



# Federal Practice and Procedure Section Newsletter

Vol. 7, No. 1 — June 2013

## Chair's Message

by Elizabeth J. Sher

As the chair of the Federal Practice and Procedure Section of the New Jersey State Bar Association, I would like to (re)introduce you to the section and the inaugural issue of our newly revived and redesigned section newsletter. Our section is the only state bar section devoted to federal civil practice in New Jersey. From September to June each year, we host various events—educational and social—to enhance the experience of members of the state bar who practice in federal court.

During the 2012-13 year, for example, we hosted a reception at the Law Center for the newest federal judges and magistrate judges and their law clerks. We held a joint dinner meeting with the Federal Criminal Law Section at which the Honorable Esther Salas, U.S.D.J., and Carol Gillen, A.F.P.D., led an informative discussion on the interplay between federal and state criminal charges. We held a dinner meeting in early April with two presentations—one on the effect of sequestration on the New Jersey District Court (featuring analysis and comments by Wilfredo Torres, chief of federal probation; Christine Dozer, chief of U.S. Pretrial Services; and Jack O'Brien, chief deputy clerk at the U.S. District Court) and one on the mechanics of multi-district litigation (featuring the Honorable Lois Goodman, U.S.M.J.)—and an update on class action law since *Wal-Mart v. Dukes* (featuring Kerri Chewning, Esq.). At the annual state bar convention in Atlantic City, our section presented a program on e-discovery for state and federal practitioners, with presentations by members of the bench, bar, and litigation support industry with particular expertise in this area. Our next meeting is scheduled for June 24 at the Law Center—we hope you will join us!

As you can see, our section provides members varied and unique live opportunities to interact with and learn from federal practitioners, judges, magistrate judges, and other members of the federal family. In addition, we email advance announcements of proposed federal rule changes and adoptions. Now we have a revived newsletter, which is intended to supplement and enhance the educational benefits provided by our section. On behalf of the current and future officers of the section, I invite you to join our section and participate as an active member this year and in the years to come.

If you have any questions about the section, becoming a member, or getting more involved in our leadership and activities, please contact me ([esher@daypitney.com](mailto:esher@daypitney.com)), Jack O'Brien ([John\\_O'Brien@njdcourts.gov](mailto:John_O'Brien@njdcourts.gov)), Kerri Chewning ([kchewning@archerlaw.com](mailto:kchewning@archerlaw.com)) or Christopher Walsh ([CWalsh@gibbonslaw.com](mailto:CWalsh@gibbonslaw.com)), the current officers of the section. ■

## Message From the Editors

---

We are pleased to announce the first edition of the newly revived and redesigned *Federal Practice and Procedure Section Newsletter*. The newsletter will be published quarterly to share the latest news from the Federal Practice and Procedure Section, historical facts about the District of New Jersey, important developments in federal case law, policy developments, and trends affecting federal practice. Each newsletter will also interview a judge of the District of New Jersey to get his or her perspective on practice and procedure in the federal courts.

We welcome members of the Federal Practice and Procedure Section to contact the editors if you are interested in submitting an article concerning an area in which you have an interest or expertise. We look forward to working together to continue to educate our members about important developments in federal practice. ■

**Maureen T. Coghlan**

*Editor*

Archer & Greiner  
One Centennial Square  
Haddonfield, New Jersey 08033  
mcoghlan@archerlaw.com

**Jesse C. Ehnert**

*Editor*

Day Pitney LLP  
One Jefferson Road  
Parsippany, New Jersey 07054  
jehnert@daypitney.com

**Jonathan D. Klein**

*Editor*

Gibbons P.C.  
One Gateway Center  
Newark, New Jersey 07102  
jklein@gibbonslaw.com

**Sara F. Merin**

*Editor*

saramerin@hotmail.com

# An Interview With the Honorable Jerome B. Simandle, Chief Judge, United States District Court

by Maureen T. Coghlan

One of the defining characteristics of the District of New Jersey is the high quality of its judicial officers. Who better, then, to offer insight into best practices and procedures for practice in the district? To this end, the editors of the *Federal Practice and Procedure Section Newsletter* plan to interview members of our Judiciary about their personal experiences and suggestions for success. For our inaugural issue, we went straight to the top. Chief Judge Jerome B. Simandle graciously agreed to be our first interviewee, and offered valuable insight into federal practice and his own personal preferences.

Chief Judge Simandle has served as a judicial officer for the District of New Jersey for 30 years. He first took the bench as a magistrate judge in 1983. On April 1, 1992, President George H.W. Bush nominated Judge Simandle to serve as district judge. The Senate confirmed the nomination on May 21, and Judge Simandle received his commission on May 26, 1992. He was elevated to chief judge on Jan. 2, 2012.

