Federal Bar Council Quarterly

Mar./Apr./May 2020 www.federalbarcouncil.org Vol. XXVII, No. 3

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Federal Bar Council

Strategic Planning: Vision for 2025

Mission:

The Federal Bar Council is an organization of lawyers who practice in federal courts within the Second Circuit. It is dedicated to promoting excellence in federal practice and fellowship among federal practitioners. It is also committed to encouraging respectful, cordial relations between the bench and the bar and to promoting the rule of law.

Vision:

The Federal Bar Council is known as the premier bar association within the Second Circuit. It is the "go-to" voice in the legal community and serves as a clearinghouse for Second Circuit practice.

Our Three Strategic Goals:

1. Grow and Diversify our Membership Base	*By expanding membership by 250 members over 2 years and 750 members over 5 years*
2. Deepen our Connection with our Members	*By emphasizing the value of membership and ensure ongoing relevance to current legal practice*
3. Expand our Engagement with the Legal Community and the Bench	*By remaining the premier bar association focused on serving the courts in the Second Circuit and promoting excellence in federal practice.*

The Council's distinct purpose: Building Community

- *The Council helps build community and generate authentic personal connections among Members.*
- *Council Members, and the legal community more generally, benefit from and are looking for ways to connect in person and build lasting relationships*
- *Organization-wide focus is on activities that help Members build connections, including expanded opportunities for new Members and deeper engagement for established Members.*

Through the Strategic Plan, we will realize our goals by focusing in 5 areas:

Increasing Membership	Improving Communication	Reaching New Generations of Lawyers	Ensuring Strong Finances and Governance	Maintaining a Strong Connection to the Judiciary
Leverage Committees and our Board as points of entry	Refresh marketing materials	Develop programs aimed at early and mid-career attorneys	Proactively identify projects meaningful to the Court	Strengthen Foundation fundraising
Better define and communicate benefits of membership	Enhance Social Media presence	Identify future leadership among early-career members	Encourage committees to engage with judiciary	Clear articulation of Board member expectations
Focus on membership retention	Leverage external opportunities to promote the Council	Ensure relevance of core events	Foundation support for Court initiatives	Increase revenue through net increase in membership
	Facilitate internal communication between leadership and committee chairs			Identify leadership that represents full diversity of legal community

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From the President

Fellowship and Community in Challenging Times and in the Future

By Judge Mary Kay Vyskocil

I write to you at a time of great difficulty and uncertainty for our city and our world, and for our legal profession. As I reflect on our circumstances, I am reminded of the importance for us, as a profession, to focus on community. As president of the Council, I am proud that we provide a network for fellowship, support of one another and those in need, and service to the larger community. We, as lawyers, are in a uniquely gifted position, which carries with it a responsibility to do what we can to serve those in need, whether it be helping with applications for financial assistance, making donations to food pantries or other charitable causes, grocery shopping for an elderly neighbor, or simply making a call to someone who is isolated.

I remind you too that one of the hallmarks of the Council is the strong fellowship we share with one another. In April, we said a difficult goodbye to Steve Edwards, founder of this publication, past president of the Federal Bar Council, founding member and past president of the Council's Inn of Court, and dedicated public servant. As you will read in the following pages and in the notice I sent to all Council members (https://www.federalbarcouncil.org/FBC/News/Steven-edwards.aspx) and the tribute the Council published in *The New York Times* (https://www.legacy.com/obituaries/nytimes/obituary.aspx?n=steven-edwards&pid=195970822), Steve was a shining example of everything the Federal Bar Council stands for, as evidenced by his commitment to public service, mentorship of younger members of the bar, and advancement of excellence in the profession. The deep sense of loss we feel is a testament to the strong connections forged through the Council.

Strategic Planning

Early in my tenure as president of the Council, I recognized the need for us to evaluate how we can best continue to serve our mission and foster community and fellowship among a broad reach of federal practitioners in our ever-changing world. I am pleased to share with you today a summary of the strategic planning work the Council and Foundation recently completed. The year-long review and planning process, the fifth in the Council's nearly 90-year history, was undertaken by a 15-member Strategic Planning Committee, overseen by president-elect of the Council, Jonathan Moses, and Council Executive Director Anna Stowe DeNicola. We undertook the review to ensure that the Council is effectively serving its members and its mission and to plot a course for the future in light of ongoing developments in our profession. This plan is especially relevant now as we are living through this unprecedented moment in history.

Among the findings of the review and planning process presented to the Council's board at its regular meeting in mid-February:

- The Council's mission of serving members of the Second Circuit legal community by fostering excellence in federal practice and promoting fellowship among federal practitioners and the federal judiciary remains meaningful and relevant;
- The Council has a committed core base of members, nearly 3,000 strong, but should focus on increasing membership, reaching out especially to the newer generation of attorneys and finding ways for them to meaningfully engage with the Council;
- The Council should do a better job of communicating both internally and externally the wide array of substantive work it undertakes through its members, including unique continuing legal education programming, 15 active committees, many focused on key areas of federal practice, and a robust Inn of Court;
- The Council's signature events such as the Thanksgiving Luncheon, Law Day Dinner, Fall Retreat, and Winter Bench & Bar Conference re-

main vibrant and highly popular, but the Council should consider potential enhancements or modifications that make these events accessible and meaningful to a broader segment of the Second Circuit legal community; and

- The Foundation, the Council's 501(c)(3) affiliate, should expand its already strong support of key programs of interest to the judiciary and the Second Circuit legal community that promote legal education and the rule of law.

A summary of the findings of the strategic review and planning process can be found at http://www.federalbarcouncil.org/FBC/About/Strategic%20Planning.aspx and on page 2 of this issue.

The Council and Foundation are beginning to implement the strategic plan resulting from this process. As an immediate step, the board unanimously approved an amendment to the Council's mission statement that makes explicit what had always been implicit – a core goal of the Council and Foundation is to promote the rule of law. The mission statement now reads (with the addition highlighted):

> The Federal Bar Council is an organization of lawyers who practice in federal courts within the Second Circuit. It is dedicated to promoting excellence in federal practice and fellowship among federal practitioners. It is also committed to encouraging respectful, cordial relations between the bench and bar *and to promoting the rule of law*.

Other developments that members will see in the near term include the following:

- Recording and release of a webinar series, initially focused on trial practice skills development;
- The establishment of a mentorship program for Members matching some of our most experienced attorneys with newer lawyers;
- Enhancements to the Council's website and an increased online presence on LinkedIn and other social media platforms
- Establishment of three new committees, including a Civil Rights Committee, an Immigration Committee, and a Mid-Career Committee;
- Greater focus on providing benefits for members, including opportunities to bring guests free to continuing legal education ("CLE") programming;
- Modifying the Winter Bench & Bar Conference on a trial basis to provide a shorter format in an easily accessible location in the hopes of making the conference more attractive to a larger number of our members;
- Greater focus on communicating both to our members and the legal community generally the extraordinary substantive work that the Council and Foundation support; and,
- Expanded Foundation support of key projects within the Second Circuit's legal community, including deeper engagement with the Circuit's Justice For All initiative.

The strategic planning process confirmed for me what I think all members know: the Council remains a vibrant organization with Members committed to fostering excellence in legal practice and building a legal community based on fellowship and a shared value of respect for one another and for the rule of law. We provide a forum for practitioners in the Second Circuit legal community to make meaningful personal and professional connections and to serve the courts and the community. We thank you for your continued membership and encourage you to spread the word to others whom you believe would benefit from joining the Council.

It is my fervent hope and prayer that all of our members remain healthy and safe. In this era of social-distancing, I encourage each of you to stay connected to one another and to the Council and look forward to the day when we can gather together again in person.

From the Editor

Memories of My Friend Steve Edwards

By Bennette D. Kramer

Steve Edwards died in April of COVID-19. He was my friend, mentor, and supporter for nearly 50 years. He was one of the smartest and most creative people I have ever met. He practiced law, played his music, was devoted to his family, and served on many boards to make life better for those less fortunate, such as Nazareth Housing, the Center for Law and Economic Justice, the Jazz Foundation of America, and Music on the Inside. Steve was liked, if not loved, by everyone he encountered. He mentored me and many, many others, helping us to make decisions about our careers and our lives. His death has left a huge hole in my heart.

Touch Football

We met in 1973 when Steve and my husband at the time, Ken Kramer, were junior associates at Cravath, Swaine & Moore. Steve loved to tell the story that he and other Cravath associates were playing touch football in Central Park on a Saturday morning. Edward Cox, Patricia Nixon's husband, was playing, too, and the field was surrounded by Secret Service agents. I sat with Robin (who married Steve two years later) and my daughter Carolyn. From that point Robin and Steve and Ken and I became friends, sharing dinners, nights at the theater, and over time weekends in Westchester and Connecticut as Steve and Ken became involved in the IBM case. There were others in our group as well, and many of us have kept in touch.

Steve supported me through many joyful and rough times. We celebrated his marriage to Robin, the birth of his children and many of their milestones along the way, many birthdays and holidays, my marriage to Eliot Long, and my daughter's and his son's marriages, to name a few, and mourned over others including the death of Eliot a little over a year ago.

We traveled and vacationed together over the years. When Ken and I were living in France, Robin and Steve came to visit. We had a wonderful time as we traveled the countryside and went

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

to a record number of three-star restaurants. Steve, the musician, did not have much of an ear for French so he learned to say he did not speak French and then tried to make himself understood. Robin and Steve and their children visited us in Michigan over many years. We visited them in New Jersey in the summer and for holidays. We stayed in Hawaii following Federal Bar Council Winter Bench & Bar Conferences. Until a few years ago, Robin and Steve and Eliot and I had our regular rounds of golf at those conferences. It was not great golf but we had a good time. Just last summer, I spent a weekend with Robin and Steve in Budapest following a bike trip. Steve loved Gundel Restaurant – an old restaurant with a modern Hungarian menu and an old-fashioned Hungarian band.

A Mentor

As a mentor, Steve was always available. He helped me when I was making my decision to go to law school, to accept a clerkship, and every time I had a career choice. He listened and gave advice and helped me work through my decisions. Steve has mentored many lawyers at the Inn of Court, in his firms, at the Federal Bar Council and at the *Federal Bar Council Quarterly*. No matter how busy he was, he was always willing to talk. I never worked with him at a law firm but know that he was valued as a mentor wherever he was.

Without Steve, I would never have become involved in the Federal Bar Council or the *Federal Bar Council Quarterly* (formerly known as the *Federal Bar Council News*). Steve was the founder of the *Federal Bar Council News* and felt deeply about its success and direction. He talked George Yankwitt and the executive committee at the time into letting him create the *News* and providing the budget to do so.

In the early days, he wrote many of the articles and edited them with the assistance of Steven Meyerowitz, our managing editor. Over time, he attracted a number of devoted writers, such as Pete Eikenberry and Evan Stewart, who still are contributing today. He suggested that I join the editorial board in the early 1990s and then provided support while I was beginning to write for the *News*. While I have been editor-in-chief he always had a myriad of ideas for articles for himself and for others at board meetings. He wanted to be provocative, challenging, to take readers outside their comfort zones. He would often play devil's advocate just to get a discussion going, and he was never angry or upset when his ideas were shot out of the water. He loved nothing more than setting up a debate in the *News*.

