Federal Bar Council Quarterly

June/July/Aug. 2020 www.federalbarcouncil.org Vol. XXVII, No. 4

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From the Editor

A Chat with Sheila Boston, the New City Bar President

By Bennette D. Kramer

On June 6, shortly after the beginning of the demonstrations protesting the death of George Floyd, I spoke to Sheila S. Boston, the newly inducted president of the Association of the Bar of the City of New York. Sheila is the first woman of color to become president of the City Bar. She has long been active in the Federal Bar Council and currently serves as chairperson of the Federal Bar Council board. She also has served as treasurer and vice president of the Federal Bar Council and as treasurer of the Federal Bar Foundation, the 501(c)(3) corporation founded in 1964 that funds many of the Council's activities. Sheila was president of the Council's Inn of Court in 2014-2015. She is a partner at Arnold & Porter Kaye Scholer LLP. Sheila and I talked about some of her goals as president of the City Bar and her view of the current pandemic of racism, the antiracism movement, and a range of other topics.

It is my personal opinion, shared by many, I believe, that Sheila has become president of the City Bar at a time she is desperately needed. Sheila has long been an active proponent of diversity in law school, her law firm, and in the legal community, including the Federal Bar Council. She is a woman of color stepping in to lead a major bar association at a time that the country is in urgent need of real diversity, understanding, and sharing of goals to ameliorate a racial divide that is separating the country. Her mere presence at the helm of the City Bar will send a strong signal and create the image necessary to influence people's acceptance of diversity.

The Pandemic of Racism

Sheila said that she is trying to be positive during this difficult time. The coronavirus pandemic has been hard for her and her family. She has lost friends and family members. However, she sees a ray of hope in the honest discourse that is arising from the demonstrations and the movement. We need open and honest discussions during this pandemic of racism. She said that people of color will not keep suffering in silence, experiencing racism and abuse, and that people can no longer deny the racism and police violence against people of color. Sheila said that she is talking to as many people as she can and appearing on as many panels as possible to discuss the issues.

Sheila is heartened because the marches look different from earlier marches and demonstrations. The marchers are much more racially diverse and younger, and broad coalitions appear to be building bridges for future progress. The country is at a crossroads facing the truth and consequences of the violence against people of color. The diverse group of marchers and other supporters are horrified by black people getting killed or targeted, and there appears to be a different momentum now. It was necessary for a cataclysmic event like the murder of George Floyd to occur for people to come together and coalesce in an organized manner. People are risking their health to take to the streets in a health pandemic.

Sheila said that she is talking with different people and organizations. She is trying to listen and collect information from many different voices. As a lawyer, she looks at policies and regulations and collects information to develop best practices for her firm, organizations, and her church. She has ideas but values the need to talk and learn from others. As president of the City Bar, Sheila has set goals in connection with criminal justice and social justice. She sees the need for police reform and to address law enforcement issues, but at the same time to encourage good officers and get them to

participate in this endeavor. She has police officers in her family and knows that reform is needed. Her son is a corrections officer, and her husband is a former state police officer.

Initiatives

In her speech as she was inducted as president of the City Bar, Sheila outlined six categories of initiatives that she wants to pursue during her term:

- COVID-19 recovery;
- Mental health and wellness;
- Access to justice;
- Diversity, equity, and inclusion;
- Criminal justice reform; and
- Protection of the rule of law.

Sheila said that she spent the shortest time on criminal justice reform in her speech because she did not believe she had to say too much about it. She did not want to insult the intelligence of her audience because there have been so many statistics about mass incarceration. Nonetheless, it is an important issue. There is so much evidence for the need for reform. She said that our legal community has some of the finest minds and should be able to address the subject in a logical and effective way.

Shelia Boston

When Sheila was first nominated, she did not accept it right away. She is the mother of young adults and has obligations to them. They need her as they begin their careers and choose life partners. She also has a busy practice, is in the middle of her career, and is involved in several different bar associations. She talked, prayed, and thought. She spoke to her family and they agreed, particularly her brother with whom she shares care of her mother. Everyone was supportive, including management at her law firm, and agreed that accepting the nomination was what she should do. Sheila has a long commitment to justice and the rule of law, including racial equality. So, she accepted.

Sheila told the story of her attendance at the living former presidents' dinner, which took place after she accepted the nomination but before she was inducted. She walked into the City Bar's main hall. She was used to being greeted by staff who know her, but there was a young man sitting there who looked new. When she approached him, he said that there was not much going on that evening. She said that she was there for the presidents' dinner. He looked puzzled. Then, a dear friend who was part of the

City Bar security team told the young man that Sheila belonged in the room with the presidents. It had never occurred to the young man who was a person of color himself that a black woman belonged in the room. Sheila said that this incident shows us why imagery and representation are so important. People tend to think that a president must be a white male. But now there is a generation, who when they imagine a president, initially only knew Obama, which creates a changing imagery and representation. It is the media's responsibility to assist by using images of people of color who have power and who are professionals. The young man apologized when he found out that Sheila was the next president of the City Bar.

Sheila then went into the room where the dinner was held. She was a few minutes late. The room was mostly full of white men, although Roger J. Maldonado, the prior president, is Latino. The only two women former presidents who were present were seated very far away. It was a very formal occasion and they were using the special chinaware. Filled with anxiety and doubt, Sheila, who usually gets along with everyone and is no shrinking violet, asked herself if she really belonged in the room. She sat down beside Louis A. Craco, who reached over and put his hand on hers and said he was very excited and proud of her and that she was going to do a great job. He asked her to please be sure to be herself – to be authentic. At that moment, the doubt and anxiety left her. It was a complicated and convoluted moment of intersectionality.

Sheila reiterated that imagery and representation are important and impact both the way we see ourselves and how the world sees us. When a great lawyer is described, the image of a white male typically appears. This is in a world where so many women and people of colorare doing wonderful things. The imagery must change.

Columbia Law School

Thurgood Marshall looms large as one of the reasons Sheila wanted to go into law. When she went to law school, she saw herself as a public interest lawyer. She applied for a public interest scholarship at New York University School of Law. She got into the law school but did not get the scholarship, so she went to Columbia Law School instead.

Back then, Columbia tended to encourage its students to go into big law. At Columbia, Sheila took a course taught by David Leebron in torts and product liability, which caught her interest because it fused law and medicine. She went to the professor and told him she wanted to do complex product liability work. He helped her put together a list of the top firms for complex product liability cases in New York, including Kaye Scholer. When she was with the Kaye Scholer interviewer on campus, Sheila asked questions about diversity, the number of partners of color, and the number of women partners. The white female interviewer from Kaye Scholer – unlike other interviewers – was not caught off guard or embarrassed at all. In fact, she was fantastic. She gave good answers to Sheila and said she wanted to work with Sheila to improve diversity at Kaye Scholer.

As a mid-level associate at Kaye Scholer, Sheila established the first diversity committee, when those committees were rare. Her mentor in that endeavor was Jim Sandman from Arnold & Porter – an interesting coincidence as the two firms eventually combined. He helped her to encourage her firm to establish a diversity committee. She wrote a memo to the law firm leader to explain the "black tax concept," which is that there are extra pressures on attorneys of color to assist more junior attorneys of color and too often the onus is placed solely on attorneys of color. A diversity committee, however, could enlist non-diverse attorneys to help shoulder the burden. Yet, management has to buy in to make any program successful, and Sheila succeeded (with the support of two to three other individuals) in convincing the Kaye Scholer management to create a diversity committee.

The Rule of Law

The protection of the rule of law is very important to Sheila. She believes that when you have a law degree you are obligated to use it to advance the rule of law and access to justice. The public must

have confidence in the fairness of the system and the principled application of the rule of law. Lawyers have a responsibility to explain the rule of law and to create transparency. A fan of John Rawls' "A Theory of Justice," she believes that the minimum level of justice that everyone should have under the social contract is decent medical care, access to education, and access to the justice system. We need to have a more level playing field. The social contract should ensure that everyone gets opportunities and has a chance to thrive. There is too much unrealized potential talent and spirit that we need to cultivate. Our society is only as strong as its weakest link.

Sheila also wants to focus on wellness and mental health. She is learning about it and also looking at it in terms of a racial justice analysis. During the COVID-19 pandemic there has been a lot of psychological and emotional trauma. Putting racism aside, the health pandemic has been brutal, but it is necessary to keep things in perspective.

For example, in some instances it is a privileged problem to have complaints about having to shelter in place (that is, people with a roof over their heads are fortunate), but it does have a debilitating effect on mental wellbeing. People feel isolated because they are not going to work and being with people. On top of that is the trauma of losing people. Sheila has learned the importance of wellness and taking care of herself. She meditates every day with a mantra and positive affirmation. She noted that she always had a positive quote on a white board in her office at her law firm: "I can't but we can." It is important to reach out to others and rely on others; to meditate and breathe to help to calm and control reactions. During the racism and health pandemics, Sheila has had to limit news on the television and reading on her phone in order to get away from it all to be productive and efficient.

The legal profession is filled with stress, but lawyers believe they can handle everything. There is a high incidence of addiction and mental health problems in the legal profession. As lawyers we need to pay attention to mental health. A new City Bar report recommends adding a mental health/wellness contining legal education requirement. Lawyers need to evaluate themselves to make sure they are okay. It is okay to be vulnerable and to have therapy. It is okay to take time out for yourself.

I wish Sheila the best in her journey as president of the City Bar. From many years of working with her on Federal Bar Council

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Federal Bar Council Quarterly (ISSN 1075-8534) is published quarterly (Sept./Oct./Nov., Dec./Jan./Feb., Mar./Apr./May, Jun./Jul./Aug.) by the Federal Bar Council, 150 Broadway, Suite 505, New York, NY 10038-4300, (646) 736-6163, federalbar@federalbarcouncil.com, and is available free of charge at the Council's Web site, federalbarcouncil.org, by clicking on "Publications." Copyright 2020 by Federal Bar Council. All rights reserved. This publication is designed to provide accurate and authoritative information but neither the publisher nor the editors are engaged in rendering advice in this publication. If such expert assistance is required, the services of a competent professional should be sought. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

programs, I know that she has the intelligence, determination, and drive to accomplish her goals. I cannot think of anyone who is better situated to take the City Bar through these perilous times.

Personal Reflections

The Remarkable Seven-Year Tenure of Chief Judge Robert Katzmann

By Pete Eikenberry and Anna Stowe DeNicola

Where did this guy come from? No one had ever heard of him, and then he burst upon the New York legal community like a supernova!

