Federal Bar Council Quarterly

Sept./Oct./Nov. 2019 www.federalbarcouncil.org Vol. XXVII, No. 1

In This Issue:

We invite you to connect with us on LinkedIn.

From the Editor

Summer Days

By Bennette D. Kramer

Every year when I first see the green of the forest, the blue of the water and sky, and the gold of the sand, I know that I have arrived back in Michigan – at a place we call the Lake. The beauty of the landscape takes my breath away. In the summer I spend time at a cottage sitting on a peninsula between two lakes – Lake Michigan and White Lake (a small inland lake formed by glaciers and the White River). Never mind that this wonderful spot is 800 miles from Brooklyn or a 65-mile drive from the most convenient airport; once I arrive, the distance does not matter.

Do not imagine that the cottage is grand. It is green and sits on the side of a sand dune overlooking Lake Michigan, so that it looks huge from the exposed side and modest from the dune side. It has four bedrooms upstairs, a room under the kitchen, and sleeping quarters above the garage (which is exclusively used for boat and bicycle storage). The kitchen has not been remodeled since my grandmother's days, except for new appliances. Although we have taken up the orange shag carpet, discovering lovely pine floors underneath, and have redone the cushions on the chairs, the furniture was put into place by my grandmother 75 years ago. The house is comfortable but far from luxurious.

The house has frequently been threatened by high water in Lake Michigan. In 1954-55, the house was moved back about 100 feet, and the old foundation subsequently fell into the lake. In 1986-87, we lost all the bank in front of the house, and my parents build a concrete sea wall to stop further encroachment by the lake. This year, Lake Michigan, along with the rest of the Great Lakes, is at a record high due to a very wet spring and summer. We have been protected by the sea wall. In between high water events we have seen dune building along the shoreline.

My grandfather bought the cottage in 1941 and it has been passed down the family since then. My grandchildren are the fifth generation to enjoy it. My grandmother and grandfather came to the Lake from Chicago because my grandmother's sister and her family already had a cottage. My uncle was the minister at our small summer church during July and August, leaving his Kenilworth Union Church parishioners to fend for themselves. My mother then became the owner of the cottage. Following her death, my four siblings and I inherited it and have shared it for the last 26 years. We all grew up spending our summers at the Lake, along with many first cousins, second cousins, and now even third cousins. Several years ago I counted and reached 65 people to whom I am related. There have been more marriages and births since then.

The cottage is part of the Sylvan Beach Resort Company. The SBRC was established in 1895 and the cottages built soon after. Businessmen from Chicago were the first shareholders. During the early 20th Century, a boat used to come from Chicago and dock nearby. The businessmen would come up on the Friday boat and leave on Sunday evening, while their wives and children would stay for the summer away from the city heat. As transportation improved, cottages were bought by people from Grand Rapids, 65 miles away, and Detroit, over 200 miles away. Now, cottage owners and their families come from all over the country. When I was growing up, my family drove from Kansas City, Missouri.

A resort company is a creation of the State of Michigan much like a co-op. We have 63 cottages, along with parkland, a small post office, a community house, tennis courts, and boat docks. We hold shares in the SBRC company, lease our land, and own our buildings. Transfers and any changes to the cottages must be approved by a board of directors.

No work may be done during the season – July 1 through Labor Day – so that cottage owners may enjoy the summer quiet.

When we were children, we all took off our shoes when we arrived, hoping to find them when we were ready to go home. We spent long days in the dunes, at the beach, swimming, reading, sailing, water skiing, and spending time with our friends. Now that we are grown up, and past grown up, we still take off our shoes and then we do much of the same things, along with cooking the abundant fruits and vegetables, eating them on our wonderful screened porch, and playing golf. I relish my runs in the woods in the nearby state park (a former Boy Scout camp) with my dogs every morning.

We brought our children to the Lake every summer. It is rarer now for families to spend the whole summer at the Lake because both parents work and the cottages have been divided among family members who each take some time during the summer, but our children have also fallen under its spell. Now, my grandchildren come too, but not as frequently as we were there or even when they were smaller. Unfortunately, they are too busy to spend time up there every summer. For me, watching them enjoy the same things that I enjoyed many years ago gives me a lot of pleasure.

But what is most important to me is reuniting with old friends every summer. These are friends that I grew up with and have seen most every summer for over 70 years. We live far away from one another and have gone in different directions during our lives, but we meet up again in sum-

A view from the deck.

mer. We have great dinners, take long walks with our dogs, kayak and paddle board, and sit on the beach and chat. Every evening the whole community watches the beautiful sunsets over Lake Michigan. The comfort of relaxing with these long-time friends and family is what pulls me back to the Lake summer after summer.

Editor's note: If you have a special place that you would like to write about, get in touch. We would welcome your contribution.

In the Courts

Magistrate Judge Sarah Cave Takes a Seat

Lisa Margaret Smith

Sarah L. Cave is the newest magistrate judge for the Southern District of New York, where she ascended to the seat that was held by Magistrate Judge Henry Pitman until his retirement on September 30, 2019. On October 1, Magistrate Judge Cave was officially sworn in and began her duties. A public swearing-in ceremony took place on November 4.

Magistrate Judge Cave is a 1997 graduate of the University of Michigan Law School, where she was a member of the Journal of Law Reform, for which she served as note editor and associate editor. Judge Cave began her studies at Michigan in the summer of 1995, immediately after graduating from Colgate University, *magna cum laude*, in Hamilton, New York. By starting her legal studies in the summer, Judge Cave was able to graduate from law school a semester early and take the bar in February.

After law school Judge Cave came to New York, where she began her career with Hughes Hubbard & Reed in March 1998. Despite enjoying her work at Hughes Hubbard, Judge Cave kept her eyes open for a clerkship opportunity and, in 2000, she was hired by U.S. District Judge Joan A. Lenard of the Southern District of Florida to serve as her law clerk. This was immediately followed by service as a staff law clerk to the U.S. Court of Appeals for the Seventh Circuit in Chicago. After her time as a law clerk Judge Cave returned to New York and to her career with Hughes Hubbard & Reed, where she rose to become a partner and remained until becoming a magistrate judge.

Judge Cave was inspired to apply for the position of magistrate judge by the good judges for whom she worked and before whom she has appeared over the course of her career. Her first experience with a federal judge was when she worked for Senior District Judge Michael A. Telesca in Rochester during her first law school summer. As an associate at Hughes Hubbard she had occasion to appear in court, and then her clerkship experiences with both Judge Lenard and the Seventh Circuit instilled in her a deep understanding of the importance of fairness and efficiency in the way the federal judicial system is administered. Judge Cave's experiences led her to seek to develop the skills and temperament that would make her eligible for a judgeship.

Judge Cave described the magistrate judge selection process as very rigorous. It was focused on the merits of a candidate's background, experience, and qualifications. Judge Cave prepared diligently, focusing on aspects of her federal and civil practice, and expressing why her own experience and varied background would be of assistance to the work of district judges. She found that the merit selection panel, which screens candidates, was engaged in focused questioning, based on their own experiences as practitioners in federal court, both on the civil and on the criminal side. Her subsequent interview with the Committee of District Judges also was challenging, and she worked hard to describe the different experiences that prepared her for the position

of magistrate judge.