A Musician

Steve loved all kinds of music. His parents, Lillian Solomon Edwards and John Richard Edwards, were both professors of music. We have been going to the opera together since 1981 and never tired of it. I was always amazed at how much he really heard at the opera; Steve could hear every note separately.

Steve was interested in all kinds of music. He grew up playing guitar and singing in rock and roll bands in high school and college in Iowa, and still enjoyed playing with a band of lawyers at Law Rocks benefits and other venues. As time went on, Steve came to love jazz more and more. He liked the freedom of jazz as compared to classical music. He became a board member of the Jazz Foundation of America and Music on the Inside, and vice chair of WBGO/Newark Public Radio, the jazz radio station. Steve made sure his friends attended benefits and performances to support these organizations and because he enjoyed them so much. Everywhere he went his friends followed.

Nazareth Housing

Nazareth Housing was another of Steve's passionate interests. Steve first learned about Nazareth Housing in the early 1990s when Nazareth, an organization that provides housing and vital support for New York's most vulnerable residents, presented a project to the Federal Bar Council Public Service Committee. The Public Service Committee did not adopt the Nazareth project, but Steve became interested in supporting Nazareth, and eventually he and Mary Beth Hogan joined the board. Steve recruited me and other friends to join as well. Steve

served as president of Nazareth for 20 years, while Nazareth transitioned from a founder-run organization to a more professionally run and broader organization that now works to prevent homelessness in addition to providing shelter. As head of Nazareth's board, Steve was interested in every facet of Nazareth's program and operations, particularly the financial aspects. He should be credited for leading Nazareth through dark times and helping to create the organization it is today.

The Inn

Finally, Steve loved the Federal Bar Council Inn of Court. Steve was a founder of the Inn and was on a team every year, when some of his contemporaries took sabbaticals. Steve loved creating a program with a team that would educate and entertain all the Inn members. He was always the most creative member of the team, throwing out numerous ideas, hoping that one would interest the group. He did more research, more writing, and more editing than any other team member. His programs always ended with Steve playing a song on his guitar accompanied by the group singing. But his favorite creative endeavor was working on the end of the year performance at the final Inn dinner. Steve and Margie Berman worked together to write the shows and arrange the music. Steve had an opportunity to sing and play his guitar and perform. He relished working on those shows.

These are my personal memories and do not reach many important aspects of his life – his law practice, for example. My life has been enriched by my friendship with Steve, and he has opened so many opportunities for me. I think back to touch football in Central Park and how lucky I was to meet both Steve and Robin.

Developments

Council Holds Winter Meeting; Evan Chesler Receives Whitney North Seymour Award

By Bennette D. Kramer

The Federal Bar Council held its annual Winter Bench & Bar Conference at the Rosewood Baha Mar, Nassau, The Bahamas, from February 23 through March 1, 2020. Second Circuit Judge Joseph F. Bianco headed the Planning Committee and Jillian Berman and Eric Franz co-chaired the meeting. Evan Chesler received the Whitney North Seymour Award for public service by a private practitioner. Below, we describe some of the programs presented.

Supreme Court Review

Southern District Judge J. Paul Oetken chaired the Supreme Court Review with panelists Michael Dreeben, O'Melveny & Myers; Miguel Estrada, Gibson, Dunn & Crutcher; and Neal Katyal, Hogan Lovells. Katyal began with a review of the prior term, providing such details as number of cases affirmed, 36 percent (as opposed to an average of 25 percent); which Justice was most in the majority (Justice Brett Kavanaugh); which the least in the majority (Justices Neil Gorsuch and Clarence Thomas); and which asked the most questions (Justice Sonia Sotomayor).

Estrada discussed *New York State Rifle & Pistol Association, Inc. v. City of New York* (2d Cir.), which involves a challenge to a New York City ordinance that restricted transport of licensed guns in New York City to one of seven ranges in the city, and not to ranges in New Jersey or Long Island or a second home outside of the city. The court heard oral argument on December 2, 2019. The city tried to moot the case by changing the regulation to allow the transportation of handguns to second homes and shooting ranges outside the city. However, the plaintiffs moved from their Second Amendment argument to one under the Commerce Clause, claiming that the regulation violated the right to travel by preventing plaintiffs from exercising their right to travel and bear arms at the same time. Estrada said that the argument focused on whether the case was now moot. He believes that there is a good chance that the case will not be decided on the merits.

Dreeben and Katyal both said that in the Constitution and original writings the right to "bear" arms means the right to participate in militia activity. Dreeben said that, even though the New York City accommodation was strategic, he does not see any basis to criticize the city for doing so.

Katyal talked about *Altitude Express, Inc. v. Zarda* (2d Cir.) and *Bostock v. Clayton County, Georgia* (11th Cir.), consolidated cases raising the issue whether discrimination against an employee because of sexual orientation constitutes employment discrimination "because of…sex" under Title VII. In both cases, plaintiffs had been fired because they were gay. In these cases, the text supports the plaintiffs. In a third case, *R.G. & G.R. Harris Funeral Home, Inc. v. Equal Employment Opportunity Commission* (6th Cir.), the transgender employee of a funeral home was fired when she told her employer that she intended to live and work as a woman and to undergo sex-reassignment surgery. The argument before the Court focused on the text of the law. Katyal thinks the employee will win the text argument. Estrada said that the text argument can work both ways because at the time the statute was passed, the situation was not considered. He questioned whether this issue should be sent back to Congress.

Next, Dreeben discussed the Trump subpoena cases – *Trump v. Mazars, USA, LLP* (D.C. Cir.), *Trump v. Deutsche Bank AG* (2d Cir.) (consolidated), and *Trump v. Vance* (2d Cir.). The consolidated cases concern the structure of government and the balance of power, and the ability of the House committees to scrutinize Trump's financial activity and subpoena creditors, family members, and other entities demanding private financial records, including tax returns. The Financial Committee was looking at money laundering activities; the Intelligence Committee was investigating the potential for foreign governments to intervene in elections; and the House Oversight Committee

was investigating violations of the emoluments clause and ethics. The president claimed that the House Committee subpoenas were nonjusticiable because they were political and had no valid legislative purpose, and that the committees were just using the subpoenas as a pretext for investigating the president and that this role belongs to the Justice Department. In addition, in connection with ethics, Congress did not need the information and it could not pass legislation because any such legislation would not be authorized under Article II. The District of Columbia and Second Circuits affirmed judgments by the district court holding that the committees had authority to issue the subpoenas.

The third case involved New York District Attorney Cyrus R. Vance, Jr.'s investigation into alleged financial crimes by Trump. The investigation arose from testimony of Michael Cohen, Trump's former lawyer, about payments to suppress Stormy Daniels' story about Trump. Vance also was investigating allegations that the Trump Organization valued assets high for applications to banks and low for real estate tax purposes. Trump sought an injunction in the Southern District of New York, which was denied and affirmed by the Second Circuit. Trump asserted broad, novel claims of immunity in connection with the *Vance* case. A grand jury is authorized to get everything it seeks. The documents sought did not involve the president conducting official business.

There is also an implied right of the House to get information. Here, the president sought imposition of a much higher standard. Katyal pointed out that Trump says that the courts must look behind what Congress is doing. Dreeben said that the Court is usually deferential to Congress, and Trump's argument that the investigations are pretextual is "a bridge too far." The House does not have to be objective. It would be striking for the Supreme Court to say the House has no rationale for the investigations.

In the *Vance* case there is an issue of the primacy of the federal government. There are two arguments: (1) there are a tiny number of instances of abuses, and (2) the fact that no one has tried this shows that everyone understood that it was unconstitutional.

Estrada said that Trump cannot use the office to protect himself from subpoenas and courts.

Looking at three cases involving the Deferred Action for Childhood Arrivals policy ("DACA"), *Department of Homeland Security v. Regents of the University of California* (9th Cir.), *Trump v. National Association for the Advancement of Colored People* (D.C. Cir.), and *McAleenan v. Vidal* (2d Cir.) (consolidated), Katyal noted that these cases affect 700,000 people. In 2014, Texas sued, claiming that DACA was illegal, now the Trump administration has joined Texas. The Department of Homeland security ("DHS") rescinded DACA, but the courts have enjoined the rescission. The two cases from the District of Columbia Circuit and the Second Circuit skipped the Courts of Appeals, and the Ninth Circuit affirmed the California case. The government argues that (1) the DHS decision rescinding DACA was an act of discretion and is not reviewable because Obama acted illegally and now DHS is correcting that illegal action, and (2) on the merits both sides agreed that the president can rescind it, but the only question is how. Katyal believes the administration will win on the reviewability issue. If it is remanded, there will be continued uncertainty.

Estrada discussed *Kelly v. United States* (3d Cir.), the Bridgegate case, which was argued on January 14, 2020. This case concerns the honest services statute. After the mayor of Fort Lee, New Jersey, refused to endorse Governor Chris Christie for reelection, the deputy chief of staff for New Jersey's Office of Intergovernmental Affairs and the deputy executive director at the Port Authority of New York and New Jersey took political revenge by blocking access lanes to the George Washington Bridge using a traffic study as a pretext. The question is whether the statutory requirement of property "obtained by defendants" was met under the wire and mail fraud statutes. The prosecution argument was that the political people had no authority if they had disclosed their true motive. The "property" element was that they used their authority to do a real traffic study for vindictive purposes. The un-

derlying premise is that politicians must be more honest in the way they use authority. Dreeben said that the technical side of the legal theory is that the statute prohibits a scheme to defraud or obtain property. Here, overtime was being paid that would not otherwise be paid. A broad concern of the Justices is how much power criminal law and prosecutors should have over the exercise of political power. Estrada said that this is an instance of the misuse of the exercise of authority that the defendants already have.

In *Seila Law LLC v. Consumer Financial Protection Bureau* (9th Cir.), plaintiff argued that the CFPB's structure violated Article II of the Constitution, which gives the president the power to remove executive officers. Under the statute, the director of the CFPB is not removeable for cause. In addition, there is only a single director, instead of a multiple member commission, which has been upheld. A single director removes the president's ability under Article II to control the agency by firing. The argument is that the president has less control if he or she cannot remove a single director. The challenge to the CFPB is the beginning of Steve Bannon's effort to deconstruct the administrative state. The real question is whether the statute deprives the president of constitutional authority. The executive branch agreed with the plaintiff that the statute is unconstitutional, so the Court appointed a special counsel, Paul Clement, to argue in favor of the CFPB. Katyal said that the Court may not reach a decision because there is no appointed director now.

Espinoza v. Montana Department of Revenue (Mont.) raises the issue of whether a religiously neutral student-aid program violates the Religion Clauses or Equal Protection Clause because it gives students the choice of attending religious schools. Estrada said that this case involves a challenge to tax credits for donating to educational programs in religious schools. Montana got rid of the program.