–New York City Lawyer David M. Brodsky

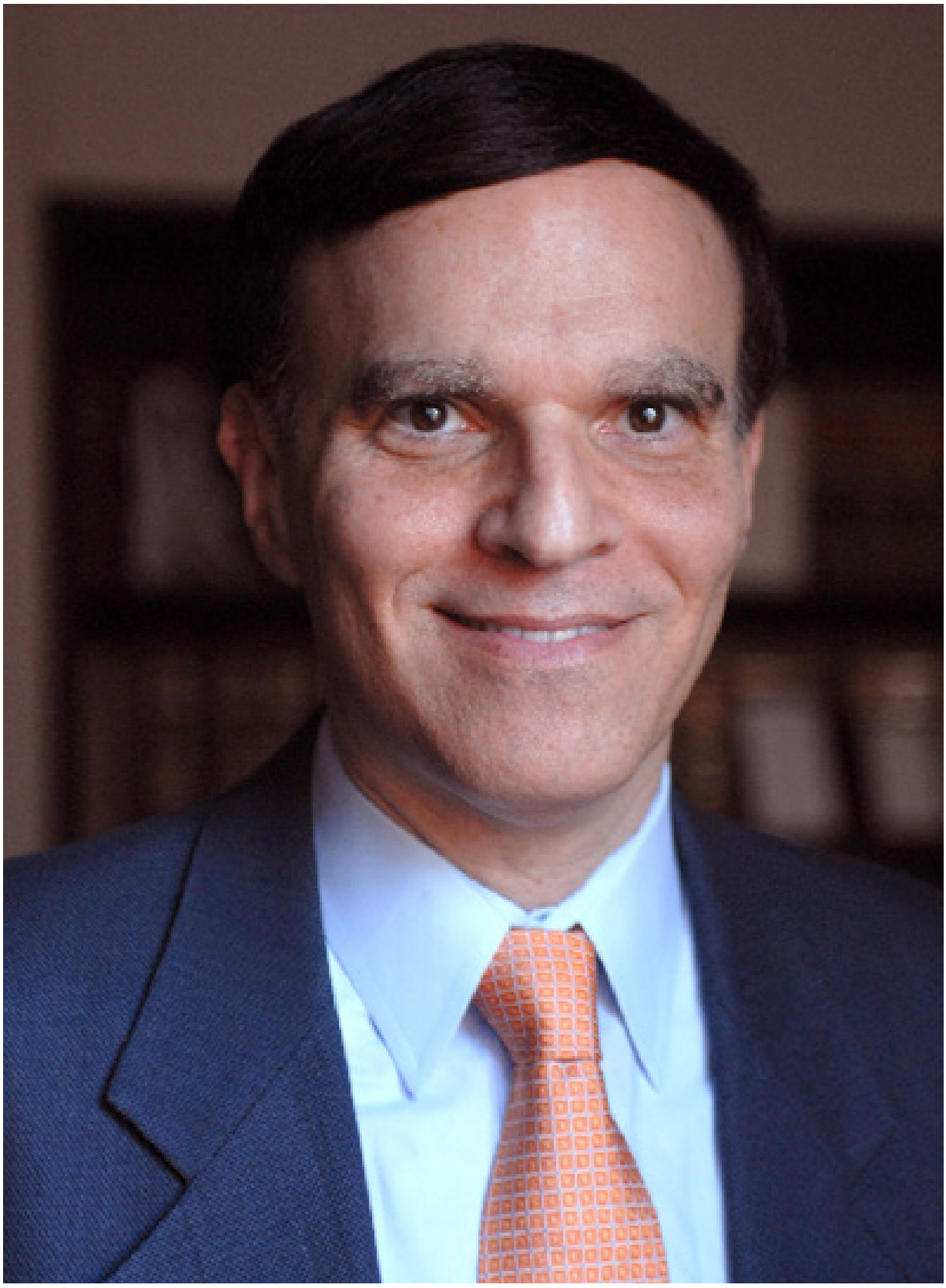
Although Judge Robert Katzmann was born and raised in New York City – a product of its public schools and a commuting student at Columbia College – his career was largely spent in Washington, D.C. A well-regarded academic and scholar of judicial administration and the relationship between courts and Congress, a chaired professor at Georgetown and a Fellow of the Brookings Institution, he was a Washington insider of sorts, including serving as pro bono counsel to Senator Daniel Patrick Moynihan and Ruth Bader Ginsburg on the latter's Supreme Court confirmation process. Confirmed by voice vote of the U.S. Senate, following a "well-qualified" rating by the American Bar Association, he virtually tip-toed back into his hometown of New York City after being appointed to the Circuit in 1999. As we celebrate Judge Katzmann's tenure as Second Circuit Chief Judge, it is illuminating to reflect on his background, on his judicial career, and on his involvements before he became chief judge in 2013, as they are instructive as to his values and approaches as chief judge.

In 2002, the New York Federal Bar Council Committee on Second Circuit Courts was working to establish its Federal Bar Council fall retreat. I asked Judge Sidney Stein if he knew of a Second Circuit judge who would agree to be a part of our faculty at the retreat. Judge Stein found us our first Circuit Court faculty member, Judge Katzmann. From the podium at the retreat, the Judge spoke of "the moral role of a lawyer," a subject I had done some thinking and writing about. After the retreat, he sent me a copy of his book, "The Law Firm and the Public Good." In it, he writes that:

> The lawyer's function is grounded in role morality, the idea that special obligations attach to certain roles – in this case to render justice…. A lawyer's duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.

Upon reading his book concerning the obligation of law firms to undertake pro bono work, I invited him to speak at the annual Marden Lecture at the New York City Bar. My former boss, Orison Marden, had been an advocate throughout his career for greater representation of indigent persons.

As a representative of the Orison Marden Lecture Committee, I proposed the Judge as a speaker, but the City Bar leaders were concerned.



Judge Katzmann

They said that, although "Judge Katzmann is a nice man, he will not draw a crowd." Two or three weeks before the lecture, Judge Katzmann emailed me to say that, "he was working hard" and that "he did not want to let me down." The evening of the lecture, the hall was full. As the Judge spoke, the crowd was in rapt attention, drawn by his exquisite presentation of the facts supporting the need, the power of his ideas, and the strength of his convictions.

His Marden Lecture was a clarion call to the legal community to address a dire problem which he saw every day: the unmet legal needs of immigrants. That lecture galvanized that community to action and has led to an extraordinary range of activities that have substantially improved the quality and increased the quantity of legal representation of the immigrant poor. As former Eastern District of New York Chief Judge Dora Irizarry said to us recently, "His sincerity in pursuit of justice, the welfare of the Court, the people in it, and humanity is an awesome force."

Following the Marden Lecture, he arranged for his talk to be published in the "Georgetown Journal on Ethics" and for several lawyers and professors to write as well on the need for immigrant representation. A year after the lecture, I volunteered to assist the Judge in putting a study group together involving judges, private litigators from the immigration bar, professors, law firm senior partners, and other interested parties in the effort. Motivated by study group participation, the members have been catalysts in the formation of an array of not-for-profit and governmental entities dedicated to providing immigrant litigants with first class legal representation.

As the more than 20 judges, court staff members, and law school deans who were willing and eager to be interviewed by us affirmed, the concept that all of us in the legal community are empowered and obligated "to render justice" is at the moral core of the Judge's every action.

Judge Katzmann's Background, Education, and Publications

Judge Katzmann grew up in Queens, received his Bachelor's degree from Columbia University in 1973; his Masters and a Ph.D. in political science from Harvard in 1978; and his J.D. from the Yale Law School in 1980. The Judge has taught at Georgetown as the Walsh Professor of Government, Professor of Law, and Professor of Public Policy, and for several years has taught at New York University School of Law. His writings span the breadth of regulation, judicial-congressional relations, disability legislation, administrative processes, court reform, and war powers resolutions. He delivered the James Madison Lecture at New York University's School of Law, the Orison Marden Lecture at the New York City Bar Association, and the Robert L. Levine Distinguished Lecture at the Fordham University School of Law, and his books include "The Law Firm and the Public Good," "Institutional Disability," "Regulatory Bureaucracy," "Courts and Congress," and the seminal "Judging Statutes."

1999 to 2013: Growth of Stature Among the Judges of New York, Connecticut, and Vermont

Collegiality, Consensus Building, and Mentoring

As will be apparent from the following statements of his fellow judges, Judge Katzmann quite naturally integrated himself into the Circuit's legal community.

Judge Pierre Leval reported on an early sitting of Judge Katzmann's after appointment to the Court as follows:

> He was remarkable. He had neither experience as a judge nor as a practicing lawyer. He had to pick all that up with on the job training. On that early sitting, we were in great disagreement on a particular issue. I was in dissent and he was in the majority, writing the opinion. I asked for a rehearing *en banc*. Although the Court determined not to proceed *en banc*, and he did not have to do so, he modified his original opinion so it no longer concerned the issue on which we had disagreed but one which the whole panel agreed was the correctly reasoned one.

After the Judge joined the Court, he often engaged other judges both in the districts and in the Circuit. For instance, Judge Wesley stated that, "When my son graduated from college he was in New York. Bob had dinner with him once a month for a year or so and on occasion, Sonia would join them, just so I had peace of mind."

District Judge J. Paul Oetken stated that:

> The Judge has been a great mentor. Bob has always been kind to me, treating me as an equal colleague. He took me to lunch in 2011, when I first was appointed. He said that judges sometimes have an overwhelming feeling. He explained what it was like when he became a judge, what to expect. If I had any questions, I was to ask Bob.

Circuit Judge Peter Hall stated that:

> When I first was on Court,… Judge Katzmann had only been there a few years. We were just swamped with asylum cases. He approached bar associations to encourage them to get firms to provide pro-bono services to represent persons whose cases were before us on asylum applications. Then, the program took off. We ended up helping these folks whose cases were less likely to succeed.
>
> However, at least, they got representation and could make the best presentation possible.

Five years before he became Chief Judge, he initiated the Study Group on Immigrant Representation. District Judge Jed Rakoff spoke of his leadership in that project as follows:

> The immigration project required getting support not just from fellow judges but from major firms and lawyers throughout New York and also making sure that the more established immigration bar would not view this as some sort of a critique. So he met with all sorts of people before he launched it. After he launched it, he didn't just turn it over for somebody else to implement, it was hands on and still is. He is a consensus builder, and he has vision that goes beyond the narrow confines of the Court, *per se*.

Circuit Judge Denny Chin stated that:

> Bob has been a visionary with the Immigrant Study Group for instance, identifying a big picture issue that affects a lot of people, working within the constraints of being a judge and working on the true administration of justice; the effort has resulted in concrete improvement. This is largely Bob's doing and certainly his leadership. He is so modest and kind but also very savvy and very effective at getting things done.
>
> Overall it has been a pleasure serving with him. He has been inspiring, you see him in action and you want to do more yourself, want to do it better yourself. You learn how to be a better judge and a better person by watching Bob. The Study Group involves so many people from so many different areas. The beauty of this kind of a project is that you get talented people from the private sector, public sector, media and then they are all united in similar goals. Whether it is to engage and educate the public or to provide representation to the immigrant community, it has been just a wonderful thing to watch. Some judges are full of themselves, but not him.

Circuit Judge Peter Hall agreed as to the Judge's bigger vision as follows:

> He's always been somebody who has thought of the mission of the Court in a larger more global sense, in the way which members of the Court can try to help address the problems that come before it.

It is clear that the Judge has always been true to his mission. District Court Judge Laura Swain was a student of Judge Katzmann when she was 17 or 18 years old and he was a graduate student at Harvard. She says, "I remember being very im-

pressed with his intellect and the care he took in teaching. He was a real star in the government department, student wise."

The Judge Reports on the Success of the Study Group

By 2012, Judge Katzmann had built the Study Group on Immigrant Representation into an inspirational force, where all concerned were motivated to respond to the plight of the unrepresented immigrant in countless ways as was recognized by the immigration bar, the press, and the judges of the Court. When he received the Learned Hand Award at the 2012 Federal Bar Council Law Day Dinner at the Waldorf, the Judge gave testimony to the success of the actions of law school deans, professors, work-a-day immigration advocates, and large law firm pro bono volunteers so that every New York City detained immigrant became represented. The Judge has continued to help extend the reach of the organization. For instance, a staff member of the New York Public Library ("NYPL") relates:

> I am writing to provide you with details about the Immigrant Justice Corps ("IJC") service at NYPL, a partnership that Judge Katzmann helped to foster. Judge Katzmann connected the library with IJC to form a partnership that launched in September 2017, and since the program's start at the Mott Haven branch in the Bronx, hundreds of immigrants have received free legal assistance. The IJC program provides free legal services to low-income immigrants by placing recently qualified lawyers as "Justice Fellows" with host community organizations. Justice Fellows represent immigrants on legal matters including removal defense, complex affirmative asylum applications, and other forms of relief available to juveniles and victims of crime, domestic violence, or human trafficking.

Thanks to Justice Sotomayor, we know that Judge Katzmann's problem-solving began at an early age. The Queens boy who wrote to President Kennedy at the age of nine on behalf of the Seneca People and who, in second grade, wrote to then-New York City Mayor Robert Wagner about a problematic traffic light in his neighborhood, was by 2012 a recognized and effective mover and shaker for positive change in New York City.