During her career at Hughes Hubbard, Judge Cave co-chaired the firm's personnel and *pro bono* committees, and was active in organizing several of the firm's diversity and women's initiatives. She also served on the board of directors of the Legal Aid Society, for which she co-chaired the diversity and inclusion committee. She believes that these experiences, and her role as a mentor to associates from various backgrounds and from all around the world, will help her to engage with and be a resource for her own law clerks, as well as for law clerks serving other judges.

After having been involved in many bar associations and civil organizations, including, as noted, the Legal Aid Society, as well as the Federal Bar Council, the New York City Bar Association, and the New York State Bar Association, among others, Judge Cave encourages younger lawyers to become involved, and to participate in bar association committee work. Judge Cave believes that experiences like this can help a young lawyer develop a profile inside and outside a law firm and acquire contacts in the profession, as well as attract clients. She appreciates those who mentored her, in particular by encouraging her to be involved in bar associations and community organizations.

Judge Cave has developed some insight into what it may take to be considered for a position as a magistrate judge. She recommends that lawyers develop as varied a legal practice as possible, trying in different ways to have some exposure in areas that may not be their main focus, for example developing opportunities for exposure to criminal practice by doing *pro bono* work, or by becoming involved in white collar criminal defense in matters related to a lawyer's civil practice. As noted above, bar activities are an excellent way for a practitioner to raise his or her profile and enhance their federal court practice. She also encourages mock interviews, conducted by friends and colleagues. She notes that it takes practice to figure out the best way to describe oneself and to answer the types of questions asked by both the screening committee and the district judges, in order to highlight one's strengths. Judge Cave's experience was that all of these things helped her to be in a strong position during the interview process. In particular, she believed it was useful to have people in a variety of areas as references who knew her well and could attest to her strengths, including not just colleagues, but also judges, adversaries, co-counsel, and clients.

Judge Cave has hired two law clerks to aid her as she begins her new job, along with a courtroom deputy. She had an

Editors

Managing Editor
Steven A. Meyerowitz

Editor-in-Chief
Bennette D. Kramer

Founder
Steven M. Edwards

Board of Editors

Marjorie E. Berman
James L. Bernard
Peter G. Eikenberry
Brian M. Feldman
Steven Flanders
James I. Glasser
Steven H. Holinstat
Molly Guptill Manning
Joseph A. Marutollo
Stephen L. Ratner
Hon. Lisa Margaret Smith
C. Evan Stewart

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 2019 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.

embarrassment of riches when it came to law clerk candidates, as many qualified young lawyers contacted her after her appointment was announced. She knew she needed appropriate candidates who would bring the right experience, and who would help her to build a strong foundation for the years ahead, including an infrastructure and system for organizing her chambers. One of her clerks clerked for a magistrate judge before; Judge Cave previously worked closely with the second law clerk, so she knew that this candidate would bring the right approach and attitude to the position. Judge Cave is also confident that her newly hired courtroom deputy brings the right work ethic to the task ahead, as the deputy took the time to shadow other magistrate judge deputies during criminal duty even before Judge Cave was sworn in, in order to be fully prepared for the tasks ahead.

Judge Sarah Cave

Judge Cave has enjoyed being in private practice, but there are certain things she will not miss. She is, in particular, looking forward to not having to take depositions, not having to bill clients, and not having to keep up with continuing legal education requirements. On the plus side, she looks forward to getting to know her new colleagues, and to facing new challenges and learning as much as she can about her new position. In fact, before she began the job on October 1, Judge Cave took the time to read as much as she could find about the magistrate judge position, including magistrate judges' opinions in a variety of cases; she drafted her individual practices, comparing them to those used by other sitting magistrate judges; she observed various types of court proceedings; and she talked to various colleagues about the job. In these ways she believed she prepared as much as she could for the task ahead of her: serving the people of the Southern District in her new position.

In the Courts

Magistrate Judge Henry Pitman Retires

Lisa Margaret Smith

On July 8, 1996, Henry Pitman was sworn in as a magistrate judge for the Southern District of New York. More than two decades later, on September 30, 2019, he retired from his post, having more than fulfilled his oath of office to "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon" him as a magistrate judge.

Judge Pitman came to the court from the firm of Lieberman & Nowak, where he was a partner. He had previously served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office, also in the Southern District, and earlier in his career he was an associate at Chadbourne & Park. In 1978, immediately after graduating from Fordham Law School, *cum laude*, he entered into a clerkship with District Judge Lloyd Francis MacMahon of the Southern District of New York. Judge Pitman has spent his entire life in New York City, from being born in Queens to attending both college and law school at Fordham, through his clerkship and during his professional career. On the cusp of retirement he has no plans to leave the city he loves.

On August 21, a little more than a month before his official last day with the court, this author interviewed Judge Pitman to hear his thoughts on his impending departure. I asked, "What part of your life before becoming a judge prepared you the most for being on the bench?" Judge Pitman's response was swift and sure: clerking for Judge MacMahon right after law school. Judge Pitman reported that Judge MacMahon, who died in 1989, was a wonderful teacher, and many of the lessons he taught Judge Pitman have informed his time on the bench. One of the things Judge Pitman remembers learning from Judge MacMahon, which he has tried to live up to, is not to write excessively long

Judge Henry Pitman

opinions. Judge MacMahon told his clerks that the district court is not the court of appeals, that it is the lowest court in the federal judiciary, so a judge should not write appeals court or Supreme Court opinions; just write enough to get it decided, he would say. Judge MacMahon also taught Judge Pitman not to be paralyzed by the fear of getting a decision wrong. Rather, a judge should "rule and roll," as Judge MacMahon told his clerks. Judge Pitman learned not to let the fear of being reversed prevent him from making a decision, because, as Judge MacMahon would say, there is no judge on the bench who has not been reversed.

I also asked the judge, "What do you wish you had known when you first started the job?" He responded that the initial training was extremely helpful. The Federal Judicial Center, the research and training agency of the federal judiciary, runs training programs for new judges, familiarly known as "Baby Judges' School," plus there is usually an opportunity for a new magistrate judge to shadow and learn from one or more experienced magistrate judges before having to go it alone. Judge Pitman does wish that he had known better how to delegate certain matters early on. He expressed that when he started his career he did not delegate as much as he should have to law clerks and his courtroom deputy. He realizes now that being nervous and cautious about making a mistake caused him to be proactive, even with administrative matters that perhaps did not require so much of his personal attention. Judge Pitman also wished that he had known the importance of delegating more administrative tasks, so that he could have spent more time on things that did require his full attention.

When I asked Judge Pitman to identify the most important lesson he has learned during his time as a magistrate judge, he responded that it is crucially important to keep an open mind until you have heard both sides of an issue. He said, "You never know where wisdom is going to come from." He described having cases with a local solo practitioner against a white shoe big firm lawyer from an Ivy League law school, yet by listening with an open mind he was able to assess that it was the local attorney who had the better argument, even if it had not been presented with quite as much polish and panache.

I inquired of the judge what he will miss the most about being a magistrate judge, and he replied that the thing he would miss most is the wonderful people who work in the courthouse. He commented that each and every person in the courthouse, from members of the maintenance staff to the employees in the district executive's office and interpreters, court reporters, court security officers, pre-trial and probation officers, chambers staff, deputy marshals, and everyone else involved in the running of the court, are committed to getting the work of the court done. He observed that everyone in the courthouse works to eliminate distractions in order to allow the judges to do the things they need to do to decide the cases that come before them. He also noted that he has never observed that kind of smooth and cooperative functioning in any other place where he has worked, and that he will definitely miss the people.

