Federal Bar Council Quarterly

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In This 4th (Yes, 4th!) 30th Anniversary Issue:

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From the President

Diversity Initiatives

By Sharon L. Nelles

In 2017, the New York State Bar Association issued a report concluding that women attorneys were underrepresented in New York state courtrooms, particularly women in private practice. That same year, Jill Centella, Global Head of Litigation at JPMorgan Chase, watched as the judge presiding over a trial beginning in New York Supreme Court asked that any woman who would be speaking for either side stand. There was just one. Centella, a recognized Diversity, Equity & Inclusion advocate, was spurred to help launch Chase's Leading with Diversity initiative, which focuses on deepening relationships between the firm's in-house counsel and its external providers, and requires that 50% of the firm's litigation, regulatory, arbitration, and employment matters be led by diverse lawyers.

Diversity and Outside Counsel

Chase was not alone in focusing on diversity and outside counsel. Hewlett-Packard also launched a program in 2017 to increase the number of diverse lawyers working on its legal matters. The program requires law firms to staff each new matter with at least one diverse lawyer who performs or manages at least 10% of the billable hours. And in 2019, Facebook launched a program to boost the diversity of outside counsel teams working on the company's legal matters by calling on law firms to staff their teams with at least 33% women and ethnic minorities. The program also provides for quarterly feedback and annual reviews to law firms on their diversity performance and offers training and mentoring opportunities for diverse lawyers.

These companies are not outliers. In 2020, the general counsel of twelve large global banks issued an open letter to the legal community calling for greater inclusivity in the legal profession. These banks announced their own commitments aligned with three pillars:

(1) Internal actions to increase exposure of diverse talent within their respective organizations;

(2) Commitment to understanding the approach that external providers take with regard to Diversity, Equity & Inclusion and including this information in selecting external counsel; and

(3) Making an impact on the wider community through social action efforts.

The stated goal of these efforts was not only to provide diverse attorneys with opportunities to lead complex matters, but also to elevate their profiles internally and externally.

Major consumers of legal services are paying increasing attention to the diversity of their outside counsel teams. They will tell you that this is an increasing and sustained focus in 2023. And this is because providing these opportunities is not only a moral imperative, but a strategic advantage that enriches collective knowledge, creativity, innovation and problem solving.

In the Courts

Courts in the Second Circuit and beyond also have taken steps to open doors for attorneys from historically underrepresented groups. Among other initiatives, federal and state judges have begun formally and informally encouraging lead counsel to delegate court appearances and oral arguments to more junior attorneys on legal teams, where the talent pool tends to have more diverse backgrounds. Some judges have adopted policies allowing for two lawyers to argue, providing an opportunity for the second (or third) chair to answer specific questions on the facts or the law, allowing more junior attorneys who have taken the relevant deposition or held first pen on the brief to participate. The goal is not just to help these lawyers gain valuable in-court experience, but to increase their confidence and competence. Judges can and do also serve as role models for newer attorneys in their courtrooms and chambers; they also recommend and appoint an array of attorneys for leadership positions, including plaintiffs' steering committees.

All of these efforts recognize that a diverse bar helps ensure that the law is applied fairly and without bias, and that attorneys from diverse backgrounds bring new ideas, experiences and perspectives to the workplace, and

uphold ethical values. But identifying, developing and promoting diverse lawyers is not simple, and requires not just bold efforts and initiatives, but sustained attention and nuance. Bar organizations have a role to play in achieving this goal.

Pathways to Success

At this stage in my career, where I wear multiple hats for multiple organizations, it is my privilege to work with and hear from lawyers at all stages of their careers. And one topic that comes up often is pathways to success and the challenges along the way. Newer attorneys correctly focus on the value of mentorship and sponsorship, and the rewards of education and access. It is easier to get a seat at the table if someone is actively saving a space. And almost all organizations, agencies and law firms have well-established mentoring programs and seek to foster such relationships, though not every program is going to serve every person. In this same vein, when I talk to seasoned attorneys about their individual paths to success, one constant is the importance of informal networks, and the support, guidance and business opportunities they provide.

This resonates with me: In addition to my own mentors, sponsors and colleagues, over the years I have cultivated a deep bench of people on whom I can – and do – turn for good advice, professional help and occasional brutal honesty. This group includes co-counsel, opposing counsel, clients, peers and some wise members of the judiciary. I have developed these relationships over long litigations, intense negotiations and, yes, my involvement in the Federal Bar Council and other bar organizations. I am incredibly grateful for them, and recognize that my own career path would have been, and would be, less well-paved (and much less rewarding), without them. Networks, informal support, and those who can and will open doors, play an outsize role for diverse attorneys. As noted in my last column, the Federal Bar Council has, as part of its strategic plan, prioritized DEI efforts. The Council has long recognized that bar associations play a critical role in advancing diversity because they help shape the norms and values of the profession. The Council provides resources and support for affinity groups and supports scholarship programs that advance equity and diversity, such as the When There Are Nine scholarship program in partnership with the Federal Bar Foundation. Our Diversity Committee, led by Patricia Miller of the New York City Law Department, sponsors, among other programs, conversations with diverse members of the bench and bar and continuing legal education around topics of inclusion and elimination of bias, alongside heritage month celebrations.

Diversity Task Force

What more can we and should we be doing? The Council has created a Diversity Task Force to help answer this question, under the leadership of Gerardo Gomez Galvis, Chaka Laguerre, Cynthia Fernandez Lumermann, Pat Miller, John Quinn and Frank Wohl. The Task Force supplements, not supplants, the Diversity Committee. Where the goal of the Diversity Committee is to honor the Council's legacy of inclusion and advancing equality in the profession by promoting diversity, the goal of the Task Force is to challenge ourselves to see where we can do more and where we can reach higher, including by making sure that all members of our community have access to our programs and can take advantage of the formal and informal mentoring and networking opportunities the Council provides.

A huge part of most of our everyday experience as lawyers is connecting to solve problems. A key goal, and a key benefit, of the Council is nurturing those connections so that, as a profession, we remain agile and equipped. As the Council moves forward with all of its efforts, there is nothing more important than having you engage with us, and allowing all of the Council to benefit from the wealth of perspectives, experiences and ideas of our membership.

From the Editor

Law Day Dinner Honors Justice Sotomayor

By Bennette D. Kramer

On May 4, 2023, the Federal Bar Council held its annual Law Day Dinner at Cipriani Wall Street.

Justice Sotomayor at the Law Day Dinner. Photos courtesy Bret Josephs Photography & Videography

After a performance of the national anthem, Hannah Y. Chanoine, chair of the Law Day Dinner Committee, welcomed the participants. Council President Sharon L. Nelles presented the Learned Hand Medal for Excellence in Federal Jurisprudence to Supreme Court Justice Sonia Sotomayor.

Southern District Judge Jessica G.L. Clarke, as the most recently seated Article III judge, had the honor of reading President Biden's Law Day Proclamation.

The Learned Hand Medal

Justice Sotomayor was introduced by Nelles and by Chanoine, who clerked for then-Judge Sotomayor on the Second Circuit. Together they presented personal anecdotes about Justice Sotomayor and outlined her accomplishments. They both emphasized her ties to New York. She was born in the Bronx, graduated from Princeton and Yale Law School, and then served as an Assistant District Attorney in New York County. Justice Sotomayor practiced at a New York law firm before her appointment to the Southern District in 1991, where she served from 1992 to 1998, followed by the Second Circuit from 1998 to 2009 and her nomination to the Supreme Court in 2009 by President Barack Obama.