Katyal looked at *Jane Medical Services L.L.C. v. Russo* and *Russo v. Jane Medical Services L.L.C.* (5th Cir.) (consolidated), concerning Louisiana's statute requiring physicians who perform abortions to have admitting privileges at a local hospital. The Louisiana statute is the same as a Texas statute that was struck down. The district court stated that the situation was worse than Texas because there was only one physician in Louisiana performing abortions. One doctor had quit because of concern about safety. The Supreme Court granted an emergency application staying the statute. The real question here is what the Chief Justice is going to do. He sided with the conservatives in the Texas case. Dreeben said that there is also a standing issue: Louisiana challenged the clinic as plaintiff, arguing that the clinic cannot sue as a third party. The woman seeking the abortion has an interest in her health, while the clinic only has an interest in profit. The effect of deciding this case on the standing issue would make it hard to challenge these laws because women would not bring cases.

Ethics: *Gillers v. Gillers*

Judge Alison J. Nathan of the Southern District chaired the ethics panel with Professors Barbara Gillers and Stephen Gillers of New York University School of Law, along with Victor L. Hou, Cleary Gottlieb Steen & Hamilton, Valdi Licul, Vladeck, Raskin & Clark, and Jeremy Lieberman, Pomerantz, as panelists. Panel members considered and discussed hypotheticals relating to ethical issues in securities fraud litigation, eyewitnesses, and prelitigation threats.

The first hypothetical was based on an insider trading case in which the plaintiff claimed that the defendant traded on inside information received from the chief financial officer of a company. The defendant testified at a deposition that he had never communicated with the CFO, and they had never dated. In fact, the client disclosed to his lawyer that the CFO had communicated with the defendant, and they had hookups, but did not officially date. Hou said that a lawyer has to look at the transcript carefully to determine half-truths and non-truths. Both answers are problematic because they are ultimately not truthful. The lawyer has a duty of candor. Hou does not think that the lawyer can settle the case without doing something about the untruthful record. He can

tell his client to do the deposition over or correct the record, and if the client balks, the lawyer should think about withdrawing.

Additionally, Barbara Gillers said the response that he did not communicate might be perjury. It is definitely false. Moving to withdraw is not sufficient. Stephen Gillers said that in the adversary system it is the obligation of the lawyer to be precise. Here, the defendant's answers were literally true.

In the second hypothetical, a woman who witnessed a bank robber remove a ski mask in the subway had previously pled guilty to lying on a mortgage application and was still on probation. Even though the lawyer knew his client was guilty, the question was whether he could use the evidence of her plea and sentence at trial to impeach her. Liberman said that the purpose of a trial is not always to search for the truth. It would be irresponsible for the lawyer not to cross-examine the witness about the conviction even when he knew the witness was telling the truth. The question is whether you can say she is lying.

A defense witness will say she saw the client in a Burger King five blocks from the bank 10 minutes before the robbery, which is confirmed by a videotape from the Burger King. The defense will also show a video showing the congestion between the Burger King and the bank. Can the lawyer argue that this was proof that the defendant was not the robber? Stephen Gillers said that the lawyer can raise a reasonable doubt. It is his duty to act within the law in the best interests of his client. Barbara Gillers said that because the lawyer knows the woman is telling the truth, he should not be able to say she is lying, but he can create an inference even though he knows the inference he is creating is false. However, creating evidence like the video may be pushing the limits of what he may do.

Next, even though she knows that the defendant was in Burger King before the robbery, the prosecutor plans to call a witness who is an expert in facial recognition to point out the differences between the face in the video and the defendant's face, and from there argue that the face in the video is someone else. She is doing this because the defendant's confession and the gun he was carrying and the stolen money have been suppressed. Stephen Gillers said that the prosecutor knows the defendant is guilty. She is just giving the jury information. However, the prosecutor cannot impeach the witness with the misdemeanor because she has no reason to doubt the witness is telling the truth, and prosecutors are held to a higher standard.

The last hypothetical involved a lawyer who represented a client in a possible Title VII sex case. Both her boss and the company would be defendants. The lawyer obtained emails from his client between her boss and another partner at the company which clearly reveal an affair between them. The lawyer wants to send a draft complaint including the substance of the emails to her client's boss only, not the company, to force him to settle. Licul said that the question is how relevant the affair is to the client's sexual harassment claims. If the emails show the woman was pressured into the affair, then using the emails is okay, but if the only purpose is to sling mud then she cannot use them. Stephen Gillers says that if there is evidence that the affair created a hostile work environment, there would be some relevance. However, Title VII does not create any individual liability, only a claim against the employer. In New York State, there is a claim against the individual. A lawyer should not say to the boss: "If you settle, I won't tell the company." Licul said that a lawyer could write to the boss as long as he knows the boss is not represented. Stephen Gillers said that if the lawyer says he will tell the company if there is no settlement, he is trading on dirt, not the claim.

Stephen Gillers said that it is a hard question whether the lawyer can include the affair in a court filing. It is obvious that lawyers use draft complaints to force settlements. The information in this complaint could lead to sealing or a protective order. There will come a time when the information will become publicly available. It is an example of the way lawyers can abuse the legal system. He would advise the lawyer not to use it in the complaint.

Barbara Gillers said that the lawyer can send the complaint if

the information is relevant and meets Rule 11. The poor plaintiff has been suffering.

Now the lawyer wants to send his investigator out to try to find out from other women at the company whether the boss had behaved the same way towards them. The client has given the lawyer names.

Licul said that whether the investigator can reach out to the women depends on who the people are, and whether they are represented by in-house counsel. If the women talked to in-house counsel about these issues, the investigator cannot get information from them. An investigator cannot do what a lawyer cannot do. Also, the lawyer needs to determine what the rules for recording are in the jurisdiction. If there is one party consent for recording, it is a bad idea to record, but not a violation. The investigator should disclose she is investigating.

Stephen Gillers said that the fact that the women work for the company does not mean that they are clients of in-house counsel, in which case you can communicate with them. In New York an investigator can talk to employees of the opposing party, but the person the investigator is talking to must understand who is asking the questions.

Barbara Gillers said that disclosures by the investigator are only suggested under New York case law. No disclosures are required as long as the investigator does not lie. There might be good reasons not to disclose. There is a risk, however, if there is no disclosure. If you get personal or confidential information, you may be disqualified.

Mass Incarceration

Second Circuit Judge Joseph Bianco chaired a panel, including the Honorable John Gleeson, Debevoise & Plimpton (formerly a district judge in the Eastern District of New York), David Patton, Federal Defenders of New York, and Nicholas Turner, Vera Institute of Justice, which examined mass incarceration and the momentum for sentencing reform.

Judge Bianco introduced panel members, noting that Judge Gleeson had participated in programs in the Eastern District that provide alternatives to incarceration. Judges Bianco and Gleeson laid out three sentencing hypotheticals describing defendants' crimes and the personal history of defendants and asked the audience to vote on estimates of the length of the sentences the defendants should receive. In every case, a majority of the audience members thought the sentence should be less than 10 years but the actual sentences imposed were 46.5 years, 80 years, and mandatory life.

Turner explained that mass incarceration was an American problem and an international aberration. Seven hundred people per 100,000 are incarcerated in this country, which is 10 times the incarceration rate in the European Union. For example, Germany incarcerates 71 people per 100,000. In 1970, in the United States, the number was 100 per 100,000 which was at a par with European countries. Mass incarceration has grown in the United States by 700 percent since then.

The situation in the United States reflects a reaction to a lot of crime and the election of officials who promised to be "tough on crime." The rest of the world also had a crime increase, but applied a different policy perspective. John Ehrlichman, counsel to President Richard Nixon (who was convicted in connection with Watergate and served time in prison), saw incarceration as a way to disrupt the black communities by getting the public to associate the black community with drugs and crime. It would be a way to disenfranchise black people after the successes of the civil rights movement. Now, one in every two American families of color has a family member who has spent time in jail in the last 10 years.

Since 2005, the population of people who have been admitted to jails has shifted to the rural counties. In the past five years the big cities have de-incarcerated and the rural counties have increased incarceration, due to elected prosecutors and sheriffs and the federal system. At Rikers, the population has dropped by 75 percent to 5,400 from 20,000. There has been an 80 percent drop in the crime rate in New York, which is now the safest big city in America.

Patton said that mass incarceration is a big problem in federal courts in New York. The

charging policies vary from administration to administration. They are somewhat worse now than during the last three years of the Obama Administration, but early during the Obama Administration charging was harsh. Federal prosecutors now are charging crimes that carry a mandatory minimum, moving away from the easing under Obama. Patton gave examples of charging decisions under the Trump Administration. These harsh charging decisions are felt more acutely in the Eastern District, which used to have a less harsh charging policy. There has been a spike in the federal prison population because of the harsh mandatory minimums and high Sentencing Guideline numbers. This has impacted the culture in the Eastern District courthouse. There has been a constant upward ratchet in the Sentencing Guideline levels charged, with no consideration of the impact on the lives of the defendants or their families. There has also been a huge jump in pretrial detention, which makes for a worse outcome at sentencing, because defendants have no opportunity to makes changes in their lives before sentencing. The failure to appear and felony re-arrest rates were one percent.

Judge Gleeson said that the causes of mandatory incarceration in the federal system are due to structural features and timing. The Sentencing Guidelines Commission was created in 1984, and it issued the manual in 1987. There were many mandatory sentences; for example, masterminds received 10 years and mid-range participants got five years. Many sentences were determined by the quantify of drugs – 10 years to life for one kilo of heroine or five kilos of cocaine, five years for 100 grams of heroin, etc. However, the mandatory minimums apply only when prosecutors use their discretion to charge offenses that carry those minimums. The Guidelines Commission started out with the goals of general deterrence and retribution. They looked at the pre-Guidelines sentences, but the mandatory minimums were higher. The Guidelines were expanded to cover all drug offenders, even though they were originally intended to cover only kingpins and managers. By 1991, the sentences were 2.5 times the original Guideline sentences. A presumption of probation was built into the original Guidelines. Under the original Guidelines, too many white collar defendants did not go to prison, because their actions were at the lenient end of the sentencing grid. Then charging decisions changed, and the number of people sent to prison and the amount of time they were sent for resulted in a steep increase in the prison population.

Judge Bianco said that the mandatory minimums shifted the sentencing decision from the sentencing judge to the charging person. For example, members of MS-13 cannot risk going to trial so prosecutors get deals and defendants waive their rights.

Patton said that the decline in trials is very troubling. Prosecutors are not challenged in court and they have extraordinary leverage. Defendants may be innocent but if they are offered a lowered sentence, they will take it.

Patton said that mass incarceration is a big problem in federal courts in New York.

Judge Gleeson said that the culture among the judges is that a defendant pays a price for going to trial. In addition, if a defendant pleads guilty a week or more before the trial date, then he or she would usually be entitled to a two or three level reduction in the applicable Sentencing Guidelines.

Turner said that the conventional thinking is conditioned to believe that long sentences are the right way to respond. However, increases in incarceration provide only a marginal value in reduction in crime rates. The reasons for long sentences do not hold up: Activity proclivity as a reason for long sentences may be true for young defendants, but people age out of it by their late 20s and early 30s. Deterrence only applies to property crimes. When one in two families have a member incarcerated, it increases the likelihood of more crime and destabilized communities.