I asked Judge Pitman what he would miss the least about being a magistrate judge, and his initial response was that there was not anything that he would not miss. He went on to say that even fairly ordinary tasks, such as deciding Social Security appeals, which are not the most exciting part of the job, but impact someone's life in a substantial and direct way, were worthwhile. He eventually admitted that he would not miss the process of hiring new law clerks, because each and every candidate is qualified and bright, and he knew that he would only be able to hire one of them, so the rest would necessarily be disappointed.

I asked Judge Pitman if there was a piece of advice that he would give to his newly appointed colleagues. He replied that each one should keep up with motions made by letter, as well as more formal motions, because once you get behind it is nearly impossible to catch up.

I also asked if he had any advice for his more experienced colleagues. He responded that his advice was to enjoy each and every day as a judge, because there is no better job. He did offer some words of appreciation for the public, saying that it has been

his honor and privilege to work as a magistrate judge. Judge Pitman expressed gratitude to all of the attorneys who have appeared before him, because more often than not they taught him something about the law.

Legal History

The Trials of "Scooter" Libby: Justice Run Amok?

By C. Evan Stewart

On July 6, 2003, a retired American diplomat Joseph C. Wilson IV published an op-ed piece in *The New York Times* challenging President George W. Bush's assertion that Saddam Hussein had sought to acquire nuclear materials for his regime in Iraq. That essay triggered a Rube Goldberg-like series of events that, frankly, confound me to this day.

Novak's Column

A week later, on July 14, 2003, well-known, national journalist Robert Novak published his regular column. In it, Novak wrote (among other things) that Wilson's earlier mission to Niger to investigate claims that Iraq had made plans to buy and transport uranium from Niger had been a result of his wife's suggestion. Wilson's spouse was publicly identified: Valerie Plame, an employee of the Central Intelligence Agency. Novak did not specify his sources, other than to reference "senior administration officials."

Novak's initial and primary source for his Wilson-Plame story was Richard Armitage, the Deputy Secretary of State (and a critic of the Iraq War); it was subsequently confirmed to Novak by Karl Rove, a key presidential aide, and Bill Harlow, the CIA's Director of Public Affairs. Armitage also leaked the Wilson-Plame story to Bob Woodward of *The Washington Post*.

The Intelligence Identities Protection Act of 1982 makes it a federal crime to disclose publicly the identity of a "covert" intelligence agent; and the CIA considered whether the Novak column triggered this concern. After its investigation, the CIA concluded that there was "no evidence" that the disclosure of Plame had harmed any CIA operation, any agent in the field, or "anyone else, including Plame herself." Indeed, by 2003, Plame was *not* a "covert" agent (as defined by the statute); furthermore, according to the CIA's acting general counsel, "dozens, if not hundreds of people in Washington" knew Plame was a CIA employee before the publication of Novak's column.

Let's Appoint a Special Counsel

Notwithstanding, the Novak column and the "leak" of Plame caused a political firestorm; it appeared to reflect a (clumsy) attempt by the Bush administration to punish opponents of the Iraq war. Attorney General John Ashcroft recused himself from any investigation into the matter out of an "abundance of caution," so it fell to his deputy, James Comey. Comey, in short order, appointed his good friend (and godfather to one of his children), Patrick Fitzgerald, as a special counsel. Fitzgerald promptly convened a grand jury and went to work.

After hearing from a bevy of witnesses, the grand jury indicted no one for violating the 1982 statue (not surprisingly). But, I. Lewis "Scooter" Libby, chief of staff to Vice President Dick Cheney, was indicted on October 25, 2005 on multiple counts for lying about his communications with journalists (other than Novak) regarding when and what he said to them about Plame in 2003. According to the indictment, Libby lied about discussions he had with Tim Russert (NBC News), Matthew Cooper (*Time Magazine*), and Judith Miller (*The New York Times*) – lied insofar as he *denied* he leaked Plame's CIA status to Cooper and Miller, and lied when he said he remembered first learning about Plame in a conversation with Russert on July 10, 2003. At

his press conference announcing Libby's indictment, Fitzgerald accused Libby of having harmed national security, said that Libby had thrown "sand…in his eyes," and called the charges of lying quite serious because "truth is the engine of our judicial system."

On March 6, 2007, after deliberating for 10 days, a District of Columbia jury convicted Libby on four felony counts, while acquitting him on another. Still proclaiming his innocence, Libby was sentenced to 30 months in jail, fined $250,000, and subjected to two years of supervised release after the end of his prison term (this was based upon Fitzgerald's sentencing recommendation that Libby's "falsehoods were central to issues in a significant criminal investigation").

On July 2, 2007, President Bush commuted Libby's prison sentence; but – notwithstanding Vice President Cheney's imploring – he refused to pardon Libby. On November 3, 2016, the District of Columbia Court of Appeals reinstated Libby as a member of the D.C. Bar. And on April 13, 2018, President Trump pardoned Libby.

I Am Confused

Almost immediately after having become special counsel, Fitzgerald learned what Comey already knew: the actual, primary leaker was Armitage. So why not go after him? Apparently, because (as set forth above) there was in fact no violation of the 1982 statute. So, why did the investigation not end then and there, with the special counsel closing up shop? (Instead, Fitzgerald instructed both Armitage and Novak *not* to go public with the fact that Armitage was the primary source for Novak.) And why go after Libby, who indisputably was not the leaker to Novak (and thus did not throw "sand…in [Fitzgerald's] eyes" on that score), and the alleged "illegality" was Libby's lying about (misremembering) a call with Russert (that it was Russert who brought up Plame's name) and lying about leaking Plame's name to Miller and Cooper (notwithstanding that neither published the "leak" *prior* to Novak's column)?

The answer seems to be that Fitzgerald was after a bigger fish than Libby. According to Libby's lawyer, Fitzgerald twice offered to drop all charges against Libby if he would "deliver" Vice President Cheney to him on a silver platter. Exactly what crime Cheney supposedly committed is/was unclear (Fitzgerald did say in his closing argument to the jury: "There is a cloud over the vice president. He sent Libby off to [disclose Plame's identity to Miller]." Fitzgerald also told the jury that CIA agents could have died because of Plame's "outing": "[Hostile foreign governments] could arrest them. They could torture them. They could kill them."). When Libby declined the twice offered "deal," Fitzgerald settled for prosecuting him.

What Was the "Evidence"?

Russert's initial recounting to the feds of what happened in the July 10, 2003 phone call with Libby was quite equivocal – he could not remember whether or not he had mentioned Plame's name to Libby (but would not rule it out). At the trial in 2007, however, Russert was unequivocal. Now (undoubtedly, with the help of governmental horseshedding), he was absolutely *certain* that Plame's name had *not* been discussed on the call. Standing alone, this difference in the two men's recollections of a phone call from years before seems to be of little moment – certainly not for meeting the burden of proving a crime. But what about Libby's interactions with the other reporters?

As for Cooper, it turned out that his work papers and notes *supported* Libby's version of his conversation with the *Time* reporter. (Karl Rove, in fact, turned out to be Cooper's source for Plame.) Consequently, the jury acquitted Libby of lying to the FBI about his conversation with Cooper.

