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From the President

Happy Spring!

By Sharon L. Nelles

Happy Spring to everyone. I write this (short) column on a dreary wet March day, in a busy and bustling conference room. But the promise of warm weather is in the air. And I am delighted to report that a quarter into the New Year, the Council is in great shape.

Robust Membership

Our membership is robust and we have seen exceptional interest in the organization. It is always exciting to meet new people at established events, validating our efforts on broadening our reach to newer attorneys and deepening our relationship with government and public interest lawyers, among others. We have had a number of very cool CLE programs, including, for example, The Future of Diversity and Workplace Equality in the Age of Anti-Affirmative Action; Rise of the Machines: The Intersection of Generative Artificial Intelligence and Intellectual Property Law; and Good Faith, Advice of Counsel, Lawyers in the Room and the Sam Bankman-Fried Trial. All of our CLE programming is available online, and we have a full line-up scheduled to take us into the summer. The programming done by and for the Council is best in class, and it is worth taking a minute to browse our library. We also have started a lunchtime pop-up series designed to provide an opportunity for our community to gather virtually and discuss hot topics from the news. Make sure to follow all that is happening on our LinkedIn and Instagram accounts.

We tried to flee the cold of February by heading to the Caymans for the 2024 Winter Bench & Bar Conference. We ended up battling gale force winds, but they held us back not at all. Spirits remained high during the day and flowed at night. We had lots of new attendees, and a fantastic lineup of panels. Read all about it further in this issue. In March, we honored our magistrate judges at our annual Judicial Reception, and now we look forward to honoring Judge Lohier at Law Day on May 2.

Fully Staffed

And speaking of meeting new people, if you have not yet had a chance to introduce yourself, please make sure you find a moment to say hi to Shantini Cooper, our new manager of events. We knew Shantini was tough when she willingly took on the Fall Bench & Bar Conference her very first week on the job, and she proved it by finding ways to keep us outdoors and fully occupied in Grand Cayman. Under the leadership of Executive Director Aja Stephens, the Federal Bar Council is fully staffed, the office is humming, and there is a long list of action items. But do not hesitate to reach out if you have ideas to add. We love to hear from you.

You will forgive me for this quick column and update (please). I am in the middle of both an office move and trial preparation. Each is an excuse for avoiding the other. But I am very much looking forward to one of my first post-pandemic trials and, in particular, working side-by-side with talented associates – some of whom spent their first years lawyering by video – as they develop new skill sets and flex new muscles. There is no better reminder that the law is a vocation, not simply a job, and it is a privilege as a senior lawyer to expose newer lawyers to cutting-edge work and to ensure that they have the opportunity to know and work alongside experienced lawyers who attack problems from multiple directions and viewpoints. I tell them there is no substitute for the real thing, including, right here, right now, a spirited collaboration in a messy conference room full of binders, boxes and lots of opinions. There is nothing more rewarding than practicing law as part of a professional community, something the members of this professional community, the Federal Bar Council, know well.

From the Editor

Highlights from the Winter Meeting

By Bennette D. Kramer

From February 4 to February 8, 2024, members of the Federal Bar Council met at the Ritz-Carlton, Grand Cayman, Cayman Islands, for the 2024 Winter Bench & Bar Conference. Second Circuit Judge Alison Nathan was the judicial chair, while Carrie Cohen and Amy Walsh co-chaired the meeting. Three mornings were spent in CLE courses (described in detail in the next article in this issue) and the afternoons were free. Last year, the group met in Puerto Rico and experienced some frustration with the ability of the hotel to provide food services. This time the service was excellent and the food delicious. The hotel was situated on a beautiful seven-mile beach. Moreover, this particular Winter Bench & Bar Conference was filled with warm and collegial moments.

The Winter Meeting actually started a day early, on February 3, with a dinner for board members and other early arrivers at Grand Old House, where we watched the sunset and met up with old friends. On February 4, at the welcome dinner, Bob Anello had a "fireside" chat with John Patrick "Sean" Coffey, general counsel of the Navy and former long-time president of the Federal Bar Foundation. Sean, an Annapolis graduate who had served many years in the Navy on active duty and as a reservist, told wonderful stories about his upbringing as the child of Irish immigrants, his experience in the Navy, his law career and his current job at the Pentagon.

The welcome dinner was followed by two "dine arounds." First, at restaurants in Camana Bay, followed by post-dinner drinks for those so inclined; second, at the hotel or nearby.

The final night, after sports awards, Seth Levine, Sean's successor as president of the Federal Bar Foundation, presented the Whitney North Seymour Award for outstanding public service by a private practitioner to Sean. In addition to his busy career in the Navy, at the U.S. Attorney's Office for the Southern District of New York, and in private practice, Sean has served on the boards of Georgetown, Common Cause, the Holocaust and Human Rights Education Center and ThanksUSA, which provides scholarships to the families of members of the Armed Services. During his tenure as president of the Federal Bar Foundation, Sean expanded the Foundation to promote the rule of law. While he was president, the Foundation supported the Immigrant Justice Corps proposed by the late Chief Judge Robert Katzmann, launched the Foundation's civics education programs, and expanded support for internships for law students to the Federal Defenders in addition to the U.S. Attorneys' offices.

The beach was lovely, and many people walked it or swam in the Caribbean. Activities were somewhat curtailed by the weather. After calm seas the day of our arrival, the wind and waves began to build up, culminating in a "sun hurricane." The winds were in the 50-mile-an-hour range with higher gusts, but the real problem was the water. All chairs were pulled from the beach, and the restaurant on the beach struggled to keep the water, sand and seaweed out. Walking along the beach was an adventure because the waves were so high. It started to calm down the next day and the sun was shining in earnest.

The CLE programs were excellent as usual. The conference wound down and everyone reluctantly said goodbye. For me, it was a trip full of poignant moments as I connected once again with old friends.

Developments

Council Holds Winter Meeting in Cayman Islands; Sean Coffey Receives Whitney North Seymour Award

By Bennette D. Kramer

The Federal Bar Council held its annual Winter Bench & Bar Conference at the Ritz-Carlton, Grand Cayman, Cayman Islands, from February 4 through February 8, 2024, with Second Circuit Judge Alison J. Nathan, as judicial chair

and Carrie H. Cohen and Amy Walsh co-chairing the meeting. Sean Coffey, general counsel to the Secretary of the Navy, received the Whitney North Seymour Award for public service by a private practitioner.

In addition to the CLE programs described below, participants at the Winter Meeting enjoyed themselves on the beautiful beach at the Ritz-Carlton. Continuing the format from last year, the conference was shorter than in the past. The CLE panels and programs were uniformly excellent, covering a variety of current topics.

Working with Expert Witnesses

Southern District of New York Judge Edgardo Ramos moderated a panel on "Working with Expert Witnesses from Engagement through Trial Testimony: Perspectives from the Bench, the Bar and the Witness Stand." Panel members included Sheila L. Birnbaum, Dechert; Southern District of New York Judge Loretta A. Preska; and Martha S. Samuelson, Analysis Group. Judge Ramos began the panel by introducing the panelists.

Considerations in Selecting an Expert

Birnbaum described how she chooses an expert and what steps the expert takes during the course of a case, explaining the difference between advisory experts and testifying experts. She said that she uses a lot of experts in product liability cases who provide medical advice where a key area of expert testimony is the question of causation. She also talked about the decision to retain local or academic experts.

Samuelson is the chief executive officer and chairman of Analysis Group, one of the largest economic consulting firms in the United States. The firm has a huge group of testifiers available with many specialized experts. When it is called by a prospective client, Analysis Group works hard to make sure that the expert's style matches that of the client and that the ground rules of the expert's efforts are established early in the process. Samuelson noted that it is better to have the expert involved throughout the process because judges and juries do not want "drive through" experts. Another concern is what role the expert will play and how to decide which expert will have an advisory role and which one will be the face before the fact finder.

Expert Reports

Birnbaum noted that she does not give an expert outside reports; rather, she wants the expert to do his or her research and own the final report. It is important to find someone who can testify and talk to the jury, because some experts cannot simplify for a jury. She said that a lawyer should work very closely with the expert, and noted strategic concerns when dealing with an expert:

(1) Talk with the expert about what is needed but do not put it in writing;

(2) Direct experts to subject matter and ask that they do research; and

(3) At trial use more localized experts unless there is a *Daubert* issue that will require a more national expert.

Judge Preska said that an expert who does not have the right expertise will be rejected by the court. She added that a lawyer should ensure that the expert report sets out everything. She said that a frequent source of trouble lies in the materials the expert reviewed and who chose them. Birnbaum emphasized that the expert must explain bad facts, not ignore them. Everyone agreed that written drafts should not be circulated. Both Birnbaum and Samuelson cautioned lawyers to be careful of drafts by using portals without any email exchange.