Planning for Service as Chief Judge

After the Law Day Dinner, I had lunch with Judge Katzmann about issues concerning the Study Group. He informed me he was becoming chief judge within the year and that there were things he wanted to accomplish during his tenure. I only recall one specific initiative, the civic education project, but now more than seven years later, we recognize the fruits of his ambitious goals which include: the *Justice For All* Initiative; the 125th Anniversary of the Second Circuit; the Thurgood Marshall Lecture Series; and the CAMP colloquy.

Chief Judge Initiatives 2013-2020

Chief Judge Katzmann has spearheaded a number of initiatives. Here, we focus on three.

Civics Education: Justice For All: Courts and the Community – A Signature Initiative

At the 2014 Judicial Conference, the Chief established a circuit-wide Committee on Civic Education and announced his intention to make civics education a focus of his tenure. He invited District Judge Victor Marrero, who Judge Katzmann refers to as his "remarkable, extraordinary partner," to serve as his co-chair of the Committee, which is comprised of circuit, district, magistrate, and bankruptcy court judges, prominent members of the bar, and leadership from the Circuit's law schools. Judge Katzmann had identified a gap in civics education in the public. He foresaw a way for the judiciary to take a leadership role in filling the gap, while simultaneously increasing public understanding of the role and operations of the courts. Judge Marrero credits the Chief with using his "enormous

imagination" to conceive of the plan and to keep its momentum going. As Judge Katzmann said at the time, the purpose was not to put the judiciary on a pedestal, but to both increase public understanding of the courts and for the courts to better understand the communities they serve.

His ambition was to spur civic education projects in every district in the Circuit, in every court in the Circuit, to be the first Circuit which would undertake a comprehensive civic education program. What has developed is a Circuit-wide series of touchpoints between the courts and their respective communities. In partnership with local bar leaders, the courts have opened their doors to the community and invited students and adult community members into the courthouses. The Committee has also developed programs including trial reenactments (pioneered by Circuit Judge Chin and his wife Kathy), courthouse tours, and financial literacy workshops. Judge and attorney pairs go into the schools to teach students about civics and the courts, also bringing judges closer to the communities in which they serve. Whenever he talks about the program, Judge Katzmann is quick to credit the deep dedication of the committee he formed, with Judge Marrero as co-chair, as well as judges throughout the Circuit who have participated, and the Circuit's imaginative library and administrative teams.

The Circuit's administrative and library staff have developed and implemented programming and have organized and facilitated the immense logistics involved in annual moot court competitions. They have curated the digital and visual exhibits that now populate the courthouse walls when you walk through 40 Foley Square. Circuit Librarian Luis Lopez recalls how Judge Katzmann took him to a particular location on the fifth floor and pointed out where the exciting new digitally equipped public library would be located.

In New York City, the Committee has a direct education partner in the Justice Resource Center led by Debra Lesser. The Justice Resource Center is a public-private partnership between the legal community and public school system. Fifty-two schools in the New York City public school system have law programs, and the Justice Resource Center supports these programs. Ms. Lesser spoke to us of receiving a call one day from the Judge, who introduced himself to her. He then arranged for her to come to the courthouse for a lengthy conversation in chambers. She says that the Judge is a most wonderful senior partner to her. Around 80,000 to 100,000 students have participated in the activities *Justice For All* instituted by the JRC Partnership. *Justice For All: Courts and the Community* hosts an annual teacher training institute, which provides the participating teachers in-depth education, training, and curriculum resources for the Bill of Rights and the Constitution. Lawyers and judges serve as faculty throughout the week, and as contact points during the school year for courthouse visits. The students who are the beneficiaries of this training program have said that they are in awe when judges and attorneys come into their classrooms or speak to them at the courthouse. For them, the experience "demystifies the whole profession." The Circuit library staff has worked to write and curate resources that are age-appropriate for the students involved in the programs.

Ms. Lesser described how *Justice For All* committee members, along with Russell Wheeler of the Governance Institute, worked with teachers to augment the school curriculum to better explain the role of courts in the legal system. The Institute has taught 25 to 30 teachers a year for five years, specifically training them on the Bill of Rights and the Constitution so they can better teach students. A recent addition is students receiving a Judiciary and Art Program. In short, even more are getting help. Some would not have necessarily been attracted to law or civics; however, their interest in art serves as an entry point into the program. Attorney John Siffert of the Civic Education Committee wondered how to attract students who are not interested in law. Thus, the arts program, with the guidance of *Justice For All* committee member Magistrate Judge Vera Scanlon, became an idea to attract others. The program brought in young students who

created several different artworks based on the Court; the artwork soon will be displayed online.

In 2018, the Circuit opened the *Justice For All: Courts and the Community* Learning Center. Located on the fifth floor of the courthouse at 40 Foley Square, the Center is a state-of-the art facility that provides a place for visitors (predominantly students) to learn, through interactive kiosks and digital exhibits, the role of the federal judiciary and the purpose of the courts. In addition, the Learning Center offers lecture spaces, a studio for recording podcasts and videos, and a modular space that can be configured in a variety of ways to enhance the learning experience. As Judge Katzmann said when the Learning Center opened, the facility signals to the public that the courthouse is not simply a venue for the resolution of conflict, but also a place for discussion and understanding about the rule of law and the importance of an independent judiciary. In the period of COVID-19, many of the Learning Center's resources have been made available on-line for teachers, students, and the public.

The *Justice For All* initiative serves the entire community. Programs and exhibits celebrating Black History Month and Women's History Month have been displayed in the courthouse. In recognition of LGBTQ Pride month in 2019, the Circuit's library team worked with Judges Oetken and Alison Nathan to produce a program honoring Judge Deborah Batts, the country's first openly gay district court judge. This program is now available on the *Justice For All* website. *Justice For All* has worked with such student groups as Legal Outreach and the Harlem Educational Activities Fund, hosted the Just the Beginning Foundation's national gathering, and welcomes bar associations, including minority bar associations. Judge Katzmann plans to continue to work with the initiative after his tenure is over as chief judge.

The Second Circuit has not been alone among the circuits in advancing civics education activities, but has been at the forefront of taking a formalized, circuit-wide approach and making civics education a court priority. In October 2019, the Second Circuit took the lead in organizing and hosting the federal judiciary's first national conference on civics education. The conference was attended by judges, administrative staff, and bar leaders from all 13 circuits. Representatives from Maine to Guam gathered to learn, collaborate, share ideas, and exchange program ideas. In addition to the 175 in-person attendees, Supreme Court Justices Breyer, Sotomayor, and Gorsuch participated remotely. The Chief envisioned this conference and empowered his colleagues through the Circuit's Civic Education Committee to make it a reality. The event has served as a catalyst for Chief Justice Roberts and the Judicial Conference to adopt civics education as an important element of judicial service and for the other circuits to institute programs of their own.

The culminating effect of the initiative was when Chief Justice Roberts in his December 31, 2019, Year End Report on the Judiciary recognized civics education as an important element of judicial service and commended the efforts stemming from the Second Circuit. In March 2020, the Judicial Conference of the United States endorsed regularly-scheduled conferences on civics education and encouraged cross-circuit collaboration in promoting civics education activities.

125th Anniversary Programs

On the occasion of the 125th anniversary of the Circuit, Judge Katzmann established a special committee to undertake a wide range of activities relating to that 125-year experience as it had done some 25 years before. The committee, chaired by Circuit Judge Richard C. Wesley, consisted of judges, court staff, and members of the bar. The activities included a biographical collection of the judges, distributed by Cornell University Press; a volume on the jurisprudence of the Second Circuit, published by Fordham Law Review; exhibitions documenting the Court's cases and history; reenactments of some of its notable cases; lectures on the history of the Court; programs of remembrances of

some distinguished judges of the past, including Learned Hand, Henry J. Friendly, and Thurgood Marshall, with reflections of four Supreme Court Justices; and a program on the certification of opinions for the Circuit to the State High Courts.

Circuit Judge Wesley stated the following:

> I was very fortunate that he appointed me to head up the 125th anniversary programs which proved to be a labor of love for myself and for everybody else involved. This ties in with our reaching out to the public and letting the public know who we are and what we do. We presented a series of terrific programs coordinated with the local bars and courts about famous cases and judges from our Court. They were just stunning programs.

Thurgood Marshall Lecture Series

Judge Katzmann conceived of the Thurgood Marshall Lecture in 2018, which, along with the Hands Lecture, is one of two signature lecture series sponsored by the U.S. Court of Appeals for the Second Circuit. The Thurgood Marshall Lecture honors the first African-American Supreme Court Justice, the lawyer who did more for civil rights than any other, and who was a judge on the Second Circuit Court of Appeals in the very courthouse now named for him, the Thurgood Marshall U.S. Courthouse.

Chief Judge Katzmann has sought to ensure that Thurgood Marshall's legacy is appropriately remembered in the Courthouse. Before the Marshall Lecture was created, Gilbert King, Pulitzer Prize-winning author of "The Devil in the Grove: Thurgood Marshall, the Groveland Boys and the Dawn of a New Age in America," offered a lecture about Marshall's courageous trial work in the South. Then, two years later, as part of the Court's 125th anniversary celebration, the Court of Appeals sponsored a discussion about Thurgood Marshall from the perspective of his clerks, including Supreme Court Justice Kagan and two distinguished law school deans, a litigator, and Judge Paul Engelmayer. Judge Ralph Winter's wonderful eulogy of Justice Marshall was distributed to all attendees.

The courthouse lobby features photographs of Justice Marshall's career. And the Learning Center has a multimedia exhibit about Thurgood Marshall's momentous life. The first Marshall Lecture was delivered by Professor Robert Post of Yale Law School. The second Marshall Lecture will be offered by Professor David Blight of Yale Law School on Frederick Douglass. As noted above, in keeping with the efforts to honor Justice Marshall's legacy, through the *Justice For All: Courts and the Community* program, the Thurgood Marshall Courthouse has become a welcoming place for a variety of diverse student groups, and bar groups, and exhibitions relevant to the civil rights experience, such as Black History Month.

Almost A Year in the Life of the Chief: 2019-2020

It would be daunting to catalog the Chief's achievements for seven years, but the last year is indicative of how he has led the Court throughout his tenure and of the continuing recognition of his leadership. Here are some highlights of the past 10 months.

October 20, 2019: Portrait Unveiling at Yale

Yale University School of Law recognized the Chief at an October 20, 2019 portrait unveiling ceremony, in a celebration populated by his family, friends, colleagues, and nearly 100 former law clerks. The event was held on a Sunday, and because the judge did not want to impose on his judicial colleagues' weekend, he asked Yale not to issue special invitations to them, but many, upon learning about the ceremony, came happily to join in the celebration. In the words of Yale Law School Dean Heather Gerken, Judge Katzmann's portrait "marks a legacy that embodies the greatest hopes of this school, to train servants of justice." In the Dean's introduction of the Chief, she acknowledged his career-long dedication to solving real-world problems and the role of law in doing so, and sharing this understanding with others.

Judge Katzmann's life and accomplishments were related by Justice Sotomayor, Dean William Treanor of Georgetown University Law Center, Lindsay Nash, a former clerk of Judge Katzmann and clinical professor at Cardozo, and Judge Guido Calabresi, former Dean of Yale Law School and colleague of Judge Katzmann on the Second Circuit, Peter Kougasian, classmate of Judge Katzmann at Yale, and Justice Ruth Bader Ginsburg.

From an early age Judge Katzmann demonstrated a sense of justice and commitment to advocating for what was right and fair in the world. Justice Sotomayor pieced together for the audience a picture of his childhood. Judge Katzmann's father, John, was an immigrant who escaped from Nazi Germany as a young teen. His mother, Sylvia, is the daughter of Russian immigrants. Together they instilled a deep sense of empathy and an understanding of the importance of access to justice that has served as a foundation for the Chief's life and career. Justice Sotomayor noted that his parents instilled in him and his siblings the belief that "nothing was worth doing unless it was done with integrity, kindness, modesty, and concern for others." Judge Katzmann always speaks of how fortunate he feels he is to have such a loving, supportive family and friends.

