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## *In This Issue:*



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From the President

# Lessons from the Pandemic

**By Jonathan M. Moses**

Just weeks before the COVID-19 pandemic shut down New York City, much of our region, and the courts, we presented to the Federal Bar Council's board and then all members the results of a strategic planning process that we had undertaken over the prior 12 months. A strategic planning process is about looking to and planning for the future. The pandemic is one of those rare historical events that immediately presents detours on the road forward. It creates a before time and an after time. And, of course, there is the during time – the pandemic, in that regard, is also rare for the recent period as it affected all of us in some way, although some of us in much harder ways than others.

One of the key findings of our strategic planning process was that our mission of building community among and between the bench and bar remains highly relevant and important to our membership. But the pandemic immediately struck at the core of the Council's mission. No longer could we meet in person. Treasured occasions such as the annual Law Day Dinner scheduled for that May would have to be cancelled. The courts themselves would need to close to visitors.

## Building Community

What we at the Council discovered, and I think all of us individually did as well on our own, is just how important the Council's mission of building community is to our personal and professional lives. Maintaining personal connections is vital. Indeed, doing so took on an urgency as the pandemic wore on and we had to remain separated. As with many things, the fact that we had to work harder to maintain and nurture our shared communities, made our successes in doing so feel even more valuable.

Through the miracle of Zoom, and the amazing work of the Council's staff led by Anna Stowe DeNicola, our executive director, we were able almost immediately to replicate much of the experience of coming together in person. One of our first Zoom CLEs focused on issues around COVID-19 and prisons, including the potential use of compassionate release petitions.

Given the importance of the issue, we decided to make the program available free not just to members but non-members as well. More than 400 people attended. Other important CLEs followed, including those in which practitioners and judges traded tips on how to conduct virtual trials. Another added benefit of these virtual CLEs is that we recorded them and have now built up a library of CLE programs available on demand to members – this was a specific to do of the strategic plan based on feedback we had received.

## Throwback Thursdays

We also increased the substance of our communications with members. We recognized that we would need to do more to stay in touch with members. Hence was born regular communications such as the beloved Throwback Thursday – a weekly walk down memory lane from the pages of the *Federal Bar Council Quarter*ly put together by Anna DeNicola. These columns are a delight to read and often find surprisingly timely lessons for us now based on the past.

While we had to cancel the Law Day Dinner, we were not going to let the Thanksgiving Luncheon go by. And, once again, the need for community prevailed (with a little assist from Remo, our virtual "meet and greet" platform). The turnout was fantastic, as were the words of our honoree David Patton, head of the Federal Defenders Office.

We had a similar success with this year's Law Day Dinner, where we honored Chief Judge Debra A. Livingston who had been expected to receive the award in 2020. Judge Livingston's remarks on the importance of the Rule of Law and the need to keep open minds were an inspiration.

## An Important Guide

The strategic plan proved to be an important guide in other ways throughout the pandemic. One of our findings was the need for our

membership to understand the scope of what the Council has to offer; that it is not just about bringing people together, it is about exploring important issues of the day for the legal community. As the above examples demonstrate, we more than checked the box on the substance front. Improved communication with our membership was also a goal of the strategic plan – the pandemic meant we had to immediately execute on this strategic priority.

Our strategic plan reemphasized the importance of our partnership with the courts and the need to assist the courts where appropriate. Again, the pandemic has provided opportunities in this regard which the Council has met. We organized virtual gatherings for signal moments within the court, celebrating, for example, the late Judge Robert Katzmann's tenure as Chief Judge of the Second Circuit. We also hosted virtual events marking the start of Judge Laura Swain's tenure as Chief Judge of the Southern District and Judge Margo Brodie's tenure as Chief Judge of the Eastern District. Following up on important discussions on diversity and access to the courts, the subject of our (virtual) Fall Retreat, we are instituting an initiative designed at enhancing the availability of pro bono counsel to take on civil *pro se* cases when appropriate, a need that the courts have long identified.

**Promoting the Rule of Law**

And while not directly related to the pandemic, as part of the strategic plan we changed our mission statement to make clear our longstanding commitment to promoting the Rule of Law. Last year proved a tumultuous time in this regard, and once again we met our mission, culminating in an extraordinary two-day symposium that focused on the Rule of Law in various contexts and which brought together judges, leading practitioners, and academics.

The pandemic now seems, hopefully, to be receding. Courts have opened for in-person hearings. Friends and co-workers are meeting in person. And the Council too is planning to resume in-person events. This fall, we plan an in-person Fall Retreat. We are exploring how best to resume an in-person Thanksgiving Luncheon. And, we aim to resume the Winter Bench and Bar Conference in the winter of 2022.

We won't throw away the lessons of the pandemic – look for continued virtual events, for example, given their practical benefits and ongoing communications designed to let members know the full scope of what the Council is doing. As we move forward into this new future, we will remain all the more confident that our mission of building a community of lawyers and judges in the Second Circuit focused on excellence in legal practice and promoting the Rule of Law remains vital.

**Terrible Losses**

We also won't forget the terrible losses of the pandemic. We presented the strategic plan to the board in February 2020. Among those attending that board meeting was a former president of the Council and the founder of this publication, Steve Edwards. COVID-19 took Steve from his family and friends only a short time later. Other members of the Council and beloved judges also lost their lives to the disease.

As we emerge from the pandemic it is right and appropriate that we remember those we lost. As an organization about building community and fostering connections, we are only as great and vital as our membership. We look forward to seeing all of you in person soon with the knowledge that our mission is vital to our future.

## From the Editor

# A Rule of Law Symposium

**By Bennette D. Kramer**

On Friday and Saturday, May 7 and 8, the Federal Bar Council held a virtual Rule of Law Symposium on Zoom, following its virtual Law Day Dinner on May 6, during which Council President Jonathan M. Moses presented the Learned Hand Medal to Second Circuit Chief Judge Debra A. Livingston.

The Law Day Dinner and the Symposium programs are discussed in articles in this issue, so I will just briefly describe my impressions of the Symposium programs.

The Symposium was intended to provide a series of programs for the Council community exploring the Rule of Law in light of the cancellation of the annual Winter Bench and Bar Conference. While sitting at home at my computer was a poor substitute for the 2020 Conference in the Bahamas, the programs were as well organized and presented as Winter Conference programs generally are.

The Symposium was a big success. The Council exceeded its attendance goals both for the Law Day Dinner and the Symposium. The programs drew an extraordinary variety of panelists with a wide range of expertise. The panel members ranged from people who participated in the 2020 election to law professors to the head of the Federal Defenders of New York and the former U.S. Attorney for the Eastern District of New York. These panelists painted a vivid picture of the everyday fight to maintain the Rule of Law in the legal system.

My takeaway from the Symposium programs is that the general interpretation of the Rule of Law is subjective and that it eludes precise definition, but the fact-based analysis in each of the programs led to a more concrete understanding of what it is. A program on the 2020 election with panelists who participated in various aspects of defending the integrity of the election and the votes in that election explained the election process and how close we came to veering from the Rule of Law. Similarly, in a program addressing Equality Under the Law and the Rule of Law, the panelists discussed exonerations and alternatives to prosecution and/or incarceration and the prejudice that runs through the federal criminal justice system.

Other programs on the definition of the Rule of Law, judges' views of their roles in promoting the Rule of Law, and a review of the recent Supreme Court term all touched on the roles and obligations of lawyers, judges, and other participants in the judicial system to ensure that the Rule of Law is followed. These participants also have a duty to the public to explain the process and encourage the perception that the system is fair to all.

All in all, the Symposium programs were at times eye-opening (prosecution of state crimes in federal court overwhelmingly affects people of color) and provocative (how to determine whether a person discussing violent acts is fantasizing or has a real intent to commit violence). One of the high points was hearing four judges talking about how they work to preserve the Rule of Law in the courtroom.

The Symposium provided an opportunity to experience the high quality programming that we generally see at the Winter Conference. However, I look forward to attending the Winter Conference in person in 2022. There is no substitute for the camaraderie that develops over a week of attending programs, dinners and simply being together with the group.

## Developments

# The Rule of Law Symposium

**By Bennette D. Kramer**

In place of the Winter Bench and Bar Conference this year, the Federal Bar Council held a virtual Rule of Law Symposium with Chief Judge Debra A. Livingston and Judge Jon O. Newman of the Second Circuit as co-chairs of the Judicial Program and Abena Mainoo and Seth L. Levine as co-chairs of the Symposium. The Symposium took place on May 7 and 8, 2021, following the virtual Law Day Dinner on May 6 at which Council President Jonathan M. Moses presented the Learned Hand Medal for Excellence in Federal Jurisprudence to Chief Judge Livingston.

### Defining the Rule of law

The first program on Friday was "What Does 'Rule of Law' Mean, Anyway?," chaired by Second Circuit Judge Gerard E. Lynch with a panel including Professor Jeremy Waldron of the New York University School of Law and Professor Andrei Marmor of Cornell Law School that explored the meaning of the Rule of Law. The panel discussion was followed by small group discussions led by Second Circuit judges that considered several questions.

Professor Waldron talked about different perceptions and efforts to define the Rule of Law. He noted that the World Justice Project works to advance the Rule of Law and ranks 128 countries on criteria such as the absence of corruption. It has

worked to define the Rule of Law, although a definition is difficult to pin down because there are so many different points of view as to what should be included. In creating a definition, tradeoffs had to be made. For example, the left believes that the Rule of Law should include human rights, and the right believes that free markets and protection of personal property are key.

The legal concept of the Rule of Law is much narrower and separate from political ideals such as free markets and human rights. The legal norms provide clear and determinate paths with transparent guidelines so that citizens know how to act. Just laws are clear, publicized, stable, applied evenly, and uphold fundamental rights.

The academic understanding of the Rule of Law includes procedure requirements, along with such elements as liberty and respect.

Another source of the Rule of Law is institutional and political. The main feature is to provide order for people while putting constraints on government through accountability, separation of powers, an independent judiciary, and limited discretion. Those in positions of authority must exercise power within the norms.

As Professor Waldron indicated, there is no clear consensus on what constitutes the Rule of Law. It really depends on the circumstances and political point of view.

Professor Marmor argued for a narrow, academic Rule of Law. He espoused the academic view because clarity in definition does not always align with the political activism. The narrow definition has limits. The fundamental idea is that there is something good about being governed by law – that legality itself is good – as opposed to terror, indetermination, or corruption. The problem is that a lot of bad can be done legally. There are endless examples of bad laws or practices, i.e., racism, apartheid, jailing people without due process. There is a temptation to go in the other direction toward the ideal, being governed by good law with respect for civil rights and human rights. But sometimes people do not like the requirements of human rights. An example is Turkey, where violation of rights is legal.

Essential to the Rule of Law are two principles: (1) laws need to be able to guide people's conduct, and (2) for law to function to guide people's conduct, it must be good with respect for values and rights and human dignity. Rules need to have certain characteristics:

- To guide people's conduct, rules must be clear, public and open and cannot be too obscure, otherwise people will not know what to do;
- Rules cannot be created retroactively because that would not guide conduct; and



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- The rules must be enforced by an independent judiciary free of corruption.

Guiding people's conduct is just one aspect of the function of rules. They must also adhere to certain principles. Laws must be fluid and capable of modification, because too much unchanging law can lead to stagnation. There is no such thing as a perfect balance.