Samuelson agreed that what was included in the materials given to the expert was very important. The entire record is often too large so the expert should review only the relevant documents but must review both good and bad documents. And it is important to think through all the issues in the expert report and to lay out why the expert chose one approach over another. Samuelson said that you need to ensure that the expert you use is engaged and has the time to do the job.

Working with Experts

Judge Preska described one of the most effective use of experts in the AT&T case. AT&T presented the testimony of someone who had been in the industry for decades who gave an industry overview and provided background. His testimony was followed by sub-experts who could explain in detail more specific aspects of the issues.

Judge Ramos cautioned lawyers to pay attention to an expert's prior history, which can sink an expert in cross examination. Samuelson agreed that lawyers had to pay attention to what actually caused

criticism of an expert and only use the expert if his or her testimony is key and outweighs any questions raised. Birnbaum opined that there are more than enough experts available so that it would be too much baggage to use one who has a mark on his or her record. You want experts who know how to handle themselves. It is a judgment call.

The deposition of the expert is key. You have to make sure the expert is prepared and familiar with the report. Birnbaum suggested doing a moot with the expert. Judge Preska said that she has seen experts destroyed at trial by their deposition testimony. Samuelson noted that pretrial procedures in the United States are very different from the rest of the world. In Europe there are no depositions.

Trial Testimony

Judge Ramos asked how panelists deal with an expert who is not likeable. After noting that such a person should not be an expert, Samuelson said that direct would be very important and should tell the story and incorporate all facts including the bad ones. The expert has to distill complicated facts and understand intuitively what factors contributed to the outcome. Birnbaum agreed that intuitive was the right word because the expert has to explain to the judge and jury so that they understand elements of the case. Jurors need to have it feel right.

While testifying, experts should have the same demeanor in the deposition and on direct and cross. An expert should be respectful during cross and not aggressive to the lawyer. Jurors know experts get paid a lot. If the expert is not likeable and is paid a lot it can affect the jurors.

Other Considerations

The expert often has access to information the client does not have. When you have dueling experts it is important for the credibility of the expert to look at the underlying business documents. It is common in Europe where the system is not as adversarial to have two experts get together and agree what they agree on. It may be effective to narrow the disagreement. Judge Preska said the narrower and more focused the issue, the more helpful it is.

The program ended with discussions of the differing rules in some states and the surprises resulting from judges and juries asking questions of experts. Experts love it when they are asked questions.

Recent Developments in Public Corruption Law

Southern District of New York Judge Jesse Furman moderated a program on "Criminal Conduct or Just Politics as Usual: Recent Developments in Public Corruption Law." Panel members were Randall Jackson, Wachtell, Lipton, Rosen & Katz; Jenny Kramer, Alston & Bird; Samuel P. Nitze, Quinn Emanuel Urquhart & Sullivan; and Michael A. Sussmann, Fenwick & West.

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Supreme Court Jurisprudence

Panel members discussed the Supreme Court cases that have shaped public corruption law. Jackson looked at *Skilling v. United States*, 561 U.S. 358 (2010). Skilling was convicted of honest services fraud. He was accused of misrepresenting Enron's fiscal health for his own profit but with no direct loss of money or property. The Supreme Court agreed with Skilling that the statute was unconstitutionally vague as applied to him. The Court concluded that bribes and kickbacks were necessary for an honest services fraud violation.

Sussmann and Jackson turned to *McDonnell v. United States*, 579 U.S. 550 (2016). McDonnell had received gifts and in return had set up a range of meetings. McDonnell was convicted of honest services fraud but the Supreme Court reversed, holding that to perform an official act required a formal exercise of government power by making a decision or taking action, not simply by holding meetings.

Judge Furman explained that in the so-called Bridgegate prosecution, *Kelly v. United States*, 140 S. Ct. 1565 (2020), defendants had been convicted of wire fraud and fraud on a federally funded program for setting up a "traffic study" that resulted in horrendous traffic. The goal was to punish the mayor of Ft. Lee, New Jersey, for failing to endorse Governor Chris Christie for reelection. The Supreme Court reversed, finding that the scheme was an exercise of regulatory power and not one to deprive anyone of money or property as required by the statutes.

Kramer explained that in *Ciminelli v. United States*, 598 U.S. 306 (2023), Ciminelli was convicted of wire fraud for a scheme to deprive the victim – a nonprofit entity that administered the Buffalo Billion initiative – of potentially valuable economic information necessary to make discretionary decisions. The Court said that mere information was not a traditional protected property interest, and the right to control economic information could not form the basis of a conviction under the federal fraud statutes.

Nitze said that *Percoco v. United States*, 598 U.S. 319 (2023), dealt with the question whether a private citizen could be prosecuted for honest services fraud for trying to influence a government entity. Percoco was an aide to Governor Andrew Cuomo before and after the actions for which he was indicted but was not working for the government at the time. He was paid to use his influence on behalf of a developer to suggest to Empire State Development that a labor peace agreement was not necessary. Empire State Development dropped the requirement. The Supreme Court in an unanimous decision said that he could not be prosecuted as a private citizen for honest services fraud.

Panel members agreed that the real issue for the Supreme Court in these cases is where to draw the line in public corruption cases, whereas the lower courts focus on the proper administration of the laws. The *McDonnell*, *Kelly*, *Ciminelli* and *Percoco* decisions were all unanimous. Jackson said that the Supreme Court is concerned about what allows the republic to continue and whether the structure of government can work. Public corruption cases have a much higher level of acquittals, which shows an acknowledgement at every level that juries and courts are uncomfortable with the jury replacing the ballot box.

Prosecutorial Decision-Making

Nitze said that there are plenty of public corruption cases left in place based on bribery and kickbacks but not on the more creative theories, which are a small portion of public corruption cases in any event. Nitze said that U.S. Attorneys' offices are still prosecuting high-profile cases. There are all sorts of considerations at play on whether to bring them. Sometimes the high-profile aspects of the cases are a deterrent as the cases are becoming increasingly harder to bring. According to Kramer, high-profile cases fall outside of the realm of normal public corruption cases. Careful analysis is necessary in every case. Judge Furman said that these cases have speaking indictments. Jackson added that every aspect of these cases is impacted by public perception in a way that does not happen with chief executive officers of corporations. There are philosophical concerns about bringing the downfall of community figures, and prosecutors have to consider how a jury will think about a case.

Kramer likes to have meetings with prosecutors pre-indictment, but she has less of an inclination to do so in a high-profile case. Jackson said that in a number of public corruption cases, information did not surface until the defendant was actually indicted, because prosecutors are concerned about interference with witnesses and investigators. Nitze said that the acquittal of Trump ally Tom Barrack for foreign lobbying in November 2022 raised hard

questions. Whether to bring these cases requires balancing the risk of acquittal against the question of deterrence. If the case is brought for the right reasons and the government loses, then the jury has done its work.

Supreme Court Review

Second Circuit Judge Alison J. Nathan moderated a panel on Supreme Court review, including Neal K. Katyal, Hogan Lovells, and Morgan L. Ratner, Sullivan and Cromwell.

Katyal gave an overview of the Court term. He said that the decision two years ago in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), changed the relationship between the public and the Supreme Court. It also impacted what we saw at the Court last year. There were more cases reflecting hard right views, including the striking of affirmative action and the student loan program. He said that Chief Justice John G. Roberts, Jr., and Justice Brett M. Kavanagh voted together 95% of the time. Justices Samuel A. Alito, Jr., and Elena Kagan voted together the least. Chief Justice Roberts and Justice Kavanagh were in the majority 95% of the time. Justice Clarence Thomas was in the majority the fewest number of times. Katyal said that Justice Ketanji Brown Jackson had an amazing first term, diving in with both feet. Ratner added that there is a perception that the term was conservative, but it really was pro-federalism and separation of powers.

Administrative Law and the Fate of Chevron

Ratner discussed *Relentless v. Department of Commerce*, No. 22-1219, and the underlying issues. She said that under the *Chevron* doctrine an agency gets deference in interpreting agency regulations if (1) the statute is silent, and (2) the agency's interpretation is reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). In *Relentless*, the agency regulation called for placement of federal monitors on fishing boats, and the agency took the position that the boats should pay the cost. The lower court held that this was a permissible construction by the agency. Before the argument the general consensus was that *Chevron* would be cut back. The takeaway from the argument was that there was a lot of support for overruling *Chevron*. In Ratner's opinion, if the Court overrules *Chevron* there would be a more careful, calibrated deference looking at the agency's expertise and the consistency of its rule making. Now in the lower courts there are big differences. Some courts apply *Chevron* and some do not. In 40 percent of challenges, the agency's regulations have been upheld as reasonable. With a lower bar there would be more challenges to regulations, and agencies would be put on a shorter leash. Overruling *Chevron* would have a much greater effect in the lower courts than in the Supreme Court. Katyal said that Justice Neil M. Gorsuch has it in for *Chevron*, but if the Court gets rid of *Chevron*, there has to be some doctrine to apply to agency regulations.