Judge Gleeson listed solutions: (1) do something about mandatory minimums; (2) help

people in prison; (3) get rid of mandatory Guidelines; (4) tell judges it is alright to sentence lower than the Guidelines; and (5) deal with the collateral consequences of conviction. There are 38 separate federal alternatives to incarceration, including drug courts and youthful offender courts. They were inspired by state innovations. What works in these courts is that participants support each other in meetings. The courts and other programs turn lives around. The drug court program established in 2012 gives defendants time to stay clean. Sentencing is postponed, defendants meet with probation. More than 40 percent of successful participants avoid conviction; the rest have no or short prison time. These courts are serving a very narrow segment of the population – four to five percent of the caseload. The Sentencing Commission has refused the request for a reduction in the Guidelines for participation in these courts. The courts are transformative for participants and judges, because they provide an opportunity to look at the whole person. The judges and the participants sit around a table and talk about family and life problems.

Turner said that the New York State Bail Reform bill is intended to reduce incarceration. He said that in Germany 60 percent of people are directed to programs and five percent are incarcerated. In the United States 7.2 percent receive probation. In Germany the average length of sentences is one to five years; a life sentence is capped at 21 years. In the United States, 200,000 people are serving life sentences. The United States is an international aberration.

Working with Men to Advance Women in the Legal Profession

A diversity program, chaired by Judge Oetken, began with an introduction by Carrie Cohen, Morrison & Foerster, who described the terms used for men who support women within law firms. An "ally" is someone who creates opportunities and helps advance a person; a "sponsor" is someone who uses his or her power to advance and support a person; and a "mentor" is someone who gives a person advice. She said that the reason we care whether men support women in law firms is because in companies where men are involved in gender diversity issues, 96 percent of respondents reported a better environment.

Too often men do not become involved in the gender diversity discussion, but it is important for everyone to be brought together to create a creative, diverse workplace. Men do not participate in the diversity discussions out of apathy, fear of what they do not know, or ignorance. Privately 53 percent of men say they advocate diversity, but only 20 percent work publicly to fix inequalities. To move toward a more diverse workplace, allies can interrupt unconscious bias, acknowledge they are in positions of power, and listen and speak up.

Following Cohen's introduction, Judge Oetken, Sheila Boston, Arnold & Porter, and Cohen shared their stories. Boston said that it is very important to share personal stories and not to underestimate their power. She said that when she was a summer associate, she was reluctant to speak up. She was often the only Black and the only woman in many a meeting.

Boston then asked Judge Oetken to tell his story. He said that his path to the bench was unusual. He had no criminal law experience, and he did not submit an application. But he offered diversity as a gay man. He was in-house at Cablevision, when he received an email asking if he had any interest in the federal district court. Someone working with Senator Charles Schumer said that there was only one openly gay federal judge – Deborah Batts (who recently passed away). Judge Oetken said that it all happened very quickly. This was the beginning of the Obama Administration and Senator Schumer wanted gay candidates, because it was important for the legitimacy of the judiciary. It matters to jurors, litigants, and colleagues to have gay judges.

Boston agreed that it was important for minorities to be represented and to create a critical mass. She said that when she was a third-year associate she had a pro bono argument before three judges on the Second Circuit. One was Judge Sonia Sotomayor. Following the argument Judge Sotomayor sent a message that Boston had done a good job. That was wonderful reinforcement.

Cohen said that women often suffer from "imposter syndrome" and have more doubt about themselves than men do. She asked Judge Oetken if he had seen any change in the people who appear before him since he has been on the bench. Judge Oetken said that he was aware of more racial and ethnic diversity in criminal cases, including some LGBT litigants. However, there is less diversity in civil cases because experienced partners do the arguments and trials.

To counteract the appearance of only experienced lawyers in court and to provide less experienced lawyers with opportunities to appear and argue in court, judges have issued individual rules that encourage less experienced attorneys to argue motions, starting with Eastern District Judge Jack Weinstein and followed by Judges Ann Donnelly and Pamela Chen. Judge Oetken said that in a big criminal case before him an associate argued and did an incredible job.

Judge Oetken said that colleagues in the Southern District have had requests for an unconscious bias jury instruction. The judges have discussed it informally, and he said he will have to think about the issue when it comes up before him. A judge has to be careful not to tip his or her hand to the jury or create a situation in which the jury could read a suggestion of an outcome.

Following the discussion, attendees broke up into individual groups and discussed three topics:

- Topic 1: Who are the most effective allies for women in your firm? What motivates them? What makes them effective?
- Topic 2: Does your firm encourage, support, reward the efforts of allies? How does your firm address obstacles to more people being allies?
- Topic 3: What can/should allies do to have the greatest impact?

Evan Chesler Receives the Whitney North Seymour Award

Judge Mary Kay Vyskocil, the president of the Federal Bar Council, presented the Whitney North Seymour Award for Public Service by a Private Practitioner to Evan Chesler, chair, Cravath, Swaine & Moore. Judge Vyskocil described Chesler's extensive public service, including as a member of the board of trustees of New York University and of the board's executive committee and as founder and chair of the Lawyer Alumni Mentoring Program, which provides mentoring and curriculum enrichment programs to prelaw students; as chair of the board of the New York Public Library; and as a member of the Leaders Council of the Legal Services Corporation.

Accepting the award, Chesler said that it was a great honor. He said that he wanted to be a lawyer from the time he was assigned to read de Tocqueville's *Democracy in America*, when he was 14. He believed that as a lawyer, he could help change the arc of history.

Chesler is concerned about the diminishing role of trials today. When he started practicing, 15 percent of cases went to trial, now, only 1.5 percent of cases do. He described the reasons as: (1) the cost; (2) litigants are risk-averse; and (3) litigant corporations have their eye on the market and are worried about earnings. Litigants want certainty, not the uncertainty of litigation.

Chesler asked why we should care. He said that sometimes cases have to be tried and the system needs people who know how to do it. Without people who know how, the rule of law is undermined. Chesler said that the Federal Bar Council enhances the process by bringing judges and lawyers together and that is important.

* * *

There were four additional programs at the Winter Conference – Immigration; Opioid Crisis; Speech, Privacy, and Platform Regulation in the Age of Big Data; and the Future of Religious Freedom. Steve Edwards took notes on those but got sick before he could write about them. As a consequence, those programs will remain unreported. I have sat next to Steve during nearly every Winter Conference in the last 20 years, and we have divided the responsibility of reporting on the programs. I will miss him terribly.

Personal History

My Brooklyn in the 1950s

By Mark C. Zauderer

When Thomas Wolfe's novel, "You Can't Go Home Again," was published posthumously in 1940, it struck a chord with the American public, evoking a universally shared experience. The book title pays homage to our wistful (and sometimes inaccurate) recollections of times past. With due regard for the distortion of recollections, allow me to share some of mine.

Remsen Street

It was the first term of Dwight D. Eisenhower's presidency. Senator Joseph McCarthy held sway over much of America. Patti Page was at the top of the charts. In the spring of 1953, my family moved from Manhattan to Brooklyn Heights, to a house on Remsen Street (which decades later was broken up into co-op floors, one of which was occupied by the late Judge David Trager). I was introduced to stoop ball and to baseball, an interest that consumed Brooklynites. The Brooklyn Dodgers' main ticket office was located at Montague and Court Streets, and it was exciting to buy tickets for Ebbets Field, which was easily reached by BMT subway. Tickets were priced at $.75 for bleachers; $1.25 for general admission; $2.00 for reserved seats; and $2.50 and $3.50 for upper and lower boxes respectively (I often wondered who could afford a box seat at those prices).

1955 was perhaps the greatest moment in the lives of Brooklynites, when the Dodgers won the World Series for the first time. Crowds gathered in the streets and surrounded the entrance to the Hotel Bossert on Montague Street, where many of the Dodgers lived (I still have a picture of pitcher Johnny Podres with his arm around me; at age nine, I came up to his waist).

Brooklyn Heights, while always regarded as a genteel place to live, had seen its brownstones at the outer edge of the neighborhood deteriorate; during World War II, many had been partitioned to create housing for workers at the Brooklyn Navy Yard. Rehabilitation and gentrification were still a decade away.

June 1954 introduced me to the St. George Hotel swimming pool, billed as the world's largest indoor, salt water pool. Passing the four foot high brass rail at the entrance (where I was several years earlier denied admission because I did not reach that minimum height), one would change in the men's locker room and emerge in a cavernous pool area. At one end was a giant waterfall and at the other, three diving boards, including a ten foot high board that challenged us all. Always health conscious, the hotel provided a smoking room by the side of the pool.

Friends Field

Each morning from third through twelfth grade, I walked to the Brooklyn Friends School on Schermerhorn Street (passing the County Courthouse on Joralemon Street), a building attached to the Quaker Meeting House that abutted the Criminal Courts Building. In the 1970s, the school building, together with a six acre athletic field on Avenue L and 4th Street, was sold by the Society of Friends to New York City, so that Friends could find the funds to acquire the old Brooklyn Law School building on Pearl Street, when the law school constructed its new building on Joralemon Street and Boerum Place. (I wonder if those who visit the field today know why the sign there reads, "Friends Field").

The Brooklyn Friends School of the 1950s played an outsize role in the lives of its students, many of whom attended from nursery school through high school. By and large, parents were professionals (it seems that most were doctors with individual practices at their homes in Brooklyn); although a denominational school, there was no proselytizing – only a silent Quaker meeting each month. In stark contrast to what we see today, neither students nor parents discussed how much

money anybody made or how much their house cost; nor did a student in my class, whose ancestor bearing her name signed the Declaration of Independence, discuss her lineage.

I am grateful to Friends for the quality of its educational instruction – with a curriculum no longer in vogue. Latin was mandatory; and in Seventh Grade English class, we would be asked to go to the blackboard and diagram complex sentences. If nothing else, the school taught students how to write, a skill that helped many of my classmates breeze through their college courses.

Directly behind my house was Grace Church, where at age 11, I joined the Boys Choir, where there was a rigorous training protocol. With me were my choir mates Harry Chapin and his brothers, Tom and Steve. They went on to musical fame; I went on to take lessons for my bar mitzvah, tutored by Rabbi Eugene Sack, the father of Second Circuit Judge Robert Sack, at Garfield Temple (my bar mitzvah mate, Eric Kaz, later found fame as a songwriter, composing "Love Has No Pride" and other songs for Linda Ronstadt, Bonnie Raitt, and others). If my soprano voice hadn't changed, I would probably still be singing in the Grace Church choir.

In 2008, as president of the Federal Bar Council, I had the privilege of presenting Judge Sack with the Council's Learned Hand Award and, on that occasion, gave him the signed prayer book that his father had given me almost 50 years earlier.

One spring morning in 1958, I rode my bicycle to a brownstone at 19 Grace Court to visit my friend John, whose family lived on the upper two floors. As I entered the vestibule, a very old African-American man emerged from a side door and asked (in jest I now assume) if he could ride my bike. When I later asked John who that was, he told me, "That's a very famous man." At age 12, I had not yet heard of W.E.B. Du Bois, born in 1868, one of the greatest civil rights leaders of the Nineteenth and Twentieth Centuries.