Judge Lynch, summing up, said that even the narrowest definition of the Rule of Law has value. Even if there is no precise definition, we know it even though we do not see it, i.e., deep corruption.

Participants separated into individual focus groups with a Second Circuit judge leading each group discussion. The groups were asked to consider:

- The meaning of the Rule of Law;
- The role of lawyers or judges in preserving the Rule of Law;
- The line between promoting change in law and threatening the Rule of Law;
- The greatest threat to the Rule of Law; and
- Whether the public values the Rule of Law and how judges and lawyers can promote respect for the Rule of Law.

Second Circuit Judges Dennis Jacobs, Raymond Lohier Jr., Debra A. Livingston, William J. Nardini, Jon O. Newman, and Richard C. Wesley led the break-out groups. Following separate discussions, the groups reported that they discussed:

- Threats to the erosion to the concept of truth in society generally;
- The problem when judges are perceived as part of a political "team";
- The need for the Rule of Law to have clear rules with democracy as a minimum component, which must apply to both rulers and decisionmakers;
- Judicial independence;
- Lawyers who accept the obligation to pursue matters with vigor;
- The necessity to counteract the widespread perception that the judiciary is politically biased;
- Whether the Rule of Law is limited to rules that limit governors rather than how people govern themselves;
- The role of lawyers to bring the debate to the table;
- The importance of social confidence in the Rule of Law;
- The need for the absence of the arbitrary use of government power; and
- The core value of empathy and the need for fidelity to some set of rules.

**Equality Under the Law and Rule of Law**

Eastern District Chief Judge Margo K. Brodie chaired a panel entitled Equity Under the Law and Rule of Law. The panelists included Seth D. Ducharme, former U.S. Attorney for the Eastern District of New York; David E. Patton, Executive Director and Attorney in Chief for the Federal Defenders of New York; Professor Tracey Meares of Yale Law School; and Christina Swarns, Executive Director of The Innocence Project.

Christina Swarns began the program with a keynote speech about how exonerations following the use of DNA evidence demonstrate that the widespread conviction of the innocent – particularly people of color – is evidence of the breakdown of the Rule of Law. As the exonerations began it became clear that fairness in enforcement and the protection of human rights had been eroded. The exonerations have led to changes in identification procedures and identification testimony. The problem is that wrongful convictions still exist. Government misconduct accounts for a significant percentage of exonerations in the form of police misconduct or prosecutorial misconduct through concealing exculpatory evidence, trial misconduct, or witness tampering.

Seth Ducharme talked about charging decisions and the role of prosecutorial discretion. During his tenure as U.S. Attorney for the Eastern District of New York, Ducharme used the Rule of Law to determine what investigations to open and continue. He said that the law must be predictable and applied fairly with transparency from the beginning. Prosecutors must look at the facts and acknowledge that people are often not what we perceive them to be. There is danger in the subjective notion of who is good and who is bad. Prosecutors cannot be formulaic in making charging decisions, but instead

must focus on facts. The process must be open minded and based on common principles.

David Patton said that rationality and equality are the ingredients of the Rule of Law that are often missing in criminal practice in federal court. Many purely state and local crimes, such as gun possession and robbery, are being charged in federal court for the purpose of harsher sentences. The New York Police Department ("NYPD"), New York Drug Enforcement Task Force, and the Drug Enforcement Administration ("DEA") often use confidential informants who target black and Latino men. In 10 years, 179 people have been charged federally in "stash house" cases, and none have been white. Gun possession cases are referred to federal courts by the NYPD in order to detain the person charged pretrial and to obtain a longer sentence. There is obviously an equity problem. The stated rationales are crime reduction and public safety, but those goals are not accomplished by these methods. Law enforcement uses sting operations where there is no crime to begin with which selectively chooses people for prosecution, and results in disparate treatment.

Professor Meares said that the trust and legitimacy of the system are at issue. People make conclusions about the fairness of an institution and not the outcome. The American Bar Association definition of the Rule of Law contemplates a notion of equality, but there is a disparity in prosecutions versus policies.

Swarns noted that there should be a focus on transparency and accountability and a prosecutorial obligation to do something to make sure that there were not disparities. It is the government's responsibility and obligation to make sure disparities are not happening.

Ducharme said that prosecutorial discretion is a good thing and discretion in itself was not worrisome. He said that it was important in hiring and training Assistant U.S. Attorneys to start a conversation about discretion and guide them. In order to counteract biases, prosecutors must root their analysis in the application of facts to law and examination of the quality of the evidence. Ducharme described some approaches to ensure fairness in prosecutorial discretion. For example, a completed crime such as bank robbery provides a clear charging decision for a federal crime, whereas inchoate offenses such as expressions of violent ideations are not determinative of a crime.

Ducharme became interested in alternatives to prosecution in 2014, when the threat streams were stimulated by ISIS. There was a lot of expression of violent ideation protected by the First Amendment. Prosecutors were trying to understand what the statements meant and how to protect public safety. At the time, there was a lot of blood in the streets of New York associated with ISIS. Ducharme's approach was to prosecute if he had a feeling that there was a real threat, but the prosecutors were faced with some people who appeared scary but were not and others who went out and committed violent crimes. At this point he decided that the government had to be open to alternatives to prosecution. Ducharme's hope was to institutionalize a more thoughtful approach to prosecution. In the Deep Space Program he created, the government undertakes a threat assessment, and if there is a determination that this is not a true threat, it will undertake law enforcement monitoring and deferred prosecution.

On the other hand, if the prosecutors perceive a real threat, the government will disrupt the action and arrest the subject resulting in prosecution or an agreed resolution. If the subject is not cooperative or escalates the threatened behavior the government will seek judicial oversight, where there is greater transparency and judicial participation which may result in a probationary sentence. With incarceration, the issue is how to get defendants to reenter society as not a threat. Ducharme said that Attorney General Loretta Lynch supported the program and Attorney General William Barr expanded it nationwide.

Meares said that the program showed the possibility of the government changing what happens. She said that it is clear that institutions in the criminal legal system do work to change ideas. Also, the program shows that the government is trying to pursue public safety in the context of fairness. The question is who is policing the discretion exercised by prosecutors. This is a structural issue and goes to the heart of what due process means. Judges use due process as a mechanism for correction. She sees the use of discretion as a structural issue. The system needs to ensure

that the application of discretion by law enforcement officers does not overstep the role of the judge. The community must think about fairness in discretion at the front end – in policing – and ensure that the system is fair throughout.

Swarns sees incarceration at the center of the story. Some version of Ducharme's structure should be incorporated into the entire legal system, not as an alternative, but more broadly. It would fundamentally change the nature of the system itself. Defendants will accept alternatives to incarceration rather than incarceration even if innocent. It is necessary to move the center away from a life-long incarceration threat.

In summing up, Patton said that some amount of discretion is inevitable and beneficial. It is necessary to determine at what point it becomes problematic and starts eroding the Rule of Law.

Swarns noted that we are at an exciting moment for criminal justice reform. We should think broadly and creatively to bring it closer to aspirational justice and break out of the models we have.

Ducharme said that the program they developed was project driven. Prosecutors have discretion but they are not experts on social engineering. He was glad for the opportunity to consult experts.

**Preserving Rule of Law Principles**

Second Circuit Judge Newman moderated a panel of his fellow judges, including Second Circuit Judge Reena Raggi, Southern District Judge Colleen McMahon, and District of Connecticut Judge Victor A. Bolden. The judges answered a series of questions posed by Judge Newman.

The first question concerned prospective jurors not responding to jury duty summonses and their attitude toward service. Judge McMahon said that it was not her experience that jurors do not want to show up. Even during the pandemic, there have been over 30 jury trials, and grand juries are sitting in all courthouses. Jurors have pride in their jury service. In every prospective juror panel, there are one or two who distrust authority and the government, but those people usually do not serve. Judge McMahon sees her role with the jury as teaching. She explains what is going on and why things are the way they are. She is clear during the trial to point out that the rules are being followed. Jurors say at the end that they understood the process.

Judge Bolden said that the District of Connecticut was just resuming criminal trials, and a fewer number of people are showing up for jury service. His observation was that jurors feel better about service at the end than the beginning. To promote respect for the Rule of Law in running the courtroom, Judge Bolden said that he always wants jurors to see a process where people get heard. If they sense arbitrariness, confidence is eroded.

Judge Raggi said that it was important to get cases on trial. In her experience as a district judge, no one was happy to get a jury notice, but each juror took jury service seriously and was proud of it. Judge Raggi said that all judges have the responsibility to convey to everyone that they will get a fair hearing.

Next, Judge Newman asked whether cameras in the courtroom improve or detract from the Rule of Law.

Judge McMahon said that she was not in favor of cameras in the courtroom because it encourages people to view trials as entertainment. However, if people sat through a trial broadcast on C-Span with no commentary, they would learn a lot. Judge Bolden said that he agreed with Judge McMahon about cameras in the courtroom. Judge Raggi said that there is not the same concern in the court of appeals as in the district court. Judge Newman pointed out that if the point was to educate the public, unless the proceedings were visible, the public would not tune in. He opined that the Supreme Court would broadcast arguments in time.

Judge Raggi said that the courts need to consider security, that some judges would be more reticent to ask questions, and even if the proceedings were broadcast on C-Span, excerpts would be picked up and distorted.

Judge Newman asked how the diversity of judges related to the Rule of Law. Judge Bolden said that to the extent the public understands that anyone can be a judge, it sends a message that the judiciary is open to all. Judge McMahon said that while diversity contributes to the Rule of Law, judges do not rule one way or another because of it.

Concerning appeals, do district judges think when they know the

panel, they know the outcome? Judge McMahon said that she is generally familiar with the jurisprudence of the judges so will think she knows the outcome, but can be surprised.

Next, Judge Newman asked what the court's role is in policing prosecutorial misconduct. Judge McMahon said that when a judge becomes aware of a Brady violation, he or she has the obligation to inquire and obtain the facts. In 22 years on the bench, Judge McMahon has seen two allegations of Brady violations borne out. In one, the government corrected the error before it became an issue and, in the second, she threw out the verdict. Policing prosecutors is a responsibility for judges that they are not comfortable with, but they do what they have to do.

The next issue that was considered was whether judges hold the government to a higher standard than defense counsel to promote respect for the Rule of Law. Judge McMahon said no. Judge Raggi said that the government has a higher standard in that it has a constitutional obligation to make sure trials are fair. Judge Bolden agreed that the government was charged with ensuring a fair administration of justice. Judge McMahon said that defense counsel are officers of the court charged with zealous representation of their clients excluding misconduct. Judge Newman said that the Second Circuit was fortunate to have U.S. Attorney Offices with high standards. Second Circuit panels more often see prosecutorial misconduct in state prosecutions. In his opinion, the government is held to a different standard because its role is to see that justice is done, while defense lawyers are trying to get their clients acquitted.

Judge Newman asked whether judicial opinions were written to convince the public or explain to the loser. Judge Raggi said that signed opinions are intended to explain the underlying principles to judicial colleagues. The public and the media do not read opinions in an astute way, but the press does read opinions. Judge McMahon agrees that only a limited section of the public reads decisions. She takes special care to lay out the decision as clearly as possible and tells her clerks that the most important portion of the opinion is the statement of facts. She writes primarily for the parties and the court of appeals. She is astounded at how poorly the press reads opinions. They will glom onto a random statement that makes a good soundbite. Judge Bolden said that he is trying to make sure the parties understand why he ruled the way he did and what supports the ruling.