Talking with Judge Jacobs

Nelles presented Justice Sotomayor with the Learned Hand Medal. Following the presentation of the Learned Hand Medal, instead of giving a speech, Justice Sotomayor sat down with Second Circuit Judge Dennis Jacobs, with whom she had served on that court. Justice Sotomayor and Judge Jacobs became judges the same year. The two old friends talked about a wide range of subjects, including the difference between serving with a panel of three and a court of nine, some of the difficulties of reaching consensus with nine people, and how Justice Sotomayor has reacted to all the attention she has received. Justice Sotomayor also discussed the evolution of her approach to opinion writing.

She lamented the death of Judge Robert Katzmann, whom she described as a genius with an incredible memory who also had emotional intelligence. She emphasized the importance of Judge Katzmann's program in teaching children what public service is and the value of it. She noted that courts across the country are setting up programs like the one he established. She talked about the value of good teachers and some of the qualities that made a teacher a good one. She said that everyone should reach out to their teachers and tell them how much they have meant in their lives. In connection with writing her book and her opinions, Justice Sotomayor said that she came to realize the value of storytelling and writing so that

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the reader understands both intellectually and emotionally.

Her final word was that she loves New York and will always be a Yankees fan.

In My View

No Depositions in Federal Criminal Cases? It's Time to Revisit That Rule

By Larry H. Krantz

I have a recurring nightmare. I represent a client charged with securities fraud. He is facing 20 years. The indictment against him tracks the language of the statute, but provides no particularity. My request for a bill of particulars was denied. I have deposed none of the witnesses because the rules do not permit it. Nor have I interviewed any witnesses, because they refused to speak with me. They did not want to be involved and feared provoking the ire of the government. I have spoken with my client, who tearfully denies his guilt.

The trial starts. The prosecutors present a smooth case. They have prepared their witnesses in dozens of prep sessions. They have spoken to them all, in private, and know what they will say. I have been given notes of those conversations but they contain only what the law enforcement agents who were present chose to write down. In the last several prep sessions no notes at all were taken. Those few witnesses who refused to speak with the prosecutor were subpoenaed to testify in the grand jury. I could not be present or submit questions. I do have transcripts of that grand jury testimony, but the questions were barebones and designed to elicit only information helpful to the prosecution.

At trial there are a slew of new allegations against my client. I am left to blindly cross-examine. I ask only questions where:

(1) The witness's answer is locked in, based on documents;

(2) Logic compels only one answer; or

(3) I have a good plan of action regardless of the answer given.

I call no witnesses, because I cannot take the risk of calling them blind. I do my best to cross-examine but it feels like I have one hand tied behind my back. In summation, I hammer the presumption of innocence and the reasonable doubt standard, but it is not enough and the result is predictable: my client is convicted.

I wake-up in a cold sweat. But then I fall back to sleep.

I dream again. This time I have another federal criminal trial. I am representing the same client against the same allegations of securities fraud. But this time it is a civil case. All that is at issue is money. For this trial, the complaint spelled out the fraud with particularity, as required by the rules. Then, in discovery, I deposed every meaningful witness. I learned how their testimony was helpful and how it was damaging. I learned the holes in their testimony. I previewed areas of potential cross-examination. At trial I am prepared. There are no surprises. I know the questions to ask and the witnesses to call. Through cross-examination and presentation of my own witnesses, I prove what is needed. I sum up with confidence and the jury quickly finds for my client. I wake with a smile.

The Real World

As you have no doubt gathered, my nightmare and my dream are not just fantasies. They are reflections, albeit oversimplified, of the striking dichotomy between criminal and civil practice under the federal rules. That dichotomy is perhaps nowhere more glaring than as to the right to depositions. One need only compare Federal Rule of Civil Procedure 30 with Federal Rule of Criminal Procedure 15. Rule 30 encourages depositions as a critical part of the truth-seeking process:

Rule 30.

(a) When a Deposition May Be Taken.

(1) *Without Leave*. A party may, by oral questions, depose any person, including a party, without leave of court. . . . The deponent's attendance may be compelled by subpoena under Rule 45.

Rule 15 does the opposite. It eliminates depositions, except in the rarest instance where they are necessary to preserve testimony:

> **Rule 15. Depositions**
> (a) When Taken.
>
> (1) *In General*. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. . . .

This opposite treatment of the right to depositions under the civil versus criminal rules cries out for an answer to the question: Why? Intuitively, one would think that the criminal rules would be more permissive as to discovery, given that liberty rather than money is at stake. But the reverse is true.

So how did the rules on civil discovery become so different from the criminal rules? The answer lies in a decision made 80 years ago, and may surprise you.

The Dichotomy Between the Civil and Criminal Rules

The roots of the split between the civil and criminal rules are examined by Professor Ion Meyn in his article "Why Civil and Criminal Procedure Are So Different: A Forgotten History." 86 Fordham L. Rev. 697 (2017) ("Meyn"). As he explains, for centuries under the common law, federal criminal and civil procedure operated under the same rules – and in neither instance were depositions generally permitted. Rather, it was a two-step process: pleading to trial. Meyn at 701. But the civil rules underwent a radical transformation with the enactment of the Federal Rules of Civil Procedure in 1938. Under those rules, civil practice went to a three step process that included an in-between phase, discovery, which became the "heart" of litigation. *Id*. at 705-06.

The reforms embodied in the Rules of Civil Procedure were widely praised. The U.S. Supreme Court itself said a few years later in *Hickman v. Taylor*, 329 U.S. 495, 501 (1947):

> [C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for parties to obtain the fullest possible knowledge of the issues and facts before trial.

With the enactment of the civil rules complete, in 1940 Congress authorized the Supreme Court to draft rules of criminal procedure. Meyn at 707. The Supreme Court delegated its authority to a new advisory committee, just as it had done for the civil rules. *Id.* at 705-706. The Supreme Court appointed New York University Law Professor Arthur Vanderbilt as chair, Professor James Robinson as reporter, and Alexander Holtzoff, a special assistant to the U.S. Attorney General, as secretary. *Id.* at 707-708. The committee members were all prosecutors or academics. There was no representation from the defense bar. *Id*. at 729.

In a slice of history largely lost until Professor Meyn's research, the committee's initial approach to drafting the criminal rules was to mirror the reforms embodied in the recently enacted civil rules. According to documents uncovered by Professor Meyn, the first draft of the criminal procedure rules, which were written in 1941, adopted the civil rules "almost [in] whole cloth." *Id*. at 720. As the committee's reporter wrote about the draft: "[The] criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure." *Id*. at 710. As justification, the reporter explained: "[T]he civil rules . . . have won a deserved prestige. There is no reason why the criminal rules might not well follow as closely as possible the plan and content of the civil rules and in that way gain some of the same confidence that has been afforded the criminal rules." *Id*. at 711. This mirroring of the civil rules in the first draft of the criminal rules included key aspects of the newly created discovery phase, including "depositions, document requests, physical and mental examinations, and requests for admission." *Id*. at 720.

Professor Meyn's conclusion is confirmed in a 1957 law review article by Professor Lester Orfield, who served on the original advisory committee. He wrote that "Rules 26 through 32 of the First Draft of the Federal Rules of Criminal Procedure dated September 8, 1941, were modeled on Rules 26 through 32 of the Federal Rules of Civil Procedure." Lester Orfield, *Depositions in Federal Criminal Cases*, South Carolina Law Review, Vol. 9: Iss. 3, Article 4, p. 2 (1957) ("Orfield").

The full committee met in September 1941 to consider this first draft. While the draft had taken six months to complete, it "was undone in four days." Meyn at 712. According to the committee's internal notes, uncovered by Professor Meyn, this was principally because of objections loudly asserted by the committee's secretary, Holtzoff, and a few committee members who followed his lead. These opponents feared that defendants would misuse depositions to cause delay. They also believed that depositions simply did not belong in criminal cases, with one opponent opining that to "go into the other side's case to examine anybody . . . before trial is a thing you would never think of in a criminal case." *Id*. at 721. As another opponent said: "This is a way of getting discovery before trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the [government's] evidence." *Id*. at 722.