Dance Classes

Each fall, Miss Elsie Hepburn, who had taught three generations of Brooklynites (her *New York Times* obituary records that she taught classes from 1908 to 1964) would send out perfumed invitations for her cotillion dance classes at Grace Church, to students at four private schools: Brooklyn Friends, Packer Collegiate Institute, Poly Prep Country Day School, and the Berkley School. Every Friday afternoon, we would put on our charcoal grey suits and white gloves and pair up with a partner to wait on line to say good afternoon to Miss Hepburn, her pianist, Miss Struthers, and the parent chaperone of the day. While the waltz and foxtrot were the main staples of the class, some of the more rebellious students succeeded in prevailing upon Miss Hepburn to teach the cha-cha. I am still a master of that dance.

In 1956, I made news in the "Brooklyn Heights Press, where it was reported that party officials stopped me from soliciting funds in a coffee can labeled, "I'm for Adlai and Estes" (do these names ring a bell?).

Unfortunately, there were few places in the Heights where one could play on grass or be undisturbed by vehicular traffic. The dead-end on Grace Court was a favorite spot for stickball. However, almost any afternoon, old Mr. Logan (who was rumored to be a Spanish-American War veteran) would call the police to complain that we were interrupting his afternoon nap. When we saw the cruiser from the 84th Precinct turn in from Hicks Street, the broomstick bat would disappear and we would run for the nearest alley.

As the 1950s came to a close and the new decade began, two events were forever etched in my memory. In the fall of 1960, as I was walking on Fulton Street with my best friend Bobby Miller (the son of playwright Arthur Miller), there was a large crowd gathered around the back of a pickup truck at Boerum Place. Bobby said, "Look, there is the guy who is running for President." We ran over to the truck, reached up and shook the hand of presidential candidate John F. Kennedy.

That Christmas season, I was sitting in the Brooklyn Friends School Assembly, and a teacher came behind me and whispered something to my classmate, who lived on Plaza Street in Grand Army Plaza. As we later learned, two planes had collided

over Brooklyn, with one of them crashing at 7th Avenue and Sterling Place, leaving the nearby subway out of service. It was the deadliest aviation disaster in the world at that time.

* * *

Of course, with the 1960s came many changes to our world, both locally and nationally. I suppose that in 60 years, someone will be penning an article about the decade just past, probably with the same selective memory. What will they recall? The scourge of the coronavirus before we found a vaccine? The time when cars still required a human driver? Nuclear power plants? It would certainly be interesting to read that article.

Editor's note: Mark C. Zauderer is a partner at Ganfer Shore Leeds & Zauderer LLP in New York City and a past president of the Federal Bar Council.

In the Courts

Judge Lawrence Joseph Vilardo: A Buffalonian and Lawyer's Lawyer

By Brian M. Feldman and Timothy W. Hoover

Although a product of the Harvard Law School, Judge Lawrence Joseph Vilardo is unimpeachably a Buffalonian; and, while a man of many passions, Judge Vilardo is decidedly a lawyer's lawyer.

Nominated by President Barack Obama on February 4, 2015, to a seat on the United States District Court for the Western District of New York in Buffalo, Judge Vilardo was confirmed by an unopposed 88-0 vote in the Senate on October 26, 2015. On Thursday, October 29, 2015, Judge Vilardo received his commission, and he was sworn in the next day in the majestic Robert H. Jackson United States Courthouse in Buffalo.

A "true son of Buffalo," as Senator Charles E. Schumer described him, "Buffalo is where [Judge Vilardo] was born, raised, and educated, and where he chose to raise his family. Buffalo is in his bones." Judge Vilardo was born in Buffalo in 1955 to parents Lawrence and Dolores Vilardo. The family business was Joseph S. Vilardo & Sons, a Buffalo printing business known as Vilardo Printing.

Judge Lawrence Joseph Vilardo

A True Son of Buffalo

Vilardo Printing taught Judge Vilardo, early in life, the importance of attending to every detail. Not surprisingly, the family business was where a teenaged Judge Vilardo held his first job. At Vilardo Printing, Judge Vilardo helped print business cards, invitations, and letterheads. Vilardo Printing strove for perfection. That meant, as Judge Vilardo has explained, that his father insisted on leveling lines of print with a rule made of brass, not lead. Lead is soft and could create an ever-so-slight indentation. A lead rule could leave measurements off, even if imperceptibly so. But with a brass rule, every line would be perfectly straight. As Judge Vilardo has recounted, "Especially because the business name was Vilardo Printing," Judge Vilardo's father "refused to take even minor shortcuts because he wanted people to associate our name with only the highest quality." The family business did everything it could to ensure that Vilardo was synonymous with quality.

Academically, Judge Vilardo took advantage of Buffalo's premiere Jesuit institutions of learning. He began his Jesuit education at Canisius High School, where he graduated in 1973, five years after Tim Russert, the late host of NBC's *Meet the Press*, and six years ahead of Tom Perez, the current chair of the Democratic National Committee. Judge Vilardo cherished his high school education and credits his early Jesuit education as the foundation of the habits that carried him through the rest of his education and career. Judge Vilardo has stated that "Canisius High School is the best school I've ever gone to and that includes Harvard."

Canisius College

After attending Buffalo's Jesuit high school, Judge Vilardo matriculated to Canisius College, where he continued his Buffalo-based Jesuit education and became the first in his family to complete a college education.

There, Judge Vilardo wrote for the student weekly, *The Griffin*. He spent much time writing about sports, especially his beloved Yankees, as well as campus life, running titles like "It's Yankee Time Again" and "Beer Cans, Trash Barrels and Club Football." But, even among many insightful sounding articles (like one entitled, "When in Doubt, Call a Meeting"), a 1976 editorial stands out. In that editorial, entitled "Promise Her Anything – But Give Her DiGamma," Judge Vilardo argued that the college's all-male honor society, the DiGamma Honor Society, should admit women. Judge Vilardo was ahead of his time; it would be eight more years until that would happen. Yet his editorial displayed Judge Vilardo's blossoming passion for justice, and his voluminous writing, as a whole, was a harbinger of the prolific writing and publication that would be a constant in his legal studies and career.

Harvard Law

The Harvard Law School welcomed Judge Vilardo in 1977. At Harvard, Judge Vilardo continued to shine. Judge Vilardo said nothing of his law school academic performance in our interview. But a review of public records reveals that Judge Vilardo bested classmates including Mark R. Warner, the later Senator from Virginia (who claims he was the only classmate to receive no offers from either of his summer associate jobs), and Harold Koh, later dean of Yale Law School (whose curriculum vitae reflects he graduated *cum laude*), when Judge Vilardo graduated *magna cum laude* from Harvard Law School in 1980.

At Harvard Law School, Judge Vilardo continued to write. Not only did he serve on the *Harvard Law Review*, but he wrote for the law school's newspaper, the *Harvard Law Record*. At the *Record*, among other things, Judge Vilardo authored the recurring humor column, "Fenno," a character that the current *Record* describes as "a perpetual Harvard Law student, [who] never ages, graduates or experiences liver failure, but continues to sporadically attend classes whenever a busy recreational schedule permits."

Judge Vilardo's last "Fenno" column perhaps foreshadowed Judge Vilardo's decision to head back to the more blue-collar Buffalo from elite Cambridge. That column, published in the *Record* on May 4, 1978, featured an absurd setup – a law professor inter-

rogating Fenno, who "sat tied to a chair," "[b]right lights" shining "on his face and drops of water [falling] slowly onto his forehead. " But, in it, Judge Vilardo cleverly and hilariously delivered a stinging attack on the law school's culture as he then viewed it, with Fenno shaking his head and lamenting, "The faculty takes itself too seriously. . . . The students take themselves too seriously. And no one has enough time to laugh." While Judge Vilardo had soared at the Harvard Law School, he would return to Buffalo, in modest Western New York, a down-to-earth city that can rarely be accused of taking itself too seriously.

Dallas Detour

Judge Vilardo returned to Buffalo, however, only after an important detour in Dallas. In Texas, from 1980 to 1981, he clerked for Circuit Judge Irving L. Goldberg of the U.S. Court of Appeals for the Fifth Circuit. It was a plum clerkship, and a job Judge Vilardo cherished. Judge Goldberg, a renowned humanist and liberal Southern jurist once called "the personification of justice," became mentor and role model to Judge Vilardo.

Judge Vilardo, writing with co-clerk Howard W. Gutman, has recalled Judge Goldberg as a "treasure," "whose eyes and voice sparkled as he spoke, whose brilliance dazzled those who listened to him, whose wisdom enriched all lucky enough to be privy to it." And Judge Goldberg urged attention to detail, just as Judge Vilardo's father had at Vilardo Printing, but with an emphasis on writing and finding *le mot juste*. Judge Goldberg would instruct his clerks: "Don't be afraid of words. They make you live. They make you go…. Use wit, humor, allusions to history and literature, metaphors and similes. Use verbs. Make an opinion talk. Heck, make it walk."

Judge Vilardo took these lessons back to Buffalo, where he quickly thrived. He started out as an associate at one of the larger firms in the city, Damon & Morey, LLP (since merged into Barclay Damon). There, Judge Vilardo became the favorite associate of the firm's hard-charging managing partner, then-35-year old Terrence M. Connors. The two would soon go on to found a successful firm of their own, Connors & Vilardo.

Judge Vilardo remembers that, when Connors pitched the idea, he thought it was a joke. Connors was the head of an established firm, and Judge Vilardo was then merely an associate and recently married, with a young child at home and no cash to invest. Moreover, Connors knew that, at the time, Judge Vilardo was considering leaving the practice of law altogether to teach at a law school. But Connors was serious, and Judge Vilardo was the partner that Connors wanted. Judge Vilardo was interested – he loved practicing with Connors – and took the leap. Connors demanded that Judge Vilardo fully commit to the enterprise. Judge Vilardo did so, with a single caveat made almost in jest: He would only leave the firm for an Article III appointment. Neither of them had any idea that such an appointment lay ahead.

Connors & Vilardo took off. There, after borrowing money from Connors to buy a desk and set up a basic office, Judge Vilardo ended up litigating a broad swath of cases. He practiced in both state and federal court. He handled both criminal and civil cases. And he handled matters at both the trial and appellate levels. The firm, at its outset, focused on many personal injury cases. But the practice soon expanded to include white collar and other criminal defense, medical malpractice defense, and general civil litigation. Connors became the go-to trial lawyer; and Judge Vilardo led the firm's motions and appellate work. They appreciated each other's strengths and stayed focused on who would best serve their clients' needs – which usually meant letting Judge Vilardo lead the appellate advocacy and motion practice, while having Connors try cases.

Over time, Judge Vilardo gained a reputation as an outstanding advocate and developed a practice representing professionals, including many lawyers. Senator Schumer extolled Judge Vilardo's reputation upon his nomination: "Vilardo has a tremendous legal acumen…. He is erudite, experienced, and deeply respected by every facet of the Western New York legal community." Judge Vilardo lectured frequently on oral advocacy, as well as professional

ethics. Judge Vilardo developed an extensive client list, which, in the ultimate sign of professional respect, included several Buffalo law firms. Lawyers trusted Judge Vilardo with their careers. Literally, Judge Vilardo had become a lawyer's lawyer.

Continuing to Publish

Even while busily authoring motions and appeals, Judge Vilardo found time to publish outside the courtroom, continuing his interest in publishing that began with *The Griffin* in college and followed with the *Harvard Law Record* at law school. He joined the American Bar Association's *Litigation* magazine in 1987 and remained active with *Litigation* until just a couple years before his elevation to the bench. From 1998 through 2000, he was at *Litigation*'s helm, serving as editor-in-chief. In our interview, Judge Vilardo showed off the covers of each issue published under his leadership, which hang today in his chambers.