Judge Newman asked how the judges express disagreement with precedent. Judge McMahon said she did it once when she told the Second Circuit it had made a mistake on the law of entrapment. She asked for them to change it and they did not do it. She felt a moral obligation to call attention to the problem. Judge Raggi said that dissent serves a useful purpose particularly when the law is in flux, but unanimity establishes law. Judge Newman pointed out that Justice Antonin Scalia wrote a dissent whenever he disagreed at all, whereas Justice Ruth Bader Ginsburg joined the majority opinion unless she really disagreed with it. It is necessary to be concerned about the language used. The Second Circuit uses a minimum of harsh language. Judge Raggi said that it was important to decide the issue and give people a clear answer.

**Protecting the Vote**

Southern District Judge Katherine Polk Failla chaired a panel that discussed the 2020 election. The panel included Barry H. Berke of Kramer Levin Naftalis & Frankel LLP; attorney George T. Conway, III; Dale Ho, Director of the ACLU's Voting Rights Project; and Seth P. Waxman of WilmerHale, all of whom played a role in the 2020 election.

Dale Ho talked about voter registration. He said that the ACLU's Voting Rights Project reviews barriers to voting such as unusual document requirements or inaccurate purges of the voting rolls and challenges them as unconstitutional as an undue burden on the right to vote. The project is usually active on cycles but has seen more activity this year because most of the litigation was about new laws and practices related to the pandemic. In 2020, the litigation also challenged longstanding practices such as witness signature requirements. Fifteen states postponed primaries, and when states did go ahead with primaries there was a surge in absentee ballots. For example, six percent of the votes in the 2016 general election were by absentee ballot, compared to 60 percent of the votes in the 2020 primary. There

were many issues including that voters were not receiving ballots or ballots were not in on time. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the Supreme Court indicated that courts should not interfere at the last minute to change voting rules. Consequently, plaintiffs find it difficult to obtain relief.

Barry Berke was chief impeachment counsel at the first impeachment of former President Trump and then represented Michigan and Pennsylvania in the litigation brought against them. In the face of the pandemic, states figured out new ways for people to vote. It was both a high point for the efforts to enable as many people as possible to vote and a low point in our nation's voting history. The attacks on the integrity of the elections were unprecedented. Former President Trump had announced that he could only lose if the election was stolen, so when he lost he declared it was stolen.

Michigan and Pennsylvania were battleground states that could determine the election. The top three elected officials in each state were Democrats, while the legislatures were Republican. It was hard for the states because people were afraid to vote, due to the pandemic. New laws expanded voting, but different counties acted differently. People had difficulty counting votes because of mail-in ballots and COVID-19 restrictions. People with guns wanted to go inside the voting places. States had to deal with lawsuits before, during, and after the election. Former President Trump brought 62 lawsuits. There were 17 lawsuits in Pennsylvania, nine in Michigan, and 10 in Georgia. The focus in Pennsylvania was the mail-in ballot. The Third Circuit shut the major Trump suit down with a Trump appointee writing the opinion. There also were challenges under the Independent State Legislature Doctrine to a Pennsylvania Supreme Court decision that said that if absentee ballots were received by November 6, they were presumed to have been mailed on time. The U.S. Supreme Court was deadlocked 4 to 4, so the Pennsylvania Supreme Court decision stood. In the end, the ballots received after election day were kept segregated and did not determine the election.

There were also extra-judicial issues, including former President Trump's request to Georgia officials to find votes. In Michigan, Detroit had a problem counting votes. The Election Commission consisting of two Republicans and two Democrats unanimously voted to certify. Former President Trump called the Republicans and asked them to decertify – the certification stood. This was a stress test for the Rule of Law.

The principles of democracy are guidelines, not rules. In late December 2020, quoting himself, former President Trump said that the election was stolen and because it was the president saying it, people believed it. Then came January 6.

Seth Waxman was part of a Tactical Legal Response Team that developed Doomsday Scenarios in anticipation of the election in an effort to protect the Rule of Law in the 2020 election. In late February and March 2020, the group was processing former President Trump's refusal to commit to accepting a defeat. He talked about widespread fraud and engendered widespread horror when he sent ICE to Portland, Oregon.

Before the election, the group worried about all the things that could go wrong with voting and certifying and counting the vote. They worried about what the government might do in connection with the U.S. Postal Service, all litigation, refusal to accept the popular vote, the failure of the electors to count the vote, and Congress' failure to count the vote. They researched federal and state law to determine what they could or could not do. They drafted hundreds of sample papers. They enlisted three law firms, including WilmerHale. They drafted a large group of volunteer lawyers as individual pro bono counsel. The goal was to have pleadings ready to go.

Even though the law of every single state provided that electors representing the candidate who received the largest number of popular votes would be selected, the Tactical Legal Response Team planned for last minutes changes by state legislatures before or after the election. When former President Trump summoned the Michigan Republican legislators to the White House, the group was concerned that the legislature would "find" that widespread fraud had occurred or a failure within the electoral Counting Act. Next, they were concerned about the certification of the electors. Under the rules, the governor of the state

was required to certify the electors. What would happen if the state legislature tried to prevent Biden electors from meeting? And then what would happen on January 6 if the state legislature had chosen its own alternative certified slate of votes. The group did not have to litigate any of these issues. They did litigate in 10 states, but there were no issues regarding the Electoral College except the uncertainty of the role the vice president would play.

George Conway talked about Congress' role. Under the Electoral Count Act, the actual certification is supposed to be a ceremonial counting presided over by the vice president. After the election of 1876, when two sets of electoral votes from Florida, Louisiana, and South Carolina were presented to Congress, negotiations resulted in a deal by which the Democrats agreed to Reconstruction, and Congress voted to give the presidency to Rutherford B. Hayes.

The Electoral Count Act provides for a joint session of Congress during which the vice president opens the envelopes from the states and hands them to four tellers – two Democratic and two Republican – who do the actual counting. If there is one objection from a House member and one objection from a Senator, Congress will retire to debate the objection. The objection will be sustained only if the majority votes in favor.

In 1961, with Vice President Nixon presiding, there were two slates from Hawaii – one for Nixon and another for John F. Kennedy. Nixon as the presiding officer told the tellers to count the Kennedy votes. In 2001 there could have been an issue, but the Supreme Court decided to shut down the count in Florida. In 2005 some Democrats objected to the Ohio electors, but they were overruled. In 2017, the House Democrats tried to object but all objections were gaveled down and there was no Senate objection. This year it went smoothly because former Vice President Pence did what he was supposed to do.

This year was still problematic for the Rule of Law because the objections to the Arizona and Pennsylvania electors were frivolous. It was all about putting on a show and the competition of two Republican Senators for attention. There was no question that the votes were lawfully certified, but former President Trump was ready to do anything to retain power.

Conway suggested that the Electoral Count Act can be improved by (1) making it harder to make objections, and (2) rewriting provisions regarding what to do if there is a dual slate. At the end of the day it comes down to whether people act in good faith by putting the law and constitution before their own political ambitions. Even though it worked this time, Conway says he is not certain it would work in the future.

In response to questions about the role of the courts during the 2020 election cycle, Ho said that the courts are reluctant to interfere in elections because they do not want to change the election rules. For example, in Wisconsin the major reason ballots are rejected was because the absentee voter failed to meet the requirement of having another person sign the ballot. The courts did not grant relief to the voters. This should be an incentive for the legislature to change the rule.

Waxman said that *Purcell v. Gonzales* puts a huge constraint on the ability of federal courts to intervene in elections. He does not know if it applies equally to state and federal courts. The good news from the 2020 election is that the Rule of Law prevailed. The courts applied the Rule of Law; Michigan legislators certified the vote; and former Vice President Pence counted the votes despite the urging of former President Trump to do otherwise.

Berke is concerned about the capacity for the Rule of Law to prevail where politics have overtaken everything and normalized illegal conduct. No one in the Senate believes Trump but politics have overtaken democratic principles.

To communicate the Rule of Law principles to the public, Conway said that it is important for lawyers to express belief in the Rule of Law. Conway was concerned that people knew better and were not speaking out. When there was criticism of the Attorney General for indicting a corrupt Republican, Conway was disappointed that more people did not speak up. The Rule of Law must be applied in all like cases in the same manner, regardless of politics.

For Ho, a big part of his work is communicating to the public through his litigation. If there is not confidence in the Rule of Law, he is concerned about the 2024 election.

Waxman is also concerned about a widespread failure of confidence. Millions believe Donald Trump won the 2020 election. He and his supporters intended to disenfranchise people in Georgia, Florida, Texas, and Arizona. People need to be motivated and energized. His group has a body of templates that could be retooled, but is not doing anything right now. He is worried about systemic challenges.

**Supreme Court Review**

Southern District Judge J. Paul Oetken moderated a panel consisting of Kannon K. Shanmugam of Paul, Weiss, Rifkind, Wharton & Garrison, LLP, and Barbara D. Underwood, Solicitor General in the New York State Office of the Attorney General.

The panel first addressed cases that the Supreme Court avoided deciding. *Trump v. New York* was a challenge to the Trump Administration directive to report the number of undocumented residents in the census. Underwood said that the Court decided that the case had been brought prematurely and said nothing about whether it was lawful to exclude undocumented immigrants from the census.

In two cases, *Texas v. Cook County* and *Oregon v. Becerra*, the Court avoided cases but sent a message. Cook County challenged the expansion of exclusions of immigrants based on their likelihood of becoming "public charges." The Court granted certiorari in a New York case, but held the Chicago case on a grant and hold. With the change in administration, the parties sought dismissal. Texas tried to keep the case alive and tried to intervene in the Seventh Circuit. The Court denied the application to intervene and suggested that it agreed with the Texas position.

In *Oregon v. Becerra*, New York and Oregon challenged the gag rule, which requires that health care providers refrain from communicating information about abortions. The Supreme Court granted *certiorari*. The new administration moved to dismiss and to intervene. The Court issued an order to the Attorney General asking whether the Justice Department intended to enforce or challenge the rule. The Attorney General said that it would treat the old rule as in effect pending the completion of the notice and comment period for the new rule. The Court upheld the stipulations to dismiss the petitions.

The panel next turned to the Election Cases. Shanmugam said that the Court is in the business of avoiding decisions and declines to decide most cases. The Court decided 50 to 60 cases this year. Last year had the smallest number of decided cases since the Civil War. Factors contributing to the small amount of decided cases were COVID-19, which saw the justices separated until recently; a new justice, which made the Court less eager to take on big issues; and the change in administrations.

Four years ago when the Trump Administration changed its position, there was a big outcry, now there is an even larger outcry in connection with the Biden transition. This is a fact of life. Cases in which the administration changed positions include *Terry v. United States*, which addresses the retroactivity of cocaine base penalties under the First Step Act. The government also changed positions in *California v. Texas*, an Affordable Care Act case. In *Brnovich/Arizona Republican Party v. DNC*, concerning Arizona voting restrictions, the Biden Administration sent a letter to the Court explaining its change in position. Shanmugan said that he would have thought the government should submit a new brief, but for a new administration it is a big job to write a new brief.