This made Libby's interactions with Miller in June and July of 2003 pretty darn important to Fitzgerald's case. Indeed, in his summation to the jury, Fitzgerald called her testimony "critical" to his prosecution of Libby. At the close of the government's case, Libby's defense team moved to dismiss the allegation that Libby lied to Miller *after* the Novak column was public. The government did not oppose the motion, and the Court granted it. This left a discussion between Libby and Miller on June 23, 2008 as the

fulcrum on which hung the jury's conviction of Libby.

Miller originally went to jail (where she spent 85 days) rather than testify before Fitzgerald's grand jury about her confidential communications with Libby. She was freed from her contempt order after Libby contacted her and specifically released her from any obligations of confidentiality. Miller then testified before the grand jury twice; the second appearance was the most consequential because she had found her notes of her 2003 conversations with Libby, and Fitzgerald used those notes both to refresh her memory and prompt her testimony. With respect to the June 23 meeting, Miller's notes included the following: "(wife works in Bureau?)." And in her notes of a July 8 Libby-Miller conversation there was an untethered reference to "Valerie Flame [sic]." Based upon those notations, Miller told the grand jury she was "certain that Libby and I discussed Wilson's wife…. [But that she] couldn't remember if that [June 23] was the first time I heard that she works for the CIA."

At trial, Miller was one of 10 journalists called to testify; she was the *only* one who testified that Libby had talked about Wilson's wife. Her testimony mirrored that of her second grand jury appearance (based upon the above quoted June 23 notes); at the same time, she also testified that she "did not recall Libby's having mentioned Plame's name, the fact that her job was secret, or that she had helped send her husband to Niger for the CIA." Nonetheless, her testimony about her June 2003 conversation with Libby could not be squared with what Libby had said about his July 10 call with Russert, and that served to corroborate Russert's unequivocal testimony. Thus, Miller's testimony was, as Fitzgerald told the jury, "critical" to Libby's conviction.

On July 2, 2007, President Bush commuted Libby's prison sentence; but he refused to pardon Libby.

Innocent and Not So Innocent Mistakes

In the same year as Libby's conviction, Plame published her account of her "outing": "Fair Game: My Life as a Spy, My Betrayal by the White House" (Simon & Schuster 2007) [which later became a movie starring Naomi Watts as Plame]. In 2011, at Libby's suggestion, Miller read "Fair Game" and a light bulb went off. Plame had written that, during the time when she was in fact a covert agent overseas (years before 2003), her covers had been various "Bureau" jobs at the State Department. As Miller subsequently wrote in her memoirs ("The Story: A Reporter's Journey" (Simon & Schuster 2015)), if Libby had been her source on Plame as a CIA operative, "he would not have used the word *Bureau* to describe where Plame worked," since the CIA (unlike the State Department) is organized by divisions. *Someone else* had thus been Miller's source about Wilson's wife working at the "Bureau" ("one of the twenty or more nonproliferation experts I routinely spoke to")!

In her prep sessions with Fitzgerald (and before the grand jury), he had asked Miller several times what Libby had meant when he said "Bureau" – "Did he mean FBI?" Miller replied no; that Libby had only been talking about the CIA. But Fitzgerald, in steering Miller to the CIA conclusion, knew that Plame had had prior cover jobs in the State Department's "Bureaus." He nonetheless failed to provide that information to Miller; and given that it constituted exculpatory evidence vis-à-vis Libby, Fitzgerald never informed Libby's lawyers of Plame's State Department "Bureau" jobs (even though such background information on Plame had been sought by Libby's lawyers).

With this new insight into Plame's cover jobs at the State Department, Miller then re-reviewed her notes from the entire June-July 2003 period. She concluded that *none* of the Plame references came from Libby. In her memoirs she wrote:

> My heart sank as I closed the notebooks. What if my testimony about events four years earlier had been wrong? Had I misconstrued my notes? Had Fitzgerald's questions

about whether my use of the word *Bureau* meant the FBI steered me in the wrong direction?

Though I felt certain before the trial that Libby and I had discussed "the wife," if only in passing, my memory may have failed me. Rereading those elliptical references and integrating them with what I had learned since trial and with the information about Plame's cover that Fitzgerald had withheld, it was hard not to conclude that my testimony had been wrong. Had I helped convict an innocent man?

The Aftermath of a Refreshed Memory

On November 3, 2016, the District of Columbia Court of Appeals granted Libby's petition for reinstatement to the D.C. bar. That action was based upon a report by the D.C. bar's Office of Disciplinary Counsel, which *inter alia* wrote that (i) Libby had consistently maintained his innocence; (ii) he never denied the seriousness of the charges for which he was convicted, and (iii) Miller, as a "key prosecution witness…has changed her recollection of the events in question."

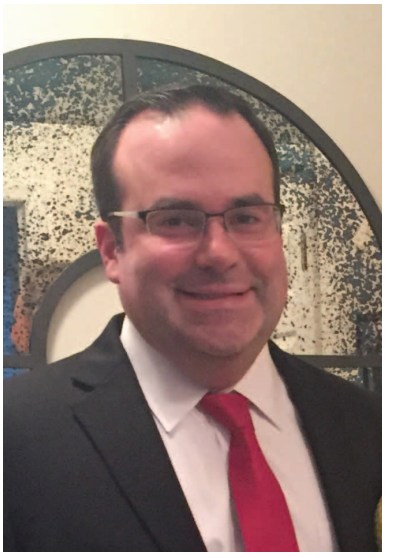
In response to President Trump's 2018 pardon of Libby, Valerie Plame wrote that that act "hurts all of us." Plame is currently running for Congress in New Mexico. Fitzpatrick, now a partner at Skadden Arps in Chicago, said the pardon was ill-considered, and to the extent the decision "purports to be premised on the notion that Libby was an innocent man convicted on the basis of inaccurate testimony caused by the prosecution,… [t]hat is false."

The man who appointed Fitzgerald, James Comey, also weighed in on the Libby pardon, calling it "an attack on the rule of law…. There's no reason that's consistent with justice to pardon him." Of course this is the same James Comey who, after telling the President of the United States: "I don't do sneaky things, I don't leak, I don't do weasel moves," promptly leaked seven internal FBI memos to a friend at Columbia Law School, so that he would in turn leak them to *The New York Times* and trigger the need for a special counsel to investigate Russian interference with the 2016 presidential election. (Comey also shared those FBI documents with his personal lawyer, Patrick Fitzgerald.) On August 29, 2019, the Justice Department's inspector general issued a 79 page report, citing Comey for willfully violating Justice Department/FBI internal policies and procedures in leaking those memoranda, and finding that Comey's actions were in an effort "to create public pressure for official action,… [which] set[s] a dangerous example" for every FBI employee. *The New York Times* characterized the report as a "stinging rebuke"; Comey's response on Twitter was as follows: "I don't need a public apology from those who defamed me, but a quick message with a 'sorry we lied about you' would be nice."

In the Circuit

Meet the New Circuit Executive: Michael D. Jordan

By Joseph Marutollo



On August 16, 2019, Second Circuit Chief Judge Robert A. Katzmann announced the appointment of Michael D. Jordan as the circuit executive for the Second Circuit. The *Federal Bar Council Quarterly* recently interviewed Mr. Jordan to discuss his years of service to the Second Circuit and his new role as the circuit executive.

Path to the Second Circuit

Mr. Jordan, who holds a B.S. from Manchester University in Indiana and a master's degree in philosophy from the University of Georgia, pursued his legal training at New York University School of Law. While at N.Y.U., Mr. Jordan served as the articles editor of the law review, a mem-

ber of the Order of the Coif, and a Butler Scholar.