Content Moderation, State Action and the First Amendment

Katyal described *National Rifle Association v. Vullo*, No. 22-842. The National Rifle Association (NRA) offers murder insurance if a gun owner shoots someone. New York State, as a part of a crackdown on the NRA, stated publicly that the insurance posed a reputational risk to insurance companies. In the Second Circuit, Circuit Judge Denny Chin said that (1) defendant/appellant Maria T. Vullo, former superintendent of the New York State Department of Financial Services, was protected by qualified immunity, and (2) she did not violate the First Amendment because her statements were not targeted speech but good public policy aimed at conduct, not speech.

The Supreme Court did not take the qualified immunity part of the case. At oral argument, Vullo argued that government officials have the right to speak and stand up for gun control and enforcing the insurance rules. Katyal said that the Court should not be involved because the case involves winners and losers on speech. The American Civil Liberties Union Foundation is defending the NRA.

In *Murthy v. Missouri*, No. 23-411, federal government officials had encouraged social media to remove postings concerning, among other things, vaccines and election fraud. The attorneys general of Missouri and Louisiana sued, contending that the federal government officials violated the First Amendment. The district court issued a preliminary injunction prohibiting the defendants from communicating with social media companies. The U.S. Court of Appeals for the Fifth Circuit vacated much of the district court's injunction. The Supreme Cout granted a stay of the injunction on October 20,

2023, and granted certiorari. The questions raised include (1) whether the state attorneys general have standing, and (2) whether social media companies are state actors.

The final case in this category – *NetChoice, LLC v. Paxton,* No. 22-555 – concerns state laws in Texas and Florida that limit the power of social media companies to moderate and curate speech on their platforms. The social media industry sued. Katyal said that Texas and Florida will lose these cases because the Court is worried about interfering in social media. The way the justices understand social media suggests that they do not understand the technology. Ratner noted that as the Court starts to grapple with social media and technology it is important to make the issues understandable. As an advocate before the Court it is always best to personalize. The best example is the GPS tracker case. The justices realized that trackers could be put on their cars.

Constitutional Challenges to Agency Structure

CFPB v. Community Financial Services Association of America, Limited, No. 22-448, involves the funding mechanism for the Consumer Financial Protection Bureau (CFPB). The Fifth Circuit ruled that the funding mechanism for the CFPB violates the constitution because it operates outside the normal congressional appropriations process by receiving funding directly from the Federal Reserve through fees collected from member banks. Ratner guesses the funding mechanism will be upheld. At oral argument there were a lot of examples of funding apart from Congress. There were not a lot of questions about a remedy. Any remedy would be very complicated.

In *SEC v. Jarkesy*, No. 22-859, defendant challenged the Security and Exchange Commission's in-house enforcement adjudication. The SEC wins 100% of the time in in-house adjudications, as opposed to in federal district court, where the SEC wins 60% of the time. There have been many challenges to the system. The U.S. Court of Appeals for the Seventh Circuit held that in civil forfeiture cases, the SEC must go to court to provide the defendant with a jury trial. During oral argument, the advocates initially sought a more sweeping remedy, i.e., to require the SEC to go to court for any case involving private property. The justices were not buying that, so expect a narrower decision, sending cases reasonably analogous to common law claims to district court.

Access to Abortion Medication

Katyal said that the two cases concerning abortion medication, *Alliance for Hippocratic Medicine v. FDA*, Nos. 23-235 & 23-236, are very important. In Texas, a district judge enjoined FDA approval of mifepristone entirely back to 2000, saying the Food and Drug Administration (FDA) had not done the safety study properly. The case was brought by Christian medical doctors who treat women and might have to treat side-effects of mifepristone, which would divert their time away from other patients. The Fifth Circuit trimmed the decision, holding that the approval in 2000 was alright but that the changes made in 2016 and 2021 that expanded access to mifepristone were impermissible and void. Katyal said that this is not a good case for the Court, which should decide it 9-0 on standing.

Ratner said that there is another case regarding emergency need for treatment and the rule that a hospital cannot turn away threats to health or to life.

Second Amendment

United States v. Rahimi, No. 22-915, is the first post-*Bruen* Second Amendment case. The defendant was convicted of possession of firearms while subject to a domestic violence restraining order. He had been involved in various shootings while the restraining order was in place, and the facts were generally very bad for him. A Fifth Circuit panel affirmed the conviction but, following *Bruen*, a second Fifth Circuit panel reversed and vacated the conviction, holding that the federal statute prohibiting possession of firearms by someone subject to a domestic violence restraining order violated the Second Amendment. In *Bruen*, the Court held that the government must justify firearm "regulation by demonstrating that it is consistent with the nation's historical tradition of firearm regulation." Each historical analysis has led to gun regulation being held unconstitutional. The Court seemed receptive to upholding the statute here because of the danger involved. This case pitted the government against the public defender. The defense bar is not thrilled. The facts are particularly bad in this case. Katyal said that an advocate has to be up front about the facts, both good and bad.

Donald Trump Ballot Challenges

Following the Winter Meeting, on March 4, 2024, the Court unanimously held that the State of Colorado could not keep former President Trump off the ballot. The Court did not decide whether he was an insurrectionist. The majority held that Section 3 of the Fourteenth Amendment was not self-executing; accordingly, Congress must pass legislation to enforce Section 3, which it has not done.

Artificial Intelligence: The New Frontier

Eastern District of New York Judge Eric Komitee chaired a panel including Medhi Ansari, Sullivan & Cromwell; Professor Raymond Brescia, Albany Law School; and Janel Thamkul, Anthropic. The panel examined artificial intelligence (AI), some of the legal issues that it has raised, practical issues in the use of generative AI in the legal profession and what's next.

Overview of AI

Thamkul began with an overview and the history of AI. She described AI broadly as systems and machines that mime human cognition or intelligence. It has been used for many years, for example in facial recognition and Amazon searches. After data is input, through the process of learning the machine will make a prediction and refine its ability to make subsequent predictions. For example, "supervised learning" uses images of animals and assigns labels. The machine then develops an algorithm by which it learns dog or cat. "Unsupervised learning" does not include labels. "Machine learning" studies how computer systems can improve their perception, knowledge, decisions or actions based on experience or data. (See Stanford Human-Centered AI, https://hai.stanford.edu/sites/default/files/2023-03/AI-Key-Terms-Glossary-Definition.pdf.) In contrast, classical programming relies on data put in that results in answers based on the data.

"Reinforcement learning" uses an agent and sequences of images to learn. "Deep learning" has more layers. It is a version of machine learning on steroids. It works for all types of machine learning and uses larger databases. Models are larger and more complex requiring increased efficiency as the key in development.

The newest development is "generative AI" including Anthropic's Claude, OpenAI's ChatGPT, Google/Deepmind's Gemini and Meta's Llama 2. The goal of generative AI is to generate completely original content. There are three major forms of generative AI: code generators; image/video generators; and chatbots and other large language models (LLMs). The first step in training LLMs is "pretraining," which is "glorified autocomplete." The training is done on a massive amount of data and this stage helps the model understand how language works. "Supervised learning" involves providing the model with desired inputs and outputs which results in (sometimes) self-knowledge. The "preference model" provides rewards to the model that responds correctly. "Reinforcement learning" puts the model in various situations and reinforces good behavior. Finally, "constitutional AI" provides the principles by which preference model training data is generated using no personal information.

Copyright/Fair Use

Ansari discussed how copyright and potential infringement arise through training. In training to learn relationships it is important to provide as wide a set of materials as possible. In developing AI, a broad range of training data comes from many sources. There is a lot of data available, and developers want to use as much as possible. There have been four or five lawsuits (e.g., one filed by the New York Times) brought by plaintiffs who have created and own data. The AI defense to charges of infringement is fair use. There is a four-factor test that a judge can use to determine fair use but it is unpredictable. The factors are:

(1) The purpose and character of the use – if the use is nonprofit education, noncommercial, or transformative, it is more likely to be considered fair use;

(2) The nature of the copyrighted work – copying of factual works is more likely to be considered fair use, than the copying of creative or imaginative works;

(3) The amount and substantiality of the portion of the data used in relation to the copyrighted work as a whole; and

(4) The effect of the use on the potential market for or value of the copyrighted work.

The New York Times case seeks draconian relief and the stakes here are high. The Times alleged that Microsoft and Open AI infringed by using Times content in the course of training their models. The Times also contended that the outputs of the generative AI models compete

with and closely mimic the inputs used to train them.

Transparency and Explainability

Another issue is the production by AI models of things that are not true, including the recent example of false citations in AI-created court filings. Thamkul compared the models to "eager interns" who want to have an answer, and are very fast, very eager and pretty smart. Thamkul cautioned those present to double check and verify.

Ansari said that AI is good at complex tasks, but bad at simple ones. It does not have the same thinking pattern as humans. Humans learn concurrently while AI learns from all directions and the errors can be surprising.