With these reservations expressed, Holtzoff – a strong opponent of engrafting the civil rules into the criminal context – volunteered to draft the second version of the rules. That version was drafted following the September 1941 meeting and dramatically altered the deposition (and other discovery) rights, limiting depositions to situations where there would otherwise be a "failure or delay of justice." In subsequent committee drafts over the next two years, the rule was further eroded: It was limited to instances where a witness would not otherwise be available for trial. *Id*. at 726. The other discovery reforms of the civil rules, including document requests, interrogatories and requests to admit, were also jettisoned.

In this way, the criminal rules ultimately adopted by Congress in 1944 parted ways materially from their sister civil rules. As documented by Professor Meyn, this rejection was most likely the result of the lack of criminal defense lawyers on the advisory committee, and Holtzoff's "force of personality." *Id*. at 736. As to why Holztoff pushed so hard to cleave the new criminal rules from the new civil rules, he appears to have had an overly zealous "tough on crime" mentality. His approach was blind to any consideration that some defendants might actually be innocent, or that in any event they were presumed innocent and entitled to a fair trial. As Holtzoff was later quoted as saying: "[P]erpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. . . . The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed." *Id*. at 733. These views reveal Holtzoff's one-sided thinking about the criminal justice system. The rules ultimately drafted reflected this stilted view.

After 80 Years, It Is Time to Revisit the Rules

The prohibition against discovery depositions has not changed since the enactment of the criminal rules in 1944 (despite other amendments to the language of Rule 15). And there has been little to no organized pushback. The principle that a criminal defendant has no deposition rights has become so entrenched that it feels almost blasphemous to suggest that the rule be otherwise. The absence of depositions in federal criminal cases has become an immutable truth.

This is highly unfortunate. Based on my experience in trying both civil and criminal cases in federal courts, the absence of depositions in criminal cases does great harm to the truth-seeking process. In civil cases, the ability to conduct depositions is the great equalizer. Depositions allow both sides to uncover the facts needed to present the full picture at trial. And by presenting that full picture the factfinder is far better situated to evaluate the evidence and reach a just result.

The absence of depositions makes federal criminal trials lopsided events characterized by a cavernous witness access imbalance. One side knows everything that a prospective witness will say on a subject, while the other side knows little if anything. One side can tiptoe around the landmines, while the other side has to stay miles away from a potential explosion. This does not further the truth-seeking process or make for a fair trial. Just the opposite.

To make matters worse, this problem is largely invisible to participants other than defense counsel. It can often not be seen by prosecutors or even the judge. To understand the problem requires getting inside defense counsel's mind. It requires knowing the questions defense counsel does *not* ask because the answers are unknown. It requires knowing the witnesses defense counsel does *not* call because they have refused to interview. When I was a federal prosecutor earlier in my career, I was

oblivious to these problems. To me, the system was just perfect as is.

These invisible problems are the real costs of the absence of depositions. And they underscore the need for reconsideration of the 80-year-old rule under which there are no depositions.

In reconsidering the rule, much can be learned from 13 states that have rejected the federal model and that do allow depositions in criminal cases, with varying limitations. Seven states – Vermont, Florida, Indiana, Missouri, Iowa, North Dakota and New Mexico – allow for depositions as a matter of right without prior court approval. Bryan Altman, *Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions In Criminal Cases*, 75 Ark. L. Rev. 1, 38 (2022). Six states – New Hampshire, Texas, Arizona, Nebraska, Montana and Washington – allow for discovery depositions upon leave of court for good cause. *Id.* at 39. While there is great variation among the rules adopted, there is a unifying principle: These states have determined that the benefits of allowing depositions – with appropriate restrictions – outweigh the dangers cited by those who oppose depositions in criminal cases. In a 1989 study conducted in Florida, a commission created to evaluate the deposition rules that had been in effect since 1972 concluded: "[Discovery depositions in criminal cases] make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process. . . . [Criminal discovery depositions] should not be abolished or significantly curtailed." Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wisconsin Law Review 541, 613 (quoting the study). And while there currently are bills pending in Florida to prohibit the deposition of children and other vulnerable witnesses in criminal cases, the basic right to discovery depositions has remained in place for 50 years. *See* Jim Ash, *Defense Attorneys Wary of Bill to Limit Some Depositions in Criminal Cases,* The Florida Bar News (March 9, 2023) (floridabar.org); John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?,* 16 Fla. St. U. L. Rev. 675 (1988). In all 13 of these states, the availability of depositions has remained in effect and the fears of deposition opponents – such as Holtzoff – have not been realized.

Conclusion

There are arguments on both sides of the debate over whether discovery depositions should be available in criminal cases, and if so, how they should proceed. But that debate has been muffled for decades because the existing rule is taken as a given. It is time for reconsideration. Even original committee member Orfield advocated for change in his 1957 law review article, writing:

> What about amending the Rule so as to adapt the wider scope of the Federal Rules of Civil Procedure? Much can be said for such a proposal. . . . [I]t should be the policy of the law to permit as broad a scope of inspection and deposition in criminal cases as apply in civil trials. I cannot believe that anyone will be deprived of a right by the promulgation of a rule which seeks to provide a means for unearthing facts, whether those facts are pertinent in a criminal prosecution or a civil action. (quotations omitted.)

Orfield at 38.

To be sure, any change in the rule to allow discovery depositions would have to be carefully tailored to deal with issues including witness safety, victim trauma, trial delay, and the consequences of the defendant's Fifth Amendment privilege (which precludes deposing the defendant absent waiver). But these issues can be addressed, particularly with the aid of judicial supervision over the process. And the presence of tough issues is no reason to avoid the debate entirely, or to throw out the proverbial "baby with the bathwater."

It is time for careful study and a more nuanced approach to the problem, rather than the current "one-size-fits all" solution that simply eliminates discovery depositions altogether. Justice demands it. In the words of Justice William J. Brennan, given in a lecture (later converted to an article) in which he advocated for more expansive discovery in criminal cases:

> Depositions have proved an important discovery tool in civil cases, and when a defendant's freedom, rather than civil liability, is at stake, we should enhance rather than limit the discovery that is available. Neither witness statements nor an opportunity to cross-examine at a preliminary hearing, when one is held, provide an adequate substitute for a deposition.

William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for the Truth? A Progress Report,* 68 Washington University Law Quarterly 1, 12 (1990).

These words ring just as true today. We should listen to them.

Author's note: My thanks to Marjorie Berman, who assisted in the drafting of this article.

Editor's note: Readers with comments or differing views are encouraged to send their thoughts to the editor-in-chief, Bennette Kramer, at bkramer@schlamstone.com.

Second Circuit Decisions

The Court Announces Streamlined Bases for Non-Merits Dispositions

By Adam K. Magid

Long recognized as the nation's leading court on matters of commercial and business law, the U.S. Court of Appeals for the Second Circuit this year alone has issued dozens of decisions covering the gamut of commercial, securities and corporate law. Although its varied jurisprudence in these cases defies any single characterization, at least one theme has emerged: the burgeoning power of courts to dispose of procedurally defective actions efficiently. Two decisions, authored by long-serving Circuit Judge Richard J. Sullivan, advance this theme: *Phoenix Light SF Limited v. Bank of New York Mellon*, 66 F.4th 365 (2d Cir. 2023), affirms a court's ability to bypass thorny constitutional jurisdictional questions when other non-merits grounds for dismissal exist; *Admiral Insurance Company v. Niagara Transformer Corp.*, 57 F.4th 85 (2d Cir. 2023), clarifies the "broad discretion" of courts to decline to hear declaratory judgment actions, even when the case presents a justiciable controversy.