After graduating *magna cum laude*, Mr. Jordan served as law clerk to then-Circuit Judge Dennis Jacobs from 2001 to 2002. Mr. Jordan called his clerkship with Judge Jacobs an immensely valuable experience. Mr. Jordan described Judge Jacobs as the "ultimate mentor" – a judge who truly cared about his law clerks and helped them to flourish in their legal careers. Mr. Jordan praised Judge Jacobs's legal acumen and his "brilliant writing." Further, Mr. Jordan admired Judge Jacobs's indefatigable work ethic and his "incredible dedication" to being a judge.

Mr. Jordan sought to embody Judge Jacobs's many virtues in his own legal career. Following his clerkship with Judge Jacobs, Mr. Jordan worked as a litigation associate at Davis Polk & Wardwell LLP for three years, followed by a year working as a staff attorney at the Division of Enforcement at the U.S. Securities and Exchange Commission.

Michael D. Jordan

After Judge Jacobs became chief judge in 2006, Mr. Jordan returned to the Second Circuit to serve as Judge Jacobs' chief counsel. As chief counsel to Chief Judge Jacobs – a position he held from 2006 to 2013 – Mr. Jordan advised Chief Judge Jacobs on a host of legal issues at the Second Circuit relating to ethics, judicial misconduct, and attorney discipline, as well as judicial appointments and committee memberships. Mr. Jordan joined a working group that helped to update and re-organize the court's local rules. Importantly, Mr. Jordan also counseled the Chief Judge on a wide range of administrative issues, including court budgets, human resources, security, and information technology, as well as on the renovation of the Thurgood Marshall U.S. Courthouse in Foley Square.

From 2013 through this past August, Mr. Jordan served as the chief operating officer and general counsel at the Second Circuit. In that role, Mr. Jordan had the primary responsibility for overseeing the Second Circuit's administrative and legal services, including its operations related to budget and finance, contracting and procurement, human resources, information technology, travel manage-

ment, and ethics and compliance. Mr. Jordan managed a team of 25 employees that provided shared services to the court's 300 employees. Mr. Jordan oversaw an annual operating budget of approximately $25 million.

Outside of the law, Mr. Jordan has an eclectic set of interests. He is an accomplished jazz guitarist with extensive performance and teaching experience. Like another individual named Michael Jordan, Mr. Jordan is also a skilled athlete; he has completed six marathons, including the Boston Marathon. Mr. Jordan is married. He met his wife when they were students together at law school, and they have a nine-year old daughter.

As Circuit Executive

As circuit executive, Mr. Jordan succeeded Karen Greve Milton, who was the longest-serving circuit executive in the Second Circuit's history and the first woman to hold that position.

In his new role, Mr. Jordan oversees an office with 35 employees. The circuit executive coordinates a number of administrative matters within the federal courts across the Second Circuit, including matters related to the Second Circuit's budget, space and facilities, workplace conduct, information technology, and the appointment of judges. Mr. Jordan is currently working to re-structure the circuit executive's office, as he continues to maintain a number of his prior duties and responsibilities from his tenure as the chief operating officer and general counsel. The circuit executive's role is critical to the smooth functioning of the immense workload of the Second Circuit and its district courts.

In Practice

Immigration Lawyer Farrin Anello

By Travis Mock

We now step briefly beyond the Second Circuit to learn about the work of Farrin Anello, a senior staff attorney at the ACLU of New Jersey, whose work encompasses both litigation and policy advocacy to advance the rights of immigrants, immigrant communities, and Muslim-Americans.

A Career

Ms. Anello's connections to the legal profession were formed from an early age. Her father, Bob Anello, is a partner in Morvillo Abramowitz Grand Iason & Anello PC and a former president of the Federal Bar Council. Her mother, Julie, is an artist whose sketches of Council events often have appeared in the *Quarterly*. Her brother, Russell, is currently chief oversight counsel for the House Committee on Oversight and Reform. And her sister, Alene, is legal counsel for the Good Food Institute.

The granddaughter of a Holocaust survivor, Ms. Anello also gained an early appreciation for the importance of legal protections for immigrants and other vulnerable groups.

She is a graduate of Yale University and Yale Law School. During law school, she gained clinic experience assisting clients seeking asylum in the United States. It was Ms. Anello's first attempt at helping someone navigate the U.S. immigration system and "running up against the often harsh and unfair nature of that system."

After law school, Ms. Anello clerked for District Judge Janet Hall of the District of Connecticut and District Judge Denise Cote of the Southern District of New York. Ms. Anello credits these "strong and generous mentors" with providing formative lessons about both the mechanics and mentality of good lawyering. In particular, Ms. Anello said, her clerkships exposed her to the many ways that different people can approach problem solving. Her clerkships also continued her exposure to immigration issues, through evaluation of mandamus petitions to compel government

action on immigration petitions, claims of employment discrimination against immigrants, and other legal issues.

After her clerkships, Ms. Anello practiced white collar litigation at Cleary Gottlieb Steen & Hamilton LLP. As a summer associate at Cleary, she gained further immigration experience, including work on a *pro bono* criminal immigration appeal and on various criminal sentencing issues that can have profound immigration consequences.

Ms. Anello left her firm to pursue a two-year Skadden Fellowship at the ACLU Immigrants' Rights Project. Her project challenged an anti-solicitation ordinance that targeted immigrant day laborers in Oyster Bay, on Long Island. In addition, other work at the ACLU provided Ms. Anello hands-on experience with a host of substantive and procedural issues in the federal courts, including immigration detention, material witness detention, and federal preemption. Ms. Anello said her work at the ACLU "opened my eyes to the possibilities of litigation and the impact that litigation decisions can have on policy and the interpretation of the Constitution."

Farrin Anello

When her fellowship ended, Ms. Anello pursued teaching, with clinic posts at the University of Miami's School of Law and Seton Hall University School of Law. At Miami, she supervised students representing immigrants in removal proceedings, habeas cases, and other affirmative litigation. Ms. Anello recalls a particularly impactful project challenging the federal government's resumption of deportations to Haiti after the 2010 earthquake. At Seton Hall, Ms. Anello worked for four years on a blend of legal services and policy projects, including issues related to immigrant access to legal services.

Working at Seton Hall connected Ms. Anello to New Jersey's legal services and coalition networks and provided an organic transition, in 2017, to the ACLU of New Jersey. There, she continues to pursue both litigation and policy projects, with a focus not only on immigration issues but also on issues affecting Muslim-Americans.

Those two constituencies, Ms. Anello explained, are closely linked. "In general, we see that a lot of the rules that seek to restrict immigration or the rights of immigrants have particularly impacted Muslim immigrants. And the discrimination that is built into that system and that fuels attacks on refugees, asylum seekers, and our immigration system arises from the same type of ani-

mus that drives attacks on U.S. citizens who are Muslim."

Federalism and Immigration

For Ms. Anello, immigration policy in New Jersey presented an intriguing challenge that also resonates within the Second Circuit. While Republicans in federal government have generated "an onslaught of attacks on immigrant rights," New Jersey has a Democratic governor and Democrat-controlled legislature that have voiced strong commitments to protect immigrant rights. The ACLU and its coalition partners are working to ensure that New Jersey delivers on those commitments:

> The priority is to ensure that people who are affected by changes in federal law are not also being targeted in their own communities by the state. While the question of whether to place someone in removal proceedings is a federal question, the state can have a very practical impact on protecting those individuals' due process rights.