In the photograph accompanying this article, Judge Vilardo stands in front of two covers from an issue about the future of litigation, of which he's particularly proud. One cover, representing the past, shows two litigants fighting before a wizened and long-bearded judge in a stone-age courtroom; the other, representing the future, shows the same two litigants, decked out in space suits arguing before an alien judge. The idea for the cover came, in large part, from Judge Vilardo's then-10-year-old daughter, and he delights in recounting her brainstorm. As the display of *Litigation* covers makes clear, Judge Vilardo has retained his passion for the published word, making time, even as a busy lawyer and father, to dedicate countless hours to the journal.

Ultimately, Judge Vilardo practiced at Connors & Vilardo, the law firm he co-founded, for three decades before President Obama nominated him to the district court. It was not an office Judge Vilardo expected three decades earlier, when he joked about leaving Connors & Vilardo for an Article III appointment, nor was it one he expected at the time it came.

Judge Vilardo was not particularly political, having never sought or held any public office. But lawyers in Western New York knew him well and supported his candidacy. As Senator Schumer aptly explained, "They love him in Buffalo. When this vacancy occurred, I heard the voices in Buffalo chanting: 'Vilardo, Vilardo, Vilardo.'"

Once nominated, Judge Vilardo's reputation and non-political background served him well. The American Bar Association rated him unanimously well qualified. Senator Schumer enthusiastically pressed his confirmation, declaring, "Mr. Vilardo is a classic Buffalonian – hard working, salt of the earth, honest, and grounded." And, where other nominations stalled in the Republican-controlled Senate, Judge Vilardo's made it to the floor for an unopposed confirmation.

Judge Vilardo joined the bench on October 30, 2015. After litigating such diverse cases – civil and criminal, plaintiff-side and defense – for decades, Judge Vilardo was surprised by the even greater breadth of his judicial docket. And he immediately appreciated the differences between lawyering and judging. Lawyering, he found, was in many ways harder work than judging. Yet the toughest part of judging was harder than anything he had done as a lawyer: the responsibility of deciding cases. Every decision affects lives. Judge Vilardo finds the hardest decisions of all, the most wrenching, to be criminal sentencing decisions. Judge Vilardo remains cognizant of his duty to impose "a sentence sufficient, but not greater than necessary." And, although he gives all due weight to the Sentencing Guidelines, he is not afraid to vary from Guideline ranges, whenever appropriate.

The Judge's Expectations

Judge Vilardo is not a stickler for idiosyncratic local practices, but he has high expectations for counsel. In his courtroom, do not expect special rules – Judge Vilardo lets lawyers try their cases, as they see fit, and does not want to get in the way. If your practice, for instance, includes the formalities of asking permission to approach the witness in an examination, you may do so, but Judge Vilardo will not require

it. His expectation for lawyers is that they make their client paramount, as "that is what being a lawyer is all about." He also expects lawyers to treat everyone in the courtroom with respect. That includes the bench, of course, but also opposing counsel, witnesses, the marshals, and the court security officers. That is also why, in criminal proceedings, as a default, Judge Vilardo does not permit defendants to be shackled or cuffed.

Judge Vilardo enjoys serving on the bench. He revels in the camaraderie among the Buffalo and Rochester judges of the Western District of New York. He has likewise been impressed with the collegiality of the Second Circuit, where he's relished being invited to sit three times. Sitting by designation for the first time, among Judges Guido Calabresi and Rosemary Pooler just months after his elevation to the bench, was an "out of body experience." But, by far, Judge Vilardo's favorite role has been conducting naturalizations for new citizens and welcoming new attorneys to the bar.

The guideposts of Judge Vilardo's jurisprudence are the lessons he learned down the street in Buffalo, at his father's printing shop, and those he took from his judicial mentor, Judge Goldberg. He strives for high quality, not just where the public is likely to look, but in every opinion, even those most likely to be overlooked. Like the best lawyers do, Judge Vilardo aims to use words, the way Judge Goldberg did, so that his opinions can be best read and understood. And, carrying on his Buffalo family tradition, Judge Vilardo affixes the Vilardo name only to products in which he can take pride.

Editor's note: Timothy W. Hoover is a partner in the Buffalo office of Hodgson Russ LLP.

Legal History

Churchill in the Eastern District

By Joseph Marutollo

"We shall go on to the end, we shall fight in France, we shall fight on the seas and oceans, we shall fight with growing confidence and growing strength in the air, we shall defend our Island, whatever the cost may be, we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender." These stirring words from Winston Churchill have been cited by many public officials during the ongoing pandemic in order to provide inspiration and encouragement to people around the world.

While much has been written about Churchill, his intriguing connection to the Eastern District of New York – and specifically, Cobble Hill – deserves more recognition.

Churchill's mother, Jennie Jerome (later Lady Randolph Churchill) was born at 426 Henry Street in January 1854, mere blocks from the current location of the U.S. District Court for the Eastern District of New York. Jennie's father was Leonard Walter Jerome, a man dubbed the "King of Wall Street" for his enormous success in the stock market. Jerome Park – currently located between the Bronx High School of Science and Lehman College – was named in his honor.

Jennie Jerome was widely considered a beautiful and brilliant woman. She married Lord Randolph Churchill in 1874 and bore him two sons: John and Winston Churchill. Lord Randolph Churchill died in 1896. As the scholar Geoffrey Best reported, "[o]f Jennie's affection for Winston, and her anxiety concerning his welfare once she was widowed and he was out in the world in the 1890s, there can be no doubt; nor any doubt of his lasting affection for her."

On March 26, 1952, a plaque was unveiled at 426 Henry Street to commemorate Jennie's birthplace. Over 1,000 people, includ-

ing Sarah Churchill – Jennie's granddaughter – attended the ceremony for the unveiling. One of the speakers, Parks Commissioner Robert Moses, stated that "[i]f the British Empire has not in fact been liquidated, it is because Jennie Jerome's boy gave it superb leadership and indomitable courage which held the line in the second World War."

Another speaker at the ceremony, British Consul General Henry Hobson, stated that when Jennie was widowed in 1895, "she devoted her energy to helping and advancing the career of her son. How well she succeeded!"

On January 7, 1953, Jennie's son, then-Prime Minister Winston Churchill, visited 426 Henry Street. Several hundred people watched as Churchill made his pilgrimage to his mother's home, including New York City Mayor Vincent Impellitteri. Newspaper accounts indicate that Churchill carried a gold-headed cane and an unlighted cigar into the home, which was inhabited by the family of Mr. and Mrs. Joseph P. Romeo and their seven children (one of whom was a college student at Fordham University). Churchill spoke to the Romeo family members and thanked them for keeping a photograph in their living room of Jennie holding him when he was about 18 months old. Churchill called 426 Henry Street a "very nice house." A newspaper reporter asked Churchill to compare the four-story Brooklyn brownstone and brick dwelling with his own birthplace in the 247-year old columned Blenheim Palace, which was the seat of the Dukes of Marlborough. Churchill humbly responded by stating, "I am equally proud of both."

Churchill is one of the giants of the twentieth century, and a leader whose words are particularly important at present. As Australia's former Prime Minister Sir Robert Menzies once observed, Churchill's speeches were so rousing because he had "learned the great truth that to move other people, the speaker, the leader, must first move himself; all must be vivid in his mind." As leaders try to emulate Churchill's steely resolve during the current time of crisis, it is helpful to remember Churchill's roots right here in Brooklyn.

In the Courts

Settlement Conferences in the Age of COVID-19

By U.S. Magistrate Judge Lisa Margaret Smith

As a longstanding technophobe I have always been skeptical when colleagues have talked about doing settlement conferences by telephone, and have staunchly resisted doing so myself. Now, of course, with the advent of the COVID-19 pandemic, we are all faced with the need to accept the assistance of technology in much of what we do. As a result of the court allowing only limited access to the courthouse, and with the assistance of court staff and my own chambers staff, I have begun to conduct settlement conferences by teleconference, and I am amazed both by how easy it is, and by its efficacy.

Teleconferencing Options

The court has made available several options for judges to use for teleconferencing, and the one I have been using has several useful features; I suspect the other teleconferencing options have similar features. First, it allows me to select a "Main Room" where all the parties can convene. Myself, my courtroom deputy, my law clerk, and counsel for the parties can convene, just as we would in my courtroom, and the entire conference in the "Main Room" can be recorded, just as it would be in court. While we are in the "Main Room" I can ask all the same questions I would usually ask, about the status of discovery and what settlement discussions have occurred prior to that proceeding. I can then move the parties into separate, unrecorded "rooms," where I can converse with counsel privately, not on the record, just as I would if they came sepa-

rately into my conference room at the courthouse. Although I could allow the parties to move freely between the rooms, I can also set up the call so that I control who is present in any given room. I can move back and forth between the unrecorded rooms, very much as I would have counsel move in and out of my conference room for separate discussions. When our discussions have come to an end, either by reaching a settlement or by agreeing to adjourn the case for further settlement discussions at another time or to otherwise continue the litigation, I can move the parties back into the "Main Room" for confirmation of the status of the proceedings. If a settlement has been reached, the agreement can be placed on the record at that time.

Another useful part of the process is that the instructions for accessing the teleconference system are placed on the ECF system in advance, primarily for the parties to gain access, but this information is publicly available on PACER, therefore the "Main Room" part of the conference (and all my other civil conferences) is available for the press and the public to listen in to the public part of the conference (though I would place all but counsel for the parties on mute during such a conference). It may even be possible for counsel to invite their clients to attend such a conference from wherever they are, by having the client call to join the teleconference (some attorneys, working from home, may only have one telephone line available to them, so may not be able to separately be in communication with the client about any proposed settlement). I would be able to place counsel and the client in a room by themselves, where they can have private, unrecorded conversations in pursuit of a settlement. Moreover, counsel sometimes ask me to have private discussions with the client and counsel, and I could continue to do so using the teleconferencing system.

Although the policy of the Judicial Conference of the United States is generally to prohibit the broadcasting of proceedings in federal trial courts, the executive committee of the Judicial Conference has approved a temporary exception to the policy for civil cases. (A similar exception is made for criminal proceedings, but it is more complex so I do not describe it here). This temporary exception allows judges to authorize the use of teleconference technology to provide the public and the media with access to court proceedings during the period when public access to a federal courthouse is restricted as a result of health and safety concerns during the COVID-19 pandemic.

Educational Tool

The use of the teleconferencing system can also serve as an educational tool; I recently held oral argument in a civil case involving an emergency application for release on bail by a petitioner who had filed a petition for a writ of habeas corpus from Immigration custody, including argument on the petition itself. Counsel for the parties teleconferenced in for their oral argument. A group of law students from the Elisabeth Haub School of Law Federal Judicial Honors Program, who would ordinarily be externing in a federal judge's chambers and observing court proceedings while there, were able to listen to the teleconference from wherever they are currently residing. Their presence had no impact on the proceedings, it was as though they had slipped quietly into the courtroom to listen to the oral argument.