Phoenix Light

Phoenix Light involved multiple actions brought by a group of issuers of collateralized debt obligations (a structured finance product backed by pools of residential mortgages) against securitization trustees to recover losses stemming from the 2008 collapse of the housing market. The district court in one action held that the plaintiffs, having been assigned litigation rights by third parties "for the purpose of bringing an action or proceeding," were barred from asserting their claims under the doctrine of "champerty." The case, therefore, was dismissed.

In a subsequent action, brought by the same plaintiff group against another trustee, the defendant moved to dismiss on two grounds: first, that the plaintiffs lacked standing under Article III of the U.S. Constitution, because they had no genuine stake in the outcome, and, second, that collateral estoppel (issue preclusion) barred the plaintiffs from relitigating the prior court's invalidation of their litigation rights. Declining to consider the Article III question, the district court dismissed the case solely on the grounds of collateral estoppel. The plaintiffs appealed, arguing that the district court erred by failing to resolve a threshold constitutional jurisdictional question before disposing of the case on other grounds.

In a unanimous decision, a Second Circuit panel (Kahn, Merriam, and Sullivan) affirmed. Recognizing the "ordinary rule" that courts must address questions pertaining to constitutional jurisdiction first, the court noted that the Supreme Court has allowed courts "leeway" to dismiss actions on non-merits grounds where the constitutional question is "difficult to determine" and dismissal on such grounds is the "less burdensome" course. The court held that collateral estoppel is a non-merits ground that may be adjudicated without addressing the difficult or novel question of constitutional jurisdiction. A threshold determination of constitutional jurisdiction is only "vital," the court explained, if the court "proposes to issue a judgment on the merits." It is not essential, however, where there is an ascertainable non-merits ground for disposing of the matter, and the constitutional question is "hotly debated." In this case, collateral estoppel clearly barred plaintiffs'

claims, so there was no need to consider the constitutional question.

Admiral Insurance

The question in *Admiral Insurance*, in turn, was whether a district court properly dismissed an action, brought by an insurer under the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaration that it had no duty to indemnify or defend its insured in connection with potential litigation. The insured had received a litigation threat four years earlier, but no suit had yet materialized. The district court dismissed the case, holding that, given the low risk that the insured would face liability, no justiciable "controversy" existed. An appeal followed.

A unanimous Second Circuit panel (Calabresi, Cabranes, and Sullivan) held that the district court properly dismissed the case with respect to the insurer's duty to indemnify. The Declaratory Judgment Act requires "an actual controversy" between the parties for a court to exercise jurisdiction. An "actual controversy" exists only if there is a "practical likelihood" that the "contingencies" underlying the rights or obligations to be declared will come to pass. The court found no error in the district court's conclusion that liability – the "contingency" underlying any duty to indemnify – was unlikely in this instance. On the other hand, in the court's view, the district court wrongly conflated the duty to indemnify with the duty to defend. The duty to defend, unlike the duty to indemnify, depends on the risk of litigation (which the district court did not consider), not the risk of liability. Consequently, the court remanded the case so the district court could revisit its duty-to-defend analysis.

In so doing, the court observed that, even if the district court were to find a justiciable "controversy" on remand, it would not be duty-bound to hear the case. Clarifying a muddled body of case law in the Second Circuit, the court explained that district courts have "broad discretion" to decline to exercise jurisdiction over declaratory judgment actions. Moreover, courts may consider a multitude of factors when they exercise that discretion, including whether a declaratory judgment would serve a "useful purpose," whether it would "finalize" a controversy between the parties, and whether "judicial efficiency" and "judicial economy" favor declining jurisdiction. The court noted that district courts have "broad discretion" in weighing these factors, and no single factor is dispositive.

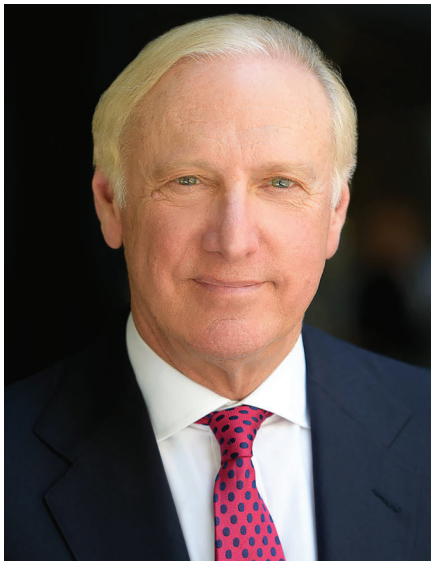
Conclusion

The common threads in *Phoenix Light* and *Admiral Insurance* are judicial discretion and judicial efficiency. *Phoenix Light* recognizes that, even though Article III constitutional standing is typically a gating issue, it would be wasteful of the court's (and litigants') time and resources to wade through the legal thicket and decide the question when a clear-cut alternative non-merits basis for disposition (such as collateral estoppel) exists. The court can decide the simpler question and move on. Likewise, *Admiral Insurance* affords courts "broad discretion" to dismiss declaratory judgment actions, allowing courts to save scarce time and resources for cases that, in the court's view, matter most. These decisions – and doubtless more to come – will serve as a boon to courts (and some defendants) in this era of exceedingly busy dockets.

Personal History

Chance Encounters

By Mark C. Zauderer



As practicing lawyers, most of us have had the opportunity to meet famous or infamous public figures – presidents, senators, Supreme Court justices, and even a few scoundrels. For me, none of those planned encounters compares with an unexpected encounter with an important person. In each instance, the encounter has given me a path of exploration to learn about not only the individual, but also a bit of history.

The Dodgers

The year 1955 was one of great celebration in Brooklyn. The Dodgers had won the World Series for the first time in baseball history. Many of the players lived during the season at the Hotel Bossert on Montague Street, one block from my house on Remsen Street. A gregarious woman who was well-known in the neighborhood was friendly with several of the Dodgers players. She saw me on the street and said, "Come with me." Taking my hand, she led me to Montague Street, where she greeted star Dodgers pitcher Johnny Podres. There, on the corner of Montague and Hicks Streets, she introduced me. I still have the picture of me standing with his arm around me, a nine-year-old with the top of my head barely reaching his waist.

W.E.B. DuBois

One day in the late 1950s, I rode my bike to visit my friend John, who lived at 19 Grace Court. In those days, most of the well-preserved brownstones in central Brooklyn Heights were either one family or, at most, two-family homes, with the owner renting out the top two floors. For security, I walked my bike into the central hallway (doors were rarely locked in those days). A very old man suddenly emerged from a door, startling me. He said, "That's a mighty fine bike you have, son. May I take it for a ride?" Before I could figure out what to say, he said, "I am only joking, but like you, I enjoyed riding my bike, when I was a youth." It was later explained to me that the man I had encountered was W.E.B. DuBois, born in 1868 and then 90 years of age. He was the most famous and consequential early leader in the Civil Rights movement, the founder of the Niagara Movement and a founder of the NAACP. The chance meeting inspired me to research his life and write a school paper on his achievements.

The author with Dodgers pitcher Johnny Podres.

The author's class with James Cagney.

Cagney

In 1958, my seventh-grade class at Brooklyn Friends School was invited to watch a film being made on the docks at the foot of Montague Street. (For quite some time, Montague Street ran down to the docks; one could cross the street at Montague Terrace over what was known as the Penny Bridge.) During the visit, we were introduced to the lead actor, whose name I did not recognize. His name was James Cagney (the film: *Never Steal Anything Small*). I still have the group picture of Cagney with my class.