Underwood said that there are a lot of cases tied up in the Supreme Court with the change in administration. It is very inconvenient for the Court to have the administration change its position after briefs have been submitted. The question is how it plays out for the Court and what it needs to decide the case. In *Terry*, the Court appointed an *amicus* to take the discarded position and delayed argument. In *Cedar Point Nursery v. Hassid*, a takings case, after the administration changed its position, union organizers took the government's place in the briefing process.

Shanmugam turned to First Amendment Speech cases. *American Prosperity Foundation v. Bonta* is a challenge to the California donor-disclosure requirement for charities and nonprofits operating in the state. The decision could be important in connection with the interest in anonymous donation generally or it could be decided on a fact-specific basis relating only to this case. The California disclosure requirement is based

on a history of leaks. Only a few states have disclosure requirements; Underwood added that only a few states oversee charitable donations. The whole world of non-profits is against the law, because they do not want to make disclosures.

*Mahanoy Area School District v. B.L.,* another free speech case involving a cheerleader who was disciplined for off-campus speech, concerns how the First Amendment applies in schools. Underwood said that the Court is more interested in the reasonableness of the school's action. Shanmugam said that bad facts make bad law. The idea that the student substantially disrupted school activities is a stretch. He does not think the Court will give all school boards the broad ability to curtail speech.

Shanmugam turned to *Fulton v. City of Philadelphia*, a case involving religious liberty. A Catholic agency had a policy of not placing foster children with same sex couples, which violated Philadelphia's antidiscrimination policy. The case is not a perfect vehicle to test the Free Exercise clause. It is not clear that the policy was applied evenly.

Next, the panel discussed the Shadow Docket, where the Court considers applications for stays and injunctions without ever taking up the substantive case. This practice has expended in connection with the 2020 election and nationwide injunctions. *Tandon v. Newsom* relates to COVID-19 restrictions on religious gatherings, a California case. The Court held that government has to treat religious gatherings the same as other gatherings and blocked California's COVID-19-related restrictions on in-home religious gatherings.

Additionally, one of the COVID-19 rules in New York was stayed because, as long as anyone else can gather, a government cannot restrict religious gatherings, even though studies had shown that being together for hours was more dangerous than passing by in a gathering; moreover, movie theaters had been allowed to open. Maybe the movie theaters were the tipping point. All cases were decided on a comparative basis, even though the comparable situations included very different scenarios.

Does the Shadow Docket undermine the Rule of Law? Underwood said that these cases are decided on an incomplete record with no briefing. She views it as impaired decision-making, where everyone is going on intuition. It is better to have a decision on the merits that has been expedited than the merits decided through a Shadow Docket. Shanmugam said that it takes five justices to take a Shadow Docket matter, but justices do not have to note dissents.

Shanmugam said that the distinctions on which these decisions are based appear very arbitrary. The Court is changing the standard. He agrees with Underwood that the Court is at its best when it is deliberate in its decision making. In deciding these matters, the orders are prepared quickly, and the Justices do not explain themselves. It is hard to draw conclusions on what the Court is doing. Congress used to pass laws, now it does nothing. The president acts by regulation, and they are challenged. Nationwide injunctions address major issues. There is a lot of activity outside of the litigation process. It accentuates the charge that the Justices are acting outside the process.

Judge Oetken said that with a liberal administration, challengers to administrative action run to the courts in Texas, and when there is a conservative administration, they run to California, New York, and Hawaii. Would the Rule of Law be enhanced if people were not so quick to run to court? Shanmugam said that if the lower courts issue nationwide injunctions, the Supreme Court is brought in and forced to act. Underwood said that some matters lend themselves to nationwide rules and circuit splits are intolerable in some circumstances. Underwood said that with all the outcry about nationwide injunctions, lower courts may consider crafting narrower injunctions.

There are several significant business cases this term. Shanmugam said that *Google v. Oracle America* about Java interface code as copyright fair use is modestly significant. Google used Java for its Android program. The question was whether the APIs were copyrightable and whether they were violated. The Court decided that it was a fair use.

In *Ford v. Montana Eighth Judicial District Court*, the Court addressed specific personal jurisdiction arising from two car accidents. Ford claimed there was no causal relationship between the state and the plaintiff's claims. The Court said there was specific jurisdiction in state court, because Ford does business in every state. This is an area where the Court has struggled.

In *Goldman Sachs v. Arkansas Teachers Retirement System*, a

securities fraud case, the district court and Second Circuit held that the fraud on the market presumption allows a class action, on the issue of how misstatements have a bearing on price impacts. Goldman Sachs argues that where the misstatement is generic there is no price impact. Is there standing for class actions where there are statutory violations? This is not likely to be a significant decision because there is a penalty without injury.

Judge Oetken asked about arguments during the pandemic. Each side has a two-minute summary and then each justice has an opportunity to ask questions. Justice Thomas asks relevant questions in this format, whereas he has been silent in live arguments.

Underwood said that the arguments are more orderly, less combative. They require a different strategy. Under the pre-pandemic system, a justice could be relentless, and an advocate needed a technique to cut off the justice. Now one can rely on a time limit for the cut off. It does curtail follow-up questions but removes the badgering and blood sport quality of arguments. She would like to preserve the more civil aspects of the pandemic arguments, but it will probably not happen. If there are no rules, arguments will revert.

Shanmugam said that he cannot wait to get back to the old in-person oral arguments, where advocates could present fuller arguments. The COVID-19-era format also enabled advocates to filibuster, making it hard for justices to get answers to questions. There are beneficial aspects of the pandemic arguments. One is Justice Thomas' questioning, which has been impressive and influential. Another is the fact that the Court has made audio available in real time, which is great for access to justice. He hopes that continues.

## Developments

# Chief Judge Livingston Honored at Virtual Law Day Dinner

**By Sarah L. Cave,**
**U.S. Magistrate Judge**

On May 6, 2021, the Federal Bar Council held its 59th Law Day Dinner. Following a stirring performance of the National Anthem by pop star Garth Taylor, Council President Jonathan M. Moses welcomed more than 500 participants to the Council's first virtual Law Day Dinner, after it was cancelled altogether in 2020 due to the COVID-19 pandemic. Moses paused to reflect on the challenges and losses over the past year, including judges, lawyers, and our own former president (and the founder of this publication), Steve Edwards. Despite those challenges and losses, however, Moses pointed out that our legal system held up well, and the Law Day Dinner was an occasion to celebrate the importance of the courts and the Rule of Law to our country.

### The Rule of Law

District Judge Diane Gujarati of the Eastern District of New York, as the most recently seated Article III judge, had the honor of reading President Biden's Law Day Proclamation, which noted that "the United States wasn't built around an ethnicity, religion, or tribe – it was built around common ideals," one of which is the Rule of Law. In the Proclamation, President Biden explained that the Rule of Law has "been a critical vehicle for delivering the full promise of American democracy to all of our people, particularly those excluded in our Nation's founding." He urged all Americans to join him, on this Law Day, in "rededicat[ing] ourselves to furthering that promise and strengthening those ideals," and renewing "our commitment to ensure that every American's constitutional rights are protected."

At the dinner Southern District of New York alumna Rebecca Ricigliano introduced "When There

Are Nine," a new scholarship created by alumnae of the U.S. Attorney's Office for the Southern District of New York in collaboration with the Federal Bar Foundation. The scholarship was established to mark the passing of Supreme Court Justice Ruth Bader Ginsburg, and was inspired by former U.S. Attorney Whitney North Seymour, who emphasized to all Assistant United States Attorneys the importance of maintaining the "high principles of the Office" following their departures from the Southern District of New York.

The scholarship was created to benefit women entering or in law school who have experienced financial difficulties, but demonstrated the commitment and resilience needed to become outstanding lawyers. The program will include mentoring and professional support by the Southern District of New York alumnae network. As Justice Ginsburg once said, "no doors should be closed to people willing to spend the hours needed to make dreams come true." The program allows these alumnae to "pay forward" the gift of their time in the office and the benefits of the community they have since enjoyed. The program was launched the day after the Law Day Dinner and will select its first cohort for the fall semester.

**Chief Judge Honored**

Moses then introduced the recipient of the 2021 Learned Hand Medal, Second Circuit Chief Judge Debra A. Livingston. A magna cum laude graduate of Harvard Law School, law clerk to Second Circuit Chief Judge J. Edward Lumbard, Deputy Chief of Criminal Appeals for the U.S. Attorney's Office for the Southern District of New York, and an esteemed academic at the University of Michigan Law School and Columbia Law School, Chief Judge Livingston has served on the Second Circuit for 14 years. After taking the helm as chief judge earlier this year, Moses noted, Chief Judge Livingston made the focus of her tenure preserving the integrity of the court and the Rule of Law, which, at her request, the Council made the focus of its Symposium on the Rule of Law following the Law Day Dinner.

**Chief Judge Debra A. Livingston commended the Council for "getting back to basics" in choosing the Rule of Law as the focus of the Symposium.**

Chief Judge Livingston commended the Council for "getting back to basics" in choosing the Rule of Law as the focus of the Symposium, a focus that was not only appropriate for Law Day but also consistent with the Council's mission statement. She noted recent remarks by several Supreme Court justices on this same topic.

In a recent Harvard Law School address, Justice Breyer noted the importance of considering the effect on the Rule of Law of proposals to increase the number of Justices, commenting that, if the public sees judges as politicians in robes, the confidence in the courts will diminish.

Similarly, Justice Gorsuch has commented that Americans cannot take the Rule of Law for granted, but must recognize that it is precious and happens only in "special circumstances." In addition, a recent intelligence assessment – aptly titled "A More Contested World" – observed that the COVID-19 pandemic marks the most significant global disruption since World War II, and will have rippling effects for years to come. The assessment also cautioned about continued disruptions from the digital age – such as advances in artificial intelligence and machine learning and increased reliance on the internet – as potentially diminishing public trust, particularly given the spread of false information on social media by those who do not support democracy.

**Two Themes**

To face these threatening trends, Chief Judge Livingston returned to the words of Judge Learned Hand from which she drew two themes: the importance of education, and the importance of an open and skeptical mind.

On the first theme, Chief Judge Livingston explained that Judge Hand had always valued education, in particular the humanities, as important to democracy because of the "sensibility" it produced. Judge Hand believed the humanities showed how tentative our achievements can be, and the importance of "standing on the shoulders" of those who have gone before, because no generation

"starts from scratch." In remarks in Albany in 1952 – in response to the McCarthyism of the time – Judge Hand explained the responsibility of educators to prepare students for their "political duties," and made a plea for critical thinking and giving the benefit of the doubt to one's neighbors. He stated that, "mutual competence among Americans on which all else depends can be maintained only by an open mind and a brave reliance upon free discussion." Chief Judge Livingston noted the timeliness of Judge Hand's proposition, given that only one-third of young Americans today think it is important to live in a democracy.

On the second theme, Chief Judge Livingston recounted Judge Hand's emphasis on having an open skeptical mind to promote democratic values. In an address that made him a household name, Judge Hand spoke at the May 1944 American Day Ceremony, during which 150,000 new American citizens took the oath of allegiance. Seeking to affirm the faith of Americans in their common devotion to liberty, Judge Hand explained that the "spirit of liberty is no less than the spirit which is not too sure that it is right." Rather, it "seeks to understand the mind of other men and women." In short, Judge Hand recognized the importance of not being overly sure about one's convictions.