Dean Treanor spoke of Judge Katzmann's academic contributions as being based on rigorous and ambitious research and colored by his personal experience. The Dean quoted the late Senator Moynihan, who commented that Judge Katzmann's *oeuvre* is an important body of "useful knowledge" that has "profoundly influenced the way scholars, judges [and] members of Congress think about the way government works and the way it should work." That's an immensely important accomplishment – enough to fully occupy one career.

Lindsay Nash, who worked with the Chief in the immigration space prior to her clerkship with him, spoke of the lasting impact the Study Group on Immigrant Representation has had not only in raising the standard for the immigration bar, but also in the real-world impact his initiatives have had on immigrants and their families. Ms. Nash spoke of his meticulous gathering and analysis of data, and how he was able – through the work of the Study Group – to change the narrative for immigrants facing deportation. From this work emerged the Immigrant Justice Corps, the nation's first fellowship program for college and law school graduates to serve low-income immigrants, and the New York Immigrant Family Unity Project, the nation's first government funded program for poor immigrants in need of legal representation. The success rate of these programs is astronomical – not only in helping families in need but also by training a new generation of advocates.

Judge Calabresi shared his experiences as one of the Chief's colleagues and as his professor at Yale. With his many administrative responsibilities and initiatives, it is easy to forget that Robert Katzmann also is a judge – hearing cases and writing opinions along with everyone else. Judge Calabresi spoke passionately about Judge Katzmann's ability to listen and lead gently, and how powerful and effective a skill it is. Judge Calabresi also shared a letter written by Judge Katzmann's Yale classmate, Peter Kougasian, who was unable to attend in person. Mr. Kougasian wrote that "Bob is a great person whom after you've met him, your first thought is, 'how special am I?'" This comment aptly captured the experience of anyone who has the pleasure of speaking with the Chief – he can make you feel that you are the most special, most important person in the world.

The Chief Judge's brother, Judge Gary Katzmann, offered the following toast:

> It is an honor to toast my big brother — by eight minutes — my identical twin brother Bob.
>
> In the last three years, with our courthouses across the street from each other, I've had the opportunity to visit Bob often in his chambers. On numerous occasions, I've run into people from Bob's courthouse family – a messenger from the mailroom, a member of the cleaning

crew – and after they've ascertained that they are speaking not to the Chief Judge but to his twin from across the street, they will invariably say – "Your brother is a wonderful guy. He cares, he really cares." That is something that our entire family has known for all our lives. He is always there for us, devoted and selfless, generous and selfless, unpretentious and modest.

Everything you have heard about Bob's professional achievements is not only true – it is understatement. He celebrates others, but never himself. A visionary in the worlds of academia and the law, a thinker and a doer, a creative leader in so many different realms, he has given voice to those without a voice, answered the call of those in need, inspired, mentored, supported, and uplifted.

A great favorite of Bob is the movie, "It's A Wonderful Life," with Jimmy Stewart playing George Bailey. That holiday classic celebrates that the measure of a person is not material accumulation or wealth, but how they've touched others, made the lives of others better. We, Bob's family, cannot imagine life without his touch. Everyone in this room, can think of countless ways in which Bob has made their lives better. And, so, like Harry Bailey toasting George in the final moments of "It's A Wonderful Life," I ask each of you, Bob's family and his vast extended family and community of friends, to raise a glass and to join me in this "Toast, to our big brother Bob, the richest man in town."

Finally, Justice Ginsburg spoke in a video-message to Judge Katzmann. She commented that Judge Katzmann had "enhanced the Second Circuit's reputation for excellence," and she commended her friend for his creation of the Immigrant Justice Corps and the *Justice For All: Courts and the Community* initiative.

October 31, 2019, the National Civics Education Conference

As noted above, in October the Second Circuit hosted the federal judiciary's first national conference on civics education, a landmark gathering.

December 2019, the Circuit Staff's Annual Awards Event

The Chief, of course, attended the annual Circuit staff awards ceremony. When Circuit Clerk Catherine Wolfe noted that this would be the final meeting that he would attend as Chief Judge, the room spontaneously erupted into a standing ovation.

January 2020, the Vilcek Foundation Prize

In January, the Vilcek Foundation, which created the Vilcek Prizes to act as an extension of the Foundation's mission to raise awareness of immigrant contributions to the arts, culture, and scientific discoveries in the United States, awarded its 2020 Prize for Excellence to Judge Katzmann. At the award ceremony, Judge Katzmann's background was related as follows:

> Born to a father who fled Nazi Germany and a mother from an immigrant family, Judge Katzmann has long been aware of the role the courts play in the lives of immigrants as well as the transformative effects of citizenship and legal status.
>
> Early in his judicial career, he observed the widespread lack of competent representation for non-citizens – especially among those in need – and the adverse impact on their cases' outcomes. Judge Katzmann inspired the formation of a Study Group on Immigrant Representation, from which emanated several path breaking initiatives. In 2014, Judge Katzmann spearheaded the creation of immigrant Justice Corps, a not-for-profit organization, and the United States first fellowship program to train recent law school graduates to provide high-quality legal assistance to immigrants in need.

In accepting the Vilcek Prize for Excellence, Judge Katzmann declined the substantial cash prize. The Vilcek Foundation honored his request to donate

the prize money to a nonprofit organization that provides direct services to immigrants in need in the United States.

February and March 2020 – Planning and Implementation of the Circuit's Virtual Operations in Response to COVID-19

In early February of this year, after attending a conference on the West Coast and wearing a mask on the flight, Circuit Clerk Catherine Wolfe determined to alert the Court to think ahead and to prepare for the virus. Judge Katzmann, thus, formed a preliminary committee of himself, Ms. Wolfe, and Circuit Executive Michael Jordan (since expanded). Ms. Wolfe reported as follows:

> The Judge devised a plan where senior staff would prepare the Court for a quick transition to remote operation. The staff divided themselves into groups where they tested and retested the remote operations. Remote practice began in mid-February and transition was very smooth. The Judge, Michael Jordan and I all emailed each other on steps to take to have everyone safe and start going virtual.
>
> During meetings the week of March 9th, we decided to transfer to remote operations. Judge Katzmann sent a global communication email to all the other department heads.

Mr. Jordan states that:

> The Court never missed a day due to the switch to remote. The Court provided public access, created archival copies of all oral arguments, tested live-feed connections and the overall stability. Only two of 325 people have become infected. Currently, less than 10 people actually go to the Courthouse every day and are taken by taxi cabs and returned to their homes; everyone else is working fully remote.

Former Circuit Chief Judge John Walker remarked in admiration on the transition as follows:

> As our Chief Judge, he has had the mother of all challenges, the COVID 19 pandemic, which required a revolution of how we do our business – doing arguments over conference calls, meetings via Zoom, getting info out to judges that's necessary so the Court can continue to function in a timely way. We've been able to basically continue the work of the Court uninterrupted without delay; we're as current right now as we were before coronavirus; that's an amazing accomplishment, and testament to his ability as chief judge, his goals and the way he approaches goals. It's also due to our remarkable staff which he has shaped, both in terms of appointments but also in terms of just inspiring them and getting the best out of them. They respond to his leadership by example, they respect him and admire him and want him to be successful and therefore they are successful.

Second Circuit Planning with the District of Columbia, 7th, and 9th Circuits on Clerkship Hiring

New York University Law Dean Trevor Morrison reported upon the Judge's leadership during the past two years in encouraging the chief judges of the District of Columbia, 7th, and 9th Circuits to come together to spearhead a uniform national procedure for interviewing and selecting law clerks. The Dean stated it was a typical performance of the Judge. He initiated the idea, he contacted and convened a meeting with the other chief judges, and was involved in developing procedures for implementation.

The Significance of the Judge's Book, "Judging Statutes" – the* Zarda *Decision

In 2014, Judge Katzmann's "Judging Statutes" was published by Oxford Press to high praise from many sectors of the judicial and legislative world. Judge Rakoff commented to us that we should make a point of mentioning that his book is having long term impact on law and the courts. Justice Gorsuch's recent opinion

in *Bostock v. Clayton County*, one of the trilogy of cases interpreting Title VII's prohibition of employment discrimination, was itself an affirmance of one of the Chief's cases, *Zarda v. Altitude Express, Inc.*, 883F. 3d 100 (2d Cir. 2018). His opinion in *Zarda* reflected his views of statutory interpretation, which is a much broader and more nuanced view of interpretation than the originalism that the dissent relied on. It is apparent from talking to both law professors and other judges, that his book has had a significant impact in countering the more rigid statutory interpretation view that began to emerge with Justices Scalia and Thomas.

Judge Katzmann, as the only sitting circuit court judge with a Ph.D. in Political Science, as a scholar on legislative-judicial relations, and with nearly 20 years of experience in Washington, working closely with Senator Pat Moynihan on a variety of projects, brought a unique perspective to the judge's job of interpreting statutes. In his own words:

> As a judge, I spend considerable time interpreting statutes, the laws of Congress. Congress enacts laws on a wide variety of important topics (e.g., civil rights, the environment, health care, the economy), and those laws (and the interpretation they are given by judges) can have a profound impact on peoples' lives. It's therefore important that people understand how judges interpret those laws. So when I was asked by N.Y.U. School of Law to deliver the Madison Lecture, I thought the time was ripe for me to revisit the subject of interbranch relations and to offer reflections on statutes. I would not have thought to expand the lecture into the book were it not for Adam Liptak of *The New York Times*, who recommended that I do so. I am so glad that I took his advice; working with Oxford University Press was a wonderful experience.

Zarda was not the only recent opinion of Judge Katzmann's to be affirmed by the Supreme Court. In June 2020, the Supreme Court affirmed another decision in a landmark ruling, *Trump v. Vance*, in which the Court held in part that the president enjoys no absolute immunity from state criminal subpoenas.

Dean Trevor Morrison of New York University Law School wrote on "Judging Statutes" as follows:

> "Judging Statutes" is a powerful and sophisticated defense of an approach to federal statutory interpretation that emphasizes the primacy of the text of the laws enacted by Congress, but that does not focus exclusively on those words when their meaning is unclear. Drawing on his deep experience as a federal judge as well as his academic training in political science and law, Judge Katzmann argues that when a judge interprets a federal statute, the core enterprise is discerning the purpose behind the law. For the courts to insist that Congress formally enact legislative history in explicit statutory text before it is given any weight would, Judge Katzmann contends, be to tell Congress how to do its business. Thus, judicial consideration of legislative history is for Katzmann, a matter of judicial deference to Congress – the very deference that textual people like Scalia tend to invoke in defense of their preferred approach.

Cardozo Law School Dean Melanie Leslie informed us that the Judge regularly teaches a one-day course on "Judging Statutes." The former Georgetown Law Professor Katzmann goes to Cardozo and participates in the question and answer discussion on the book. Dean Trevor Morison said that New York University Law School schedules a special forum with the Chief for new appellate judges at which "Judging Statutes" is discussed. Judge Katzmann has also enjoyed lecturing about the book at St. John's Law School, Fordham Law School, Brooklyn Law School, and Cornell Law.

In its sixth printing, "Judging Statutes" has become a classic in the field, with the late Justice John Paul Stevens declaring it "required reading for all lawyers confronting questions

of statutory construction when advising clients or arguing such issues before judges." And in a book review, then Judge Brett Kavanaugh urged: "Read this book, read this book."

Summing Up

Judge Katzmann's National Role

By appointment of the Chief Justice, Judge Katzmann has had major assignments. He chaired the Judicial Conference Committee on the Judicial Branch, a committee that monitors relationships with Congress, and seeks to increase public understanding of the courts. In that role, he launched an innovative program, a dialogue series of judges and legislators, supported by the Pew Charitable Trusts. It was also in that role that he spearheaded the first survey of judges as to civic education activities, which helped guide Judge Katzmann in starting the Second Circuit's civic education program. As a member of the Judicial Conference, he also has served on the Chief Justice's Executive Committee, a committee of seven judges that helps manage Judicial Conference activities. He has also served as Chair of the Supreme Court Fellows Commission.