Thamkul said that the key is to understand when one should use AI and when not to use it. There are many ways of sharing information to use the models as intended but the question is whether we can control and verify the information. She said that this is the key focus of Anthropic's research as AI has more autonomy and control. Anthropic wants to make sure that the models are aligned to and stick to human values.

Thamkul said that the focus of President Biden's executive order on AI is to measure the capability of models that could create the greatest risk. The executive order has reporting requirements and seeks to raise awareness of AI issues.

Application of AI to Close Legal Service Gap

Brescia described his background in legal services. AI provides a lot of opportunity for legal services offices that traditionally have a high volume of cases with low stakes. The work is rote and simple. There is a representation gap between legal services for the poor and private representation. Brescia said that legal services offices can use generative AI to fill in the gaps for civil cases and simple areas of the law. He said that it takes a lot of work to assist someone so the use of AI could help. He gave the example of helping veterans determine the reason for discharge. There are 20,000 military records to go through to determine the reason for a discharge.

Risks and Court Reactions

Panel members discussed the risk to the courts of fabricated results created by AI. Tools to minimize risk include prohibition of the use of AI; disclosure of use; warnings; explicit sanctions for use; a hybrid of tools; and relying on Rule 11 and a court's inherent powers as the policing mechanisms. Through standing orders judges are:

(1) Imposing an outright ban with a duty of disclosure (U.S. District Court for the Southern District of Ohio);

(2) Imposing a ban of use in drafting and disclosure of use (U.S. District Court for the Northern District of Illinois);

(3) Disclosure of use and either acknowledgement of application of Rule 11 or confirmation of accuracy of the submission (U.S. District Courts for the Western District of Oklahoma; District of New Jersey; Northern District of Illinois; Northern District of Texas; Eastern District of Pennsylvania; and District of Hawaii, and the U.S. Court of International Trade); and

(4) Warning of risks (U.S. District Court for the Southern District of New York).

Fewer than 1% of judges have issued standing orders and the overwhelming choices for those who have is acknowledging the application of Rule 11 and the need to verify content. The next most popular standing order is a warning.

What Is Next in AI

The panel members looked at what is next in AI. Thamkul described the present as early days for AI in which the legal profession is taking early steps. AI is very controlled now, but there is a movement to a more autonomous model. Technology is advancing at a rapid speed. In just two months the technology will be very different. Rules should not be made based on the current status. The legal profession needs to have a flexible approach. Thamkul suggests trying AI out by interacting with tools like ChatGBT.

There are significant risks as AI reaches higher. Indeed, there are catastrophic risks of use by bad actors, including cyber, biosecurity and nuclear risks. The real question is whether AI is doing what humanity wants it to do. There is a potential for layoffs and significant disruptions of geopolitical balances of power.

On the other hand, there are significant opportunities, including the democratization of access to technology for people who cannot

afford legal representation and who represent themselves. There is also a great opportunity for access to language and culture.

Trial Reenactment: "Constance Baker Motley, James Meredith, and the University of Mississippi"

The last program was a reenactment of the trial of the suit James Meredith brought after he was rejected for admission to the University of Mississippi. Before submitting his application, in anticipation of difficulty, Meredith contacted the NAACP Legal Defense and Educational Fund (LDF) in New York City asking for help. Thurgood Marshall assigned the case to Constance Baker Motley, who represented Meredith from 1961 to October 1, 1962.

At the request of Seventh Circuit Judge Ann C. Williams, Second Circuit Judge Denny Chin and his wife Kathy H. Chin developed the script for this program with the help of Cadwalader, Wickersham & Taft's Black and Latino Association and others to celebrate the legacy of Constance Baker Motley. The reenactment was presented for the first time at Just the Beginning Foundation's national conference in New York City in September 2016 at the Thurgood Marshall United States Courthouse. See Denny Chin & Kathy Hirata Chin, Constance Baker Motely, James Meredith, and the University of Mississippi, 117 Columbia L. Rev. 1741 (2017).

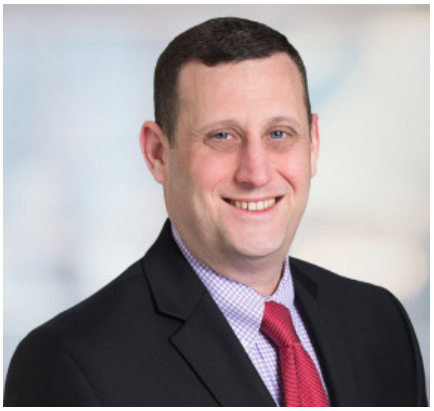
Constance Baker Motley along with the LDF represented Meredith in the U.S. District Court for the Southern District of Mississippi in a suit alleging the university had rejected him because of his race. The suit followed the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), holding that segregation in public education was unconstitutional. Motley and Meredith lost in the district court after many deliberate delays by the district judge that pushed off Meredith's ability to enter the university from May 1961 to October 1962. The victory and Meredith's entry into and graduation from the University of Mississippi were hard fought, as the presentation demonstrates. The reenactment, based on records of court proceedings, other legal proceedings and other contemporaneous material, shows Motley's tenacious efforts as a lawyer to win in spite of concerted efforts by the university, the district judge, and the community to prevent Meredith and other Black applicants from attending the university.

Participants in the reenactment at the Winter Meeting included Judge Denny Chin and Kathy Chin as narrators, Sheila Boston as Constance Baker Motley, Randall Jackson as James Meredith, Jerome Robinson as Thurgood Marshall, Michael Tremonte as District Judge Sidney C. Mize, District Judge William F. Kuntz II as Fifth Circuit Judge John Minor Wisdom, Second Circuit Judge Alison J. Nathan as Chief Judge Elbert Tuttle, District Judge John P. Cronan as Judge Richard Rives, and District Judge Edgardo Ramos as Judge Griffin Bell. Other players included Rowena Moffett, John Rizio-Hamilton, Aja Stephens, Robert Radick, Adebola Olofin, Raymond Brescia and me.

From the Courts

Judge Hector Gonzalez Joins the Eastern District of New York

By Steven H. Holinstat



On September 8, 2020, President Donald J. Trump nominated Judge Hector Gonzalez to serve as a judge on the U.S. District Court for the Eastern District of New York. On December 15, 2021, President Joseph R. Biden renominated Judge Gonzalez for the same post. Judge Gonzalez was confirmed by the Senate on February 10, 2022, received his judicial commission on April 18, 2022, and fills the seat vacated by Judge Brian Cogan, who assumed senior status on June 12, 2020.

From Havana

Born in 1964 in Havana, Cuba, Judge Gonzalez's family emigrated to the United States in 1969. According to Judge Gonzalez, his family lived the "stereotypical" immigrant experience. Upon coming to the United States, they were relatively poor, spoke little English and settled in Queens, New York, an enclave for Cuban immigrants. His father, a jack

of all trades, told him, "We can be poor in Cuba or poor in the United States, but at least here you will have more opportunities." Although his parents did not graduate from high school, they prioritized Judge Gonzalez's education and instilled in him a strong work ethic. His immigrant experience motivated him to become, as Senator Schumer remarked, "one of the top attorneys in New York."

From 1982 to 1983, Judge Gonzalez attended the U.S. Military Academy at West Point. After an honorable discharge from his active duty service, he attended Manhattan College and received a B.S. in 1985, becoming the first person in his family to earn a college degree. He later served on Manhattan College's board of trustees from 2004 to 2009. In 1988, he earned his J.D. from the University of Pennsylvania Law School, where he served as an editor of the law review. In 1995, he received an M.A. from John Jay College.

Public Service

Inspired by a "deep desire to be part of something bigger than himself," Judge Gonzalez has dedicated a considerable portion of his impressive career to public service. "As a stranger to the United States, [Judge Gonzalez explained that he] wanted to feel a part of the United States and public service was a proxy for that." In 1990, after a stint in private practice, he joined the New York County District Attorney's Office as an assistant district attorney (ADA), where he was first assigned to the Appeals Bureau. He later served in the Special Prosecutions Bureau, supervising fraud and corruption investigations and was the lead counsel in multiple trials prosecuting public corruption cases. He left the DA's office in 1993.

In 1994, after another brief layover in private practice, he became an Assistant U.S. Attorney (AUSA) for the U.S. Attorney's Office for the Southern District of New York, prosecuting cases involving organized crime, narcotics trafficking, and gang violence. In 1997, Judge Gonzalez was named deputy chief of the Narcotics Unit and became the chief of that unit in 1998, where he supervised one of the busiest federal narcotics enforcement dockets in the United States. And, in that role, he twice received the Director's Award for Superior Performance from the Department of Justice's Executive Office for the U.S. Attorney's Office.

Fulbright Scholar

Shortly before leaving the U.S. Attorney's Office in 1999, as a Fulbright Scholar Judge Gonzalez served as a visiting lecturer on trial advocacy at the University of San Carlos in Guatemala in 1998 in the aftermath of Guatemala's switch from an inquisitorial to an adversarial legal system. His lectures focused on the critical role lawyers play in an adversarial system.