Chief Judge Livingston commended Judge Hand's spirit of liberty, in which probing skepticism and a commitment to independent decision-making are mainstays of the Rule of Law. She noted that, as a judge, she herself had taken an oath to deliberate, and has kept in mind Judge Hand's sentiment that realizing the possibility that one might be wrong "is the surest safeguard against mistake."

Chief Judge Livingston ended by observing that we have reached a critical point in our country's journey, "guided however imperfectly by the lodestar that is the Rule of Law." As Judge Hand stated in 1946, "of those qualities on which democracy depends, next after courage comes an open mind. Surely the latter requires the former." She predicted, with optimism, that "if we can remain open to contrary views, we will celebrate the Rule of Law for years to come."

**Focus On:**

## Chief Judge Laura Taylor Swain

**By Joseph Marutollo**

On April 10, 2021, Judge Laura Taylor Swain began her tenure as the Chief Judge of the Southern District of New York. On June 9, 2021, the Federal Bar Council hosted a virtual celebration for Chief Judge Swain in honor of her new position. On June 15, 2021, Chief Judge Swain spoke with *Federal Bar Council Quarterly* Board of Editors member Joseph Marutollo about her new role. The June 9 celebration and the June 15 interview are described further below.

### A Celebration

On June 9, over 150 guests – including current and former judges from the U.S. Court of Appeals for the Second Circuit, the Southern District of New York, and the Eastern District of New York, as well as family members and local leaders – virtually attended the Federal Bar Council's celebration of Chief Judge Swain via Zoom.

The evening program began with remarks from Sharon L. Nelles, President-Elect of the Federal Bar Council. Nelles provided a brief overview of Chief Judge Swain's incredible career. Nelles recounted that after graduation from Harvard Law School, Chief Judge Swain clerked for Constance Baker Motley, a pioneering Chief Judge on the Southern District of New York and an esteemed leader of the civil rights movement. After working in private practice, Chief Judge Swain was appointed a bankruptcy judge in the Eastern District of New York.

In 2000, President Bill Clinton nominated Chief Judge Swain to a district judge position in the

Southern District of New York; she was confirmed by the Senate shortly thereafter. In 2017, Chief Justice John Roberts appointed Chief Judge Swain to preside over Puerto Rico's filing for a form of bankruptcy relief from its many creditors – a unique and unprecedented role that Chief Judge Swain continues to ably perform. Nelles also recounted a number of Chief Judge Swain's most high-profile cases during her distinguished career on the bench, including *Lapine v. Seinfeld*, a civil action brought against comedian Jerry Seinfeld and his wife, Jessica Seinfeld, related to alleged copyright infringement in Jessica Seinfeld's cookbook.

Kimba B. Wood, Senior U.S. District Judge for the Southern District of New York, a former Chief Judge in the Southern District of New York, described Chief Judge Swain as "soft spoken" and a "natural leader." Judge Wood noted that she was not surprised when Chief Justice Roberts selected Chief Judge Swain to oversee Puerto Rico's debt liabilities given Chief Judge Swain's impressive bankruptcy and litigation background. Judge Wood noted that Chief Judge Swain routinely works 18-hour days, and that even when she is flooded with major cases, she carefully considers "even the smallest case" on her docket.

Following Judge Wood, District Judge John G. Koeltl of the Southern District of New York described Chief Judge Motley – Chief Judge Swain's mentor – as a "distinguished public servant" and one who presided as a judge and chief judge "with compassion and quiet authority." Judge Koeltl added that Chief Judge Swain will undoubtedly "emulate her mentor" in service to the court and its litigants. He said that Chief Judge Swain is someone who "does all of her work with pleasant good grace" and who, despite her myriad responsibilities, "never appears abrupt" with those around her.

Judge Koeltl also recounted his shared experiences with Chief Judge Swain in private practice. Specifically, he described how she became an expert in litigation related to the Employee Retirement Income Security Act of 1974 ("ERISA"). Despite ERISA being a highly complicated area of the law, Chief Judge Swain's "great intelligence," "attention to detail," and "great sensitivity" to clients allowed her to master this complex subject area. Her background in ERISA served Chief Judge Swain well as a bankruptcy judge and in her important work in Puerto Rico. Judge Koeltl added that Chief Judge Swain is devoted to her family, her religious and charitable endeavors, and to her love of knitting.

District Judge Andrew L. Carter of the Southern District of New York lauded Chief Judge Swain for being a "hands-on" judge who works very hard on every case before her. He added that she also works diligently to assist her colleagues on the bench. Judge Carter noted that Chief Judge Swain has even given him tips on knitting, among many other kindhearted pieces of advice over the years.

Gustavo Gelpi, Chief Judge for the District of Puerto Rico, spoke next from Puerto Rico. He began by commending Chief Judge Swain for her "service to the District of Puerto Rico." Judge Gelpi noted that Chief Judge Swain has worked on the Puerto Rico bankruptcy case for over four years. Judge Gelpi described the litigation as the first case in which *an entire government* – the Commonwealth of Puerto Rico – was subject to a bankruptcy proceeding. Judge Gelpi noted that Chief Judge Swain has had to handle hundreds of complex motions in the case, including many issues of first impression and many novel issues related to U.S. Territories. Judge Gelbi explained that Chief Judge Swain was able to take on this critical role because, "since day one [of her appointment], she came ready to work." Judge Gelpi expressed his amazement at Chief Judge Swain's exceptional ability to effectively work three separate judicial positions, to wit: the administrative duties of chief judge, the day-to-day work of a district judge in one of the busiest districts in the nation, and the unprecedented special assignment in Puerto Rico.

Chief Judge Swain spoke last. She said that it was a true honor and privilege to serve as "Chief Judge of the Mother Court." She thanked the judges for their kind words and acknowledged that it has been "extraordinary" to do substantial work in both the Southern District of New York and the District of Puerto Rico despite the 1,500 mile distance between them. She discussed her mentor, Judge Motley, whom she described as having "sharp insight," "eloquence," "grace," "courage," and "vision." She said that Judge Motley had used her many talents for the "benefit of the nation" on the whole, and that her work literally changed the course of history for African-Americans and countless

others. Chief Judge Swain said that she aims to follow Judge Motley's path "to do justice well."

Chief Judge Swain thanked her predecessor, Judge Colleen McMahon, for her work as chief judge, especially during the pandemic. She also thanked the district's judges and staff members for learning new technology on the fly throughout the pandemic and recognized the courageous actions of staff members and law clerks during the worst periods of the pandemic.

Following the formal event, participants in the Zoom celebration "unmuted" themselves and shared their well-wishes with the chief judge. Despite the virtual setting, the heartfelt comments of the judges and attendees made the celebration a truly moving and inspiring event.

**Speaking with the Chief Judge**

When Chief Judge Swain spoke with the *Federal Bar Council Quarterly* on June 15, she outlined her major goals and objectives as Chief Judge. She said that, in the short term, her goal is to support the court as it moves forward from the pandemic. She explained that her "chief job as chief judge" is to support her colleagues on the bench to ensure that the court continues to deliver a strong performance on its constitutional duties. She hopes to continue the Southern District's extraordinary work in a manner consistent with its history, importance, and function.

When asked how she is able to, as Judge Gelpi described, effectively perform three roles (chief judge, district judge, and the judge overseeing the major bankruptcy litigation in Puerto Rico) at the same time, Chief Judge Swain immediately expressed her gratitude to those around her for all of their extraordinary work. Specifically, she thanked her dedicated chambers staff, the terrific unit executives in the Southern District, the court staff in Puerto Rico, and Magistrate Judge Judith G. Dein, who is working on the Puerto Rico bankruptcy litigation with her. Chief Judge Swain added that, for her, the key to performing well at these various tasks is "hard work"; "one has to be fully devoted" to serve in these different, yet equally important, capacities.

Chief Judge Swain also discussed how the pandemic may impact the Southern District, and the federal bar, moving forward. She noted that, due to the pandemic, the "toolbox of resources has been expanded" and that these technological tools will remain available, as needed, on a case-by-case basis going forward. When asked about the effect of these technological changes on federal civil litigation in particular, she noted that video/remote proceedings may end up making court more accessible for parties and counsel that are not in the immediate physical area of the

Chief Judge Laura Taylor Swain

courthouse, or who otherwise have certain financial constraints. As a result, in certain circumstances, video or remote proceedings may actually "enhance [the court's] ability to perform its constitutional duties."

During the interview, Chief Judge Swain thanked court staff for their creative and dedicated work during the pandemic. She noted that staff members seamlessly continued to operate core courthouse operations during the pandemic while also creating and adopting new technology for judges and litigants. Throughout the pandemic, the Southern District had a "all hands on deck" view, and everyone – from judges to clerks to staff members – played their part to figure out how they could continue their important work. Many staff members bravely went into the courthouse early in the pandemic to ensure that the district's constitutional duties were being carried out. She added that the Probation and Pretrial Services departments expeditiously found and adopted new remote supervision techniques. She recognized the impressive work of court reporters and interpreters who were often forced to transcribe or translate for witnesses who were wearing facial covering that covered their mouths – a difficult task under any circumstances, but especially challenging during a global pandemic. Chief Judge Swain also noted that the Bar adapted to the pandemic in an incredible fashion, as lawyers found new ways to interact and meet with their clients so that matters could be brought to court in a timely fashion.

Finally, Chief Judge Swain offered her condolences to the family of the late Judge Robert Katzmann, who sadly passed away shortly before the interview. She said that she was "heartbroken," about Judge Katzmann's untimely passing. She called him a superb judge who brought a "unique combination of practical and scholarly knowledge of government" to the judicial branch. The loss of Judge Katzmann is "incalculable," as he was "dedicated to making lives better and making the world better, and increasing fairness, opportunity, and broad participation in systems of government."

**Focus On:**

## Two New Magistrate Judges

**By Travis J. Mock**

Two friends of the Federal Bar Council, Marcia M. Henry and James M. Wicks, are the newest magistrate judges in the Eastern District of New York. *Federal Bar Council Quarterly* Board of Editors member Travis J. Mock spoke to them and, in this article, tells us a bit about their careers, their early experiences on the bench, and their shared values of professionalism.

### Magistrate Judge Henry

Magistrate Judge Marcia M. Henry was appointed to the Eastern District bench on May 10, 2021.

A native of Brooklyn, Judge Henry attended the University of Pennsylvania, graduating *cum laude*. After college, Judge Henry worked at J.P. Morgan Chase & Co. in human resources and diversity program management. Judge Henry then obtained her law degree from New York University School of Law, where she was editor-in-chief of the *NYU Review of Law & Social Change*. Judge Henry practiced labor and employment law at Seyfarth Shaw LLP and Rao Tiliakos LLP. Between firms, Judge Henry clerked for Judges Carl E. Stewart of the U.S. Court of Appeals for the Fifth Circuit and Sterling Johnson, Jr., of the Eastern District of New York. Judge Henry left private practice to join the U.S. Attorney's Office for the Eastern District of New York, where she spent more than seven years prosecuting complex crimes, including international narcotics trafficking, money laundering, and wire fraud. Before joining the bench, Judge Henry worked in the Cybersecurity Division of the New York State Department of Financial Services, where she oversaw policy initiatives related to cybersecurity regulation and enforcement.