As a committed Luddite I have long resisted allowing attorneys to appear for settlement conferences by telephone, even if that meant that one or more attorneys had to travel by long distances to be present in my courtroom. I now believe that the use of teleconferencing, while not ideal, would allow me to consider granting such requests in future. This period of remote work is frustrating and challenging, but I, for one, am gaining an understanding of, and appreciation for, the amazing types of technology that can make me a more efficient judge in the future.

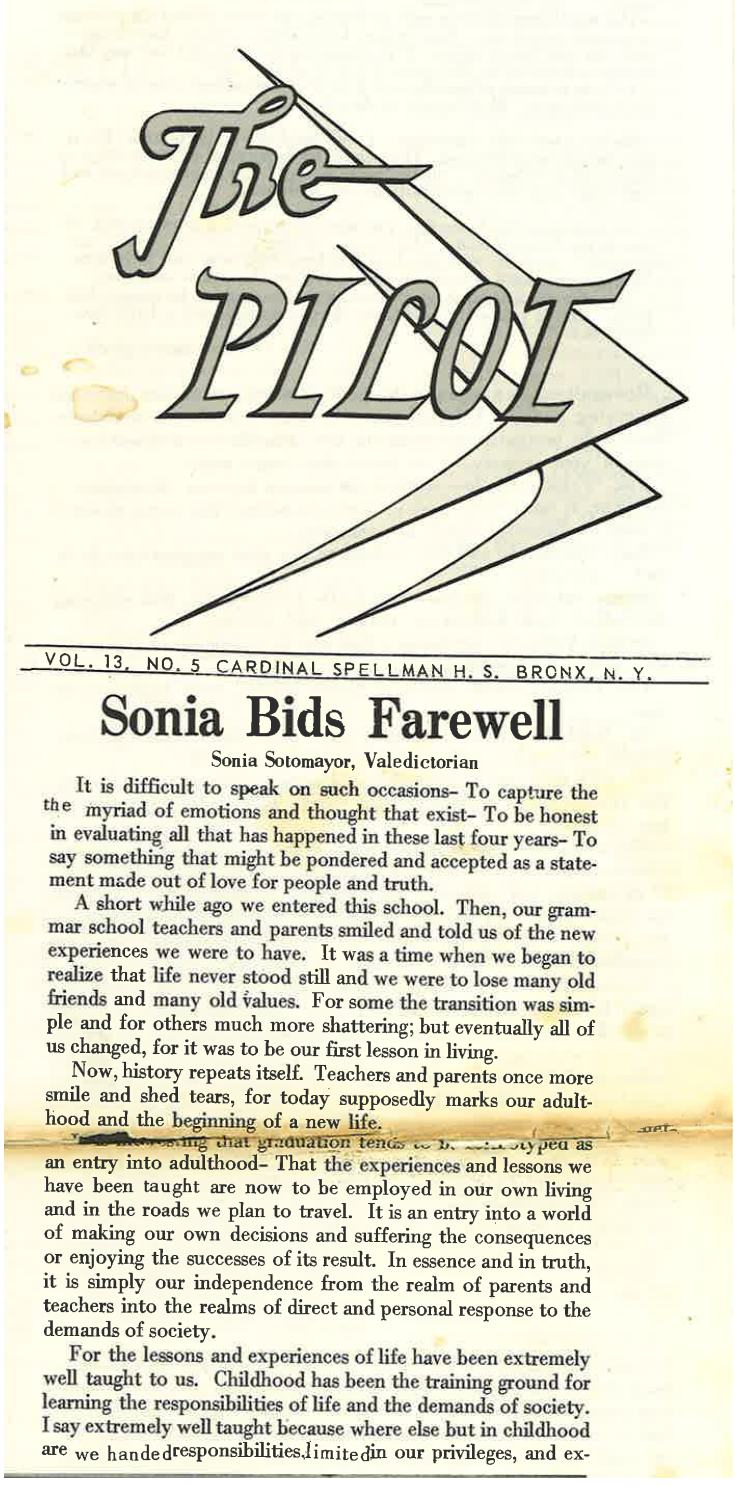
In The Court

Words of Hope from the Past

By Magistrate Judge Lisa Margaret Smith

Forty-eight years ago this coming June a young woman named

Sonia Sotomayor graduated from Cardinal Spellman High School in the Bronx. She was her class's valedictorian, and so, of course, she wrote a speech. Recently one of her schoolmates came across a copy of *The Pilot*, the Cardinal Spellman High School newspaper, from June 26, 1972, and, seeing that it contained now-Justice Sotomayor's valedictory speech, she gave it to a young lawyer she knew. That young lawyer happens to be my law clerk, and he gave it to me. I, likewise, sent the crumbling old newspaper to Justice Sotomayor, as I suspected that she did not have a copy any more, and I requested permission for the *Federal Bar Council Quarterly* to print her words in our upcoming issue. That permission was graciously granted, and so we present to you the original printed version



The PILOT

VOL. 13, NO. 5 CARDINAL SPELLMAN H. S. BRONX, N. Y.

Sonia Bids Farewell

Sonia Sotomayor, Valedictorian

It is difficult to speak on such occasions- To capture the the myriad of emotions and thought that exist- To be honest in evaluating all that has happened in these last four years- To say something that might be pondered and accepted as a statement made out of love for people and truth.

A short while ago we entered this school. Then, our grammar school teachers and parents smiled and told us of the new experiences we were to have. It was a time when we began to realize that life never stood still and we were to lose many old friends and many old values. For some the transition was simple and for others much more shattering; but eventually all of us changed, for it was to be our first lesson in living.

Now, history repeats itself. Teachers and parents once more smile and shed tears, for today supposedly marks our adulthood and the beginning of a new life.

[redacted] that graduation tends to be stereotyped as an entry into adulthood- That the experiences and lessons we have been taught are now to be employed in our own living and in the roads we plan to travel. It is an entry into a world of making our own decisions and suffering the consequences or enjoying the successes of its result. In essence and in truth, it is simply our independence from the realm of parents and teachers into the realms of direct and personal response to the demands of society.

For the lessons and experiences of life have been extremely well taught to us. Childhood has been the training ground for learning the responsibilities of life and the demands of society. I say extremely well taught because where else but in childhood are we handed responsibilities limited in our privileges, and expected to accept as adults the consequences of our failure. Upon entering adulthood, we are too well aware of the expectations of this society and the seemingly futile battle of diverting from its norms. It has been emphasized for us that success or happiness is obtained by the amount of responsibility we display in accepting the norms of this society and that deviant paths will only lead to failure.

Perhaps this measure of success and failure is the reason why our society is filled with so many ills- Why so many youths "drop out" before they even begin- Why so many parents are left only with the dreams of their children living the life they never had- Why educators still teach in a system that no longer is adequate for the time- Why our society in the face of demands for change still moves so slowly con't on p. 4, col. 2

con't from P.1, Col 5 [redacted]

For, in our children, their educators have destroyed the love for idealism, the hunger for striving and the confidence to endeavor th change the things they deem wrong. Children have been taught to live within the norms of this society but have failed to be taught how to create their own. So wrapped up has society become in providing its children with security and better opportunities, that it has forgotton the basic values of life- which is- that every individual must search to make his dreams of perfection real. That man must not settle for what exist but must challenge it in order to create his own ideals.

Society must realize that their children can not live in their world but must seek what seems to them at times radical and destructive changes. Thus, the lessons of childhood should not be the acceptance of the existing society but more importantly, lessons in temperance of change with concern for the people it effects, hope and not resignation to life, and the confidence in society to perpetrate dreams without being oppressed with condemnation.

And so, the measure of failure in the years of childhood in high school is the amount of responsibility for the existing society that is instilled. If parents and teachers measure success by academic grades, the prestige of the college the student attends or the high paying occupation he is prepared for- they are sadly mistaken. No, there is more. If here we have learnt to carry forth dreams- If here we havesupersede the limits of our own potentials and learnt to utilize and share each others strengths- If here we have incorporated and exalted the dreams of perfection into reality- then I measure these years as totally successful.

And so, we do leave Cardinal Spellman High School, each graduate to lose once more many old friends and many old values. Yet, there is a major difference from four years ago. For, today, we should carry forth bonds that transcend furthur than the physical and momentary events of Spellman. Those bonds that will not allow us to accept well taught lessons. Bonds that in the society we enter, will not allow our dreams to die. Bonds of friendship, that for the sake of one another, we will never allow the nostalgia or security of the past to impede the future.

I can not finish by wishing my classmates riches or power, nor eternal happiness or peace; but instead, I can wish you only the riches of continual change, the power to never cease growing, the happiness of eternal striving and the peace allotted only to a few in death because they refused to ever stop living.

of the valedictory address given by Sonia Sotomayor to her 1972 high school class (one spot cannot be read, due to the crumbled fold of the paper, it reads "It is interesting that graduation tends to be stereotyped as…").

Federal Bar Council News

Fellowship and Excellence in the Age of Social Distancing

By Travis J. Mock

As COVID-19 imposes a new, socially distant reality, the Federal Bar Council is finding new ways to foster fellowship and excellence among the bench and bar of the Second Circuit.

These initiatives address the needs of the moment and also place the Council in a position of strength going forward.

Expanding Access to CLE Programs

As described by Jonathan Moses, the president-elect of the Council, the Council is committed to fostering networking and professional development through substantive programs.

For example, the Council provides a series of remote continuing legal education ("CLE") programs for federal law clerks. Now, the Council has reimagined that series as the foundation of a new and rapidly expanding series of streaming and on-demand CLE programs for the Council's general membership.

To date, this new series includes over half a dozen programs on issues spanning the gamut of federal court practice. Program topics have included Section 1983 litigation, habeas petitions, Social Security, white collar, class actions, federal prosecutions of foreign bribery, and the impact of COVID-19 on the federal prison system. A series of webinars on trial practice will be released soon.

The Council has a long history of providing its members with free, high-quality CLE programming, and will continue that tradition with the Council's new live streaming and on-demand offerings. Council Executive Director Anna Stowe DeNicola anticipates that while some of these programs will be made available to non-members for a fee, both the streaming events and on-demand catalog will remain free to Council members.

A schedule of streaming programs can be found on the Council's online calendar. On-demand programs can be accessed through the online CLE section of the Council's website. Members who would like to suggest ideas for other new CLE programs are encouraged to contact the chair of the Program Committee, David Siegel.

Sustaining Committee Engagement

Social distancing also has not stopped the work of the Council's committees, which have continued meeting regularly by videoconference. Although DeNicola acknowledges that remote events cannot replace in-person participation, she notes that the Council's growing sophistication with videoconferencing will increase access to Council activities for those who cannot participate in person.

Continuing Public Service

In addition to innovating ways to engage its members, the Council continues to explore opportunities to engage the broader community.

Every year, the Council participates in the Second Circuit's Law Week civic education activities, spearheaded by the Second Circuit's Justice For All civic education initiative. As part of the court's outreach efforts, in past years lawyers partner with federal judges to go into New York City schools to teach topics related to the ABA's Law Day theme. This year the Law Day theme was the 19th Amendment. Although in-person classes have been suspended during the

COVID-19 outbreak, the Law Council worked with the Justice For All program to produce online digital content about the 19th Amendment to be distributed to teachers and students thropughout the greater New York Coity public schools.