In addition to his distinguished career in law enforcement, Judge Gonzalez enjoyed success in private practice. At various times between his roles as an ADA and an AUSA, he was a litigation associate at Rogers & Wells (now known as Clifford Chance) working on complex commercial litigation matters. After leaving the U.S. Attorney's office, he became a litigation partner at Mayer Brown from 1999 to 2011 and then a litigation partner at Dechert from 2011 until 2022, when he became a district judge. At Dechert, he rose to chair the firm's global litigation practice, became a member of the firm's Policy Committee, and led the firm's diversity and inclusion efforts. In private practice, Judge Gonzalez focused on advising corporations and executives on various criminal and related civil matters, including Securities and Exchange Commission and Commodity Futures Trading Commission enforcement proceedings, Foreign Corrupt Practices Act matters, and internal, grand jury and state attorneys general investigations. While in private practice, Judge Gonzalez earned numerous accolades, including The American Lawyer Global Legal Award in 2017 for Investigation of the Year for Asia; recognition from Best Lawyers in America in 2018 for White Collar Criminal Defense; and in 2019 he became a Fellow of the prestigious American College of Trial Lawyers.

In addition to his responsibilities as a partner in private practice, Judge Gonzalez continued his tireless work in the public sector. For example, in 2000, Judge Gonzalez was appointed to serve on the New York City Civilian Complaint Review Board (CCRB), an independent agency empowered to receive, investigate, mediate, hear, make findings, and recommend action on complaints against New York City police officers alleging the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language. In 2002, he was appointed to chair the CCRB, a role he held until 2006, when his service for the CCRB ended.

From 2002 to 2005, Judge Gonzalez was a member of the board of directors of LatinoJustice

PRLDEF, a national nonprofit that uses and challenges laws to create a more just and equitable society, which has played a profound role in advancing equity and justice for Latinx communities in the United States, Puerto Rico and for others, as well as fostering the next generation of Latinx leaders in the legal field.

From 2003 to 2018, Judge Gonzalez was also an active member of the board of directors of New York Lawyers for the Public Interest (NYLPI), a non-profit organization that has fought for more than 40 years to protect civil rights and achieve lived equality for communities in need. The NYLPI distributes resources without regard to race, poverty, disability, neighborhood or immigration status. Judge Gonzalez states that he was particularly drawn to NYLPI because of its commitment to disability rights, health justice and translation services provided to immigrant communities. Indeed, he recalls that his mother, who suffered from degenerative nerve disease, was unable to work outside of their home, and he had to accompany her to her medical appointments to function as a translator – a difficult burden for a child. The services provided by NYLPI are intended to help immigrant families like Judge Gonzalez's to shield children from having to provide these services. At NYLPI, Judge Gonzalez has served as its chair as well as the chair of the Program and Litigation Committee overseeing NYLPI's extensive docket of pro bono litigation.

Judge Gonzalez's public service contributions also include being a member of the New York Federal Judicial Screening Committee (2001-2006), serving as a special master in a federal civil rights case involving the hiring practices of the New York City Fire Department (2012-2016), serving as a member of the Committee to Reform the New York State Constitution (2016-2020), and serving on the board of trustees for The Climate Museum, the first museum in the United States dedicated to the climate crisis (2015-2022).

Leadership Roles

After his illustrious career in the public and private sectors, Judge Gonzalez wanted to reinvent his career by taking on a new role, that of judge. He believes that his significant state and federal criminal experience as an ADA and as an AUSA helped to prepare him for this role, as he is already extremely familiar with aspects of state and federal law, including Section 1983 claims and habeas proceedings. His prosecutorial experience was amplified by his leadership roles at two major New York City law firms, including a practice focusing on white collar criminal and complex commercial matters, and, of course, handling numerous discovery disputes. Judge Gonzalez contends that these varied roles, which gave him the opportunity to try more than twenty federal and state jury and bench cases and to argue countless motions before state and federal trial and appellate courts, afforded him significant courtroom and trial experience that enabled him to make judicial rulings with a sense of confidence.

Judge Gonzalez hopes to be remembered as a judge who thoroughly enjoyed the demanding craft of being a lawyer and a "lawyer's judge who understands the complexities and demands of practicing law." He also wanted to impart how incredibly proud he is to be a district court judge in the Eastern District of New York, a court that is one of the top courts in conducting naturalization ceremonies, and the very court where his parents were naturalized approximately fifty years ago. Indeed, his parents' framed naturalization certificate is prominently displayed over his desk – a constant reminder, as Senator Schumer remarked, of how Judge Gonzalez is "the embodiment of the American Dream."

From the Courts

Southern District of New York Welcomes Magistrate Judge Gary Stein

By Magistrate Judge Sarah L. Cave

On September 15, 2023, Gary Stein was sworn in as a magistrate judge for the Southern District

of New York. A native of Cherry Hill, New Jersey, Magistrate Judge Stein attended New York University, where he was editor-in-chief of the student newspaper as an undergraduate before pursuing his law degree, serving as the senior articles editor for the law review at the New York University School of Law. Magistrate Judge Stein appreciated his journalism training, during which he learned to collect, analyze, and report the objective facts about both sides of newsworthy issues, but set out instead on a career as a lawyer, the first in his family to do so.

After law school, Magistrate Judge Stein clerked for Chief Justice Robert N. Wilentz of the New Jersey Supreme Court, before joining Paul, Weiss, Rifkind, Wharton & Garrison as a litigation associate. In 1995, Magistrate Judge Stein became an Assistant United States Attorney for the Southern District of New York, where he investigated and prosecuted cases involving money laundering, fraudulent investment schemes, and other financial crimes. During his tenure, he rose to the position of chief appellate attorney, which he held from 2002 to 2004. In 2003, he received the Attorney General's Award for Outstanding Achievement in Asset Forfeiture.

In 2004, Magistrate Judge Stein returned to private practice, joining Schulte Roth & Zabel LLP, where he became a partner in 2006. At Schulte, he represented corporations and individuals in complex civil litigation and in investigations by federal and state law enforcement and regulatory agencies involving fraud, the Foreign Corrupt Practices Act, money laundering, sanctions, asset forfeiture, and antiquities. Magistrate Judge Stein also took on several prominent pro bono representations, including a Sixth Amendment challenge to New York's system for providing counsel for indigent criminal defendants, a First Amendment and Due Process challenge to an Oklahoma law prohibiting teaching of certain race and gender concepts, and several federal appellate cases as a member of the New York Council of Defense Lawyers' amicus committee. In 2015, he was named as one of the New York Law Journal's Lawyers Who Lead by Example and is a two-time recipient of the Burton Award for Distinguished Legal Writing.

Amidst his accomplished career in both government and the private sector, Magistrate Judge Stein continued to cultivate his journalistic talents, writing numerous legal articles in the New York Law Journal, the Business Crimes Bulletin, and the Washington Post, among others. In July 2023, he published his first book, "Justice for Sale: Graft, Greed and a Crooked Federal Judge in 1930s Gotham," an in-depth investigation of the malevolent Martin T. Manton, who sat on both the Southern District of New York and Second Circuit benches before his avarice and ambition got the best of him, leading to his conviction in 1939 for defrauding the United States and a two-year prison term. A New York Law Journal review described "Justice for Sale" as "gripping" and commended Magistrate Judge Stein for "telling this squalid and degrading tale so well."

A Magistrate Judge

Fueled by a desire to return to public service and committed to the importance of objective resolution of disputes, Magistrate Judge Stein applied for a newly allocated magistrate judge position in the Southern District of New York. Since taking the bench in September, he has enjoyed deploying his inquisitiveness about factual and legal issues to the intellectual challenge of resolving disputes large and small. Despite having somewhat less experience with civil discovery disputes and settlement conferences, Magistrate Judge Stein has embraced the objective of bringing parties together through patient listening to both sides' views. He has also enjoyed the experience of learning areas of the law that were previously less familiar. The support and guidance of his magistrate judge and district judge colleagues has been key to his productivity in his first few months on the bench.

Magistrate Judge Stein's first law clerk came from a prior clerkship with another magistrate judge, while his second and third joined him from the litigation department of his prior firm, Schulte Roth. He seeks out law clerks who display maturity and judgment derived from post-law school experience with federal court litigation.

In his spare time, Magistrate Judge Stein enjoys reading nonfiction and can often be seen cheering on the New York Rangers at

Madison Square Garden. However the Rangers' playoff prospects may develop this year, in the meantime Magistrate Judge Stein revels in the privilege of serving the people of the Southern District of New York.