And More and More

"If It's Tuesday, This Must be Belgium" was my childhood experience in 1959, while visiting Europe with my mother. On a stop in Lucerne, Switzerland, we visited the high-end Bucherer store, where well-heeled customers sat on counter stools viewing expensive watches and jewelry. My mother pointed to a well-coiffed woman at the counter, commenting that she was a well-known singer and actress. Curious, I went to the counter and sat on the stool next to her. The woman briefly looked at me before turning to the sales person assisting her. I glanced over for a moment and saw the woman signing her American Express Travelers check, "Dinah Shore."

In the fall of 1960, I was riding my bike in downtown Brooklyn with my best friend, Bobby Miller (more on Bobby later). Bobby pointed to a crowd and a man standing on the back of a pickup truck on the corner of Fulton Street and Boerum Place. He said, "Look, there's the man running for president." We walked over, reached up, and shook hands with John F. Kennedy.

In the mid-1960s, as a political science major at Union College in Schenectady, I had been exposed to a fair amount of college-level American history and had acquired a rudimentary knowledge of the structure of American government, including familiarity with the identity of the Supreme Court justices. I had seen a posted notice that a Supreme Court justice would be coming to the college, but it was imprecise as to the time and location. One afternoon, I was reading a book inside the library, not far from the entrance and the librarian's desk. A white- haired man with a ruddy face came in, seemingly lost (in those days, justices generally travelled unrecognized and without visible security). The librarian looked at me and said, "That's Supreme Court Justice William Douglas." Trying to be of help, I walked over to him and introduced myself. He did not look pleased; apparently, there had been some confusion about where he was to meet his host. The librarian made a phone call and then told the justice that his host would be there shortly. I thereupon took it upon myself to invite Justice Douglas to sit down with me and attempted to make conversation for what turned out to be about 20 minutes. I cannot remember what the conversation was about; but I do recall he did not seem very interested in what I had to say.

In the late 1970s, as an associate at a large law firm in Manhattan, I was assigned to a large antitrust case in the U.S. District Court for the District of Kansas, before trial Judge Richard Rogers. The multi-defendant case was being litigated on both sides by lawyers in New York City. During the course of the litigation, one of the defendants we were representing settled, which required the formality of the judge's approval. Judge Rogers had told the lawyers how much he enjoyed "mixing it up" with the New York lawyers. One day, we advised chambers that we would like the judge to approve a settlement with one defendant. The judge got on the phone and asked my counterpart and me to come to Topeka, so that after he had approved the settlement, he could take us to lunch with his law clerk.

When we arrived at chambers in Topeka, the judge so-ordered the stipulation of settlement and we left for lunch at his club at the top of a bank building (the place where most of the lawyers and judges got together). Like the good politician the judge had been, when we got to the restaurant, where he received many greetings, the judge walked me over to introduce me to an elderly, rather short and well-dressed man. The judge said, "Please meet my friend from New York, a distinguished lawyer" (I am sure he said that about everybody). The man said, "Good afternoon, I'm Alf Landon. Good to meet you." Of course,

the distinguished man, then in his 90s, was the former governor and presidential candidate who ran unsuccessfully for president against Franklin D. Roosevelt in 1936. You will recall that his daughter, Nancy Kassebaum, years later became a U.S. senator from Kansas.

In 1980, I flew to California to interview a witness. On my return, I was riding a crowded escalator at the Los Angeles airport and heard a familiar British voice several steps behind me. A little later, I boarded my plane for New York. Seated on the aisle and hearing that same British voice, I looked across and saw that man speaking with a companion. I finally realized that it was the actor John Houseman. On our long flight, we engaged in conversation about his role in *The Paper Chase*, and he gave me a most interesting explanation of how he mastered the role of the feared Professor Kingsfield. The plane made a stop in Las Vegas, where more passengers boarded. A fortyish man, neatly dressed with a brown leather jacket, sat down next to me. A few minutes later, a flight attendant came over and asked him for his autograph. I pretended not to notice, but a few minutes later curiosity got the best of me, and I asked, "Who are you?" He replied, "James Darren" (remember *Goodbye Cruel World* and *Beach Blanket Bingo* – as well as his Philadelphia buddies Frankie Avalon, Fabian and Bobby Rydell?). It turned out he had just left a meeting with billionaire Meshulam Riklis and his wife, Pia Zadora. Several months later, by sheer coincidence, Riklis appeared at my office for a deposition in a rather tense litigation over the use of property he owned in Virginia. Breaking the ice, I told him of my encounter with James Darren, which led to a pleasant conversation that helped the deposition go smoothly.

Bobby

In this article, I briefly mentioned my boyhood friend, Bob Miller. Unfortunately, last year, I learned of his passing and was asked to come to California to deliver a remembrance. As a child, I had spent weekends with his father, playwright Arthur Miller, who was married to Marilyn Monroe, at his home in Roxbury, Connecticut. (Arthur had left his first wife, Mary Miller, in 1956, who continued to reside at 155 Willow Street in Brooklyn Heights.) At the memorial in California, I met Bob's half-sister's husband, the actor Daniel Day Lewis (who looked like the Lincoln he had recently portrayed), with whom I spent several hours remembering Bob's interesting and productive life. The actor was particularly interested in our chance meeting with candidate John Fitzgerald Kennedy in 1960.

We cannot predict chance encounters. I hope that, like me, you have experienced them and had the opportunity to reflect on the life achievements of important people as a result of a momentary encounter. Such occasions of happenstance bring home to us the importance of the unique contributions of these individuals.

In the Courts

Magistrate Judge Valerie Figueredo Takes the Bench

By Magistrate Judge Sarah L. Cave

Valerie Figueredo was sworn in as a magistrate judge for the Southern District of New York on April 18, 2022. A South Florida native, Judge Figueredo majored in finance and political science at the University of Miami before obtaining her J.D. at the University of Pennsylvania School of Law. Following law school, she clerked for Circuit Judge R. Guy Cole, Jr., on the U.S. Court of Appeals for the Sixth Circuit in Columbus, Ohio. Judge Figueredo honed her litigation skills at Cravath, Swaine & Moore before taking on her second clerkship, with Judge Colleen McMahon in the Southern District of New York.

Experience

After her term with Judge McMahon ended, Judge Figueredo joined the Shapiro Arato Bach firm, before jumping to the New York State Attorney General's Office, working for Solicitor General Barbara Underwood. In her five and one-half in the Solicitor General's office, Judge Figueredo handled a wide range of civil appeals on behalf of New York in both state and federal courts. She argued all of her own cases, and particularly enjoyed opportunities to prepare amicus briefs to the U.S. Supreme Court.

Seeking to expand her criminal experience, Judge Figueredo joined the office of the Manhattan District Attorney, where, over the course of the next five years, she handled criminal appeals in the New York courts. All told, Judge Figueredo briefed and argued nearly 100 appeals, including several in the New York Court of Appeals and two amicus briefs in the U.S. Supreme Court.

As a Magistrate Judge

Having clerked for two federal judges, Judge Figueredo knew that being a judge would be interesting, challenging, and rewarding, so when a magistrate judge position opened in the Southern District of New York, at the not-so-subtle urging of Judge McMahon, she applied. Despite her years of preparation, she nevertheless feels as though being selected "was a bit like getting hit by lightning." Since she became a magistrate judge, she has been surprised by the inability, or reluctance, of litigators to compromise over small discovery disputes and their willingness to be disrespectful to each other in front of a judge. On the other hand, Judge Figueredo has appreciated the well-prepared lawyers who understand both the helpful and unhelpful case law, as well as those who have an intimate familiarity with the facts of their case.

Judge Figueredo's own clerkship experiences also inform her law clerk selection preferences. She looks for "diverse people in the broader sense of the word," that is, not just "ethnic and racial diversity but also people who are interesting and will be fun to work with for a year." She is open to hiring clerks straight out of law school, because someone who is smart and eager has the capacity to learn what is necessary to succeed as a law clerk. She also seeks clerks with different interests and experiences who are also nice and personable and will find the work interesting and enjoyable.

