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By Jeff Storey

Donna Aldea

Donna Aldea ended a 15-year career as a prosecutor in April 2013 to join the firm of Barket, Marion, Epstein & Kearon as head of appellate and post-conviction litigation.

On Sept. 18 of this year, Aldea could be seen in the familiar surroundings of the state's highest court in Albany, arguing another high-profile case for her former employer, the office of Queens District Attorney' Richard Brown—trying to beat back a challenge to Brown's practice of pre-arraignment intervews.

Although she is now a partner at a prominent criminal defense and civil rights law firm, Aldea, 42, had reached an arrangement with Queens prosecutors that allowed her to continue to handle several significant ongoing criminal cases from her former position pro bono.

Aldea joined the Queens District Attorney's Office as soon as she graduated from St. John's University Law School in 1998 and started feasting on what she describes as a juicy diet of complex appellate advocacy.

She eventually grew into a job on the "borderlands" between trial and appellate work. As Brown's counsel for special litigation, she said she worked with "some of the office's most talented and experienced trial attorneys on difficult cases through investigation, grand jury, pretrial hearings, the trial, and then, ultimately, handling the direct appeal and post-conviction proceedings."

Aldea said she never saw herself as a career prosecutor. "I loved my job, and was not actively looking to leave, but I was always open to the possibility of one day moving on to something different."

She has almost completed her remaining prosecution work. One major task remains: to convince the U.S. Supreme Court to hear her arguments challenging the Court of Appeals' decision against Brown's pre-arraignment interview program. She wouldn't miss that opportunity.

TIM ROSKE

Q. You joined the Queens District Attorney's Office right out of law school and spent 15 years there. Why did you want to be a prosecutor?

A. Actually, I had no passion for prosecution while I was in law school; rather, I had a passion for appellate advocacy. I was very active in moot court, I loved crafting legal arguments with the capacity to shape the breadth of constitutional rights, and I adored making oral arguments before panels of judges who challenged my arguments and tested the strength of my logic and conviction. But there were very few places to practice appellate law right out of law school, and even fewer where you could literally step out of the classroom and right into an appellate court. The district attorney's office afforded me that opportunity: I was writing briefs immediately, I argued my first case in the Appellate Division before I even received the results of my bar exam, and I was arguing in the state's highest court about the scope of one of our most important constitutional rights—the right to counsel—when I was only two years out of law school. It was a dream job for me.

Q: What were the rewards of being a prosecutor? Was there any aspect of the job that you found frustrating?

A: There were so many rewards—intellectual, emotional, and professional. Intellectually, in my position, I was always challenged. I worked on very difficult, and usually novel, legal issues, I litigated against many of the most distinguished and talented defense attorneys in the country, and I had the privilege of arguing before brilliant, probing and knowledgeable judges on a regular basis. Emotionally, the work can be draining, exposing you to horrific crime scenes and the worst side of human nature; but is also incredibly rewarding. Often, you develop a very close relationship with victims or their families—people who have lived through unimaginable pain and suffering, and are inspirations in their strength and perseverance. Achieving a measure of justice and closure for those people, and for the silenced victims, makes you go home at the end of the day feeling like you've done some good. Professionally, I worked in an environment where I was always learning and growing. I had ready access to some of the best prosecutors in the state, who were always available to sit and chat with me, to teach me, and help me hone my skills. I worked for a district attorney who entrusted me with some of his most important cases, and yet never in 15 years pressured me to "win"—only to make sound and fair arguments so that he and the courts could, as he likes to say, "get it right." And I had the satisfaction of doing in real life what all kids pretend to do in debate or moot court: making arguments that actually shaped the contours of the Constitution, that gave life-breath to this living, changing document. I think, sadly, not many people find that their professions are as interesting or fulfilling as they had envisioned. I found mine to be exactly what I had dreamed it would be, and more.

Of course, there were some frustrating moments. Prosecutors in general will tell you about their frustration in forging a case when many witnesses are scared or reticent to come forward to testify, for fear of being labeled a snitch or suffering retaliation. But I was not primarily a trial prosecutor, so I did not experience so much of this firsthand. In my position, the greatest frustration was trying to bridge the divide between Trials and Appeals. I think throughout our profession, trial lawyers often have a view of appellate attorneys as being ivory-tower bookworms, aloof and removed from reality, without the in-the-trenches experience needed to really understand a case. Conversely, appellate attorneys sometimes see the trial lawyers as cowboys, shooting from the hip, riding away into a glorious sunset while leaving behind the carnage of undeveloped records, mistakes, or comments better left unsaid. As counsel for special litigation, I worked on the borderlands, moving from one world to another, and sometimes that was tough.

Q: How much of your time did you spend briefing and arguing appeals?

A: For the first seven years of my career, nearly all of it—briefing, editing, and arguing. In the latter half, it was probably a bit less than half, with much more of my time devoted to pretrial and trial litigation.

Q: How many cases did you argue in the Court of Appeals?

A: Of approximately 200 cases that I've handled on appeal, I have argued 13 in the New York State Court of Appeals—three since leaving the district attorney's office— and 20 in the U.S. Court of Appeals for the Second Circuit.