Around the Circuit

Settling In as Circuit Executive

By Steven Flanders

Second Circuit Executive Michael Jordan was appointed to that post in 2019, and immediately faced multiple unprecedented challenges. There are few managerial posts in any field that rely so profoundly upon face-to-face interaction as do those in court administration. For this reason and many others, the COVID-19 pandemic that struck almost immediately upon Jordan's appointment constituted a circuit-wide crisis that could have derailed the system entirely. Remarkably, the Court of Appeals never missed an argument during the COVID-19 crisis, though of course many trials and other proceedings were delayed or otherwise modified. Oral arguments were held over Zoom. And at essentially the same time, the Court of Appeals experienced a generational change unique in its history. At one point, eleven of the thirteen active judges had served four years or less. One experienced practitioner who has followed the court closely for many years recently observed to me that slip opinions he receives often are headed by three totally unfamiliar names; he may not even know if the judges on a particular panel are men or women. Each circuit court of appeals relies implicitly upon its distinctive culture and institutional memory; the Second Circuit more than most. Without the indispensable and thoughtful contributions of the fourteen senior judges, and of a distinguished and energetic court staff, much would have been lost.

Years ago when I was circuit executive, I received an amusing call from former Chief Judge John R. Brown of the Fifth Circuit, a resident of Houston, Texas: "Steve, I understand that you have certain peculiar practices up there. . . . I should say practices peculiar to the Second Circuit, that I should be aware of when I come to New York next month for my sitting." What Judge Brown was requesting was a memorandum, drafted by Judge Jon R. Newman and approved by the court, that explained Second Circuit panel operations in detail for the benefit of visiting judges. As listed by former Chief Judge Wilfred Feinberg in a Hofstra law review article later reprinted by the Federal Bar Council, those "peculiar practices" included distribution of "voting memos" by each judge on a panel immediately following oral argument, use of oral argument in essentially every appeal (no "screening"), one or more panels every week for most of the year, a requirement in criminal appeals that trial counsel must continue unless relieved by the court, severe limitation of the use of the en banc procedure, and (possibly most surprising to a visiting judge) the "sixty-day list," discussed at every meeting of the full court, of the reason for delay of any appeal on the list, with explanation from the assigned judge (or the presiding judge, if the authoring judge is a visitor or otherwise absent). The mutual expectations of all circuit judges following procedures along these lines (some have changed) are essential to the effective and harmonious discharge of the court's business.

The Position

The position of circuit executive is much less familiar to many practitioners than are other senior posts in the judicial branch, something I can attest to as a retired circuit executive myself. Though appointed pursuant to 28 U.S.C. § 332(e) as the staff to the judicial council, the governing body for the courts of the circuit, circuit executive duties are in large part internal to the judicial branch. It is rare for a circuit executive to have any direct role in any particular case, so our work is much less visible than that of the clerk or deputy clerk, or staff attorney, or probation officer, or other official. But the position is literally central to administration of the courts circuit-wide, as Jordan's activity detailed below will make clear.

Judicial Misconduct Complaints

These proceedings, filed pursuant to 28 U.S.C. § 351, have exploded in recent years, but in numbers only. In the past there were a dozen or so filed each year, nearly all promptly dismissed by the chief judge of the circuit pursuant to preliminary inquiry by the circuit executive. Most commonly the grounds for dismissal, then and now, have been that the complaint

concerned the merits of a judge's decision, a matter that can only be addressed by appeal. Following renewed attention by Congress and by local rule, the number of filings has increased to about one hundred per year in this circuit. The Breyer Report of 2009 drew renewed attention to the process. Only a handful of the complaints have passed the initial review by the chief judge, and none in our circuit, so far, have resulted in reference to the House Judiciary Committee, the ultimate, if provisional, action empowered to the judicial council under the statute. Notably, the most significant statutory investigative committees appointed under the relevant subsection of this title have been by transfer from other circuits, pursuant to order of the Chief Justice of the United States.

Space and Facilities

One of the most demanding of the office's circuit-wide responsibilities is to assure that courts throughout the circuit have adequate and efficient facilities. Assistant Circuit Executive Scott Teman and his staff are constantly on the road, arranging, designing, and pressing for approval of new facilities for a growing judicial branch. Large projects, especially new courthouses but also monumental efforts like the recent renovation of the Thurgood Marshall courthouse on Foley Square, generally require specific Congressional action, often more than once. Other projects, like creation of a new courtroom or judicial chambers or office space, often require a balancing act bringing together appropriations at the national, circuit and district level.

Budgeting

Under the system of decentralized budgeting adopted some years ago by the judicial branch, this is a complex process running from the courts and their individual offices up through the circuit to the Administrative Office in Washington and Congress, then back down once Congress has acted. The judicial branch is far from immune to the well-known dysfunction of the appropriation process in recent years. Circuit Executive Jordan is the prime advisor to the Court of Appeals budget committee, often a painful responsibility as budgeting formulas have been cut, often late in a fiscal year. Fortunately, the Court of Appeals has mostly been spared the need to wield an axe to cut valued employees. Mostly this has been achieved by delaying hiring for positions likely to be adversely affected by cuts. These have run as high as an 11% sequestration in 2013.

Recruitment and Other Personnel Matters

On behalf of the Judicial Council, Circuit Executive Jordan staffs each statutory committee that recruits bankruptcy judges throughout the circuit, conducting interviews and concluding with recommendations for appointment by the Council. Initial advertising and screening applications take place in the circuit executive's office, much by Jordan himself. His responsibility is roughly similar as to appointment of Federal Defenders in the four districts outside New York City (the Federal Defender Services section of the Legal Aid Society is a semi-private body that serves the Eastern and Southern Districts of New York, and is outside the Federal Defender system). A circuitwide Director of Employment Dispute Resolution addresses a wide variety of workplace issues.

Other Programs

Space, and the patience of our readers, forbids detailed explication of every major program of the circuit executive and his staff. Some others include:

- The Office of Information Technology, which develops applications for the court of appeals and other courts, both within judicial chambers and in every court unit.
- Civic education, one of many distinguished programs of the late Chief Judge Robert Katzmann, is an astonishingly widespread effort, once essentially unique to the Second Circuit but now widely adopted throughout the United States. The program initiates more than eighty school visits each year, doing moot courts, mock trials, and other events.
- Judicial conferences and other public events. The circuit executive participates in the planning of each circuit conference, a statutory event that brings together judges and practitioners from every part of the circuit to address court administration issues. Circuit executive staff plan the logistics of the conference and address the myriad details of so large an event. Such ceremonial events as a forthcoming observance of 50-years operation of the Civil Appeals Management

Plan (CAMP) are planned and executed by circuit executive staff.

- Washington events. The Judicial Conference of the United States Courts meets twice each year, normally in March and September. Each circuit is represented by its circuit chief judge and an elected district judge on this national governing body of the entire system of "inferior" federal courts. The chief justice presides. Most of the agenda is in response to committee reports; the committees usually have at least one representative from courts in this circuit. When matters arise of special significance here, the circuit executive is often involved. Also, at about the same time there is a meeting of circuit chief judges and circuit executives, and Administrative Office and Federal Judicial Center staff, a meeting also presided over by the chief justice, to address administrative issues common to the courts. The circuit executives also meet separately with Washington staff.

Circuit Executive Michael Jordan had the great advantage of considerable experience and familiarity with all of these issues before he was appointed in 2019. Following law school he had been a law clerk to Chief Judge Dennis Jacobs. After a stint at Davis Polk, he returned to the Court of Appeals and the Judicial Council as deputy circuit executive under the late Chief Judge Robert Katzmann, prior to his appointment to the position of circuit executive for the Second Circuit. Few new circuit executives have ever been in so favorable a position to hit the ground running.

The Legal Profession

Ken Hart: Extraordinary Lawyer, Mentor, and Friend

By C. Evan Stewart

Kenneth Nelson Hart was a great man, and he had a profound impact on my professional career and my life. Born to modest circumstances in Rhode Island, Ken attended Colby College, where he excelled academically. Thereafter he joined the Marines, where he served as a master sergeant – because of his imposing physique (Ken was 6'4" (plus) and approximately 240 pounds), his picture was used on Marine Corp. recruiting posters. Upon his honorable discharge, Ken enrolled at Boston University Law School, where he graduated first in his class. That accomplishment made him eligible for the U.S. Justice Department's Honors Program, where he served with distinction in the Antitrust Division for several years. Upon completing that program, Ken considered numerous attractive job options, ultimately agreeing to Ralston (Shorty) Irvine's request that he join one of the country's leading litigation firms: Donovan Leisure Newton & Irvine (see *Federal Bar Council News*, December 2002).

At Donovan Leisure, Ken worked for and with many of the firm's legendary litigators, including Walter Mansfield (see *Federal Bar Council Quarterly*, May 2010) and Sam Murphy (see *Federal Bar Council Quarterly*, November 2009). Ken's intelligence, work ethic, good judgment, even temperament, and sense of humor earned him the respect and affection of colleagues and clients alike. Over the course of Ken's exemplary career his clients would include Pfizer, Kodak, American Cyanamid, and the Penn Central Corporation.

My first exposure to Ken came as a result of his administrative task at the firm in the late 1970s: giving out substantive assignments to associates. As was his want, Ken would invariably end up his assigning some onerous task with a cheerful: "This will be a good experience for a young lawyer."