Judge Richard K. Eaton of the U.S. Court of International Trade recounted:

> Many believe that the Branch Committee is the most influential. While Bob was chair, I was a member of the Committee and a witness to his leadership style. Bob led with a light touch, both when he was conducting the meetings and overseeing the work between meetings. He never tried to force an issue or dictate a result. Rather, he moved the Committee by means of gentle persuasion and a sly (often self deprecating) humor.

While serving as chief judges of their respective districts, Judges Carol Amon and J. Garvan Murtha were privileged to serve with Judge Katzmann on committees of the Judicial Conference in Washington, D.C. Judge Amon recalls how protective he was of the Circuit's interest, and how he worked hard to avert cuts to 24-hour security for the courthouse in a period of government shutdown. Judge Murtha and Judge Katzmann worked together as members of the Judicial Branch Committee to restore lost salary adjustments for judges. Judges Amon and Irizarry recall how well the Judge stayed in touch with them with concerns for their districts when they were chief judges, indeed all of the chief district judges value Chief Judge Katzmann's attentiveness to their concerns. At a gathering of New York University's Annual Survey of American Law, which dedicated an issue to Judge Katzmann, Administrative Office of the U.S. Courts Director James C. Duff summed up Judge Katzmann's national role: "Bob is a giver. Within the federal Judiciary his advice is highly valued."

A Special Day

Judge Sidney Stein reports on Constitution Day 2016 as follows:

> On September 16, 2016, a naturalization ceremony in the imposing Great Hall on Ellis Island, where new immigrants assembled for processing upon their arrival by boat in New York Harbor. It was the largest collective naturalization ceremony in the history of Ellis Island. In addition to the 300 new citizens from around the world, there were hundreds of guests and relatives, including officials of the Park Service, the USCIS, the Department of Homeland Security, the military, and U.S. Customs and Border Protection, as well as members of the Immigrant Justice Corps, which Bob had founded. I gave the welcoming remarks and Bob administered the oath of citizenship and gave personal reflections. Those reflections were loving, deeply felt, articulate, highly personal and galvanized the entire hall. He spoke movingly about his father's flight from Nazism and anti-Semitism in Germany to the United States and his mother's family's flight from Russia as well. In very personal terms, he spoke about

how that past had fortified his resolve to ensure that the U.S. would be a country "that remains true to its principles of justice for all." I am always proud to be a judge, but that day Bob made me even prouder and deepened my own high regard for "the chief" and his life-long, effective, and truly monumental body of accomplishments.

Judge Katzmann's Effectiveness as a Leader

As a good leader, the Chief mentors new judges such as asking District Court Judge Victor Bolden to serve as chair of the Judicial Conference (in 2019) and (again in 2020) after Judge Bolden had served on the bench for just four years.

District Court Judge Laura Swain describes the Judge as, "the complete package." She says that:

> He has a singular combination of academic experience, experience in operations and theories of government, and achievements in government at a high level, as a writer and a judge in his craftsmanship and leadership and in his overall dedication in public service. This is unusual in the federal judiciary and he has put all of that to work for the judiciary. He presents as quiet, unassuming and very powerful all at the same time. He's also passionate about justice, about things he can improve and change. He puts that passion to work and leverages his experience and his connections and the platform he has earned with this work to create solutions and the Justice Corp. and civic education initiative are living a growing embodiment of that work of his. Those are tremendously important achievements, but also very much indicative of his character.

Judge Oetken added:

> Chief Judge Katzmann recognized LGBTQ Pride month with educational programs and historical information on the Court's website – perhaps the first time the Court of Appeals has done so. Taking those steps was historic, and it was certainly significant to members of the LGBTQ community and anyone interested in the history of civil rights in this country.
>
> What strikes me most of all about Chief Judge Katzmann's tenure was the way he genuinely opened up the federal courts to the community. He brought in the public – students, educators, people affected by the legal system, and people who might someday work in the justice system – and made the courts less mysterious, more accessible, and more relevant.

Judge Wesley describes the Judge as follows:

> He's soft-spoken, kind of reserved. He's really just wrapped in the perfect package because you look at him and say, "okay, he's quiet, not going to be throwing lightning bolts and then all of a sudden he's got your arm in a hammer lock and you're doing exactly what he wants." He has demonstrated that the role of the Chief Judge can be broader than simply administrating the day to day…and I think that will set a long-term model. For a guy who's so low-key and soft spoken, he has an enormous amount of focus energy. You really don't want to be the guy that is swimming against his stream, he is kind of ever pressing. In that soft-spoken manner of his, he just doesn't quit.

Former Circuit Chief Judge John Walker states:

> He has the ability to make organizational changes without disrupting performance and he can engineer smooth transitions. That applies not only to hiring and staff, but also to the whole function of the court and to his response to the Covid-19 situation. It was a smooth transition and performance.
>
> He has the admiration of all Article III judges. When you are chief judge, you're not their boss. Some have likened the job to herding cats. They're independent judges with their own ideas of how

they want to do things and managing that is not easy. You have to listen a lot. Your skills are much less that of autocrat than of diplomat. You have to lead by example and by consensus and he's done a remarkable job with that in seven years he's been Chief.

Circuit Judge Pierre Leval states:

> When I had my 40th anniversary as judge, he invited me to dinner; he's just a sweetheart of a person. When members of the court are being honored somewhere or giving a lecture, he shows up, comes to support. When I've given lectures at various law schools around the city, he's there; it amazes me.
>
> Another thing is what a good and conscientious judge he is. He is thoughtful and caring and careful in studying the precedents to figure out exactly what they mean which is not always so clear.

Justice Sotomayor's observations of her dear friend and "brother," Judge Katzmann, summed up the Chief's tenure:

> Bob has an innate sense of justice, morality, and integrity. He is unrelenting *in his advoc*acy. He has a tenacious spirit and never gives up; he is a visionary who brings out the best in people and always sows the seeds for things and inspires people to go along with him.

What better way to end the article!

* * * * *

Editor's Note: The authors thank Sarah Eikenberry for her invaluable assistance with the interviews and David M. Brodsky for his editing.

From the Bench

The Impact of COVID-19 on Federal Court Proceedings

By U.S. Magistrate Judge Sarah L. Cave

By March of this year, "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic [became] apparent" to the world in general, and to the federal judges within the Second Circuit in particular. Opinion & Order, *United States v. Stephens*, No. 15-cr-95 (AJN) (S.D.N.Y. Mar. 18, 2020).

On March 13, 2020, in the interest of protecting public health and reducing the size of public gatherings and unnecessary travel, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York issued a standing order that, among other steps, continued all civil and criminal jury trials scheduled to begin before April 27, 2020, excluded time under the Speedy Trial Act, and strongly encouraged judges to hold proceedings by telephone or videoconference where practicable. Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00154 (S.D.N.Y. Mar. 13, 2020).

Within three days, due to the rapid advance of the virus, the standing order was revised to further restrict access to Southern District courthouses, body temperature and other screening mechanisms were put in place, and courthouse staff were placed on administrative leave, with only essential functions continuing. *See* Revised Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00155 (S.D.N.Y. Mar. 16, 2020); Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00161 (CM) (S.D.N.Y. Mar. 17, 2020); Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00162 (CM) (S.D.N.Y. Mar. 18, 2020); Memorandum dated March 20, 2020.

By March 27, 2020 all jury

trials were suspended until June 1, 2020, and by April 20, 2020, were suspended indefinitely. *See* Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00172 (CM) (S.D.N.Y. Mar. 27, 2020); Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00197 (CM) (S.D.N.Y. Apr. 20, 2020).

Chief Judge Roslynn R. Mauskopf entered similar orders for the Eastern District of New York, *see* https://www.nyed.uscourts.gov/covid-19, and the Second Circuit also adopted modified procedures. *See* https://www.ca2.uscourts.gov/.

With the extreme disruption the virus has imposed on federal court proceedings, judges and practitioners have found creative ways to cope with this very unusual set of circumstances. Three months into what may be the "new normal" was an ideal time to discuss and assess the status of federal court litigation in the Second Circuit. On June 22, 2020, the Federal Bar Council hosted a webinar entitled "Remote Proceedings: The View from the Bench." Moderated by Seth Levine, a former federal prosecutor and now a partner with Levine Lee LLP, the panel included former Second Circuit Judge Christopher Droney, District Judges Brian Cogan of the Eastern District of New York and J. Paul Oetken of the Southern District of New York, and Magistrate Judges Sanket Bulsara of the Eastern District of New York and your author, Sarah Cave of the Southern District of New York.

Criminal Proceedings

Beginning in early March, the Southern District initiated temperature screening procedures for all detainees arriving at the courthouses from the Metropolitan Detention Center ("MDC"). *See* Standing Order, *In re Detainee Screening Procedures*, No. 20MC00137 (CM) (S.D.N.Y. Mar. 6, 2020). Similar procedures were put in place in the Eastern District. *See* Administrative Order, *In re Detainee Screening Procedures*, No. 2020-04 (E.D.N.Y. Mar. 9, 2020). While, initially, criminal defendants, their counsel, and their families, remained among those still able to enter the courthouses, *see* Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00155 (S.D.N.Y. Mar. 16, 2020), by the end of March the virus had advanced to the point where detained defendants were no longer being produced in person.

The Coronavirus Aid, Relief and Economic Security ("CARES") Act, signed into law on March 27, 2020, combined with the courts' standing orders, promptly provided alternative avenues for the courts to conduct criminal proceedings in a timely fashion. CARES Act § 15002(b)(1), Pub. L. No. 116-136, 134 Stat. 281 (2020).

Pursuant to that authority, federal judges could proceed with presentments and other proceedings with the defendant participating remotely by videoconference, or, if videoconferencing was not reasonably available, by teleconference, if the defendant consented to doing so after consultation with counsel. The proceedings in which a defendant may consent to participate remotely include initial appearances, bail hearings, appointment and substitution of counsel, waivers of indictment, arraignment, probation and supervised release revocation proceedings, and pretrial release revocation proceedings.

In the case of felony pleas or sentencing, Section 15002(b)(2) of the CARES Act allows a judge to conduct the proceeding by videoconference or telephone conference if two requirements are met:

(1) The chief judge of the district "specifically finds…that felony pleas…and felony sentencings cannot be conducted in person without seriously jeopardizing public health and safety"; and

(2) The presiding judge "finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice."

The chief judges of both the Southern and Eastern Districts entered standing orders making the first finding, *see* Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 20MC00176 (CM) (S.D.N.Y. Mar. 30, 2020); Amended Standing Order, *In re Coronavirus/*

COVID-19 Pandemic, No. 20MC00176 (S.D.N.Y. June 24, 2020); Administrative Order, *In re Coronavirus/COVID-19 Pandemic*, No. 2020-13 (E.D.N.Y. Mar. 30, 2020); Administrative Order, *In re Coronavirus/COVID-19 Pandemic*, No. 2020-13 (E.D.N.Y. June 25, 2020), and each district judge has individually made the second.

Pursuant to this authority, the district courts in the Second Circuit have conducted criminal proceedings remotely, through videoconferencing and teleconferencing platforms. Magistrate Judge Balsara explained that the Eastern District uses a combination of Skype for Business and Webex platforms to conduct criminal proceedings remotely. A typical proceeding, such as a presentment following arrest, involves the magistrate judge and the defendant appearing by video, with all other participants – the Assistant U.S. Attorney, defense counsel, a representative of Pretrial Services, an interpreter, etc. – participating by phone. The combined platform also includes a mechanism for the defendant to confer confidentially with his or her counsel. Although the technology, after a few complications in the early days of use, has largely worked well, the number of proceedings that can be conducted in this manner is necessarily limited by the very small number of video and telephone links at the MDC and the Metropolitan Correctional Center ("MCC"), where most detained defendants in the Eastern and Southern Districts are held.