Magistrate Judge Marcia M. Henry (photo courtesy Roger Archer)

The daughter of immigrants from Trinidad & Tobago, Judge Henry is the first Black woman magistrate judge in the Eastern District of New York. Describing her appointment as "humbling," Judge Henry expressed her admiration for those who came before her as well as her hopes for those who will follow. "I very much admire [Eastern District of New York] Chief Judge Brodie and [Southern District of New York] Chief Judge Swain. I feel so honored to be in the company of such accomplished jurists." "It is a meaningful thing," she reflected, "when a law clerk becomes a judge, and it is a meaningful thing when a *Black* law clerk becomes a judge because there aren't that many of them. I'm very pleased that I was able to follow in the footsteps of my two mentors [Judge Stewart and Judge Johnson], and I hope that I can be an inspiration to law clerks of all races."

Having clerked and practiced for many years in the Eastern District, Judge Henry brings to her new role a familiarity with what she described as the "community of the court" and the ebb and flow of courthouse activity. Judge Henry also remarked on the value of her broad professional experience. "We are not a specialist court, and I am not a specialist judge. We have a very broad docket, and the ability to look at different subject areas and 'figure it out' is the essence of what I took an oath to do." Judge Henry also observed that her policy-level experience in the Department of Financial Services may help parties to think creatively about resolving their disputes. "I carry with me a skillset of looking at issues holistically. As a litigator, you are focused narrowly on a problem and how to solve it. [In contrast,] in the policy role you acknowledge the problem but then search for and evaluate all possible solutions."

Since first taking the bench, Judge Henry has conducted proceedings mostly remotely. She sees both advantages and disadvantages in remote practice. Although she acknowledges that remote proceedings may diminish lawyers' opportunities to develop certain courtroom skills, she noted that those lawyers now have an opportunity to hone a different set of advocacy techniques. Effectively presenting in a videoconference is "a very different skill than effectively communicating in an open courtroom," Judge Henry observed. "If nothing else," she said, "remote proceedings give junior lawyers an opportunity to learn that skill" early in their careers.

And as much as some aspects of trial practice have changed, many guiding principles remain the same. "As the practice of law has evolved to encompass these new ways to appear before the court, I think that the constant still has to be a level of professionalism and civility," Judge Henry advised. "Even if you're on video, you should still treat it like you're in a courtroom. I will treat the parties professionally and with civility, and it is my expectation that they will do the same with me." Judge Henry also emphasized the continuing importance of communicating openly with one's adversary. "You don't need to talk to me until you've talked to each other," she said. "Meet and confer, please!"

**Magistrate Judge Wicks**

Magistrate Judge James M. Wicks was appointed to the Eastern District bench in Central Islip on April 26, 2021.

Judge Wicks obtained his bachelor's degree from Wheeling Jesuit College, where he was a member of the *Alpha Sigma Nu* and *Psi Chi* honor societies. Judge Wicks earned his law degree from St. John's University School of Law, where he was Executive Articles Editor of the *St. John's Law Review*. Immediately following law school, Judge Wicks clerked for Eastern District Judge Arthur D. Spatt upon Judge Spatt's appointment to the federal bench. Judge Wicks began his law practice as an associate at White & Case – which, he noted, "was a bit 'smaller' firm then" – where he had the unique opportunity to second-chair several trials. Judge Wicks then joined Farrell Fritz, P.C., where he remained for 25 years until joining the bench. At Farrell Fritz, Judge Wicks specialized in business and commercial litigation as well as attorney ethics and professionalism. After joining the partnership, Judge Wicks served on Farrell Fritz's management committee for over 20 years and was also the firm's first general counsel. Since 2005, Judge Wicks has taught as an adjunct professor at St. John's University School of Law, teaching courses in pre-trial advocacy and depositions.

Judge Wicks has dedicated much of his career to issues of attorney ethics and professionalism. In addition to his work at Farrell Fritz, Judge Wicks has served on

Magistrate Judge James M. Wicks

numerous committees on matters of professional practice. He serves as a member of the State and Federal Judicial Advisory Council, and, by appointment of the Chief Judge of New York, the New York State Judicial Institute on Professionalism in the Law. He also chairs the Eastern District's Civil Litigation Advisory Committee and formerly chaired the New York State Commercial and Federal Litigation Section.

Judge Wicks credits his clerkship with and mentorship by Judge Spatt as a formative experience in his career and his trajectory to the bench. Judge Spatt's guidance and encouragement over the years led Judge Wicks to pursue the bench, a goal that Judge Wicks carried with him throughout his career in private practice. Having now achieved that goal, Judge Wicks has had what he described as the "surreal" experience of inheriting Judge Spatt's courtroom and chambers, including some of the very furniture that adorned Judge Spatt's chambers when Judge Wicks clerked.

Judge Wicks, like Judge Henry, has hit the bench running. Each is managing a substantial docket after the departure of two magistrate judges, and Judge Wicks said that he has been assigned approximately 400 cases. Judge Wicks credits the ability to manage these cases to the intensive training programs provided by the Federal Judicial Center and the support, guidance, and teachings from his fellow Eastern District magistrate judges and district judges. "The camaraderie and mentorship among the Eastern District judiciary is truly extraordinary, and I am humbled and grateful to be here," remarked Judge Wicks.

While many proceedings in his court remain remote, Judge Wicks said that he has held in-person hearings whenever possible and hopes that continues. Remote appearances for shorter conferences and proceedings will likely continue beyond the pandemic because of the efficiencies for all. Notwithstanding these efficiencies, Judge Wicks also emphasized the importance of in-person appearances for parties and advocates alike. In fact, he noted that in-person court appearances create invaluable professional development opportunities for junior litigators. "I learned a lot as a young litigator while sitting in the back of the courtroom waiting for my case to be called," Judge Wicks observed.

Judge Wicks brings to the bench a set of values drawn from unique personal and professional experiences as well. In chambers, he emphasizes values of teamwork and loyalty, themes he saw in Judge Spatt's chambers. He also serves as a volunteer firefighter and Captain of his local volunteer fire department. "We depend on each other, and it is essential to have each other's backs," Judge Wicks said. And on the bench, Judge Wicks brings with him his experience with and belief in the importance of professional responsibility. "I expect a level of professionalism, civility, and adherence to ethics" he said. "Civility matters," he added. "Some of the best litigators I've seen advocate with civility, and I believe that's critically important to our system of justice."

## In the Courts

# Recommencing Jury Trials in the Southern District of New York

**By Lisa Margaret Smith, U.S. Magistrate Judge (ret.)**

On March 13, 2020, the Southern District of New York canceled all scheduled jury trials, because of the COVID-19 pandemic. Soon thereafter, then-Chief Judge Colleen McMahon asked three district judges – P. Kevin Castel, Vincent L. Briccetti, and J. Paul Oetken – to undertake the responsibility of developing ways to recommence jury trials in the district, by forming an Ad Hoc Committee on the Resumption of Jury Trials ("Ad Hoc Committee"). On June 14, 2021, this author interviewed Judge Briccetti about the process that followed as the three Committee members took on this monumental task. As of this writing, 39 in-person jury trials have been completed in the Southern District since September 2020, 32 in Manhattan and seven in

White Plains, and many more have been scheduled through September 2021. Largely because of the work of the Ad Hoc Committee, and the amazing cooperation of all involved, there have been no reports of COVID-19 transmission as a result of any of those trials. A snapshot of all the work the court has done to protect the health and safety of all involved can be seen at "The Southern District of New York Response to COVID-19 (Coronavirus)" on the court's website at https://www.nysd.uscourts.gov/covid-19-coronavirus.

The Ad Hoc Committee was only part of the overall process that has taken place in the federal courts. The Administrative Office of the United States Courts issued COVID-19 Recovery Guidelines to assist the various courts around the country, but emphasized the importance for courts to vary their responses based on local needs and circumstances. A group of judges from around the country were also appointed by the Chief of the Administrative Office to begin to develop protocols for safely resuming grand jury and trial jury proceedings. One Southern District of New York member of that group, Denise Cote, offered guidance to the Ad Hoc Committee on a regular basis, providing information on what was being done in federal courts nationwide. The Southern District also established a COVID Response Team responsible for the overall development of protocols for safe conduct of all court business, made up primarily of Chief Judge McMahon, Clerk of Court Ruby Krajick, and District Executive Edward Friedland, with the expert assistance and advice of Dr. Amira Roess, Professor of Global Health and Epidemiology, and Dr. Rainald Löhner, Professor of Fluid Dynamics, both from George Mason University, all of whom provided assistance and support to the Ad Hoc Committee. Guidance from the Centers for Disease Control and Prevention was also followed.

**Daunting Task**

The Ad Hoc Committee had a daunting task. They recognized they had not only to create a safe environment in which jury trials could proceed, but they also had to communicate the appearance of safety to jurors and all other trial participants. The Ad Hoc Committee members immediately concluded that despite the challenges, the court needed to find a way to move forward with trials, because of Constitutional and statutory concerns for speedy trials in criminal cases, and similar concerns under Rule 1 of the Federal Rules of Civil Procedure for civil cases ("These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, *speedy*, and inexpensive determination of every action and proceeding." (emphasis added). The Ad Hoc Committee members knew that restarting jury trials would also serve to encourage resolution of cases, through guilty pleas in criminal cases and settlements in civil cases.

Initially meeting several times a week (virtually, of course), the Ad Hoc Committee first set out to accomplish a protocol for prioritizing cases for trial, setting out an order of preference for which cases should be scheduled on any given day, as it was clear that only a limited number of courtrooms would be able to be modified to assure safety for all participants. The Ad Hoc Committee developed a formula, including that for any given trial date, criminal cases would have priority over civil cases; among criminal cases, those with detained defendants would have priority over defendants at liberty; among cases that were otherwise equal, older cases would have priority over newer cases; and cases with trial dates that had been set before trials were canceled in March had priority over cases that had not previously been scheduled for trial. After a great deal of thought, the Ad Hoc Committee decided not to prioritize shorter criminal trials over longer criminal trials, as they concluded that the speedy trial rights of every defendant were the same, no matter the complexity of the case, although other courts have done the opposite. The draft of the priority protocol developed by the Ad Hoc Committee was distributed to the district judges for comment, of which there were many, and eventually the final protocol was approved by the Board of Judges.

The Ad Hoc Committee had to rethink nearly every step of the process. They had to determine how to call jurors for service (sent a form to complete with health information, and gave jurors the opportunity to postpone their service until after the pandemic, so jurors who were called in were willing to serve), what type of screening would be accomplished for prospective jurors coming to the

courthouse (standard for all those entering the courthouse, inclusive of attorneys, jurors, employees, and litigants, involving taking of temperature, answering COVID-19 questions, and requiring masks to be worn), where to select a jury that would allow for sufficient social distancing (in the jury assembly room both in Manhattan and White Plains, with chairs for each juror spaced six feet apart), how to assure random selection of jurors (as jurors entered they were assigned a random number and seated accordingly, rather than seating them in the order of arrival), how to transport detained criminal defendants into the jury assembly room without prospective jurors becoming aware of their detained status (had all non-juror participants enter one by one after jurors were seated, with the detained defendants not in handcuffs or leg irons and escorted front and back by Deputy Marshals), and the list of issues went on and on for the Ad Hoc Committee members. To assist the judges and all other court personnel involved, they prepared a manual on how to summon jurors and then conduct jury trials from beginning to end. So far nearly 2000 prospective jurors have arrived at court since September 2020 for jury service. Although a few jurors have had to be excused after jury selection due to exposure to COVID-19 outside the courthouse, there has been no known transmission inside the courthouse.