Fostering Community

In addition to those substantive programs, the Council is also developing new, informal ways to engage its members. In March, the Council kicked off Trivia Tuesdays, a weekly online trivia challenge in which members can test their knowledge of the federal rules. Each Tuesday's round is accessible online from 12:00 p.m. to 5:00 p.m., so members can participate in the challenge when and where their circumstances allow.

In addition to offering some friendly competition, the Council offers walks through history with Throwback Thursdays, a weekly email series highlighting notable past editions of the *Federal Bar Council Quarterly*. Recent Throwback Thursdays have revisited fascinating discussions of lawyer ethics, gender equality, and the courts' early forays into videoconferencing, among other topics.

Building Digital Presence

In parallel with these efforts, the Council's staff is working to improve the organization's digital presence through more active engagement on social media. As a first step in this effort, the Council has retooled its LinkedIn account and is developing a more active presence with content designed to engage members and non-members alike.

Moving Forward

While the exigencies of COVID-19 have accelerated the rollout of these new remote initiatives, these resources will help to position the Council for continued success long after concerns over this pandemic have passed.

As Judge Vyskocil discusses in her From the President column, the Council's recently-updated new Strategic Plan sets goals for both growing the Council's membership and deepening engagement with current members. According to DeNicola, "a big part of the Council's thinking around its Strategic Plan relates to how the Council continues to provide value to its member community." The practice of law is changing and so, too, is the way that many lawyers engage with bar associations. DeNicola and Moses acknowledge that remote programming cannot replace the unique opportunities for networking and professional development that in-person interaction provide, and the Council will continue to prioritize in-person programs and events. But DeNicola and Moses are enthusiastic about the potential for remote programming to expand access to the Council and thus not only to attract new members but also to engage existing members more deeply.

Federal Bar Council News

Criminal Practice Committee Holds Second Sentencing CLE

By Avrom Robin

On October 3, 2019, the Federal Criminal Practice Committee, under the direction of its chair, David Anders, presented its second annual continuing legal education ("CLE") program, "Sentencing: The View from the Bench."

District Judge Vernon Broderick moderated. District Judges Ann Donnelly, Paul Engelmayer, Kiyo Matsumoto, and Cathy Seibel were on the panel.

Judge Broderick introduced the session with background and history on the Sentencing Reform Act and the Guidelines. The panelists then spoke individually about their approach to sentencing, including at what point in a criminal case they start thinking about the potential guideline range that would apply to a sentence. For most of the judges this happens very early in the case.

The panel explained the potential significance of bail in an ultimate sentencing determination. A defendant's ability to demonstrate a good record while on pretrial release – work, school, treatment programs, counseling – can have a significant impact at sentencing. As one panelist reminded us, "the best predictor of

the future is the past." Proof that the defendant is, post plea, saving money for an impending restitution judgment is also a positive factor in the sentencing equation.

The judges all agreed that, when the defendant pleads early in the case, the court often has very little hard information for use at sentence. From the defendant's perspective, this lack of information could be beneficial, as the discovery and 3500 material may not be favorable. On the other hand, sometimes a trial will show the defendant was considerably less culpable than the co-defendants, which plainly would be helpful for the defendant at sentencing.

Many, but not all, of the judges prefer to take guilty pleas themselves rather than sending them to the magistrate judge because it gives them a chance to see and hear from the defendant before the sentencing hearing.

On written sentencing submissions, the judges all said they read the letters in support from family and friends carefully but reminded us that letters are a question of quality, not quantity. A lot of general letters that all say the same thing are not useful. Also, when letters contradict each other about the defendant's past or character, that is obviously not helpful. Judges notice these details, so defense counsel should monitor and manage all submissions to the court.

Submissions from social workers, while important and useful, should not make legal arguments or statements on what the appropriate sentence should be. Counsel should perform that legal analysis themselves. Insights from social workers about how the client will react to life in prison can be helpful. Social worker reports should both look back, to childhood influences, and forward, to post sentence reentry into society.

An "Eye Opener"

Panelists disagreed on how they weighed sentencing recommendations from Probation, but agreed that a recommendation for a variance is "an eye opener."
The panelists all said that sentencing for cooperators can be especially difficult, for example when the defendant has committed murder or other violent acts.

With regard to oral argument at sentencing, the attorney's credibility is important, especially on sentencing requests. The defendant need not speak, but when defendants plan to speak on their own behalf, counsel should prepare them thoroughly beforehand. The defendant should acknowledge the victims and show genuine remorse.

Several fact patterns were presented, all drawn from sentencing transcripts in recent cases. One example illustrated how *Fatico* hearings generally hurt the defendant because a lot more bad information gets on the record. A second example illustrated how judges view abuse of public trust as even more serious than private company fraud. A third example illustrated the downside of pleading after the trial starts.

The Federal Criminal Practice Committee plans on presenting its third annual "Sentencing: The View from the Bench" in October of 2020 and you are all encouraged to attend.

A Lawyer Who Is Making a Difference

Jojo Annobil of the Immigrant Justice Corps

By Pete Eikenberry

As a law student in Ghana, Jojo Annobil was arrested with 39 other law students demonstrating against the human rights excesses of a military government and imprisoned for two weeks. After graduation, he became a corporate lawyer in Ghana, but in 1985, as a result of the absence of due process under a second repressive military government in Ghana, Jojo came to New York City where he lived with his sister, a nurse.

He attended Fordham Law School to again seek to become a

lawyer and received two awards. He supported himself as a full-time student working as a security guard. After graduation, he was employed by the Legal Aid Society. As attorney-in-charge of the Legal Aid Society's Immigration Unit, he built its immigration unit into the premium immigration litigation and advocacy unit in New York City; from nine lawyers when he started, he increased the number to a total of 43.

In his Marden Lecture at the New York City Bar Association in 2007, Judge Robert Katzmann related that only 10 percent of the immigrants facing deportation in the United States had lawyers. He stated that in the Second Circuit, even when there was legal representation, too often lawyers miserably failed their clients, not infrequently submitting photocopied form briefs.

The judge doggedly continued to carry the message, and a Study Group on Immigrant Representation was formed to bring together all of the stakeholders. As one initiative, Judge Katzmann proposed the creation of a national lawyer corps of immigration lawyers to serve poor immigrants, modelled after the Peace Corps. In response to an interview he gave to Kirk Semple of *The New York Times* discussing the corps idea, Judge Katzmann was contacted in 2013 by the Robin Hood Foundation. They wished to help him realize his dream of a lawyer corps.

The IJC Is Born

The Robin Hood Foundation incubated the project with expert consultants and a distinguished advisory committee. In 2014, the Immigrant Justice Corps ("IJC"), https://justicecorps.org/, was born with continuing support from Robin Hood which provided lead funding, space and technical advice, as well from two other major early funders, Bloomberg Philanthropies and JPB Foundation. From the start, William Zabel has served as chair of the Im-

Jojo Annobil, Executive Director of the Immigrant Justice Corps

migrant Justice Corps board.

In 2016, the Immigrant Justice Corps recruited Jojo to be executive director. "With his vast experience, energy and wisdom, Jojo has given IJC superb leadership," says Chief Judge Katzmann. As executive director, Jojo is in charge of recruiting recent graduates, and training and placing them into legal service and community based organizations serving immigrants. In a highly competitive process, IJC offers prestigious two-year fellowships to 25 recently minted law school graduates ("Justice Fellows.") The Corps also recruits 10 college graduates ("Community Fellows") whom Jojo refers to as "first responders."

Upon retention, the 35 Fellows undergo three weeks of training by seasoned professionals focused on developing the ability to efficiently represent immigrants facing deportation, or seeking lawful status or citizenship. IJC has a staff of 15, including a training staff and lawyers who mentor the Fellows. There are currently 82 Fellows on the job. IJC hosts monthly trainings for the fellows on emerging issues in immigration. There is also a yearly one-day training day where alumni and current Fellows meet.

Community Fellows

The college graduate first responders are trained to screen immigrants for possible immigration benefits, acquaint them with the American immigration system and assist them to complete applications for green cards or citizenship. Complex cases are referred to the lawyers. The Community Fellows are embedded in the immigrant communities to identify those who need help. They occupy a very unique representation space for immigrants, different than other legal workers and, possibly, the reason they have been so successful in protecting families.

Immigrant families recognize Community Fellows as more than legal help, they are a part of the immigrant community; many are immigrants or children of immigrants themselves. For example, if a "breadwinner" or head of the family is deported, it has a detrimental effect on the whole family, especially the children. The more communities the Immigrant Justice Corps can help keep together, the more funding it can receive to further its mission.

At the same time as recruitment, IJC circulates requests for proposals from legal services providers and community-based organizations serving immigrants who would like to have a Fellow in their organization. Recipient organizations include Catholic Charities of the Archdiocese of New York, the Door, Catholic Legal Services of Miami and the Capital Area Immigrant Rights ("CAIR") Coalition. While New York City is IJC's home base, it has in six years expanded to 10 other states and 33 cities including Arizona, California, Connecticut, Florida, New Jersey, Maryland, Minnesota, Nevada, Texas, and Virginia. There is an enormous need. In 2014, when IJC was founded, 400,000 immigrants were in removal proceeding; now that number is easily at 1.1 million.

Objectives Achieved

Under Jojo's leadership, the Immigrant Justice Corps has achieved the objectives of:

- Training the next generation of immigration lawyers, and
- Improving the quality of legal representation of immigrants by the power of example of a cadre of well-trained and zealous advocates, and
- Increasing the stock of available advocates since a lawyer who enters immigration practice usually does not leave it, and
- Helping agencies to substantially build their capacity to serve more immigrants.

The Immigrant Justice Corps has served over 70,000 individuals and families. It has a 93 percent record of closing cases with a favorable outcome and 92 percent of the Fellows have remained immigration lawyers after their fellowship ends. IJC continues to thrive under Jojo's vigorous direction, with funding mostly from philanthropy, including the Federal Bar Council Foundation. Jojo Annobil, the Ghanaian trained corporate lawyer, is now the dynamic head of an enormous effort benefiting thousands of immigrants. Judge Katzmann put it this way: "When Jojo speaks, he draws from his own experience as an immigrant. By his in-

spiring example, as a tireless advocate for immigrant justice, he has been an extraordinary leader of the Immigrant Justice Corps, contributing importantly to the fair and effective administration of justice for non-citizens. He has shaped the careers of newly minted lawyers, who themselves have made a huge difference in the lives of thousands of immigrants in need of quality legal assistance. His is a distinguished, ongoing legacy."

Editor's note: Byron Almeida assisted in the preparation of this article.

Federal Bar Council News

On January 4, before social distancing, the First Decade Committee kicked off 2020 with its third volunteer event for Encore Senior Center, preparing meal service and delivering meals to seniors in midtown Manhattan. Pictured are (front, left to right) Colleen Faherty and Kristine Fitzpatrick as well as (back, left to right) Travis Mock, Alex D'Amico, C. Briggs Johnson, and Ana Lea Setz. Not pictured are Renee Wong and daughter Layla. Anyone interested in joining in the First Decade Committee's volunteer events should contact Travis Mock (tmock@pincus-law.com) for more information.