

New York Law Journal

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[Back to Article](#)

After Tough Questioning, Senate Committee Delays Vote on Rivera

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New York Law Journal

02-05-2013

ALBANY - Court of Appeals nominee Jenny Rivera, a law professor, yesterday endured four hours of unusually aggressive questioning from Senate Judiciary Committee members concerned about her lack of judicial or practical legal experience, an academic record focused narrowly on social justice and scholarly writings that some lawmakers found abstract and unclear.

In a rare move, the panel delayed a vote until this morning to provide members time to digest the testimony.

Rivera, who would be the first law professor in at least several decades to go directly from academia to the high court, spent hours fielding questions and attempting to persuade the committee that she would be an objective judge, and not one who would use the court to advance a liberal social agenda.

"The Court of Appeals is not a legislative body," she said. "The Court of Appeals has no role in drafting legislation, telling any legislative body how to go about its business. That is not the role of the Court of Appeals... The role of the court is to decide the cases and issues that come before it based on the law... It is not in any sense a super legislature."

Rivera, who teaches at the City University of New York School of Law, spoke of the intellectual parallels in academic discourse and appellate jurisprudence, and relayed a Horatio Alger story of her upbringing by her poor Puerto Rican mother.

If confirmed, the 52-year-old Democrat would become the second Hispanic to serve on the court, replacing Carmen Beauchamp Ciparick, who retired on Dec. 31.

But Rivera struggled to get past the fact that she has taken only two cases to jury verdict, argued only two appeals and, other than serving a stint as an administrative law judge, has no judicial experience.

Although two recent Court of Appeals judges—retired Chief Judge Judith Kaye and incumbent Judge Robert Smith—came to the court without judicial experience, both had decades of experience as practicing litigators.

Rivera worked early in her career as a Legal Aid Society attorney and as an administrative law judge, clerked for U.S. Supreme Court Justice Sonia Sotomayor for a year when the judge was on the Southern District bench and served as a special state attorney general for civil rights for a year and a half.

But almost all of Rivera's career has been in academia, and while she has published prodigiously, her writings almost exclusively deal with social justice issues, especially as they relate to the Hispanic community. Her writings do not cover the wide range of criminal and civil issues that the court decides.

Over the course of an afternoon Rivera engaged with committee members, fielding the most probing and

occasionally skeptical questions from Republican members.

"What makes it difficult in your case is that...normally we could look to judicial decisions if you were a judge, we could look to cases that you tried as an attorney that would give us an insight into who you are, in terms of your philosophy, your experiences," said Senate Judiciary Committee Chairman John Bonacic, R-Mount Hope.

Bonacic told Rivera that her background is seemingly "devoid" of practical experience.

"In your life, after you finished your formal education, how many years did you engage in the practice—the practice—of law as opposed to being in academia?" Bonacic asked.

Rivera said she graduated from law school in 1985 and didn't join academia until 1994.

"I believe I have broad experience I would bring to the Court of Appeals," Rivera said. "I never divorced myself from the practice of law. I am engaged with the practice of law...I don't view my academic experience as one where I have been isolated and apart or divorced from the practice."

Rivera said she knew during law school that she wanted to teach and she sought practical experience so she could tell her students, "I have drafted a complaint. I have done a motion to dismiss. I have done a summary judgment motion. I have done depositions."

But Bonacic pressed the issue.

"I think most attorneys will tell you that the study of law...and the practice of law is night and day, totally different," he said. "When you speak of the practice of law, the cases that your students bring you or from a cerebral analysis or policy, it seems very theoretical, more than practical. Have you tried a case? Have you done any commercial litigation? Have you appeared before a jury? Have you done anything in Surrogate's Court, anything with securities, a real estate closing, an assortment of subjects in the trenches for which a practicing attorney does?"

Rivera again stressed that she had "done the quantity and quality of work that prepares me" for the Court of Appeals. "In the classroom, I made it clear that there is theory and there is practice."



Left, Jenny Rivera meets with Senate Judiciary Committee Chairman John Bonacic, R-Mount Hope, before her hearing yesterday. Below, Rivera appears before the state Senate Judiciary Committee at the Capitol.

Tim Roske



Focus on Writings

Senators also referenced Rivera's academic writings, with Bonacic and former Judiciary Committee Chairman John DeFrancisco, R-Syracuse, suggesting that her work was unclear.

"In research and publications, you say 'critical race feminism' and, I may not even pronounce this right, 'paradigmatic challenges to race-based discrimination theory and practice,'" Bonacic said. "What does that mean? Please tell me."

Rivera explained that the title was from a course she taught.

"What I was trying to communicate with that title... was the different ways we can approach problems using the rule of law," Rivera said. "We need not limit it to any particular approach that has been historically successful or unsuccessful. Changing the paradigm, that is what it refers to—different ways of thinking about issues."

Rivera said it is the role of a scholar to "think outside the box" and challenge students to do the same.

"Yes, I am very passionate in my writings and I was a zealous advocate for my clients when I practiced law," Rivera said. "Much of my writing has expressed my passion for justice, fairness and equality by focusing on the particular and unique conditions of Latinas but I consider my work scholarly work and other work to be about equality generally. The issues facing Latino communities are the issues facing all communities, to be treated fairly and justly, to not be treated in a way that is discriminatory, to not be the target of violence. These are critical issues for every one of us."

DeFrancisco, himself a practicing attorney, spoke of the need for clarity in judicial decisions, and suggested Rivera's writings are too frequently opaque.

Three witnesses spoke on Rivera's behalf: Michael Jaffe, president of the New York State Trial Lawyers Association; Seymour James, president of the New York State Bar Association; and CUNY Law School Dean Michelle Anderson. All referred to Rivera's breadth of experience, integrity and intelligence.

Bonacic said the one-day delay in voting on the nomination would "allow every member to digest some of the things that were said today, to review the exhibits, maybe to review the writings of Ms. Rivera."

He said the panel, on which Republicans hold a 12-11 majority, will vote this morning at 10 a.m., but declined to speculate on how the vote will go.

"I don't want to be letting you know right now how we're leaning," Bonacic said. "You've got to see if there is going to be 12 members that want this nominee to go forward to be confirmed on the Senate floor. But I think there's been sufficient concerns raised by these writings and her testimony today that will give people pause to reflect."

Bonacic said he is concerned with Rivera's "lack of legal experience as a practicing attorney" and said Governor Andrew Cuomo "is asking this body to make a leap of faith from someone in academia to the highest court."

A negative vote from the committee would be a stunning and unprecedented rebuke of Cuomo. Since the Court of Appeals became an appointed court in the late 1970s, the Senate has never rejected a governor's nominee.

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