Judge Figueredo has found that the research and writing she does as a magistrate judge tap into her talents as an appellate lawyer. Her fluency in Spanish has proven to be very useful in settlement conferences in employment discrimination and wage-and-hour disputes involving Spanish-speaking plaintiffs. She has used her language skills to speak directly to the plaintiffs in a way that makes them more comfortable, willing to trust the process, and able to assess the value of the settlement offers.

Judge Figueredo looks forward to her years ahead serving the people of the Southern District of New York.

The Associate's Dilemma

How to Handle Your First Pro Bono Matter?

By C. Evan Stewart

As explained in prior issues of the *Federal Bar Council Quarterly*, there are many challenges that young associates at large firms must confront and overcome. Now, in this article, yet another will be addressed: How does a novice lawyer handle his/her first *pro bono* case, where he or she is flying solo?

Right after I passed my character and fitness interview (which consisted of an elderly gentleman taking one look at my file and, upon seeing that I was at Donovan Leisure Newton & Irvine, standing up to shake my hand saying: "Anyone good enough for Owen

McGivern [legendary New York First Department jurist and then of counsel to Donovan Leisure] is good enough for me!") and was admitted to the bar, one of my top priorities was to take on some pro bono work. Although I was challenged and excited to be working for the firm's blue-chip paying clients, the work for someone at my level on the food chain tended to be (for the most part) doing legal research and reviewing lots and lots of documents. But with pro bono assignments, I could actually interact with clients, and maybe even try a case on my own (just like Perry Mason)!

And so I asked some sage veteran of the firm (a third year associate) how to go about getting one of those plum assignments. I was told that the firm had a well established pro bono program, and that the program was headed by a senior associate named Doris K. Shaw.

Doris, as I would later learn, was a fearsome personage. She was so tough that many of the firm's partners were scared of her. But when I knocked on her door and introduced myself, she seemed quite pleasant and prepared to help me take this big step on becoming a "real" lawyer. Doris explained the firm's program, its connection to the Legal Aid Society, how the firm was assigned cases, and her oversight responsibility. All that sounded great to me, and so I asked her how I might get in the queue. Doris told me she would be back to me in short order with an appropriate assignment.

My First Case!

About a week later, Doris called and told me that the Legal Aid Society had sent on a new matter that, if I was interested, I could work on. "I'll be right there," I replied, and hot-footed it to her office. Doris handed me the file and wished me luck.

Back in the office I shared with another first year associate, I excitedly scanned the materials by which I would start to make my reputation as the lawyer of first and last resort. It was not what I expected. The matter was a criminal prosecution brought by the Manhattan District Attorney's office against a middle-aged man with a Hispanic surname (for purposes of this article, he will be identified as Mr. Rodriguez). Mr. Rodriguez was accused of public indecency on a New York City subway – specifically, rubbing up against a woman who was unknown to him. This did not sound promising (did Edward Bennett Williams get his start on such cases?).

Undeterred, I next went to the firm's law library to dig into the charge against my client and see what (if anything) I could find that would help me defend the case. Once I felt fairly comfortable with the legal side of things, I steeled myself and called Mr. Rodriguez at the telephone number in the Legal Aid file. On the third ring, a male voice answered. I identified myself and told Mr. Rodriguez that I had been assigned to represent him. He seemed very grateful to have a young, hard-charging advocate on his side. We then arranged for him to come to the firm's offices at 30 Rockefeller Place to discuss his defense.

When Mr. Rodriguez arrived the following week, he was dressed in a suit and seemed a highly unlikely defendant of the crime for which he stood accused. Middle-aged and fairly non-descript (with a neatly trimmed mustache), my client greeted me with a firm handshake; I then escorted him to one of the firm's lavishly decorated conference rooms for our initial interview.

During this meeting (and at each succeeding session in preparation for his defense), Mr. Rodriguez strongly protested his innocence. He had a responsible job at a bank in Harlem, he was happily married, and he had wonderful children. This charge was a blot on his impeccable reputation and he wanted to go to trial (if necessary) to clear his good name. I assured my client (then and thereafter) that I would vigorously defend his honor with every weapon at my disposal and would (of course) advocate his innocence at every opportunity. Together, we then started to map out a strategy for vindicating his good name, including him getting me a list of strong witnesses to attest to his upstanding character.

A Court Date

After several such sessions with my client, I felt prepared for the notification to appear at Centre Street for a settlement conference. This would be my first time (as a real lawyer) in court!

Together with Mr. Rodriguez (who was required by the notification to attend), we made our way to the vast forum for such events (later, I would learn that these were usually referred to as "cattle calls"). With hundreds of other lawyers (and their clients), we sat in the huge courtroom awaiting the clerk to call our case. Finally, we heard "People versus Rodriguez" – "counsel for the People?" (a female voice from far away answered "present"); "counsel for Rodriguez?" (I heard myself peep out "present.") "Will counsel please approach?"

Leaving Mr. Rodriguez, I made my way up to the clerk's station. There I met the assistant district attorney, a woman who was clearly a more senior member of the bar than I. The clerk instructed us to talk and report back when we were ready to speak with the judge. My adversary started by asking if I was ready to discuss the terms of a settlement. "Oh no," I replied, "My client is innocent, and we are prepared to go to trial to vindicate his good name!"

She looked at me like I was the dumbest person she had yet to come across. "Go to trial?" she responded: "Are you kidding me? Do you know what kind of evidence we have?"

That did not sound good, so I asked her to share it with me. "Well, for starters, he has prior convictions for the same conduct. Plus, I have two police officers who were eyewitnesses and are ready to testify." At that point, I do not know whether my adversary saw my Adam's apple move and heard my big gulp, but suddenly it was clear that my best laid plans were not looking so good.

Notwithstanding, she went on to explain that if my client would agree to a number of mandatory items, including psychological counseling, the D.A.'s office would agree to a suspended sentence with no jail time. I responded that I would have to check with my client and I would get back to her promptly.

I made my way across the packed courtroom to meet with Mr. Rodriguez, who anxiously asked me: "How did it go?" "Well, the D.A.'s office will agree to no jail time if. . . ." Mr. Rodriguez interjected: "Agreed!" "But don't you want to hear the rest?" I asked. And while I dutifully recited the other items that were part of the deal, my client had clearly checked out once he was assured he would not be prison bound.

Later that day, I was back at the firm and I ran into Doris, who knew I was going to be in court. "How did it go?" She asked with genuine interest. "Sorta mixed," I replied: "I got a really good settlement for my client with no jail time, but it is clear to me that he had been lying to me all this time about his innocence!" Doris looked at me with a look I still remember forty-five years later, paused, and said (with words I have also not forgotten): "I guess you just don't have what it takes to be a lawyer."

Postscripts

Notwithstanding Doris' disdainful look and comment, I did go on to do a few other pro bono turns while I was with the firm:

- In *McGuiness v. Jakubiak*, 106 Misc.2d 317, 431 N.Y.S.2d 755 (Sup. Ct. Kings Co. 1980), I represented the family of a young secretary at the firm who sued their landlord for extensive water damage in their apartment caused by roof leakage. That case made new law when our motion for summary judgment was granted based on a breach of the implied warranty of habitability (Real Property Law §235-b). See Bender's Forms: Real Property Law Section 235-b (Form 3).
- As part of a program initiated by the Manhattan district attorney, several large firms agree to "volunteer" associates to serve (in their "free time") as special assistant district attorneys. In that role, I briefed, argued, and won several appeals in the First Department. Somewhere, in the bowels of the D.A.'s files, is a picture of me and a few other eager beavers being sworn in by Robert Morgenthau.
- I subsequently represented a Sing Sing inmate who prosecuted a Section 1983 civil rights claim against the prison warden. After a four day trial before Judge Leonard B. Sand, the jury awarded my client damages and punitive damages. Thereafter, Judge Sand awarded my attorney's fee application in full ($49,047). See New York Law Journal (July 14, 1986); Attorney Fee Awards Reporter (Vol. 9, No. 4) (August 1986).

