates to written decisions on written motions. It also relates to bench decisions that are reflected in a transcript. If an attorney comes in and asks for an adjournment of a trial and the judge says no and that's all the dialogue. "Judge, can I have an adjournment?" "No." And then the appeal is over the denial of the adjournment, we don't know any of the circumstances.

If the trial judge says, "Well no this is your fifth request and the last time you were in here I told you, you weren't going to get anymore." Then, that gives us some information that we wouldn't otherwise might have had from the trial judge's perspective. So, while we're not expecting a magnum opus explanation from the trial judge, as to what is involved it's very helpful to us and can also help us understand why the trial judge made the decision that the trial judge made.

John Caher: Interesting.

Justice Scheinkman: Developing a record is both the obligation of the trial court and the lawyers. In civil and criminal cases, we are not very likely to reach issues that weren't argued below. We don't like sandbagging judges, so that means somebody's arguing on an appeal a point that they didn't raise with the judge. Because it's not fair to the judge; the judge didn't get the opportunity to make a decision on that point.

It also may be that the appeal would've been obviated had the issue had been raised and the trial judge handled it. So, it's important that if a lawyer wants to make a record for a potential appeal, to make sure that the point that they want to argue is clearly articulated and clearly presented.

That means, for example, in a criminal case, if a lawyer is going to argue, if there's a conviction, that the evidence was not legally sufficient, then the lawyer has to make a motion for a trial order of dismissal that says why the lawyer believes that the evidence is legally insufficient and as to what element.

Was it the element of intent? Was it the insufficiency of the evidence of corroboration where corroboration is required? What is it about? You can't just say, "Judge, the evidence is not enough." You have to put some flesh on the bones.

John Caher: I understand. Let me end by asking you a somewhat loaded question. What do you wish the other branches of government, the Executive and the Legislative branches, better understood about the Judicial Branch?

Justice Scheinkman: Well, I'm going to broaden my answer a little bit if I can, John.

John Caher: Please.

Justice Scheinkman: What I wish everyone understood about the Second Department, people ask, "Why does it take so long for cases to get heard and decided?" And

the answer is because we have such a great volume and there's a lot we have to do to get a case decided. So, I mentioned before when we were chatting that most of the cases are decided right at the conference after the oral argument, but sometimes there are cases that have to be taken back.

Well, if I'm taking cases back and then in another two weeks I'm getting another group of 20, unless I'm really diligent, I'm going to rapidly accumulate a backlog. And then by the time I circulate a revised writing on a case that's being held for further deliberation, to my colleagues, they also have heard 20, 40, 60 other matters and we've got to go back and "What was that case all about anyway? What was the point that we have to deal with?"

So, the process of deciding appeals when you're in a court with a lot of volume is time-consuming and labor-intensive and if you care about the work product, which we do deeply, and you care about getting it right, it does take time.

John Caher: Judge, thank you so much for your time and your insights, and please stay safe and healthy.

Justice Scheinkman: Thank you, John. Thank you for affording me this opportunity. it's been a lot of fun.