Q: What is it like trying to convince the judges of the state's highest court to see a case your way? How often were you successful?

A: Arguing in the Court of Appeals is different, in many respects, than legal argument in other courts. Unlike a trial or intermediate court, in which argument typically focuses on how and where to fit a new fact pattern into pre-existing precedent, the Court of Appeals has the power to define or change the law for the state; and, in fact, it frequently grants leave precisely because a case has the capacity to push or test the boundaries of existing law. So, to convince the judges of the Court of Appeals of your position, it is not enough to know your record well and be armed with good precedent, but you also have to be able to effectively argue policy: that the law should be what you claim it is; that this will lead to a just result in your case and a workable rule for thousands of others to follow.

Frequently during argument in the Court of Appeals, a judge will ask a litigant, "What is the rule you would like us to announce?" and, more often than not, the attorney will not have a ready answer. Successful argument in the Court of Appeals requires knowing what you want the rule to be, not just what you think it already is, and then an ability to dynamically use your facts, public policy, and the rationale—not just the holdings—of prior precedent to prove that your proposed rule will hold strong against a barrage of questions about competing public policies and hypothetical future cases with different facts from your own.

To me, this intellectual give-and-take of question and answer—this testing of the correctness of my position and the depth of my conviction—is pure heaven. It is what I love best. I once argued a case in the Court of Appeals where each side had two-and a-half hours of argument, and, for our team, I argued for one and a-half hours of that time. At the end of the argument, a colleague said that I must be exhausted, and had earned a day off; but nothing was further from my mind. I felt invigorated; and, if I could, I would argue like that every day. It is the best feeling in the world.

Success is more difficult to measure in the Court of Appeals than in other courts, because it is not just a win or loss, a reversal or affirmance; there is often a rule of law that is announced. I have "won" cases where the court did not fully adopt the rule I had hoped to obtain, and I have "lost" cases where the court announced the rule I had advocated in whole or in part, but sent the case back to the trial court to apply it. But, while I don't keep statistics, I would estimate that in contrast to the 90 percent or more of cases I have won overall on appeal, I have probably fully prevailed in about 60 percent of the cases I have argued in the Court of Appeals. This makes sense, I think, because leave is usually granted in that small percentage of cases where the court questions the correctness of the holding below to begin with. So prevailing more than half the time is still pretty good.

Q: Have you kept videotapes of all your arguments?

A: I have recordings of all of my Court of Appeals arguments, because those are readily available. But, unfortunately, I don't have any of my federal arguments, and only one of my arguments from the Appellate Division, which are frequently much longer than the average Court of Appeals argument. If videos were available for these, I would absolutely watch them all. I think that watching yourself argue is a tremendous learning opportunity. It affords an opportunity to critically assess your own performance and see » *Page 8*

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yourself as you really appear, rather than as you think you do. I find that arguments are often very different in reality than how I remember them.

Q: What Queens cases are you proudest of? Which ones do you think made a significant contribution to New York's criminal jurisprudence?

A: *People v. John Taylor* and *People v. Mazoltuv Borukhova* are definitely the two hardest cases I have ever litigated, and they are the ones of which I am proudest, even though they did not significantly change the law, and won't be found in any hornbooks. Both were horrific first-degree murder cases, with complex evidentiary issues and lengthy records, each resulting in about 10 separate significant issues on appeal. They were each very difficult appeals, involving emotionally charged and sensitive issues, which presented unique challenges to my litigation strategy. I think that the quality of my advocacy in these cases was at its pinnacle, in part because I had to work so much harder to master the difficulty of the cases, in part because I was so emotionally invested, and in part because, in preparing the briefs and the oral arguments, I benefited from a very close collaboration with the trial attorneys and the district attorney himself to ensure that my arguments were thorough and correct, and that I struck the right tone.

Many of my state and federal cases have dealt with issues of first impression, but I think that my string of right-to-counsel cases: *Ramos*, *Henry*, *Grice*, and the Central Booking cases, are probably the most legally significant, as they all announced rules that changed, or redefined, the contours of this most-cherished constitutional right. In fact, I teach as an adjunct professor at St. John's Law School, and I was pleasantly surprised to see a couple of these cases in the students' textbooks and materials.

Q: Did you have any qualms about switching to the defense from the prosecution? Why did you decide to make the change?

A: I was very hesitant, for many years. Bruce Barket and I met as adversaries on a case, *People v. Rodriguez*, which involved a novel, and difficult, application of the "emergency exception," which permits police to enter a home without a search warrant to protect life or for other exigencies, but not for investigative purposes. After a hotly litigated suppression hearing, the evidence recovered during the search was initially suppressed; but I then appealed the case to the Appellate Division, obtaining a reversal. The litigation went on for a while, and during the course of it, Bruce became impressed with my advocacy. Afterwards, he asked me to apply for a position with his firm. Although that didn't work out at the time, Bruce and I became friends. And over the next few years, he persisted in trying to convince me to join him. He proved a tenacious and effective advocate in that regard, and I grew to admire him as a person as well as an attorney. So, after many years of talking about it and thinking about it, the stars eventually aligned. My kids were a little older (8 and 10 now); my husband had begun working from home, giving us more flexibility, but reducing our income, which made a higher-paying position tempting; and Bruce's new firm— Barket Marion—was thriving, and growing, with an impressive array of talent, a diverse case load, and a real need for a partner to head the Appellate and Post-Conviction Litigation Group. It was an exciting opportunity, and the time was right for it.