With the extreme disruption the virus has imposed on federal court proceedings, judges and practitioners have found creative ways to cope with this very unusual set of circumstances.

Judge Cogan described the ease with which he has converted status conferences to written status reports from the parties, with telephone conferences as necessary. In fact, this shift has been so efficient and effective that Judge Cogan is strongly considering continuing the practice even when parties and defendants are able to appear in person.

Judge Oetken noted that the Southern District has deployed a different technology platform known as CourtCall, supplemented by a telephone conference line that has largely been a stable and reliable mechanism for remote criminal proceedings. The Southern District's platform faces the same constraint arising from the limited number of video and telephone facilities in the detention facilities, but through the combined efforts of the court, the bar, and the Bureau of Prisons, an advance schedule has been put in place to facilitate organized use of the limited number of connections.

Magistrate Judge Cave described one additional impact of the pandemic – the temporary absence of a sitting grand jury in the Southern District – so that many new arrests have been based on complaints rather than indictments and further noted the corresponding implications for deadlines under the Federal Rules of Criminal Procedure and the Speedy Trial Act. Where a defendant has been detained following arrest, Federal Rule of Criminal Procedure 5.1(c) (as well as 18 U.S.C. § 3060) requires that a preliminary hearing be held within 14 days of the initial appearance, absent findings that "extraordinary circumstances" exist and "justice requires the delay." Fed. R. Crim. P. 5.1(d).

In addition, the Speedy Trial Act requires that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). This deadline may also be "continu[ed]" if the court finds "that the ends of justice served by taking on such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(a). As these deadlines began to approach in April for defendants who had been arrested in March, some defendants declined to consent to extending the deadlines – as is their right – but the government could not file indictments in the

absence of a sitting grand jury in the district. Thus, the government was in the position of having to seek extensions of the preliminary hearing deadline and continuance of the deadline to file an information or indictment.

At least five magistrate judges in the Southern District heard such motions from the government, and in each case, after finding that the requirements of Rule 5.1(c) and the Speedy Trial Act, respectively, had been met, extended the preliminary hearing deadline and continued the indictment or information deadline.

For example, in finding that "extraordinary circumstances" existed to justify an extension of the preliminary hearing deadline, Magistrate Judge Gabriel Gorenstein looked not only to the chief judge's findings in the various standing orders, but also to impediments specific to the case, such as the inability of out-of-state witnesses to travel to appear at the hearing and a shortage of interpreters. *See* Order, *United States v. Carrillo-Villa*, No. 20MJ3073 (UA) (S.D.N.Y. Apr. 2, 2020).

Judge Gorenstein also found that the circumstances satisfied the less demanding "ends of justice" standard under the Speedy Trial Act. *Id.*

Magistrate Judge Barbara Moses made similar findings in a separate case and also granted the government's application, extending both deadlines by 30 days. *See* Order Extending Preliminary Hearing Date and Order of Continuance, *United States v. Ramirez*, No. 20MJ02370 (UA) (S.D.N.Y. May 7, 2020).

In the Eastern District, all preliminary hearing deadlines were extended to 60 days after a defendant's initial appearance in cases in which a preliminary hearing would otherwise have been required between April 27, 2020 and June 15, 2020. *See* Standing Order, *In re Coronavirus/COVID-19 Pandemic*, No. 2020-15 (E.D.N.Y. Apr. 21, 2020). As a result, there has not been a noticeable increase in preliminary hearings in criminal cases during the pandemic, and with grand juries beginning to sit again in June – albeit with additional procedures in place to protect the health of jurors and potential jurors – the temporary urgency with respect to preliminary hearings and indictments appears to have abated. *See* Alexandra M. Gross, *COVID-19 Judicial Task Force Proposes Protocols to Reinstate Jury Trials*, Nat. L. Rev. (Jun. 17, 2020), https://www.natlawreview.com/article/covid-19-judicial-task-force-proposes-protocols-to-reinstate-jury-trials.

Civil Cases

The transition to remote proceedings has been simpler for civil proceedings. Judge Oetken described how the pandemic interrupted a bench trial that was in progress at the end of March, for which he received the final two witnesses' testimony and closing arguments in writing. He has since heard several oral arguments via video or telephone, but noted that, consistent with his prior practice, oral arguments have been the exception and he has continued to largely rule based on the parties' submissions.

Magistrate Judge Cave discussed the unique challenges of conducting settlement conferences remotely. While she has held most settlement conferences by telephone, she has given the parties the option to arrange videoconferencing, which facilitates the face-to-face interaction that is often helpful in settlement negotiations. Whether by video or by telephone, Magistrate Judge Cave employs a mechanism to speak with each side separately and to allow the parties to confer confidentially with their counsel outside her presence. As a result, despite the remote nature of the conferences, she has been impressed with parties' willingness to negotiate and, in some cases, reach agreement.

Each of the judges has taken a slightly different approach to extensions – for example, Magistrate Judge Bulsara has entered extensions on a case-by-case basis, while in March, Magistrate Judge Cave entered 30-day extensions in each case in which she was supervising pre-trial proceedings – but all described accommodating such requests. Even so, the judges noted that discovery disputes have not abated, and that practitioners have needed additional encouragement to conduct depositions via videoconference.

It was noted that, with the backlog of criminal cases awaiting trial, civil jury trials seem unlikely to resume until 2021, which has led some of the judges to prepare for additional bench trials this fall, and to encourage settlement.

The judges offered suggestions to practitioners appearing remotely. As usual, consulting each judge's individual practices is the best first step, as some judges have adopted practices specific to the pandemic. *See, e.g.,* Emergency Individual Rules and Practices in Light of COVID-19 of The Honorable Jesse M. Furman, United States District Judge.

The judges reminded practitioners appearing on video to be attentive to professional dress and background, and for those appearing by telephone to identify themselves before speaking to ensure a clear record. Effective advocacy in remote proceedings requires a new aptitude for the requirements of technology – first and foremost, eliminating background noises. (Some of the judges reported regular interruptions from dogs, landscapers, and clock chimes.)

Mastering remote technology also requires facility in displaying and discussing exhibits. Judge Cogan, in particular, noted the importance of counsel taking the time to point out to the judge and the other parties the page and line they are discussing during their argument.

Judge Oetken and Magistrate Judge Cave have noticed an increase in inter-party squabbling during telephone arguments, often to the point of counsel interrupting the judge, and thus reminded practitioners to strive to maintain a professional demeanor during telephone conferences. To mitigate this problem, Judge Cogan often advises the parties at the beginning of a conference that each counsel will be afforded an opportunity to speak, which can allay practitioners' apprehension that they will not have a chance to be heard.

Finally, the judges noted parties' reluctance to exchange exhibits before depositions and conferences, at the risk of losing the "element of surprise." The judges encouraged practitioners to set aside typical inhibitions and instead consider the benefit of ensuring a smooth proceeding by sharing exhibits in advance, including providing hard copies to the court.

Second Circuit Proceedings

Judge Droney addressed proceedings in the Court of Appeals for the Second Circuit. On March 16, 2020, all filing deadlines through May 17, 2020 were tolled by 21 days unless otherwise ordered. Effective March 23, 2020, the Second Circuit began to hear all oral arguments using a teleconference platform, and arranged for audio livestreaming to the public. The paper-copy filing requirement was also suspended, so that all filings have been electronic (although the paper-copy filing requirement resumed on July 1, 2020). *See* https://www.ca2.uscourts.gov/.

In connection with telephonic arguments, Judge Droney offered several helpful suggestions to practitioners.

First, counsel does not have the benefit of the lights on the lectern to show remaining argument time, and thus must be prepared to monitor their own argument time.

Second, in the absence of visual cues from the judges themselves, Judge Droney encouraged counsel to pause after a judge's question, to make sure the complete question has been posed, and to pause after an answer, to allow the judges to interject additional questions and comments.

Finally, counsel should not expect that their argument time will be extended, and should manage their time accordingly.

Conclusion

Despite extraordinarily challenging circumstances, the courts in the Second Circuit have adapted to remote proceedings, with the cooperation of practitioners and parties and the diligent efforts of court staff, to ensure that both criminal and civil cases continue to progress. The hallmarks of this cooperation between the bench and bar throughout the duration have been flexibility, patience, and kindness, which are virtues that will no doubt be necessary as the courts move toward reopening in the coming months.

In the Courts

Philip M. Halpern Joins the Southern District Bench

By U.S. Magistrate Judge Lisa Margaret Smith

Philip M. Halpern was confirmed to serve as a U.S. District Judge in the Southern District of New York on February 12, 2020. He was sworn in quietly on March 10, 2020 by Chief Judge Colleen McMahon of the Southern District; a formal and public swearing-in ceremony will take place in the future.

Judge Halpern was raised in Tuckahoe, in Westchester County, but he and his family had the good fortune to travel quite a bit when he was a child, because of his father's job working for Mobil Oil; he designed computer programs and taught Mobil employees worldwide how to use them during the 1960s. This gave the judge an opportunity to live for several years in both Melbourne, Australia, and London, England, and to experience parts of the world that he otherwise would not have experienced.

Judge Halpern graduated from Archbishop Stepinac High School in White Plains, and Fordham University College of Business (now the Gabelli School of Business), where he earned a B.S. in economics, magna cum laude, in 1977. As Judge Halpern approached his graduation from Fordham he was working at a golf course near White Plains, and he had settled on the twin goals of continuing his education and aiming for a job in the golf industry, which was (and is) his passion. Fortunately for Judge Halpern, in 1976 the Pace Law School (now the Elisabeth Haub School of Law at Pace University) was founded in White Plains. Judge Halpern successfully applied to this new law school, and was able to attend while continuing his work at the golf club, which was just eight miles from the Pace Law School campus.

Judge Halpern

Judge Cooper's Clerk

Judge Halpern commenced his legal career in a highly-sought after clerkship for then Senior District Judge Irving Ben Cooper of the Southern District of New York. Judge Halpern credits Judge Cooper with teaching him many of the skills needed to competently represent a client in a courtroom. One result of Judge Halpern's clerkship was that Judge Cooper planted a seed in the heart of the young Phil Halpern that grew to a determination to become a federal district court judge.

Judge Halpern's career before the bench lasted nearly 40 years, exclusively as a litigator in trial and appellate courts. His practice took him to many states and many federal district courts, representing individuals, corporations, and Fortune 500 companies, and, according to Judge Halpern, he "enjoyed every minute of it." He believes that his experiences have informed his preferences on what he expects from attorneys who will appear before him. He respects those attorneys, and knows how challenging their calendars and workloads can be. He expects counsel to raise their concerns efficiently and effectively, in order to allow him to resolve their problems.

Trial Skills

In addition to his career as a litigator, Judge Halpern has served as an adjunct professor at the Elisabeth Haub School of Law, teaching "The Anatomy of a Trial: The Burden of Proof," which deals exclusively with trial skills. His book, "The Burden of Proof," has just been published by the American Bar Association. In light of his familiarity with issues pertaining to the burden of proof, Judge Halpern expects counsel to address those issues, and the appropriate standards of review, in a straightforward and clear manner.

Judge Halpern has been married to his wife, Carolyn, for more than 31 years, and they have three grown children. His passions are first his family, and then his work and golf, although it is not completely clear in which order those last two come.

Judge Halpern describes his desire to become a district court judge, which survived his years as a litigator, as being the result of his watching Judge Cooper work in "the greatest job in the world." Judge Halpern observed how Judge Cooper thoroughly enjoyed each and every day; how Judge Cooper's intensity of decision-making consumed him; and how Judge Cooper stood up to whatever issue arose, and did what he believed was right.

Judge Halpern wants attorneys and parties who appear before him to know that he feels extremely fortunate to have been appointed a district court judge. He says, "I am living my dream and intend to do my level best to uphold the oath I took, one case at a time, and one day at a time."