**Modifications to Courtrooms**

Issues of how to modify courtrooms to allow for safe jury trials were legion. Decisions were made to select large courtrooms (not all courtrooms are the same size), and expand space for the jurors by removing gallery seating and replacing the benches with tiered seating. This allowed the placement of some jurors, socially distant, in the jury box, with the remainder seated on the raised tiers, so that they could fully view the proceedings. There was some grumbling from attorneys about not being able to see all of the jurors at all times during trial, but the participants necessarily adapted to the situation. The Ad Hoc Committee agreed that witnesses should not be masked during their testimony, particularly in criminal trials, so that the Sixth Amendment right to confrontation, and also as a matter of fundamental fairness, would be met. Various choices were considered, and eventually, with substantial advice from the experts, the decision was made to have a Plexiglas box enclosing the witness stand. This, however, was not sufficient, as the experts said the box would have to be cleaned and allowed to air out after each witness.

After testing various alternatives, each witness box was fitted with a High Efficiency Particulate Air ("HEPA") filter, designed to remove any infectious droplets from the air in the box, as well as a speaker so the witness could hear what was said in the courtroom. A similar Plexiglas box with HEPA filter was placed around the attorney's podium. Both the podium and the witness box were fitted with microphones which were protected by removable covers, replaced after each person used them. Needless to say, all of these changes were both time-consuming and expensive to complete before trials could begin. In Manhattan eight courtrooms were modified for jury trials, in White Plains three were modified. The physical reconstruction in each of these courtrooms was primarily overseen by the District Executive's Office.

More protocols had to be developed for the trials themselves. The jury rooms, in both Manhattan and White Plains, were not large enough to allow for social distancing. The Committee recommended that jury deliberations in the Manhattan courthouse take place in a separate large courtroom that was not being used for trials, in which the jurors could socially distance during deliberations. In White Plains, there were not enough unused courtrooms available for use as jury rooms, so a decision was made to build three new, larger jury rooms, in what had been public space on several floors. Then the Ad Hoc Committee realized that there would be an issue with feeding jurors (who would ordinarily have gone either to the cafeteria or outside to get their lunches), and with jurors unmasking in order to eat lunch, as the new spaces were not sufficiently large to allow for that. This required that the court provide meals for all the jurors for every day of their service (rather than only during deliberations), and split the jurors into multiple spaces so that they could unmask and eat in safety. Additional court personnel had to be committed to this process, to escort the jurors to the various locations, and then back again to recommence deliberations.

**Master Jury Trial Calendar**

After input from the Clerk's office, the Ad Hoc Committee recognized the need for the court to have a Master Jury Trial Calendar in each courthouse that could be used to implement the priority protocols, because there were far more judges hoping to schedule trials than there were available courtrooms. In White Plains there was an added wrinkle, as the Grand Jury suite in the building is not large enough to safely accommodate the Grand Jury. As a result, the court had to consult with the United States Attorney's Office to determine when the Jury Assembly Room would be scheduled for Grand Jury use, and when it would be available for jury selection in scheduled trials. To accomplish the goal of trying as many cases as possible in a reasonable and safe manner, the year was divided into quarters, beginning in September 2020. About 45 days before the beginning of the quarter the judges submitted their requests for trials during the upcoming quarter on a form that was developed by the Clerk's office and approved by the Ad Hoc Committee. The forms were submitted to the Clerk's office, where the jury clerks undertook the complex process of applying the priority protocols to all the requests, and then scheduling the trials in accordance with the protocols. Thus, for example, by May 15, 2021, judges who wished to schedule trials for July through September of this year had to have made their requests by submitting the appropriate form. Even then, if their case did not fit the priority protocol for any of the available dates, they might not be able to try the case when they intended to do so. Any scheduling order issued before the complex process of preparing the Master Calendar was done had to include only a tentative date for trial. In both courthouses, for each date made available for jury selection, a primary case would be scheduled, with several other cases, lower on the priority protocol, scheduled as backups. The Ad Hoc Committee's expectation that this process would have case management consequences, through entry of guilty pleas or settlements, was fully met, and there were occasions when backup or secondary backup cases would be tried, or where none of the scheduled cases went to trial, because all of the scheduled matters had been resolved.

The Ad Hoc Committee's mantra throughout the process, coined by Judge Castel (with apologies to John Quincy Adams), has been "We can try and fail, but we cannot fail to try." Their extraordinary efforts have been successful, through amazing work by court personnel, and cooperation of the participants in the process. Judge Briccetti noted that all of the participants in the process have been amazingly innovative and open-minded as they approached doing their jobs in new ways that had never been done before. He remarked on the extraordinary work of Ruby Krajick and Ed Friedland and their staffs, including particularly Rigoberto Landers from the Clerk's office, Rhonda Mayers-Best, the Jury Administrator for the District, Allison Lombardo-Karlson, the Deputy Jury Administrator for White Plains, and Sheila Henriquez, James Puskuldjian, and Bonnie Waldron from the District Executive's Office.

The Ad Hoc Committee members continue to keep eagle eyes on the process of jury trials in the Southern District of New York, though their active involvement in the process has diminished somewhat. They deserve recognition for their extraordinary work, which allowed the Southern District of New York to begin holding jury trials despite the COVID-19 pandemic.

**Masks**

It is worth noting that on the date of this author's interview with Judge Briccetti, June 14, 2021, an order was issued by Chief Judge Laura Taylor Swain permitting participants in non-jury trials and other non-jury proceedings to appear in the well of the courtroom without masks, so long as all those who would be in the well are fully vaccinated, at the discretion of the presiding judge. Those in the gallery must continue to be masked and socially distanced, even if they are vaccinated. If any of the parties who will be in the well of the courtroom is not fully vaccinated, then all parties must continue to wear masks and socially distance. *See* "Revised Protocols at the Courthouses," at https://www.nysd.uscourts.gov/sites/default/files/2021-06/Changes%20to%20protocols%206.14.pdf.

Jury trials will continue to require masks and social distancing. We are all hopeful that the receding pandemic will allow the courts to open fully and completely very soon. In the meantime, the Southern

District of New York is conducting the court's business, perhaps not fully and completely, but sufficiently to uphold the protection of the Constitution, statutes, and rules of the United States for those involved.

**Legal History**

## The Associate's Dilemma: Joe Fortenberry, Mahlon Perkins, and the Kodak Antitrust Trial

**By C. Evan Stewart**

In the December 1979 issue of *Esquire*, Steven Brill published an article ("When A Lawyer Lies"); it has become the widely-accepted story of what went wrong in the most important antitrust trial of the 1970s: *Berkey Photo v. Kodak*.

### The Conventional Wisdom

On April 20, 1977, Alvin Stein, Berkey's lead lawyer (a partner at Parker, Chapin, Flattau & Klimpl), was taking the deposition of Kodak's expert witness, Merton Peck, a distinguished professor of economics at Yale. Kodak's law firm was its long-standing outside counsel, Donovan Leisure Newton & Irvine, one of the country's leading litigation firms. And defending Peck at the deposition were Mahlon F. Perkins, Jr., and Joseph Fortenberry.

Perkins, the son of a United States diplomat, was born in China, where he lived until he was 14. Thereafter, Perkins came to the U.S. to go to school, ultimately enrolling at Phillips Exeter Academy. After graduating from Exeter, Perkins matriculated at Harvard College. During World War II, he served in the Office of Strategic Services (toward the end of the war, he parachuted into Peking to assist in the release of POWs, for which he was awarded the U.S. Army's Soldier's Medal for Valor and the Chinese Order of the Flying Cloud). After the war, Perkins entered Harvard Law School; and after graduation he joined Donovan Leisure – the firm founded by the O.S.S.'s head, General William ("Wild Bill") Donovan. At the time of the *Kodak* trial, Perkins (according to Brill) was "one of the firm's most respected partners."

Joe Fortenberry, originally from Mississippi, went to Harvard and then to Yale Law School. After clerking for a federal appeals judge, he joined Donovan Leisure in 1970. At the time of the *Kodak* trial, Fortenberry (according to Brill) "was on the perfect big-time lawyer's career path": he was "not only . . . brilliant but [was] also . . . engaging and enjoyable to work with"; he was "a well-liked, personable genius"; and his "prospects for being made a partner at the prestige firm the following year were excellent."

Professor Peck was a very important witness for Kodak. His task was to advance the narrative that Kodak's market domination was the result of its skill, hard work, and innovative products, and not because of other less honorable methods (e.g., illegal tie-ins, the acquisition of competitors). At his deposition, Stein pressed for all the materials Peck had generated and used in arriving at his conclusions, including everything Donovan Leisure had provided to him. Peck responded that he had shipped everything back to Donovan Leisure. At that point, Stein angrily demanded that Perkins immediately produce all of the documents. Perkins' response: that would not be possible, he had destroyed them.

That was not true. In fact, the documents were sitting in a suitcase in Perkins' office. Moreover (according to Brill), not only did Fortenberry know his boss was lying, he whispered in Perkins' ear about the suitcase (and the documents therein), but Perkins waved him off during the angry back and forth with Stein. Two weeks later, Perkins submitted an affidavit to the court in which he doubled down on his misrepresentations(s) vis-à-vis the "destroyed" documents.

In January 1978, the *Berkey v. Kodak* trial was winding down, with Professor Peck as the final witness for Kodak. On cross-examination, Stein pressed Peck about the materials used to reach his conclusions.

This led Judge Marvin Frankel to review the whole history of the "destroyed" documents. Faced with this new and intensive scrutiny of the episode, Perkins broke down and confessed his wrongdoing, which Stein then used before the jury to destroy Peck's credibility and thereafter secure a "spectacular $113 million verdict" (a verdict reversed on appeal because the measure of damages was improper; ultimately, Kodak settled the matter by paying Berkey a few million dollars).

Perkins was prosecuted and pled guilty to contempt of court; he was sentenced to one month in prison (which he served). Although he resigned from the firm (on March 20, 1978), Perkins did not lose his law license.

Fortenberry was the real focus for Brill, however. Citing to the Code of Professional Responsibility (then DR 7-102 (R) (reporting fraud on a tribunal); and then DR 8-102 (A) & 8-103 (reporting another lawyer's "dishonesty, deceit, or misrepresentation"), Brill wrote: "Fortenberry was obligated to speak up when Perkins lied. Instead, he said nothing to anyone." Brill went on to quote an unnamed "close associate" of Fortenberry's: "What happened to Joe was that he saw Perk [Perkins' nickname at the firm] lie and really couldn't believe it. And he had no idea what to do. I mean, he knew Perkins was lying, but he kept thinking that there must be a reason. Besides, what do you do? The guy was his boss and a great guy."

The remainder of Brill's piece was an examination of the pressures on associates at large law firms and the quandaries facing them if they see wrongdoing (a Fortenberry "situation"). He concluded with a quote from Judge Frankel: "There isn't any way for an associate to handle that problem."

**The Real Story: Telling the Firm**

Not surprisingly, the conventional wisdom (à la Brill) is not quite the whole (and more interesting) story. It turns out that I was also an associate at Donovan Leisure at the time (I was a summer associate in 1976; I started full-time on September 26, 1977). I knew the principals of this story. And since the time I started teaching professional responsibility at the Fordham Law School in 1996, I have devoted one class session to reviewing this tragic episode. (I have also taught it in my Cornell law class since 2006.)