Off to Boston

My first real work with Ken was on an important criminal antitrust case that was going to trial in federal court in Boston. We were faced with an uphill job. Our client was a major, international conglomerate that had acquired a leading manufacturer of industrial screws several years before. The screw industry in the United States at that time was under enormous pressure from foreign competitors. As a result, the trade association for the industry had not played fair under our antitrust

Ken Hart and C. Evan Stewart. Photo courtesy the author.

laws. The association was led by a former F.B.I. agent who convened meetings in Bermuda, where he assured company representatives it was permissible to discuss and agree upon prices. To make matters worse, the case was assigned to Chief Judge Andrew A. Caffrey of the District of Massachusetts – an Irish-politician turned judge, who was legendary for his temper (he was twice appealed to the First Circuit for prejudicial facial expressions made during testimony).

On the first day of jury selection, the judge assembled seventy potential jurors in his courtroom. Caffrey, whose flaming red hair of his youth had turned snow white, explained the nature of the case and that it would likely take four weeks to try. Leaning over the bench, the judge sternly asked: "Will any of you have any difficulty serving for that long?" The large group, intimidated by the setting and the imposing judge, was silent . . . until one elderly gentleman in the back row meekly raised his hand. Caffrey leaned further over the bench and with an even more menacing stare intoned: "What would your problem be, sir?" The old gentleman squeaked out: "I have an ear appointment in two weeks." In response, Caffrey even more intensely probed: "And will that prevent you from serving on this jury?" To that came the quiet reply: "What?" With the entire courtroom erupting in laughter, and with his face now scarlet vermillion and the veins on his neck visibly pulsing, Judge Caffrey screamed out: "You're excused!"

That singular light moment did not change the daunting assignment we faced. After two days of trying to see how we could possibly put on a defense through our client's principal witness, Ken worked out a nolo plea agreement with the Justice Department lawyers. The other defendants did not pursue that same path, however, and (not surprisingly) were found guilty of price-fixing by the jury.

Iron Ore Litigation

My next important job for Ken was in representing the Penn Central Corporation in a series of cases that went on for many years and that became known as the *Iron Ore Antitrust Litigation* (see 42 B.R. 657 (E.D. Pa. 1984); 771 F.2d 762 (3d Cir. 1985); 1982-83 Antitrust Trade Cases (CCH) ¶¶ 65,054 & 65,608 (N.D. Ohio 1983)). For our first pretrial conference in Cleveland before Judge William K. Thomas of the Northern District of Ohio, we flew out the day before to meet with our local counsel, a leading partner at the Jones Day firm. He told us that Thomas was an old school gentleman who put a particular premium

on courtroom decorum; one insight I will never forget was the fact that Thomas took great umbrage at lawyers putting their briefcases on counsel tables in the courtroom.

Opposing us (along with the litany of co-counsel representing the other co-defendants) was plaintiff's lead counsel, Lawrence R. Velvel of Howrey & Simon. Velvel, as we would soon learn, was an intelligent and aggressive lawyer, but one who also had an extremely abrasive temperament that often did not serve him or his client (a dock company that transported iron ore to the railroads from the Great Lakes) well. As the large group assembled in the majestic courtroom in downtown Cleveland, Judge Thomas entered to greet us. Before we could sit down, the first thing Thomas said (in a booming voice) was (to Velvel): "Get that briefcase off the table!" It was an auspicious beginning to many years of tough sledding.

And it did not take long to find that out. In the first deposition – which concerned Penn Central's production of documents – it got testy very early. Ken objected to a question that began with the prologue: "As I understand it." Velvel jumped in: "You can continue if you wish with that kind of belaboring . . . , but I will tell you, sir, that you will pay for that." Just minutes later Velvel reacted to another objection: "Mr. Hart . . . ." Ken cut him off with: "You're not going to threaten me again with 'you'll pay,' are you?" Velvel: "Well, I think before the case is over you're probably going to write a very large check, Mr. Hart." Hart: "Mr. Hart is not going to write a very large check, Mr. Velvel. I have eight children to support. I will tell you right now, I am very fond of you, Larry. . . ." Velvel: "I only have two, three."

When Velvel then pressed his argument to Judge Thomas that Penn Central was hiding the ball in discovery, he again did not get off to a great start. When the judge asked how many copies of a key document should be made, Velvel answered: "I suppose about seven or eight copies, what we normally use, your Honor." Thomas replied: "[M]ake seven. We don't want this to be indefinite, like the number of children you have, Mr. Velvel. You said two or three."

The next step in the case (for me) was an assignment to go off to a document warehouse, review the millions of documents therein, collect all the "hot" documents, and then write up a fact memorandum that would be the "Bible" for the duration of the case. When I asked Ken how long I should expect to be away on this project, he smiled and said: "until you're done." And of course he added: "This will be a good experience for you." And you know what, he was right!

Later came the substantive part of discovery: depositions of the key witnesses. Our co-counsel deferred to Ken and he was asked to depose the chief executive officer of Velvel's client, Maynard Walker. I came along to assist Ken with the "hot" documents (and whatever else he needed me to do). This was in the era of multiple-day depositions (or even weeks); and so we headed to Washington for the long-haul within the District of Columbia offices of Howrey & Simon. In that one week I learned from watching Ken an enormous amount, both in substantive experience and how to conduct yourself as a professional.

Early on Velvel was up to obstructionistic behavior. First, he objected to a question: "No foundation is laid." Ken calmly replied: "I didn't know you had to have a foundation for questions for a deposition. You may answer." Then Velvel objected: "Mr. Hart, what is the purpose of this line of question?" Ken (again) calmly replied: "I don't think I need to tell you what the purpose is. If you want to object on some ground recognized by the Rules of Civil Procedure, the record can so show." After Walker had difficulty estimating how much time he had spent preparing for his deposition, Ken said: "Why don't you try your best. I am sure being with Mr. Velvel every day is memorable." Velvel: "If only women thought the same thing, Mr. Hart." Hart: "I have been told a lot of them do." Velvel: "I wish to put on the record, Mr. Hart, I would certainly like to know your source of information." Hart: "That's privileged information. I have been instructed not to go any further."

As the deposition dragged on – and as Ken was eliciting very favorable testimony for our promising statute of limitations defense – things got even more testy. Now Velvel weighed in as follows: "Mr. Walker, I instruct you not to be browbeaten." Hart: "Don't be browbeaten, Mr. Walker." Walker: "That is a long hose you have."

Then Ken showed Walker a document and asked him to review it in advance of some questions. Velvel objected. Ken asked: On what grounds? Velvel responded that it was improper interrogation because it was a document neither authored by nor seen by Walker. At that point Ken stood up, leaned over the conference table (which meant he was towering over the elderly, diminutive Walker), and said in a commanding voice: "I can use a baseball bat, if I want to, to refresh

Mr. Walker's memory!" This was (and is) of course precisely so (and the image of the cowering Walker has never faded from my memory).

Toward the end of the deposition, Velvel's objections became even more fanciful – at one point he tried to cut off questioning because the "document speaks for itself." Hart: "That is why we are taking the deposition to get some information that is in Mr. Walker's head. If we had to look at the documents, Mr. Velvel, we could all go home. I can read these in my library in a nice comfortable chair with a fire going and my feet up and my good dog Ralph by my side." Velvel: "Tell me something, Mr. Ralph, ..." The following day, Velvel went on the record to say he had not called Ken "Mr. Ralph." Ken replied: "I was just going to say that my dog Ralph was so offended that you called me by his name, and I thought that was probably a Freudian slip, that you think I am really a dog, Larry." Velvel: "No sir; now whatever I may think I did not say "Tell me, Mr. Ralph."

A Lanham Act War

During a brief lull in the never-ending Iron Ore odyssey, Ken and I took on a new challenge. Our client, the New England Educational Institute (NEEI), had a temporary restraining order application filed against it by Yeshiva University in the Southern District of New York. Yeshiva, which had run a summer vacation program for mental health professionals on Cape Cod for years, was extremely upset that NEEI had established a competitive program (also on Cape Cod). As such, Yeshiva initiated a Lanham Act prosecution aimed at shutting NEEI's program down.

Hired to deal with the TRO, Ken devised a not obvious, but brilliant, plan of attack. Rather than defend on the merits, we would take a dive and negotiate (using the good offices of the judge assigned to the case – Leonard Sand) a means to resolve any "confession" that might exist between subscribers to the two programs. In the end we mailed registered letters to the hundreds of subscribers to the NEEI program, explaining the situation and offering them the opportunity (if they had been "confused") to re-register in Yeshiva's program. The end result: two psychiatrists switched programs.

We thought that would be the end of it; but Yeshiva wanted its pound of flesh. And so we ultimately went to trial for a week before Judge Sand and a jury. Two highlights remain (for me). The first was my cross-examination of the plaintiff's expert on his survey "evidence," which purported to reflect vast "confusion" on the part of the "validly" surveyed mental health professionals concerning the two programs. And while I thought I had done a good job, it paled in comparison to Ken's cross-examination of the plaintiff's expert on damages.