Legal History

The Most Publicized Trial in History, and the Case with Perhaps the Most Legal Errors

By C. Evan Stewart

Certainly every lawyer in the Second Circuit, let alone in America, remembers his or her reaction when a Los Angeles jury, on October 3, 1995, acquitted O.J. Simpson of the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman, at Simpson's ex-wife's home on June 12, 1994. The entire eight month trial had been broadcast on television, with breathless 24/7 media commentary.

O.J. Simpson was a charismatic Hall of Fame football player turned actor. Knowing he was going to be arrested for the brutal double murders, Simpson had fled in a white Bronco, owned and driven by his friend A.C. Cowlings. Spotted on the Los Angeles freeways, the Bronco was soon converged upon by the city's police department.

Cowlings warned them

not to do anything precipitous, shouting: "Put away your guns. He's in the back seat, and he's got a gun to his head." That led to an hours' long, freeway parade of the Bronco being followed by a string of police department squad cars in its wake – a spectacle that was broadcast live across the country and watched by an estimated audience of 95 million people.

During the "chase," a note just written by Simpson was publicly disclosed by a friend of his; it concluded with: "Don't feel sorry for me. I've had a great life, great friends. Please think of the real O.J. and not this lost person. Thanks for making my life special. I hope I helped yours."

Ultimately, the "chase" ended back at Simpson's home, with Simpson surrendering and saying: "I'm sorry, guys. The only person who deserves to be hurt is me." Inside the Bronco was Simpson's travel bag, in which was found his passport, a fake goatee and mustache, a supply of fresh clothes, and a fully loaded Smith & Wesson handgun. In addition, Cowlings had $8,750 in cash, which he said was Simpson's.

The Evidence

Simpson's conduct, his note, and his statement upon arrest, all seemed to indicate consciousness of guilt. What else pointed to him being the murderer? Only, among other things, the following:

(1) There was a long pattern of domestic abuse by Simpson on his wife – between 1985 and 1988, the police had been called to Simpson's home eight times (on one of them his wife was in a car, crying, with the windshield having been smashed by a baseball bat wielding Simpson) – in 1989, a 911 call brought police again to the house, where they found Nicole Simpson, who emerged from the bushes, with her lips cut and bleeding, a black and blue left eye, and a clear hand imprint on her neck ("He's going to kill me! He's going to kill me!") (for this incident, Simpson pled "no contest" to a misdemeanor of spousal abuse) – in October 1993 (less than eight months before her murder), Nicole Simpson made another 911 call; while she pleaded for 13 minutes for the police to come, Simpson (who had broken down his ex-wife's door to gain entrance) was recorded as saying: "I'm leaving with my two fists is when I'm leaving.") – and on June 7, 1994, five days before her murder, Nicole Simpson called the Sojourn Battered Women's Shelter in Santa Monica, asking for help because she was being stalked by her ex-husband, O.J. Simpson (this report was ruled to be inadmissible hearsay, and the criminal jury never heard it);

(2) Even without that last bit of evidence, the long pattern of abuse was highly relevant given the brutal nature of what was clearly a crime of passion – Nicole Simpson was stabbed seven times in her neck and scalp, with one of her wounds being a slash to her throat which nearly severed her head; Ron Goldman was stabbed approximately 30 times (and not only was there nothing taken from Nicole Simpson's home – her children were asleep in the house – only a very strong person could have inflicted such brutal and fatal injuries);

(3) Simpson, who had no alibi, failed a polygraph test, and failed it spectacularly – with a score lower than -6 constituting lying, Simpson scored a -24 (this test, administered by his own legal team, was never before the trial court or jury);

(4) Every drop of blood – at the crime scene, at Simpson's home, on and in Simpson's car, on two gloves (a matching pair, one found at the crime scene and one found at Simpson's house), and on Simpson's socks – belonged to Nicole Simpson, Ron Goldman, Simpson, or some combination of all three (e.g., Nicole Simpson's blood was found in Simpson's house, Ron Goldman's blood was in Simpson's car);

(5) More specifically, of three blood drops next to footprints at Nicole Simpson's house, only one out of 240,000 people had a DNA match (and Simpson was one); of another blood drop at the same spot,

only one in 170 million people had a DNA match (and Simpson was one); of blood found at the rear gate of Nicole Simpson's house, only one out of 57 billion people had a DNA match (Simpson again) (this data came from two different crime laboratories utilizing different techniques);

(6) The black knit cap found at Ron Goldman's feet had hair fibers that matched Simpson's (as did hair found on Goldman's shirt);

(7) Hair from the bloody glove found at Simpson's home matched Nicole Simpson's hair;

(8) Fibers from the shirt Simpson wore the night of the murder were found on the same glove, on Simpson's socks, and on Goldman's shirt;

(9) Carpet fibers from Simpson's car matched those found on the knit cap and on the bloody glove at Simpson's house;

(10) The bloody gloves were a very unusual style, sold only at Bloomingdale's in New York City – Nicole Simpson had bought two extra large sized pairs in 1990, and only approximately 200 had ever been sold in that size;

(11) The bloody footprints of the killer were from size 12 Bruno Magli shoes – a type and size that Simpson wore;

(12) The footprints were made by someone between 6 feet and 6 feet 4 inches tall and weighing approximately 200 pounds (Simpson: 6'1", 210 lbs);

(13) Simpson had no explanation for the deep cut to one of his left knuckles (Simpson did tell police he had cut himself on the night of the murder, but he had "no idea, man" how it happened; he also told them he had not cut himself the last time he said he had been at his ex-wife's home, a week earlier); and

(14) At the time of the murders a witness had had her car cut off by a car hastily leaving the crime scene, with the driver yelling: "Move your damn car! Move it! Move it!" – she recognized the driver as O.J. Simpson, took down the license plate number (Simpson's car), reported the incident to the police after learning of the murders, and testified about what she had seen to the grand jury.

What Went Wrong?

With all that (and a lot more), one might wonder how things turned out the way they did. As the title of this article suggests, the lawyers prosecuting the case made a lot of mistakes; the most material of those mistakes were:

- **Venue**

  Prior to the Simpson case, the Los Angeles District Attorney (Gil Garcetti) and his office had lost a number of high profile cases: the first Menendez brothers trial (accused of murdering their parents); the Michael Jackson trial (child abuse); the McMartin Preschool trial (child abuse); and the Rodney King trial (police brutality). With the plethora of evidence they possessed, perhaps the district attorney and his colleagues thought they could win anywhere. So rather than conduct the trial in the Santa Monica District of Los Angeles County (where the murders occurred), Garcetti (up for re-election in 1996) decided that the trial would take place in the South Central District of the county – i.e., in downtown Los Angeles, where the jury pool would be made up primarily of African-Americans, likely to be favorable for Simpson. Harshly criticized (especially in hindsight) for this venue decision, Garcetti gave a series of dissembling responses, most of them flat out false (e.g., the court had made the decision; trials lasting longer than two months had to be tried in the downtown courthouse). In any event, this fateful decision was then magnified by the process of jury selection.

- **Jury Selection**

  And it was not that the district attorney's office had been unaware of the downtown jury pool issue. With the help of a well-known jury consultant, the office had held a number

of focus groups, demographically made up of the likely jury pool. The results were not good, to say the least – the African-Americans believed Simpson was innocent, notwithstanding the evidence; and the African-American women were particularly "vociferous" in their support of Simpson. Not only were they not affected by the history of domestic violence ("every relationship has these kinds of problems"), they also hated the lead prosecutor, Marcia Clark; as the jury consultant reported, they described her with such words as "shifty," "strident," and "bitch, bitch." The consultant reported all that to Garcetti, Clark, and others in the prosecutor's office, adding that the African-American women "saw [Clark] as a pushy, aggressive, white woman who was trying to bring down and emasculate a prominent black man."

Given that feedback, not only should the district attorney have reconsidered having Clark lead the trial team, but the consultant's unwavering conclusion – that "black females were the worst conceivable jurors for the prosecution in the Simpson case" – should have been heeded. Instead, Clark, hating the messenger, banished the consultant and decided to follow her "gut" – that she "could talk to women,…reach them somehow…. White, Hispanic, Asian, Black, it didn't matter." The result? The jury ultimately selected to hear the evidence, deliberate, and decide Simpson's fate was comprised of eight African-American women, one African-American man (inexplicably, a former Black Panther), one Hispanic man, and two white women. Simpson's lead lawyer, Johnnie Cochran, reportedly had said: "Give me one black juror, and I'll give you a hung jury." Now he had nine. Even Clark herself (later) described the process as "this [expletive] jury pool from hell."

- **Evidence Not Used**

With these seemingly insurmountable obstacles, was there any hope of gaining a conviction? Who knows; but one thing is sure: the prosecution continued to make matters worse, particularly in the trial itself by what incriminating evidence it did not present to the jury. Four stand out:

First, the prosecution had a 32 minute police interview on tape with Simpson from the day after the murders (for some reason his then-lawyer allowed this to happen, and without him present!). While the interrogation was less than stellar interrogation, Simpson did make a number of extremely incriminating statements (e.g., cutting his hand the night before and bleeding in his car and in his house that night); things he said would also have made some of the police-racism conspiracy theories woven at trial impossible to be advanced. In addition, the jury would have heard Simpson's voice, contemporaneous with the murders (contradicting, changing answers, hesitant, ungrieving) – as opposed to the silent, yet well-rehearsed Simpson with whom the jury spent eight months. Finally, the jury learned of the police tape, but not having heard it allowed them to speculate that the tape exonerated Simpson (something Cochran invoked in summation).

Second, the prosecution (incredibly/inexplicably) failed to put in anything regarding Simpson's white Bronco "chase." As set forth above, Simpson's attempted flight from arrest, statements made both during (when he also called his mother and reportedly told her: "It was all her fault, Ma.") and after, the materials Simpson had in his possession, etc., were all powerful evidence of consciousness of guilt. Yet, none of it was put before the jury.

Third, the prosecution never used Simpson's "farewell" note. Composed shortly before his flight to avoid arrest (during which he had placed a gun to his head), it sure sounded like further evidence of him acknowledging his guilt (and his desire not to face justice for his brutal actions). But the jury never saw

it. (Simpson's note and the "chase" – Simpson's own actions – would also have gone far to undercut the defense's conspiracy theme of police racism.)

Last, and certainly not least, Jill Shively – the eye witness of Simpson's driving away from his ex-wife's home at the time of the murders – did not testify! Because Shively had sold her story to a television tabloid show for $5,000, Clark – later calling it a matter of principle – angrily decided that Shively's action "made her personally useless to the government." Certainly Shively's action was ill-advised, but there were obvious ways to inoculate her from an obvious cross-examination attack. Instead, because of Clark's pique, the jury never heard this key piece of the puzzle.

- **The Race Card**

Everyone knew that the Los Angeles Police Department's difficult history in race relations might well play an important role in the trial. Indeed, after the trial, one of Simpson's lawyers, Robert Shapiro, told Barbara Walters: "We not only played the race card, we dealt it from the bottom of the deck." And well before the trial started, it was clear that the focus would be on Detective Mark Fuhrman.

Fuhrman had a well-documented history of racist statements, about which the prosecutors were aware. And Jeffrey Toobin had written an article in the July 22, 1994 *New Yorker* in which he reported that Simpson's lawyers were going to portray Fuhrman as a racist who planted the bloody glove at Simpson's house.

With that as prologue, the prosecution moved to exclude any reference to racist bias on Fuhrman's examination under California's evidence code (Section 352). Judge Lance Ito correctly ruled that there could be nothing on that score unless the defense could offer proof that Fuhrman in fact did plant the glove (of which there was none). Three days later, however, Ito reversed himself and ruled that Fuhrman could be crossed on whether he had used the N-word at any point in the past 10 years.

The trial was now at a critical crossroad because of Ito's error (unfortunately, just one of many); and the prosecution chose the wrong fork(s). Prosecutors could have sought an immediate appeal of Ito's second ruling. Fearing he would be mad at them, however, the prosecution decided not to appeal (even Clark later admitted that was a very bad error in judgement). But now with Fuhrman a key witness and clearly going to be open to racist attacks, did Clark or her colleagues (knowing of Fuhrman's past statements) subject him to rigorous preparation, confront him with his various statements and other allegations of racist statements, and inoculate him from attack? They did not. So, Fuhrman went in unprepared and on cross-examination, lied:

Q: And you say under oath that you have not addressed any black person as a n----- or spoken about black people as n------ in the past 10 years?