What follows is a personal profile, a recipe for the successful federal practitioner and, writ large, a blueprint for individual achievement.

## Where did you grow up?

I grew up in Binghamton, New York. My family lived there for over 50 years. I am the youngest of four. I have three older siblings, two brothers and a sister.

Binghamton was an interesting place to grow up. It's known as a manufacturing center, the birthplace of IBM, and several other high-tech industries, including flight simulators. My mother made flight simulators that were used to help astronauts train to land on the moon. My father worked for General Aniline and Film Corporation.

## What inspired you to become a lawyer?

I was an engineering student at Princeton when the Center for Study of Responsive Law, a group sponsored by Ralph Nader, recruited me and other students, engineers, and lawyers to work in Washington, DC. My group worked on aviation safety and regulation of airplane manufacturers and airlines. I really admired the legal work being done and saw the good that came from it. I had never known lawyers before. There were none in my family. The center eventually became known as Public Citizen. I also worked with this organization one summer in law school. I was admitted to graduate school in architecture and urban planning when I changed my mind and applied to law school.

## Where did you go to law school?

I graduated from the University of Pennsylvania Law School in 1976.

## Is there a person or mentor you credit with helping you with your career?

Yes. Chief Judge John F. Gerry was a beloved and brilliant judge in our district who died far too young in 1995. He hired me as one of his first law clerks in 1975. I clerked for Judge Gerry for two years, beginning in 1976. He taught me by example things about judging and about life. He encouraged me every step of my career.

Judge Gerry's teaching style was direct. He did not speak in parables. He showed me how important it was to take a job seriously, but not yourself too seriously. He also emphasized the importance of listening before you talk. He was a great listener, very focused on the moment. Judge Gerry made you feel that you were at the center of the universe when you were with him. This was his way of treating everyone with respect. Judge Gerry also taught me the importance of being a good person first and that everything else, including being a good lawyer or judge, will follow. He was also very, very funny. In that regard, he set the bar so high that I've not tried to imitate him!

## **What do you count among your most notable life events or proudest professional accomplishments?**

Certainly, I count marrying my wife Jane and becoming a step-father to two wonderful children, which changed my life, to which five beautiful grandchildren have been added.

With regard to my profession, my proudest moment was becoming a magistrate judge and working with the judges I so admired. This is a district-wide process where five names are put forward to the judges and one selected. I was 33 at the time, much too young. I had worked as an assistant United States attorney in the Civil Division for five years and had tried a number of cases, so for better or worse, the judges knew me. After the interviews, I could not have been more surprised when Chief Judge Fisher called me to tell me that I got the job. It was a great moment for me. But I was only seven years out of law school. For a while, I was always the youngest in the room, and now I'm one of the oldest!

## **What advice would you give to lawyers appearing before you for the first time?**

I would tell lawyers to be prepared. Ask questions if you are unfamiliar with procedures and learn the procedures.

I would also advise an attorney not to be too reactive; don't rise to the bait that your opponent may cast on the water. Listen to the questions that I am asking and use those questions to your advantage. If I am asking questions, those are the issues that are troubling me. I also think it helps to know that a trial will be an attorney's first. This helps me adjust my expectations and guide an attorney who might be unfamiliar with procedures. I vowed when I took the bench never to engage in any hazing-type ritual for new attorneys.

## **What would you caution a lawyer practicing before you not to do?**

Don't interrupt, don't twist facts, and don't overlook case precedent.

## **How would you describe your ideal brief?**

An ideal brief is concise, interesting, has some 'life,' an advocate's edge, and is of such quality that it could even become part of an opinion. What I mean by life is it offers the party's point of view, it humanizes the client. For example, refers to the client by name, walks

through the facts, and lays them out in an interesting way. I'd also caution against elaborating too much or using a lot of adjectives or adverbs. Use verbs to move the story along.

Also, don't leave out uncomfortable facts. A good brief should also provide the procedural basics, a statement regarding the court's jurisdiction and the proper standard of review. The standard of review should be adjusted for nuances. Don't be content with boilerplate language.

A good brief should also be specific about the relief requested. For example, make a cross-motion for summary judgment explicit; don't bury the request in the body of the brief. When an issue like a cross-motion for summary judgment is not raised in the procedurally correct way, a judge can lose confidence in the attorney's skills.

Also, identify the issues that need to be decided. In almost all of my opinions I include a sentence that says, "The principle issue to be decided is..." This sentence is so important that it's usually the last sentence I write, although it will appear near the beginning of the opinion. The brief should help me to answer the principle issue question and write that sentence.