The plaintiff had hired the dean of a New York University graduate school to come up with a Rube Goldberg-like structure that resulted in monetary damages in the high seven figures (a lot of money in 1985). But after Ken spent time deconstructing the dean's work, what he demonstrated on cross-examination was that (according to the dean) every year after the registered letters had been sent the level of "confusion" as to the two programs (for some of the smartest people in America) would actually increase – thus, the "confusion" by year ten would be ten times worse than year one!

Following this vivisection, we asked Judge Sand to strike the dean's testimony (and supporting evidence) in toto. Aware of what he had just seen, but reluctant to impose such a drastic sanction, the judge (outside the presence of the jury) admonished the dean to reconsider his testimony and come back the next day with something more defensible. But when the next trial day began, the dean dug in and would not change his story. Judge Sand, cutting the plaintiff a lot of slack, then told the jury to disregard only years three through ten of the dean's damages model. Regardless, and needless to say, we prevailed at trial. See 229 USPQ 849 (March 13, 1986).

The Haunted House

The firm was retained to handle the appeal of an adverse antitrust ruling from a trial that had taken place in Oklahoma. To get a realistic understanding of what had happened (as well as to assess our client's chances on appeal), Ken and I flew out to Oklahoma City. Arriving at the best hotel in town, I asked for restaurant recommendations. The Haunted House was the unanimous favorite, so I booked us there for our first night. It was a night to remember.

After we sat down to dinner, Ken ordered his usual cocktail and I had a glass of wine; and once we had refreshed both of our drinks we ordered the restaurant's specialty: sirloin steak with all the trimmings. When they arrived they certainly appeared to live up to their billing, so we dug in. As I was enjoying my

steak I glimpsed across the table and saw something I had never seen – Ken had turned ashen and had a look of total fear on his face! "You're choking, aren't you?" I immediately asked. Ken nodded. "Stand up!" I ordered. So here I was up against Ken's back with my arms around his chest, feeling his large but slack body (and life) in my hands. I had never done the Heimlich maneuver before, but I started pounding Ken's lower chest with all my might. Fortunately, within just a few poundings the large chunk of steak that had lodged in Ken's throat flew out of his mouth and on to the Haunted House's floor.

Both of us – for related but somewhat different reasons – sat back down with huge sighs of relief. Ken was, of course, grateful; but I was still somewhat shocked that I had reacted so quickly and effectively to save my boss' (and friend's) life. As we finished our dinner (making sure we cut each piece of steak into very small bites), I explained that my maternal grandmother had died under the same circumstances because she had been eating alone.

The End of Ken's Career

By odd timing, Ken was becoming head of Donovan Leisure just as I was leaving the firm. He had a big job ahead of him because a number of senior partners had recently jumped ship. By all accounts he did a fine job in calming the waters, but then fate intervened. Carol, his beloved wife (and mother of their eight children), was diagnosed with an extremely serious degenerative disease. As a result, Ken had to spend a considerable amount of time caring for her, especially as Carol's condition worsened. Always looking for a bright spot, Ken took over all cooking duties and ultimately published in 1994 "Home Cooking of the Hart Family" (a copy of which is in my office). Not long after Carol died Ken retired to his summer residence in Rhode Island. On December 24, 2014, Ken Hart died peacefully surrounded by his family. Ken's son, Kevin (a noted antitrust lawyer in the federal government), called me to share the sad news at the express request of his father.

Ken and I stayed in close touch after I left the firm; and he took a strong interest in the professional milestones of my career. Every day in my office I look at his picture and draw strength from all my wonderful memories of that very special man.

Pete's Corner

My First Days as a Lawyer

By Pete Eikenberry

Sixty years ago, on January 2, 1964, I commenced my legal career as an associate at White & Case. It had 125 lawyers, as did Dewey Ballantine; Shearman & Sterling was the largest firm, with about 150 lawyers. When I was hired, the "going rate" was $7,200. Before starting, I called Columbia Law School and learned that the going rate had gone to $7,800. My first week, I asked the White & Case hiring partner, Larry Morris, if the going rate had gone up. He told me that he would check with a guy at Shearman & Sterling. Larry got back to me later in the day; the going rate had gone up to $7,800. My buddies in the "bullpen" (the room where 8 desks were crammed, and the new recruits were quartered) were ecstatic. (As I recall, the "going rate practice" was wiped out by the "Cravath raise" in the fall of 1968.)

In 1964 at White & Case, there were no women lawyers, no Black lawyers, and no "other" lawyers of any description except for two guys from Saudi Arabia. (White & Case represented Aramco.) There was no requirement for the hours associates needed to work. Vince O'Brien did not even know to keep track of his hours and had to reconstruct several months at one time. (Later, he became general counsel of Seagrams.) I was released from work at 5:00 to study for the bar – and ate quickly at Chock Full o' Nuts before going to bar review sessions. On St. Patrick's Day, 1964, I skipped bar review and joined my buddies Vince O'Brien and Austin O'Toole at a bar just off the parade route. Thankfully, I passed the bar exam.

In 1965, when the Securities and Exchange Commission brought an insider trader case against White & Case client Texas Gulf Sulphur, I was drafted onto the team. The

others on the team were Orison Marden, then president-elect of the American Bar Association, junior partner Bill Conwell, second year associate P.B. Konrad Knake, and new associate Tom McGanney, fresh from a clerkship with a federal judge. A couple of months earlier, I had drafted a research memo on the market impact of Texas Gulf having discovered a $2 billion mine near Timmons, Ontario. I was assigned to interview all of the officers, directors, and relevant employees of Texas Gulf, except for the president. I interviewed several "tippees" as well. I traveled to Timmons, Ontario, the location of the mine, to Washington D.C., the home of some tippees, and to Toronto several times. I remember trudging down a frozen street in Timmons to interview a tippee drycleaner and to visit a stock brokerage office where older women sat around in fur coats. (There were no cabs in Timmons.)

Shortly after I was assigned to the Texas Gulf team, I was on a Texas Gulf plane bound for Toronto to cover a deposition of a Canadian trader, among other things. He was being deposed on impact of the Texas Gulf find on the market. On the plane, I met one Bob Fiske. I reached into my wallet and took out the name Bob Fiske, the guy I was to look up in New York. He had been in Michigan Law School with my first cousin, Jim. At the deposition of the Canadian trader, it appeared to me that his testimony was going to hurt Texas Gulf. Thus, I determined to ask questions. I had been admitted to the bar for a few months at best and had never even attended a deposition, let alone asked questions at one. I asked first how old was the broker – he was in his 20's. This was good. I plunged ahead. I asked him, "How much experience do you have?" He trotted out a world of experience. Fiske asked for a break; he took me into the hall and said, "Pete! Do not ever ask a question on cross, if you do not know the answer!" Properly chastised, I asked no more questions.

One night, just before the trial, I was working on the file and listed all the exhibits. Later, since I knew the exhibits, Orison asked me to second seat him at the trial. Everyone else had to stay behind at the office until the Texas Gulf part of the trial was over. Every day, I put all the exhibits into boxes, then onto a cart, and with bailing twine, I pulled the cart out to the street. I got a cab in front of 14 Wall Street to go to court for the trial. At midday, I took orders and paid for lunch for the lawyers from White & Case, Davis Polk and Cravath at Eberlins (a couple of blocks from the courthouse). One day a waiter, with quite a few plates in the air on his one hand, said – "Don't worry! I have never lost a plate!" – and then, at that moment, all the full plates came cascading down.

After the trial was over, Konrad and Tom were tasked with writing the post-trial brief, and I took the plane to Jackson, Mississippi. I had asked Orison in 1964 if I could volunteer to be a civil rights lawyer in Mississippi on my vacation that year in August, and he had discouraged me. But in 1966, just after the trial concluded, he took me to lunch at the Downtown Association, a private club that no longer exists. He asked me if I would like to go to Mississippi for the month of August as a civil rights lawyer at White & Case expense. I said, "Yes." I never worked on the Texas Gulf team again. For the month of August 1966, I worked as a civil rights lawyer in Mississippi for the Lawyers' Committee for Civil Rights Under Law. It had been organized by a group of lawyers including Orison Marden who had been called to the White House by President John Kennedy to request that they do something to ensure that civil rights litigants had effective representation. There were only six Black lawyers in all of Mississippi and any white lawyer who might have represented a Black client would have been ostracized.

In the fall of 2016, Bob Fiske and I were both at the Supreme Court to receive awards. Bob, a national one, and me, one from the Second Circuit. Tom McGanney and Konrad Knake from the Texas Gulf team played tennis with me and each other in a foursome for decades. Although Konrad died some years ago, Tom and I are still in touch on a regular basis through participation in two American history groups. In September 2023, Bob Fiske and I participated in a retrospective on the impact of the Texas Gulf case at the invitation of Professor Marilyn Ford of Quinnipiac Law School.

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