On January 12, 1978, a memo from Donovan Leisure's Executive Committee was directed to "All Associates and Paralegals." We were to assemble at 3 p.m. the following day (Friday the 13th) in the Belvedere Suite on the 64th Floor of 30 Rockefeller Plaza. The next day at the appointed hour, I saw (and heard) Samuel W. Murphy, Jr., for the first time.

Murphy was the firm's preeminent litigator and a legendary figure in the bar. I had not seen him before because he had mostly been in Minnesota defending himself (and the firm) against a contempt citation issued by a federal judge because of Murphy's strong defense of his client, American Cyanamid (*see* "Jumping on a Hand Grenade for a Client," *Federal Bar Council Quarterly* (November 2009)) (the reversal of that contempt citation remains the leading decision on opinion work product; *see In re Murphy*, 560 F.2d 326 (8th Cir. 1977)).

Murphy succinctly detailed the unfortunate events at the trial's end (John Doar, Kodak's lead trial counsel, had just delivered his summation on January 11; the jury, after deliberating for nine days, would return its verdict on January 22), Perkins' inexplicable conduct, that the firm was being advised by ex-federal judge Simon Rifkind (of Paul, Weiss), and that the firm was doing everything it could to protect Kodak's interests (Murphy reported that he had deployed fellow partner, Kenneth N. Hart, to rally the shell-shocked Donovan Leisure trial team). Fellow Executive Committee member, John E. Tobin, then sought to assure the stunned assemblage that the firm would survive this unfolding tragedy and that we would all be needed to continue to work hard to service the firm's stable of other clients. We then shuffled out silently and took the elevators back down to our offices at 30 Rock.

**The Real Story: Three Document Issues**

Right after Perkins had told Stein in Peck's deposition that he had destroyed Peck's documents, there was another major document problem. John Doar, a partner of the firm, had shown Peck the four trial notebooks he intended to use for Peck's testimony; they included all

the questions he intended to ask, as well as all the answers he expected to receive. When Doar revealed this to Stein, Stein objected (*see* Rule 612, F.R.E.), but Doar claimed those materials were attorney work product and need not be produced. Stein raised Doar's blunder to Magistrate Sol Schreiber, who ordered Doar to hand over the notebooks. Doar appealed that order to Judge Frankel. This led to a May 5, 1977 hearing, a session that quickly turned its focus onto Perkins' "destruction" of the Peck documents. Frankel ordered Perkins to submit an affidavit about the "destruction;" and it was that affidavit which constituted the basis for Perkins' criminal conviction. It is more than ironic that Perkins' deposition outburst obscured Doar's huge mistake – a mistake, in and of itself, which undoubtedly would have destroyed Peck's testimony and credibility. Amazingly, the judge did not order Doar to produce the notebooks (74 F.R.D. 613) – although, as a matter of law, it was/is not even a close call (*see* "Positively 4th Street: Lawyers and the "Scripting" of Witnesses," *NY Business Law Journal* (Summer 2014)).

The second document issue involved a letter Peck had written to Donovan Leisure in November 1974, early on in his work for Kodak. In that document Peck told the firm he was unable to conclude (at that point in his work) that a 1915 antitrust consent decree entered into by Kodak was not a contributing factor to Kodak's subsequent market dominance. Although Magistrate Schreiber had ordered the production of all expert reports, including "interim" ones, the trial team did not consider Peck's 1974 letter as falling into the "interim" category.

Fast forward to Peck's testimony in January 1978. With Doar questioning Peck on the reason(s) for Kodak's preeminent market position, Stein argued to Judge Frankel that he should be able to inquire about the 1915 consent decree. Judge Frankel took the matter under advisement and said he would rule the following day. Overnight, Doar and his trial team dug up the 1974 Peck letter and decided if Frankel ruled in Stein's favor it would have to be produced.

The next morning, however, Frankel ruled that the 1915 decree was too remote in time and would be too prejudicial. But Stein formed a different way to attack, asking Peck whether he had generated any relevant work product before 1975. When Peck answered in the affirmative, Stein demanded it, and the document was produced. This turn of events had two critical consequences. First, it allowed Stein to blow up Peck before the jury. An unprepared Peck could not explain how the seemingly contradictory letter jibed with the opinion he had offered in response to Doar's questions. As one Donovan Leisure lawyer recounted: "[Peck] was completely at sea. He looked like a fool, he sounded terrible, he wasn't answering properly, he wasn't making any sense." In short, it was the 1974 document that was the tipping point in Peck's destruction as a witness.

The second consequence was that an incensed Judge Frankel ordered Doar to produce an affidavit explaining why the 1974 letter had not been produced earlier and for another affidavit to be submitted on Perkins' "destruction" of the Peck documents. When Perkins could not bring himself to lie under oath a second time, he confessed to his earlier perjury. That then allowed Stein – on Peck's last day as a witness – to drop the other hammer down on the now hapless Peck, ending his cross-examination with questions about the "destroyed" documents and Perkins' perjury.

The third document issue is perhaps the most bizarre. The documents in the suitcase in Perkins' office had virtually all been produced to opposing counsel and, in any event, had no real substantive impact on the trial. Perkins had lied for no reason (or had he?).

**Why Did Perkins Lie?**

Perkins was the wrong man, for the wrong job, at the wrong time. The business model that General Donovan had established for his firm was unique. Donovan did not want the firm to be made up of generalists; rather, he wanted his partners to have niche specialties. Thus, for example, there would be certain partners whose only job was to be brilliant, creative geniuses; they would sit in their offices, ponder their partners' most difficult questions, and then come up with impossible solutions. There would be other partners who, although called litigators, never went to court; their specialty was brief writing. That was Perkins' niche (conversely, in Murphy's words: "[Perk] doesn't get up on his feet.").

In fact, he was generally considered to be the firm's best writer.

So what was a lawyer, who had no real experience in sharp-elbow trial practice, doing heading up the critical expert witness phase of the most important, hotly contested antitrust trial of the 1970s? Donovan Leisure had been stretched to the limit, not only by its obligations to Kodak, but also by a whole host of other major, complex cases (indeed, that was the reason Murphy was unable to take the lead in Kodak, as the client initially desired). As such, Perkins, being a good team player, agreed to step in to help out on Kodak. While that was admirable on one level, he would be entering an arena which was not only a war zone, but also one with which he had no experience or aptitude.

Then there was an obvious culture clash. Perkins was not only from a genteel, upper-class, establishment world, he was also the most gentle man in Donovan Leisure's partner ranks (while he was not really one of the firm's "most respected partners" on a professional level, Perk was in fact one of the most revered – hence, the shock to most of us that, of all the partners, he would be the one to act unlawfully). Stein, on the other hand, was a Brooklyn born, street-fighter type, with years of in-the-trenches trial experience. Thus, when Stein angrily demanded that Perkins immediately bend to his will in the heat of the moment, Perkins got his back up, snapped, and lost his way. As Perkins later said to Judge Frankel: "that answer came into my head for some reason at the deposition. I had not planned to make that answer; I don't believe that I had really considered it." But having crossed this fateful Rubicon in a heated instant, Perkins thought he was trapped and did not seek counsel or consider correcting his obvious misrepresentation(s).

**What About Fortenberry?**

First off, it is important to understand who Fortenberry really was. Contrary to Brill, Joe was not "brilliant," "engaging," "enjoyable to work with," "a well-liked, personable genius"; moreover, he would not have made partner. Joe was smart, but a loner, nerd type, who affected a quirky, professorial persona (he smoked a pipe, self-nicknamed himself "El Lagarto" (the alligator)), and regularly published law review articles on esoteric subjects – (I remember one on "hirsute jurisprudence"). Fortenberry appeared to believe his future at the firm was in the creative genius niche.

As for the "situation" in which he found himself, the evidence is not compelling. Fortenberry at the time, and for the rest of his life, categorically denied that he knew about Perkins' misconduct or that he had whispered in Perkins' ear at the deposition about the suitcase. And initially, Perkins avowed that he "did not discuss [the documents] with Mr. Fortenberry," and that "Mr. Fortenberry had no knowledge . . . of the contents of [Perkins'] affidavit." But later, in what appeared to be an attempt to help Joe, Perkins suddenly remembered that "Mr. Fortenberry . . . whispered in my ear, something to the effect . . . 'You have forgotten about the suitcase.'" When told about Perkins' refreshed memory, Fortenberry was startled and thus began his categorical denials. Regardless, Fortenberry's career at the firm was thereafter under the black cloud of the Perkins' debacle and, until his "All Hands" departure memo on July 27, 1979, Joe walked around the office a beaten man with glazed eyes. Notwithstanding, the firm helped him get a job in the Antitrust Division at the Justice Department in Washington. Joe died a few years later of a heart attack; I believe it was of a broken heart.

**The Fortenberry "Situation"**

The associate quandary posed in Brill's article was actually directly teed up by *In the Matter of Kristian Peters*, M-2-238 (S.D.N.Y. April 10, 2008).

In that case, Peters, a seasoned litigator and a (then) partner at a well-known NYC law firm, had received deposition transcripts covered by a protective order in a case before Judge Harold Baer. On the eve of Peters voluntarily dismissing the Southern District of New York action and seeking to file an identical suit in Boston, Judge Baer ordered the return of all documentation covered by the order. To forestall part of that return, Peters instructed a first-year associate to "scribble all over" unmarked deposition transcripts; she believed (wrongly) that by so "scribbling" on the transcripts they would be converted into attorney work product and thus not be subject to being returned. The associate promptly

reported the instruction to senior members of the firm, which then launched an investigation.

This incident was brought to Judge Baer's attention and an evidentiary hearing was conducted. Peters testified her instruction was merely a "joke" or that she was being "facetious" or " sarcastic." Questioned by Judge Baer, however, the associate testified: "It was absolutely not in jest." Peters received a multi-year ban from practicing in the Southern District.

**Postscripts**

- Two associates at Donovan Leisure directly benefited from Perkins' departure: a good friend of mine received responsibility for Perkins' client, the 4As (the leading trade association for advertising agencies); and I received responsibility for Perkins' client, the National Board of the Y.W.C.A. of the USA.
- John Doar's public career (first in the Justice Department's Civil Rights Division, and later as Chief Counsel for the House Impeachment Committee for President Nixon) had been exemplary; but he was not exempt from criticism within the firm and in the numerous public accounts of the *Kodak* trial and the Perkins' affair. Since it was Doar's first complex trial of any kind – let alone the most important antitrust trial of the 1970s – it is no surprise that things did not go as planned, and that hindsight could be especially tough. Finding himself increasingly isolated, Doar announced to the firm on December 22, 1978 he was leaving Donovan Leisure effective January 2, 1979. In his "All Hands" memo, Doar wrote that he wanted to practice law "independently" and had made his decision "some time ago."
- I was lucky to work on a number of matters with Murphy and on many trials and appeals with Hart (whose autographed picture is in my office). They were great lawyers, great mentors, and great men.
- Each of the "All Hands" memos referenced herein (including Fortenberry's "El Lagarto" departure memo) is in my DLN&I file. At one point during my tenure at the firm I was assigned to Fortenberry's old office; I found it a comfortable place in which to work.
- So what is the "real" lesson of the unfortunate Kodak episode? In my view it is the following: when (not if) you make a mistake under pressure, do not internalize the problem and double-down on it (like Perkins did); instead, seek good counsel from someone whose judgment you trust so you can rectify/mitigate the damage.