In the Courts

A Naturalization Ceremony

By Joseph Marutollo

The Eastern District of New York is home to more than eight and one-half million people. Covering Brooklyn, Queens, Staten Island, and Long Island, the Eastern District is one of the most diverse districts in the United States. Reflecting the district's gorgeous mosaic of people and cultures, Eastern District judges swear in thousands of new U.S. citizens at ceremonies in Brooklyn and Central Islip each year.

On January 26, 2023, Breon Peace, the U.S. Attorney for the Eastern District of New York, spoke to 76 of these new citizens at a naturalization ceremony presided over by District Judge Rachel Kovner in the Jack B. Weinstein Memorial Courtroom at the Theodore Roosevelt Courthouse in the Eastern District.

Naturalization is the process by which U.S. citizenship is conferred upon a foreign citizen or national after fulfilling requirements established by Congress as set forth in the Immigration and Nationality Act. Naturalization ceremonies take place multiple times per week in Eastern District courthouses. The ceremonies are special events in the courthouse, as each participant has cleared myriad hurdles to reach the goal of becoming a U.S. citizen. New citizens are often seen holding American flags after the ceremony, as they take photos and celebrate with their families in front of Cadman Plaza in Brooklyn or in front of the courthouse on Long Island.

Breon Peace, the U.S. Attorney for the Eastern District of New York, speaking to new citizens at a naturalization ceremony in the Eastern District of New York.

Guest Speaker

At the ceremony on January 26, Peace spoke eloquently about how, despite our differences, Americans are "united by the philosophy that all people are created equal, and with a goal to make this country better, a more perfect union."

Peace told the new citizens that one of the best parts of his job "is being able to work on behalf of and interact with the citizens of this great district – a district that was created in 1865 by President Abraham Lincoln." Peace noted that the Eastern District "has a long and storied history," that "is perhaps best characterized by its rich and vibrant diversity." Indeed, the 76 new U.S. citizens at that ceremony hailed from 35 countries around the globe.

Peace discussed how each new citizen in the courtroom received a packet that contains the Declaration of Independence and the U.S. Constitution. He noted how these documents speak to the origin of American citizenship and the country's founding principles in establishing its democratic form of government. But he also noted that "[t]hese documents, despite their central role in structuring a government of, by and for the people," did not contemplate that he, a Black man and a descendant of slaves, "would one day be responsible for protecting the 8.5 million residents of this district from crime; promoting civil rights, justice, and equality for all; and safeguarding the very ideals of democracy and the rule of law enshrined in these documents."

Peace asked the new citizens how we, as a nation, were able to move from the exclusion of the past to the welcoming inclusion reflected in the present moment. He explained how "[h]istory teaches that it took generations, as well as strength, determination, and sustained, unyielding courage to ensure that the nation's promise of equality was extended to all of its people."

Dr. King Quoted

Peace quoted Dr. Martin Luther King, Jr., who "identified the precursor to the American dream as the Emancipation Proclamation, which he referred to as the 'offspring' of the Declaration of Independence." King said that the Emancipation Proclamation, "resurrected and restated the principle of equality upon which the founding of the nation rested." Peace said that "[i]t could not be more fitting for us to join in pledging our allegiance to this great country in a proud district created by President Lincoln and rooted in his proclamation of freedom."

Peace also quoted former Presidents John F. Kennedy and Barack Obama, as they "often spoke of audacity and hope; the audacity to believe that each of us can make this country greater and stronger, and hope for a better and brighter tomorrow for all Americans." Peace stated that, in his own life and career as a lawyer and now as the U.S. Attorney for the Eastern District, he had "the audacity" to believe that he "could bend the 'arc of the moral universe' towards justice, fairness and freedom, especially for the vulnerable and the marginalized."

Peace urged the new citizens to make this naturalization day their day "of audacity, [the] day to use the voice [they have] been given to further our democracy and give meaning to its founding principles." He implored them to "[h]old fast to the belief that all men and women are created equal and pay it forward by bending the moral arc of this district and country towards justice, fairness, equity and inclusion."

Peace concluded by giving the new citizens a warm welcome as each began their journey in our vibrant democracy. It was a moving ceremony and a wonderful celebration of the United States and the Eastern District.

An Inside View

The First Decade Committee

By Sherry N. Glover

Founded in 2001-2002, the Federal Bar Council's First Decade Committee began as a space for attorneys in their first 10 years of

practice to build relationships with each other and other members of the Council community. The committee now has over 45 practitioners from all sectors – including law firm associates, junior partners, in-house counsel, and public service lawyers – and it continues to provide opportunities for networking and career development.

Recently, we spoke to the committee's outgoing chair, Julian S. Brod, about the committee's work. We also spoke to the committee's new co-chairs, Brachah Goykadosh and Joshua Bussen, whose tenure began at the end of March, about their vision for the committee's future.

Conversations with Federal Judges

During the past three years, the committee has prioritized three core activities: (i) virtual brown bag lunches with federal judges; (ii) panel discussions with practitioners; and (iii) social events. The virtual brown bag lunches have been of particular interest to First Decaders, Council members, and members of the bar. These lunches, which are moderated by committee members via Zoom, provide attorneys unique opportunities to converse informally with federal judges within the Second Circuit. The lunches begin with a structured Q&A session, followed by questions from the audience. Recent judicial guests have included Second Circuit Judge William J. Nardini, Southern District Chief Judge Laura T. Swain, Southern District Judges John P. Cronan and Vernon S. Broderick, Eastern District Judge Rachel P. Kovner, Southern District Magistrate Judge Ona T. Wang and Eastern District Magistrate Judges Ramon E. Reyes, Jr. (whose nomination to district judge is pending) and Marcia M. Henry.

The most recent virtual brown bag lunch featured Southern District Judge Jesse M. Furman. Judge Furman discussed his experience as a former judicial law clerk and counselor to former U.S. Attorney General (and former judge) Michael B. Mukasey, the importance of collegiality in the courtroom, past terrorism cases, and the practical elements of oral arguments. Additionally, Judge Furman reflected on the duty of sentencing individuals convicted of crimes – a task he described as "weighty."

Among other topics raised during this event was the need to encourage law firms to include law students and junior associates in court proceedings. To address this concern, Judge Furman noted that he "favorably considers" applications for oral arguments from junior lawyers. Indeed, many judges within the Southern and Eastern Districts of New York echo these sentiments in their individual rules and practices. The committee's hope is that the virtual brown bag lunches will continue to enable junior attorneys to interact with judges and utilize these experiences to gain enhanced opportunities at firms.

Collaborations

The committee has collaborated with other committees. Each year, the committee and the Second Circuit Courts Committee plan the Council's annual Fall Bench and Bar Retreat. The October 2021 retreat stood out, as it was one of the Council's first large, in-person social events since the start of the pandemic. And on November 17, 2022, the two committees collaborated to organize the Pathways to the Bench live event, during which Magistrate Judges Robert W. Lehrburger and Valerie Figueredo of the Southern District discussed their careers and journeys to the federal judiciary. In early 2022, the committee collaborated with the Bankruptcy Litigation Committee on an event with Southern District Bankruptcy Judge Sean H. Lane. The committee anticipates sponsoring future events with other committees and outside organizations.