Current Policy Initiatives

Among Ms. Anello's diverse and important policy work, the following policy initiatives may be of particular interest for their salience to the Second Circuit.

Immigrant Trust Directive

In November 2018, and in close consultation with the ACLU of New Jersey, New Jersey Alliance for Immigrant Justice, law enforcement, and others, the New Jersey Attorney General issued the Immigrant Trust Directive. As Ms. Anello explained, the directive "deliberately separates the functions of state and local law enforcement from those of federal immigration enforcement."

Under previous policy, state and local law enforcement making arrests for felony-equivalent offenses and DUI were required to inquire into arrestees' immigration status and refer individuals whom officers believed not to be lawfully present to ICE. In practice, this dragnet swept up not only criminals but also innocent witnesses and even survivors of crime. Additionally, because the referrals to ICE occurred at the time of arrest, rather than at the time of conviction, individuals who were arrested and referred to ICE could be ensnared in removal proceedings even if they were never prosecuted or were acquitted of the charges against them.

As a consequence, immigrant populations became reluctant to press charges or even report crimes, perpetuating a cycle of victimization and distrust.

The directive aims to end that cycle and restore trust between law enforcement and their communities by limiting the types of voluntary assistance that state and local law enforce may provide to ICE.

Ms. Anello acknowledged that implementation of the directive is "still a work in progress," complicated by the fact that some local governments appear to be acting deliberately to undermine the directive.

For example, between the time the directive was announced and it entered into force, Cape May and Monmouth counties renewed "287(g) agreements" with the federal government. These agreements create unfunded mandates effectively deputizing local sheriff's offices to do the work of ICE agents.

Ms. Anello contended that those 287(g) agreements, which the counties renewed without public notice or comment, deplete local government resources while directly undermining the goals of the Directive. They also, Ms. Anello pointed out, expose participating counties to costly lawsuits for constitutional violations and other issues that can arise from their enforcement actions.

And in September, after strong advocacy from ACLU of New Jersey and other groups, the attorney general acted to block all 287(g) agreements and to further strengthen the directive's separation of state and local law enforcement functions.

Universal Representation

Immigration law is exceptionally complicated. "You might have heard removal cases likened to trying death penalty cases in traffic court," quipped Ms. Anello. When immigrants are forced to navigate that gauntlet without counsel, "mistakes are made." And yet, most states have no public defender-type program for immigration courts.

The consequences have been severe. According to Ms. Anello, only one-third of individuals in

removal proceedings in New Jersey have historically had access to counsel. Unsurprisingly, the two-thirds who were unrepresented suffered far less favorable litigation outcomes.

In 2017 New York became the first state to create and guarantee access to a state-funded representation program for everyone detained for removal proceedings within the state.

Now, New Jersey, with strong support from the ACLU of New Jersey and other groups, has initiated a similar program. Ms. Anello called the New Jersey law a "groundbreaking step" and hopes the state will fully fund the program as New York has done. "We want to ensure that people who are living, working, and caring for their families in New Jersey are not forced to go to court and face life-changing—and sometimes life-threatening—sanctions without a lawyer standing beside them," Ms. Anello said.

Access to Driver's Licenses

Historically, driver's licenses required applicants to provide documentation of federal immigration status. As a result, undocumented immigrants without such status found themselves without access to licenses or auto insurance, even if they were skilled drivers.

The ACLU of New Jersey is currently engaged in the Let's Drive NJ Campaign to ensure that all "safe and qualified drivers" can apply for and receive a license or learner's permit. The goal, Ms. Anello explained, is to make sure people can care for themselves and their families. If New Jersey passed such legislation it would join the 14 other states—including New York—that have passed similar laws.

Courthouse Arrests

Ms. Anello also expressed concern about ICE's practice of arresting individuals in or near courthouses. "When immigration enforcement officers target people at courthouses, usually state courthouses, they are directly interfering with the state's ability to run an effective court system, and they are chilling people's ability to get protection from the courts. It harms everyone from criminal defendants to survivors of crime to people accessing courts to resolve family issues like protection from abuse and neglect."

A survey released by Make the Road NJ, ACLU of New Jersey, and others confirmed the chilling effect of these enforcement measures.

Ms. Anello noted that ICE's existing "sensitive locations" policy gives the agency discretion not to conduct arrests at courthouses.

Litigation Matters

At the national level, the ACLU has played a prominent role in suing to enjoin recent anti-immigrant policies: the so-called Muslim ban, the child separation policy, the border wall, the third-country asylum ban, and restrictions on the availability of asylum for victims of domestic violence, to name a few.

The state divisions of the ACLU, including the ACLU of New Jersey, do vital litigation work as well.

Special Immigrant Visas

Ms. Anello represented an Afghan man who arrived in the United States on a "special immigrant visa," a classification for individuals who assisted U.S. forces in Iraq or Afghanistan. Under his visa, the man should have been admitted as a lawful permanent resident. Instead, he found himself caught in the dragnet created by the second iteration of the federal government's "Muslim ban."

The man was stopped at the airport and flagged for immediate removal. Ms. Anello and the ACLU of New Jersey filed a habeas petition and motion for a temporary restraining order to block his removal. After a year of additional litigation during which the federal government argued the man's visa had been cancelled, the man was granted *asylum* in the United States on the same grounds as those that had served as the basis for his visa.

Green Card Interview Arrests

In another case, in collaboration with the New York Civil Liberties Union, Ms. Anello and her colleagues represented a man who was arrested during his green card hearing and flagged for immediate removal. The arrest was precipitated by a "very old removal order," even though he was applying for a green card through a process established specifically to allow individuals facing final orders of deportation

to obtain a provisional waiver and not be separated from their families during the proceedings.

These cases, Ms. Anello noted, illustrate how litigators can ensure that detained individuals are not deported "so quickly that they are unable to take advantage of the mechanisms our laws already provide to obtain review of their immigration cases."

The Role of the Private Bar

To accomplish its mission, the ACLU of New Jersey collaborates actively with law firms and solo practitioners in both New York and New Jersey.

Ms. Anello recalled that the ACLU of New Jersey's work in a recent class action engaged law firms and solo practitioners around the region to secure individual counsel for every member of the plaintiff class.

According to Ms. Anello, there are "a wealth of opportunities" in the Second Circuit and New Jersey for lawyers to engage in *pro bono* immigration efforts.

Strong mentoring programs, like those offered by the American Immigration Council, exist to help the less experienced find a point of entry.

And getting involved does not require an open-ended commitment to prolonged litigation. For example, immigration groups have launched programs that pair lawyers with detained asylum seekers to help them prepare for their "credible fear interview," which is the first and only opportunity for many asylum seekers to avoid expedited removal proceedings.

Beyond litigation and legal services, Ms. Anello encourages private practitioners to consider supporting the work of local community organizers to pursuing "significant and lasting change to protect the rights of immigrants in our own communities." For those interested in policy or organizing work, Ms. Anello recommended investigating which *immigrant-led* community groups are having an impact. Ms. Anello advised that "listening to the constituents in need of services is the best way to ensure that your work is having the desired impact."