An opposition brief or reply brief should also address an adversary's position point by point. Concessions can also be powerful tools of persuasion. An attorney shouldn't fight an issue that he or she has no chance of winning. A gracious concession can elevate an attorney's professional status in the eyes of the court.

## **Do you accept informal letter briefs?**

Usually, I accept informal letter briefs when I ask for supplemental briefing at oral argument. If that's easier for an attorney, then that's fine. Otherwise, I expect attorneys to follow Local Rules 7.1 and 7.2. For example, a table of citations is important. Following the correct format is a confidence-building measure. Judges read thousands of pages a month, so a crisp letter brief can be most welcome.

## **What factors do you consider when weighing whether to grant permission to file a sur-reply?**

I consider whether the original movant unexpectedly raised a new issue in a reply brief and whether the opposing attorney did not have an adequate opportunity to anticipate this new issue. I would not be inclined to grant permission if there has been a pattern of delay or neglect on the opposing attorney's part prior to seeking

leave to file a sur-reply. There are good reasons why sur-replies are disfavored.

### **What do you think are the most important attributes of a successful federal practitioner?**

I would list civility, ability to listen and synthesize, an ability to listen to the judge and the adversary, to really pay attention. I would also say a familiarity with the rules—don't assume something to be true without checking. Successful practitioners have the personal attribute of being comfortable with their tasks. This is especially true for practice before a jury.

### **What common mistake(s) do you see practitioners make and what remedies would you suggest?**

One mistake I see attorneys make is not taking advantage of oral argument. There is a healthy debate in our district about the role of oral argument. I am generally in favor of granting oral argument. Some judges in the district may be more reluctant. I think it's a common mistake not to use oral argument to an attorney's advantage. It is a second opportunity to persuade a judge in a completely different way than the briefing and to address an adversary's points. It is an opportunity to shape the argument. It is also an opportunity to address an issue that is troubling the judge or to explain confusing facts.

Another common mistake is failing to have a plan for how evidence will be admitted at trial. A good attorney will anticipate evidentiary problems before he or she comes to court. It is a mistake to overlook the Rules of Evidence. The way to win a judge's heart is to cite a specific rule and explain why it does or does not apply. For example, "Yes, Rule 803(6) allows a hearsay exception for records kept in the normal course of business, but these records were not kept in the course of a regularly conducted activity of the business, and therefore the exception should not apply."

Another mistake I see is a reluctance to concede obvious points. Attorneys should agree to stipulate to things that can reasonably be resolved via stipulation rather than require the testimony of a records custodian, for example.

Talking too fast can also be a major problem. In this electronic age, we seem to speed everything up. People think that they can say more if they say it fast. Abraham Lincoln did not rattle through the Gettysburg Address and arguably said more in that speech than in any other

speech in American history. An attorney should visualize where a thought is going, picture what the paragraph looks like if written down. Make sure each sentence has a beginning, middle, and end. Your thoughts should be logical and comprehensible.

Repetition is also a common mistake. I promise you, the first time a judge hears it, he or she gets it. This is an especially dangerous mistake with a jury. Juries do not like to be talked down to by the attorneys. They are very smart people. They resent being talked down to as much as they resent incivility in the courtroom.

### **How would you recommend an attorney proceed if he or she thinks that oral argument would be helpful to the court?**

I think the attorney must ask for oral argument. Judges say they don't get many requests for oral argument, or the request is tucked away as an afterthought. Make a statement as to why oral argument is requested. Maybe there's a novel issue, or the facts are complex, or the attorney simply would like to address the judge's questions.

Sometimes a judge may deny oral argument if it's clear that the party requesting will win the motion or there is nothing to debate. And, of course, oral argument costs time and money, and this time and expense may not be necessary.

A practitioner might also consider following up on his or her request for oral argument with a letter laying out the reasons for the request around the time of the motion return date. The letter might state the return date of the motion, note that oral argument has not been scheduled to date, and explain why argument could be helpful on a date convenient to the court. The worst way to request oral argument is to call chambers and make an *ex parte* request. A request for oral argument is a substantive matter that should always be put in writing.

### **What is your preferred procedure for receiving notification of an application for emergency relief? For example, should a practitioner file an emergent motion as well as contact your chambers to provide notice that a party is seeking emergent relief?**

The attorney should certainly reach out to the clerk's office and give notice that the attorney is in final preparation for filing. The key thing is to have the application electronically filed. I would also recommend calling my

courtroom deputy, or call chambers, being careful to avoid any *ex parte* communication about the merits but simply to bring the matter to someone's attention. The documents should speak for themselves. Also, I would not recommend waiting until Friday at 4:30 p.m. to file for a temporary restraining order.