An ongoing goal of the committee is to encourage attorneys to get involved and attend Council events. This has been challenging during the COVID-19 pandemic, but technology has created alternative ways to bond. The committee recognizes the benefits and disadvantages of virtual events. While virtual events allow for easier dissemination of information, it can be difficult to form connections through a screen. The committee is proud of its recent in-person events, including a series of panel discussions focused on career development (e.g., "Going In House," "Making Partner," "Public Service," and "Starting a Firm").

Looking Forward . . .

Brod, who stepped down as chair of the committee in March 2023, reflects that the most rewarding part of his tenure as chair has been working with committee members on programming that brings together members of the bench and bar – events that were especially important during the pandemic, which coincided with the first half of his tenure.

New Co-Chairs Goykadosh and Bussen are excited about their new roles. They assisted with the committee's past program planning and look forward to "continuing the good work."

Recognizing how they have gained relationships and informal mentorship, their goal is to increase awareness about the committee to ensure that other young lawyers reap similar benefits.

Brod, Goykadosh, and Bussen are all hopeful that the committee will continue to serve as a gateway to the Council for newly admitted lawyers, enabling friendship, networking, and professional development.

Pete's Corner

Larry Doby to the Rescue

By Pete Eikenberry

Growing up in Cambridge, Ohio, I was an early and rabid fan of the Cleveland Indians (now known as the Cleveland Guardians). As the mother of six children, my mother could not "care less" about ironing, and we all ironed whatever we needed to look presentable – except that my mother loved to iron while listening to the Indians' broadcast on the radio.

In October 1948 (the last time the Indians won the World Series), I was parking cars at the county fair when the Indians beat the Red Sox in a one game play-off for the American League championship, which I was able to hear on the radios of the cars I was parking. Earlier that same year, a father drove four of us boys to see the Indians play the Red Sox in a double-header in Cleveland, a three hour drive from Cambridge.

The Catch

There was a fence in front of the stands behind the outfield creating a space in which fans could sit on the ground, watch the game, and eat picnic lunches. At one point, a Red Sox player hit a deep fly ball toward centerfield, and the star centerfielder of the Indians, Larry Doby, raced back, launched his body, with his feet off the ground, ribs on the fence, glove outstretched and caught the ball. It was the most amazing play I have ever seen.

Some years ago, my executive secretary came to me with information that a family friend, who had helped raise her, had a negligence action pending in Brooklyn Supreme Court, and that her attorneys were advising her to settle for something not more then $15,000. I interviewed her lawyers and determined that I could take the case. When I got the file, I learned the problem; the client previously had an accident where she also had been injured. When she was deposed, she did not reveal the earlier accident. Nevertheless, I had the file, so I said to my associate, "Maya, we can go to Brooklyn and try a negligence case, can't we?" She said, "Yes."

The Bio

We were assigned a judge, Larry, whose last name I will omit. In the early days of the trial, it was tough sledding. The judge was totally disinterested. Yet in a conference in chambers with the judge, I spotted on his bookshelf a book entitled, "The Biography of Larry Doby." The judge explained to the lawyers that his family had grown up next door to Jackie Robinson's family, but that his parents had named him "Larry" after Larry Doby, the first Black player to play in the World Series. I then told the judge about seeing Larry Doby catch the fly ball at the game in Cleveland. From then on, we had the full attention of the judge, and the trial went well. I was not familiar with trying a negligence case, and my adversary offered me a 50/500. I had no idea what he was talking about. A friend told me it was an offer that if we lost, we get $50,000, but if we won, we would get $500,000, saving both sides the aggravation and uncertainty of trying the damages portion of the case. We took the offer.

The Case

The plaintiff was cross-examined about the fact that she had a prior injury and had not revealed it at her deposition. Nevertheless, she testified

that she had come from Panama and while raising five children as a single mother had become a citizen. Each of them had college educations of at least two years. In the relevant accident, a cabinet had fallen on her, when she was working eight hours a day as a cleaning lady for the New York City Police Department; at the time she also was working six hours a day cleaning rooms for Ramada. Her injury working for the Police Department was much more serious than the first injury and incapacitated her. She was a "Great American Hero," and the jury bought her story.

Pete's Corner

Power of the U.N. to Counter the Aggression of a Member of Its Security Council

By Pete Eikenberry

The five nuclear powers who prevailed in World War II, the United States, the Soviet Union, the United Kingdom, France, and China, negotiated the United Nations ("U.N.") charter in their collective interests. In it, each was not only a member but was designated as a permanent member of the U.N. Security Council. Ten member states also are elected to the Security Council for two-year terms with no right to immediate re-election. For a Security Council resolution to pass, it must receive the votes of 9 of the 15 members, including the votes of all the permanent members. There is an exception: pursuant to Article 27 of the charter, in certain circumstances, a permanent member who is "a party to a dispute shall abstain from voting."

Is the Russian Federation a Member of the U.N.?

Membership in the U.N. is open to all "peace loving states which shall refrain from the use of force and obey international law." Although the Soviet Union was a permanent member of the U.N. and the Security Council, the Russian Federation ("Russia") has never been elected as a member of either. After the collapse of the Soviet Union, Russia assumed its membership in the U.N. and the Security Council as the successor of the Soviet Union. (Presumably, the U.S. assented in this arrangement as Russia is a nuclear great power.) Subsequently, Russia has been treated as if it is the Soviet Union's legal successor.

When Czechoslovakia collapsed, the General Assembly elected Slovakia and the Czech Republic into membership; Russia has never been elected a member.

The U.N.'s Purposes

Pursuant to Article 1 of the UN Charter, its purposes are, among other things:

> To maintain international peace and security, and to that end to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . .

Since Russia has invaded Ukraine by force of arms, it is in violation of the UN Charter.

Pursuant to Article 2:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles. . . .
>
> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. . . .
>
> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner consistent with the Purposes of the United Nations.

The Security Council's Power to Enforce

Article 5 provides:

> A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council . . . .

Article 6 states:

> A Member of the United Nations which has persistently violated

> the Principles Contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

Sanctions Available to the U.N. Against Russia

Article 41 says:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

Finally, Article 42 adds:

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, or land forces of Members of the United Nations.

Comment

No member state has moved in the Security Council to sanction Russia for its aggression against Ukraine and, thus, it is hypothetical to discuss whether a Russian veto would be valid. Since it would be required to abstain, arguably, a Russian veto would not prevent the Security Council from acting.

A Tribunal Issue

Since Russia has independently violated the UN Charter by its aggression against Ukraine, why has the UN not enforced the Charter against Russia? It could be sanctioned by a vote of the General Assembly, but the vote will not be enforceable without recommendation by the Security Counsel.

The Problem for the U.N.

It is indisputable that Russia is in violation of the U.N. charter in taking adverse actions that inspired the founders of the U.N. to organize it. It seems apparent that, pursuant to its charter, the U.N. should:

(a) Expel Russia from the UN and from its Security Council, and

(b) Bring force against Russia for its use of force, and

(c) Determine that Russia has never been duly elected as a member of the United Nations, and

(d) If Russia is a member of the U.N., it should expel Russia from membership and otherwise counter Russia's aggression.

Should not Russia be banned from voting as a member of the General Assembly and the Security Counsel – if it is found to be a member of the UN?

The Obvious

Presumably, if the UN were to counter Russia's aggression set forth above, China would veto any such actions, and the United States might do so as well.

Conclusion

It is extremely improbable that any of the above actions to counter Russia's aggression appropriate to the U.N.'s mission will be taken. Yet, should we not examine the glaring defects in the structure of the U.N.? It was organized by a group of men who represented nations whose collective preeminence is no longer unquestioned. Perhaps, in my grandchildren's lifetimes there will be a world conference to reestablish a U.N. without such alarming organizational weaknesses. Many young people no longer look upon the U.S. Constitution as a sacred document. Is it not time for many nations, peoples and women to meet and discuss how the defects of the U.N. Charter may be remediated?

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