Second Circuit Decisions

Admissibility of "Materiality" Evidence

By Charles C. Platt

The Second Circuit's recent decision in *United States v. Gramins* is the latest in the *Litvak* series of decisions that address whether evidentiary rulings in securities fraud cases "unfairly tipped the scales" in favor of the government on the issue of "materiality."

Defendant Michael Gramins was found guilty of making false statements to counterparties while acting as a broker in trades of residential mortgage backed securities ("RMBS"). Specifically, the defendant lied to counterparties about price negotiations that he was having with other buyers and sellers of RMBS, causing the counterparties to increase their bids to buy, or decrease their offers to sell, RMBS. The defendant benefited from his misstatements by capturing a larger "spread" between the bid price to buy, and the offer price to sell, than would otherwise have been obtainable for those RMBS.

One of the significant questions at trial was whether the defendant's misstatements were "material"; that is whether a reasonable investor would find the misstatements "important in making an investment decision. According to defense counsel, the government improperly elicited testimony on this question from one of the counterparties: testimony that the counterparty had "heightened expectations of truthfulness" in the specific trades that had occurred, and testimony strongly implying (without explicitly stating) that an agency relationship existed between the counterparty and the defendant, both of which could have suggested to the jury that the defendant owed fiduciary du-

ties of loyalty and honesty under agency law. Defense counsel objected to the introduction of this testimony, arguing that it was irrelevant under Federal Rule of Evidence ("FRE") 401, was likely to confuse or mislead the jury under FRE 403, and unfairly tipped the scales in favor of the government's theory of materiality at the trial and against the defense's competing theory.

After the jury's guilty verdict, defendant moved for a new trial, relying on the Second Circuit's new decision in the *United States v. Litvak* line of cases. The court held there that "the admission of testimony from a counterparty [in an RMBS trading case] who erroneously asserts the existence of an agency relationship between himself and his broker-dealer unduly prejudices the jury on the issue of materiality." Based on this new *Litvak* decision, the district court in the *Gramins* case granted the defendant a new trial.

On appeal in *Gramins*, the Second Circuit's decision started with the principle that "the question of whether [defendant's] misrepresentations were material under the reasonable investor standard was for the jury to decide in light of the opposing theories advanced by the two sides and the evidence that each side marshalled to support them." The court was satisfied that the government had introduced evidence sufficient to support the jury's conviction of the defendant on its theory of materiality. There was still an issue, however, as to whether the government's presentation of that evidence at trial violated the FRE and gave the government an unfair advantage in pressing its theory to the jury.

The *Gramins* decision illustrates the fine lines that exist on the admissibility of evidence showing "materiality" in a securities fraud case. The debate over where those lines should be drawn undoubtedly will continue.

The Second Circuit concluded that "nothing that occurred at Gramins's trial conferred an undue advantage on the government in the battle over the issue of materiality." In *Litvak*, the facts were different because the witness there had been permitted to testify regarding his "idiosyncratic and erroneous belief" regarding an agency relationship between an RMBS counterparty and an RMBS broker that was not "probative of the views of a reasonable, objective investor in the RMBS market." That testimony "had a high probability of confusing the jury by asking it to consider as relevant the perception [of an agency relationship] that was entirely wrong," and could mislead the jury into thinking that such a perceived relationship of trust "showed materiality."

By contrast, the court in *Gramins* did not view the challenged counterparty testimony as being erroneous or idiosyncratic. There was no express misstatement that an agency relationship existed with the defendant broker, or erroneous statements of agency law. Moreover, the counterparty testimony regarding the relationship was similar to other witnesses, not idiosyncratic. Finally, the counterparty witness himself admitted on cross-examination the accurate legal nature of the transactions, and the prosecutors, defense counsel and the judge all expressly and repeatedly informed the jury that no agency relationship existed, so it was unlikely that the jury was confused or misled by the challenged testimony.

The *Gramins* decision illustrates the fine lines that exist on the admissibility of evidence showing "materiality" in a securities fraud case. The debate over where those lines should be drawn undoubtedly will continue.

In the Courts

Judge Sullivan on the Second Circuit

By Stephen L. Ratner, Steven H. Holinstat, and Edward J. Canter

On May 7, 2018, President Donald Trump nominated Richard J. Sullivan to serve as a judge on the U.S. Court of Appeals for

the Second Circuit – a nomination supported by New York Senators Chuck Schumer and Kirsten Gillibrand. Judge Sullivan was confirmed on October 11, 2018 by a vote of 79-16 and received his judicial commission later that month. He fills the seat vacated when Judge Richard C. Wesley took senior status on August 1, 2016.

Born in 1964 in Manhasset, New York, Judge Sullivan received his B.A. from the College of William & Mary in 1986 and his J.D. from Yale Law School in 1990. Following graduation, he began his legal career as a law clerk for Judge David M. Ebel of the U.S. Court of Appeals for the Tenth Circuit. Thereafter, he joined Wachtell, Lipton, Rosen & Katz LLP as a litigation associate. In 1994, Judge Sullivan left Wachtell for the U.S. Attorney's Office for the Southern District of New York, where he worked for more than a decade as an Assistant U.S. Attorney in the Criminal Division.

During his tenure at the U.S. Attorney's Office, Judge Sullivan served in a variety of leadership positions, including chief of the General Crimes and Narcotics Units. In 2002, he was named the chief of the newly created International Narcotics Trafficking Unit, dedicated to investigating and prosecuting large-scale narcotics trafficking and money-laundering organizations. From 2002 to 2005, he also served as director of the New York/New Jersey Organized Crime Drug Enforcement Task Force. In these roles, Judge Sullivan received numerous distinctions. In 2003, he was awarded the Henry L. Stimson Medal from the Association of the Bar of the City of New York, presented annually to outstanding Assistant U.S. Attorneys in the Southern and Eastern Districts of New York. In 1998, he was named the Federal Law Enforcement Association's Prosecutor of the Year.

Circuit Judge Sullivan

In 2005, Judge Sullivan joined Marsh Inc., an insurance brokerage and risk management firm, where he served as general counsel and managing director. In 2007, Judge Sullivan was nominated by President George W. Bush to fill the seat on the U.S. District Court for the Southern District of New York vacated by Judge Michael B. Mukasey. Judge Sullivan was confirmed by the Senate on June 28, 2007 by a vote of 99 to 0.

Judge Sullivan served as a district court judge for 11 years. As a trial judge, he wrote significant decisions on copyright infringement, securities fraud, search and seizure, trademark infringement, religious freedom, and insider trading.

During his confirmation hearing, Senator Chuck Grassley asked Judge Sullivan what he would take from his time as a district court judge to the court of appeals. In response, Judge Sullivan said, "The thing that [stands out] most about… the district court is that you are dealing with human beings. The humanity of the district court is palpable – you see litigants, you see lawyers, you see families, you see defendants in criminal cases, you see people and human beings who are affected by the decisions that judges make." Although the court of appeals is removed from that, he said, "I think it is vitally important that judges at all levels remember the impact…that their decisions can have on people, and not always the people who are the

named parties, but other people as well."

Judge Sullivan was sworn in as a Second Circuit judge on December 13, 2018. He said, "At the moment, I'm still doing a lot on both courts, but the transition to the circuit has been interesting and challenging, and my new colleagues could not have been more generous and welcoming. Although I know I will miss the humanity and pace of the district court, the Second Circuit is a fascinating and collegial place and I feel very blessed to have the opportunity to serve on this great court."