### **With regard to a motion to seal, do you prefer that materials subject to the motion be submitted to chambers in addition to being filed with the court?**

Yes, I would prefer that materials subject to the motion be submitted to chambers, although the magistrate judges usually handle motions to seal. Submitting an extra set for review can be helpful.

### **Is being a judge what you thought it would be?**

It's even better than I thought it could be. It's been an opportunity to make a difference and grow intellectually. I have genuinely enjoyed my association with my judicial colleagues over the decades. We genuinely enjoy working with one another. The opportunity to work with a dedicated professional staff and supremely talented law clerks is especially gratifying.

### **What do you find challenging about being chief judge?**

My predecessor, Chief Judge Garrett Brown, was very generous in preparing me and he left our court in great shape when he retired. I became chief judge on Jan. 2, 2012, during a very difficult budgetary environment, when sequestration was around the corner and then hit on March 1, 2013. We have been planning austerity measure after austerity measure.

During the past two years, the caseload for the District of New Jersey has increased by 20 percent. We are the fastest-growing district of any large federal court. Those cases are managed and adjudicated by people, but we don't have the money to replace experienced staff who move on to other positions. We have been doing more with less. Plenty of businesses go through similar circumstances, but courts are different. We have no control over the number of customers we serve. We have a constitutional duty to serve everyone. We can't shrink our staff by five percent, particularly when we have a 20 percent increase in caseload, and we were already thin due to staffing cuts in the clerk's office, probation and pretrial services beginning in 2009.

It is also difficult to talk about furloughs. It's harmful for morale. We have efficient, professional staff. The idea of not being able to pay staff for all their hard work, if Congress doesn't adjust the budget by Oct. 1, is very, very difficult.

It is also a challenge to manage three large courthouse systems in Newark, Trenton, and Camden, each of which is bigger than some entire districts. For example, Camden has 12 judicial officers that will handle about 2,000 civil cases this year and many thousands of bankruptcy cases. Camden alone has more cases and judges than about 30 entire district courts, but Camden alone doesn't get nearly the resources that some smaller districts get. This means that we need to be tremendously efficient. We need to make sure that each vicinage shares the same benefits and burdens of life in federal court.

### **What do you find rewarding about being chief judge?**

I am privileged to see all of the great work being done by our district judges and magistrate judges despite the heavy caseloads. I see firsthand how hard the judges and their staffs work. I also appreciate the dedication and professionalism of our probation, pretrial services, and clerk's office personnel. It is very rewarding to work with such dedicated staff throughout the state, particularly in a time of financial crisis. We are all pulling in the same direction.

I also find the opportunity to give some voice to the way the court system works very rewarding. I am in the position to respond to the community's concerns or misapprehensions about the federal court system. I enjoy doing public outreach, speaking at bar events, and participating in educational opportunities like CLEs.

### **What are your goals for the district?**

Being chief judge means you have a lot of responsibilities but no individual power. What gets accomplished in the district is done by consensus. And fortunately, we do have a consensus on all the important things. I would like to build on that consensus. I would like to increase our openness to innovation and provide more educational opportunities for judges and staff.

I would also like to listen to the bar and propose changes that may need to be made. I have the pleasure of working with our active and helpful Lawyers Advisory Committee (LAC) under the leadership of Tom

Curtin. I have the opportunity to work with other judges to act as a sounding board for the LAC's ideas and to give them my honest reaction. I then can go back to the Board of Judges with these ideas, and very often we enact the proposals with minimal changes. I would like to continue to build on this relationship.

Like all our judges, we hope to maintain the District of New Jersey's excellence in complex litigation, including patents, class actions, and multi-district litigation generally. I am told that there is no federal court that has more MDL dockets than ours.

At the other end of the spectrum of our docket, I hope our district can continue to provide meaningful court access to unrepresented litigants and develop the *pro bono* panel of attorneys willing to accept appointments in worthy cases.

I would also like to be part of a process that demystifies the court system. Our judges continue to work closely with the Association of the Federal Bar and the New Jersey State Bar Association to explain the court to lawyers and the public. I want to do my part to ensure that our courts continue to be a place where people come to seek justice. This requires transparency, enacting the right rules, and setting the right tone.

Nothing can be done by any chief judge alone, least of all me. We will only succeed because of all our judges and staff. We succeed because of everyone. ■

*Maureen T. Coghlan practices with Archer & Greiner, P.C.*