A: Yes, that is what I'm saying.

Q: So that anyone who comes to this court and quotes you as using that word in dealing with African-Americans would be a liar, would they not, Detective Fuhrman?

A: Yes, they would.

Q: All of them, correct?

A: All of them.

The defense could now show that Fuhrman was both a liar and a racist. And they did, most spectacularly with tapes a screenwriter had made in 1988 with Fuhrman; the tapes included a plethora of racist vulgarities from Fuhrman's lips, including the N-word 41 times.

With those tapes, the race card had truly been played. Fuhrman was immediately cut loose by the prosecutors; they refused to speak with him (or even return his phone calls). As such, when Fuhrman was called back by the defense – with no as-

surance that the prosecutors would attempt to rehabilitate him (which they could have – there were a number of Los Angeles Police Department minority officers who had worked with Fuhrman and were willing to testify he was not a racist, had a police record free of racial bias, and was a good policeman who was scrupulous in handling evidence) – Fuhrman took the Fifth Amendment to all the questions posed to him. This Fifth Amendment spectacle was, as Clark later wrote, a disaster; and she compounded the disaster by telling the jury she was "disgusted" with Fuhrman (a key witness for her case) and "wish[ed] there were no such person on the planet." But the whole mess (a) could have been avoided by taking an immediate appeal of Ito's improper ruling; (b) could have been neutralized by proper witness preparation (i.e., admit to prior racist statements on direct, put them into some kind of context (that they applied only to hardened criminals), and cut-off a parade of impeaching defense witnesses on Fuhrman's past, including the tapes); and (c) could have been mitigated if the prosecution had recognized that it was their duty to rehabilitate Fuhrman.

- **Trying On The Glove**

  Last, but certainly not least, came the infamous glove demonstration, where the prosecutors had Simpson try on the bloody gloves – one found at the murder scene, the other at his home – in front of the jury.

  At a sidebar, Clark had noted that there might be a problem: "He has to wear latex gloves underneath . . . and they're going to alter the fit." Another problem was that the gloves, soaked in blood, had shrunk. A third problem was that the demonstration was being turned over to the control of Simpson himself. Thus, there was a terrible trifecta, underscoring what any first year law student should know (let alone what every experienced trial lawyer does know): Never try a demonstration in front of a jury unless you know it is going to work.

  So Simpson, by now an experienced movie and television actor, walked over to the jury box as he "tried" to put on the gloves. Keeping his thumb bent at a right angle to his wrist (ensuring the glove could not fit on his hand), Simpson grimaced and testified in front of the jury (but not under oath) "too tight" (others heard him also say "they don't fit").

  Clark (who had approved of this demonstration) later wrote that she said to herself: "That's it we just lost the case." And, of course, this monumental screw-up allowed Cochran to coin the most famous phrase of his legal career: "If it doesn't fit, you must acquit."

  And that is precisely what the jury did, "deliberating" for four hours. After the verdict was read, the former Black Panther juror, in open court, gave a Black Power salute!

Postscripts

Simpson did not fully escape justice. He lost a civil wrongful death suit brought by the families of his ex-wife and Goldman. And, in 2008, he was convicted of armed robbery, kidnapping, and conspiracy in Nevada; Simpson was released from prison on October 1, 2017.

Oprah Winfrey once said that one way to delineate an inappropriate potential suitor is if the potential suitor believes Simpson did not do it.

Of the mountains of material written on the Simpson case, the best continues to be Jeffrey Toobin's "The Run of His Life: The People v. O.J. Simpson" (Random House 1996). For those who want a detailing of all the errors by the prosecution, as well as those by Judge Ito (and the not-edifying tactics and strategies of Simpson's counsel), the best book is Vincent Bugliosi's "Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder" (W. W. Norton & Co. 1996). An excellent overview of the whole imbroglio is a chapter in Glenn Altschuler and Faust Rossi's wonderful book "Ten Great American Trials: Lessons

in Advocacy" (American Bar Association 2016).

When the Simpson criminal trial was first being teed up, I was speaking to a law school classmate who is a very prominent lawyer in Los Angeles. I will never forget what he told me: Because of the venue decision and the basic competence of the local prosecutor's office, a hung jury would be the best result achievable. He was right.

The Interview

A Chat with Historian Joseph J. Ellis

By Joseph A. Marutollo

Joseph J. Ellis is one of the United States' most distinguished historians and authors. Ellis has written a host of books on the American Revolutionary era, including the Pulitzer Prize-winning "Founding Brothers: the Revolutionary Generation"; the National Book Award-winning "American Sphinx: The Character of Thomas Jefferson"; and the national best-seller "The Quartet, Orchestrating the Second American Revolution, 1783-1789."

Ellis is a ubiquitous presence on various PBS and History Channel documentaries as well, including the History Channel's recent series on George Washington.

Ellis has taught in the Leadership Studies program at Williams College, the Commonwealth Honors College at the University of Massachusetts, Mount Holyoke College, and the U.S. Military Academy at West Point.

The *Federal Bar Council Quarterly* recently interviewed Ellis regarding his scholarship, his writing, and his insights for lawyers.

The Writing Process

While Ellis' works make good writing look easy, he explained that his writing process is quite arduous. He noted that a single, well-written paragraph in one of his books can take weeks at a time to perfect. Ellis stressed that successful writers must know their audience. Many professional historians, for instance, often write only for other professional historians. Ellis' objective, however, is to write for the public at large. Ellis envisions writing for students who are smart, but who do not necessarily know anything about the subject at issue. As a result, despite addressing dense and complicated historical events, his books are more akin to epic page-turners than dusty textbooks.

Ellis' books are generally rather short. Ellis does not waste words. Instead, he gets right to the point of his argument or assertion; no flowery language needed. As lawyers are typically forced to deal with strict page limitations in their briefs and submissions to the court, Ellis' writing provides a roadmap to follow for clear and concise writing that strikes right at the heart of the issue.

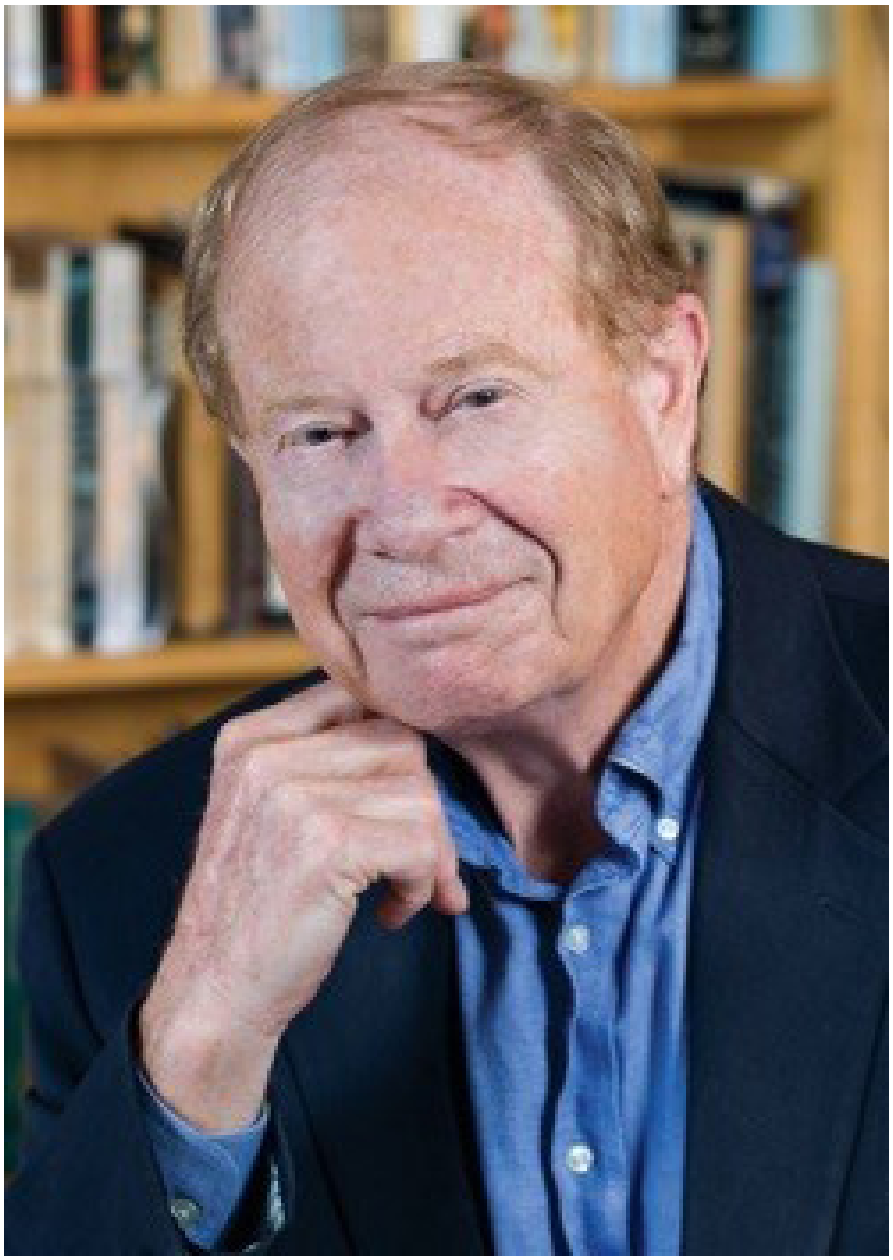
Editing is, of course, critical for effective writing. According to Ellis, many historians fall into the trap of "essentially reporting on the research" that they have conducted, rather than focusing on the key question: "What is the story?" According to Ellis, "if you spend a year gathering a great deal of evidence" on a particular topic, "you can't resist wanting to tell people everything you've found, and that creates a series of extraneous asides" in your writing. Ellis remarked that he routinely "throws away about one-third to one-half of [his] notes at the end" of his book drafts, because, at the time he is doing research, he does not necessarily know where the story is going. In short, Ellis is not interested in showing how much work he has done, but rather is interested in explaining "the story" in his book.

Editing the Constitution

And, interestingly, good editing is at the foundation of the Constitution itself. As Ellis

wrote in "The Quartet," "while the Constitution was clearly the creation of many hands [delegate Gouverneur] Morris was the man who actually wrote it." Although the Committee on Detail at the Constitutional Convention had written "We the people of the states of New Hampshire, Massachusetts, Rhode Island…" in the draft preamble, Ellis notes that Morris "single-handedly chose to change that to 'We the People of the United States.'" As Ellis explains, "[i]n retrospect, this was probably the most consequential editorial act in American history."

Additionally, while 29 of the 55 delegates to the Constitutional Convention studied law, Ellis cautioned that we should not necessarily over-emphasize the role of professional lawyers in the creation of the Constitution. While the Founders' legal background was helpful in understanding English common law and the basic framework for the law, the most powerful faction at the Convention were "retired officers from the Continental Army." These Founders' experience in the war – "where they saw the inability of the Confederation Congress to provide the support that the army needed" – was far more important than any legal training that they may have experienced.



Joseph J. Ellis

Ellis remarked that despite all of the current unrest around the country, he takes heart in the enormous success of shows like "Hamilton," which he described as "absolutely wonderful." He glowingly added that many of his students now routinely quote lines from "Hamilton" about the origins of our constitutional system as if they were quoting from "Harry Potter."

A New Book

Ellis is working on a new book, "The Cause," about the 1770s. This book will effectively complete his trilogy on the 1770s, 1780s (the focus of "The Quartet"), and 1790s (the focus of "Founding Brothers"). Ellis' strong writing is a great model for lawyers eager to learn more about the Revolution and further hone their writing craft.