Criminal Justice

The ACEs Study

By Pete Eikenberry

In connection with an inquiry to Connecticut District Chief Judge Stefan Underhill as to alternatives for incarceration programs in his district, he happened to invite me to attend one of the monthly meetings of the Bridgeport Reentry Roundtable held in a Bridgeport, Connecticut, detention facility. I heard a guest speaker there address the approximately 60 attendees as to the implications of the Adverse Childhood Experiences ("ACEs") study. The study was conducted by the Centers for Disease Control and Kaiser Permanente in 1998. In the ACEs study, over 17,000 adult participants were given a 10 question "test" as to the trauma they may have experienced as children.

The ACEs questionnaire included questions about abuse, neglect, and dysfunction, for example, including whether (1) a person's parents were separated or divorced; (2) a household member had gone to prison; and (3) a household member was an alcoholic or a user of street drugs. The higher the ACEs score, the more likely that the young child's normal brain development of, for instance, "emotional regulation" and "paying attention," was diverted to "fight or flight" survival techniques. Thus, the study concluded that an individual's brain chemistry probably would be altered substantially and detrimentally by childhood trauma. A score of six ACEs leads, among other things, to a probability of the person living 20 years less than average and to increased risks of diabetes and obesity. ACEs informed practices such as collaborative problem solving exercises can mitigate the effects of toxic stress and build, for instance, resilience. It has been stated that ACEs are the root causes of incarceration and the best place to start for suitable measurable change.

As a result of this information, the not-for-profit Friends of Marcy Houses, with which I am involved, now is developing programs for Marcy child residents that are ACEs informed. There are state statutes concerning education that are "ACEs informed." In limited research, I found no awareness of ACEs in any American criminal justice system.

Laboratories for Improving Criminal Justice

Criminal justice systems are under intensive scrutiny and are subject to substantial revision. Jeremy Travis, former John Jay College president and now executive vice president of criminal justice at the Laura and John Arnold Foundation, has stated that:

> We are emerging from a "tough on crime" era with the sobering realization that our resources have been misspent. Over decades, we built a response to crime that relied blindly on incarceration and punishment, and provided too little safety, justice, or healing. Now is the time for a new vision – the time to dig deep, challenge our imaginations, and build a new response to crime that comes closer to justice….

On April 15, 2019, the U.S. Courts, Office of Pretrial Servic-

es published a report entitled, "A Viable Alternative? Alternatives to Incarceration Across Seven Federal Districts." The report stated that:

> [I]n December 2018, the First Step Act was enacted including additional "safety valves" for certain mandatory minimum sentences and provided for "good time" incentives for inmates to participate in recidivism-reducing programs.
>
> [T]he results of…this study indicate that participants are more likely to avoid new arrests for criminal behavior, remain unemployed, and refrain from illegal drug use while their case is pending in court.

In referring to the financial and human implications of avoiding or minimizing custody – both at pretrial and with post trial convictions – the report (to which representatives of the Southern and Eastern Districts of New York contributed) stated that:

> After long prison sentences, the majority [of offenders] are estranged from family, prosocial support systems, and are generally ill-equipped to resume law-abiding lives. Further, those defendants who struggled with substance abuse and mental health disorders upon arrest are likely to confront re-entry with little improvements in those problems….
>
> This "wake-up call" in the criminal justice system at large have led leaders in the pretrial profession to understand the unique opportunity they have to improve our criminal justice system, so that public safety is ultimately enhanced; that is, pretrial professionals see an opportunity to be part of the solution as opposed to part of the problem.

The "wake-up call," of course, is being heeded by judges as well and all participants in the criminal justice system. District court judges in the federal system administer a docket of criminal as well as civil cases, and, thus, each of them must determine her or his method of coping with the vagaries of criminal misbehavior. The net result is a plethora of innovative laboratories as to how to improve the criminal justice system in response to the challenge typified by Jeremy Travis to "build a new response to crime that comes closer to justice."

The Eastern District of New York, for instance, in recent years has published three periodic alternative to incarceration programs reports to its board of judges ("ATI programs.") Chief Judge Dora Irizarry also convenes monthly "Summit Meetings" in the district with guest speakers reporting on ATI programs in which they have participated or are developing. Eight judges in the Eastern District have ATI programs. Chief Judge Dora Irizzary and Magistrate Judge Robert Levy have reentry STAR drug programs, which have resulted in a "shortened length of supervisions and reduction in recidivism rates among participants." Chief Judge Irizzary also use this program in sentencing so that a participant may not even be imprisoned.

In the district's Pretrial Opportunity Program ("POP"), successful participants may come to enjoy the benefits of a drug free life and complete diversion from prison. Judges Raymond Dearie and Johanna Seybert and Magistrate Judges Steven Gold and Gary Brown participate. The third or SOS program targets "primarily non-violet and young adult defendants" based on the belief that many youthful offenders can benefit from "more intensive supervision and access to education, job training and counselling." It is supervised by Judge Joan Azrak and Magistrate Judge Cheryl Pollak. All three Eastern District programs depend on substantial participation by federal defenders (including social workers), pretrial services, and probation. The programs also require intensive supervision of the participants by the judges themselves. United States attorneys participate on a voluntary basis.

A Proposal for Sharing ATI Approaches

There appears to be a utility and a feasibility of holding a conference, seminar, or retreat for the sharing of the various ATI experiences of the different federal districts. Representatives from state court jurisdictions could also be

invited to attend and share their practices and procedures to improve results of pretrial, post-trial and drug programs. In view of the Eastern District's leadership, Brooklyn may be the optimum location for such a gathering. The 2017 Eastern District ATI report stated that:

> Communication among the districts that have established them…is essential to determining which practices are most effective in judge-involved supervision programs. Data collection remains critical to an objective, long-term analysis of whether these programs…are…better and more cost effective [than previous efforts].

ACEs awareness could be one outcome of such sharing. For instance, participants in sentencing, rehabilitation, and incarceration could benefit from being ACEs informed. What chance does an inmate ex-offender, drug addict, or youthful offender have for rehabilitation or reform if his/her brain has been rewired by childhood trauma to be inattentive to suggestion and inclined to disruptive behavior. Attempted rehabilitation without recognition of the terrible disadvantages wreaked upon an individual by ACEs may be substantially wasteful of lives and money. The incidence of ACEs damaged persons is reportedly high among prison populations. If a civil litigator like me could develop ACEs awareness in one day's meeting, then the probability of most ATI participants learning from each other in a symposium or other gathering must be high.

Federal Bar Council Calendar of Events

CLE Program

Expert Witnesses, December 5

Law Clerk Videoconference Series

Law Clerk Videoconference Series: Habeas Corpus Petitions, December 4
Law Clerk Videoconference Series: Section 1983, Part 1, December 12
Law Clerk Videoconference Series: Section 1983, Part 2, January 15, 2020

Upcoming Events

Annual Thanksgiving Luncheon
November 27, 2019
Grand Hyatt New York

Winter Bench & Bar Conference
Rosewood Baha Mar, Nassau, Bahamas
February 23, 2020-March 1, 2020

Judges' Reception
Union League Club
April 2, 2020

For further information, contact the Council at (646) 736-6163

Federal Bar Council
150 Broadway, Suite 505
New York, NY 10038-4300

PRSRT STD
U.S. POSTAGE
PAID
White Plains, NY
Permit NO. 825