Q: You have been working for Barket Marion for more than a year, yet you are still handling some cases for the District Attorney's Office? Is that unusual? How much of your time are you spending on these cases?

A: It is not unusual for an attorney in private practice to be assigned as a special prosecutor on an individual case, or even to do pro bono work for a D.A.'s Office. And I know of other appellate attorneys who, after leaving the office, argued one or two cases that they had previously briefed. This is certainly not the norm, I think. But I have a tremendous amount of love and respect for the Queens D.A., Richard Brown, and at the time that I left, I had several very significant and difficult cases pending on appeal, which he had entrusted me to handle from their inception at the hearing level. So I felt that I owed it to the district attorney—and to myself, the victims' families, and the trial prosecutors with whom I had closely worked—to finish my work on those cases, and see them through to completion. All told, I have spent approximately 350 hours doing pro bono work on these cases over the past year and a half. But it is a labor of love, and I am very fortunate that my partners at Barket Marion have fully supported my commitment to finish these cases.

Q: How does your caseload at Barket Marion compare to what you

carried at the District Attorney's Office? Do you work shorter hours?

A: Shorter hours? Not by a long shot. Except it certainly does feel like there are far fewer hours in a day! My caseloads are difficult to compute, because both at the district attorney's office and at Barket Marion, I spent quite a bit of time handling emergencies—giving advice during an ongoing trial, or stepping in to help out at a suppression hearing, or preparing memoranda to address new cases or legal developments. But, in terms of the volume of work that I actually produce and file, I think my caseload is probably double now than what it used to be. And, in a sense, I am working all the time, because clients call and need help all the time. There are no real days off; no weekends or evenings that are off limits. But there is also a lot of flexibility. When I am writing a brief, I can work from home; which means I can see my kids after school and put them to bed at night, and then keep working in the evening after they're asleep. If they have a school event during the day, I can usually structure my schedule and appointments around it. So, in the end, I have no "free time"—every minute is filled with either my family or my work. But I love both immensely, and both bring me great joy, so it's a very good kind of busy.

Q: Defense attorneys often complain that the prosecution has a big advantage in criminal trials— "the state" has more resources, judges are pro-prosecution, etc. Now that you are a defense attorney, how do you feel about these complaints?

A: I do think that there is a huge difference in the amount of available resources, and sometimes a cap on the nature or depth of the investigation that a defense attorney can realistically conduct because of a client's financial constraints. The playing field is definitely not level in this regard. However, I personally do not think that, overall, there is a pro-prosecution bias on the bench. I have been lucky to be exposed to judges at all levels who, in my opinion, whatever their personal viewpoints, have always tried to be fair and achieve a just result in the cases before them. Of course, judges are people, and, like all people, they are the product of their own experiences. Some judges are more conservative, some more liberal. And, surely, that may impact an individual case. But, particularly on an appellate level, where multiple judges hear each case, anomalous results can usually be corrected, and those individual differences between the judges' perspectives create a balance that is, in my view, one of the greatest strengths of our judicial system.

Q: Have there been any surprises in your move?

A: I was surprised how easy it was for me to shift from prosecution to defense. I was a very passionate prosecutor, and many of my friends were convinced that I would return to the district attorney's office within a year of my leaving. But both they, and I, were surprised to find that I was immediately just as passionate about criminal defense. In fact, I found that there was almost no difference between the two, because—at least at an appellate level—prosecution and defense are just different sides of the same coin. The constitutional doctrines we litigate day-to-day are not absolutes; they are a balance between individual liberty and the need for effective law enforcement. As a defense attorney, I highlight the need to protect individual liberties; as a prosecutor, I underscored the need for rules that promoted effective law enforcement. But to be effective on either side requires a respect for the importance of both interests, and an understanding of how they work together to achieve a balance. I was surprised to find that my passion did not reside in the "white hat" I wore as a prosecutor, but in arguing about the nuances in the shades of grey that can be found in equal measure on both sides of the courtroom.

Q: What do you miss most about being a prosecutor?

A: I miss so many of the remarkable people I worked with. I miss the access to far-vaster resources. And I miss the autonomy of working purely to achieve "justice," regardless of whether that means a conviction or a dismissal in an individual defendant's case.

But all of that is tempered by the amazing experience of meeting a new set of extraordinary and talented lawyers; of forging a different, and in many ways deeper, comradery with my partners at Barket Marion; of expanding my knowledge and growing as an attorney; and of experiencing the reward of representing an individual rather than "the state," and giving my all to protect his rights and obtain a just result for him as a unique person, in his unique circumstances.

As my former boss, and still close friend, used to say, "Onward!" My past as a prosecutor has shaped me, for the better, I think, and I look back on it very fondly; but it is far more exciting to look forward to the challenges the future will bring.

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