A LIFE IN SERVICE: INTERVIEW WITH THE HON. CHRISTOPHER M. KLEIN

by

Hon. Christopher M. Klein[*]
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Over the course of a few days, Judge Christopher M. Klein agreed to sit down, figuratively speaking, with Professor Nancy Rapoport and answer a few questions about how he approaches his job as a bankruptcy judge.

By way of background, Judge Klein was appointed to the bench in 1998 as a United States Bankruptcy Judge for the Eastern District of California. He was a member of the Bankruptcy Appellate Panel of the Ninth Circuit from 1998 through August 2008, serving as Chief Judge from 2007 to 2008. Prior to 1988, after service in the Marine Corps as an artillery officer in Vietnam and judge advocate, Judge Klein was a trial attorney in the United States Department of Justice; in private practice with Cleary, Gottlieb, Steen & Hamilton; and deputy general counsel-litigation of the National Railroad Passenger Corporation.

During his time on the bankruptcy bench, Judge Klein has presided over thousands of bankruptcy cases—both individual and business—and interacted with countless debtors, creditors, and professionals. He also was a member of the Advisory Committee on the Federal Rules of Bankruptcy Procedure and the Advisory Committee on the Federal Rules of Evidence; he has spoken on many panels and participated in likely as many roundtables; and he has written articles on bankruptcy law and practice. His vast experience, including his time as a nonbankruptcy attorney and in public and private practice, offers unique insights and food for thought for the bankruptcy community.

Prof. Rapoport: I'd like to start with an overview and then get into details. How would you describe yourself as a judge?

Judge Klein: Consider me a "rescue"—psychologically scarred by a legal puppyhood defending appeals of 70+ criminal felony convictions in which prosecutors had not carefully protected trial records. Their plausible explanations for appealed issues ("that's not what happened, here's what really happened") were out of bounds when nothing in the record supported their excuses. The appellate standard of review was unforgiving—"harmless

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[**] Interviewing Judge Klein for this article was, simply put, loads of fun, and I'm grateful to him.

error" had to be demonstrated to be "harmless beyond a reasonable doubt." I hated to lose.

"Rescue" came when the United States Department of Justice retreaded me to be a district court civil trial lawyer. By then, four propositions were seared into my psyche: (1) the record is everything; (2) anticipate the potential appellate audience; (3) be mindful of the standard of appellate review; and (4) there is a mutual obligation of judges and lawyers to assure the accuracy of the trial record. To this day, during a hearing, I can visualize the transcript with a view to ambiguities or gaps that could lead to confusion on appeal if not clarified.

Prof. Rapoport: That's a good point. You were a litigator for a long time before becoming a judge, so I'm wondering what it was like for you when you first became a bankruptcy judge.

Judge Klein: To a new bankruptcy Judge in 1988, the position seemed straightforward: decide bankruptcy cases, applying the Bankruptcy Code and substantive nonbankruptcy law in matters governed by the rules of procedure based on facts ascertained by way of the Federal Rules of Evidence. Thirty-six years later, the view through the lens of 160,000+ cases and hundreds of Bankruptcy Appellate Panel (BAP) appeals is a kaleidoscope that defies description.

Life experience surfaces here. Before law school, I was a Marine Corps officer instilled with the Corps' leadership precept that, in life, one gets some of the respect that one commands, and a lot more of the respect that one earns. Earning respect is a human exercise that involves professional knowledge, demeanor, grace under pressure, and openness to hearing other views. A view that may initially seem wrong often turns out to have merit. Doing actual justice in fact is obviously important, but also appearing to have done justice can be even more important.

The challenge inherent in managing the appearance of justice is to be mindful that most individual bankruptcy litigants are having their sole lifetime experience with the federal courts. The reality of bankruptcy is that everybody, in some sense, loses. Debtors don't get everything they want; neither do creditors. If litigants are treated respectfully, heard, understood, sympathized with, and the ruling is explained, they tend to leave satisfied,

even when they lose.[1]

Prof. Rapoport: That point must be especially true when a self-represented party is appearing before you, right?

Judge Klein: The self-represented litigants in bankruptcy courts are simultaneously the glory and the curse of our legal system.[2] Glory because any person may be heard in court. Curse because of the extra effort and time entailed in accommodating them.

For many persons, the bankruptcy court is their first and only contact with the quality and fairness of the federal courts. It is vital that they leave the experience believing they have been heard, understood, and respected.

One useful technique to show the judge is listening is for the judge to repeat back to them what the judge understands their position to be, get confirmation that the position is understood, and (unless they appear volatile or spoiling for a fight) sympathetically explain why the law (or Congress) requires a different result. The most that can be hoped for is "I may not have won, but the judge at least listened to me and understood my position." On numerous occasions, litigants who have lost have thanked me for taking the time to listen and explaining the reasons for the outcome.

Unmediated adversarialism is a problem that may necessitate a judge becoming active in the name of balance.[3] Reliance on one-sided

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[1] Commentators and judges have long recognized the importance of litigants feeling "heard" and having their "day in court." *See, e.g.*, Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J. 25, 27 (Oct. 2002) ("'When litigants are satisfied with their experience, it is not about maximizing the dollars or minimizing the cost. There is a huge concern about the procedural justice—having your day in court. They want a voice. They want a chance to be heard.'") (quoting Professor Stephan Landsman of DePaul University College of Law in Chicago).

[2] *See, e.g.*, Pamela Foohey, Robert M. Lawless, & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 588–89 (2022) (suggesting that, on a national basis, approximately 12% of debtors file their bankruptcy cases pro se, though certain districts may have higher pro se filing rates, and observing that "[t]he consequences of filing without an attorney can be severe. Bankruptcy judges dismiss pro se filings at much higher rates than attorney-represented cases. Consequently, pro se debtors are less likely to receive a discharge of debts.").

[3] The American Law Institute has begun a project titled, "Principles of the Law: High Volume Civil Adjudication" that bears monitoring for insights about how best to dealt with adversarial asymmetries. *See* materials available at www.ali.org/projects/show/high-

presentations is difficult to defend from the standpoint of procedural fairness. It is not always competent lawyer versus nonlawyer, sometimes it is competent lawyer versus incompetent lawyer. While always a delicate matter, a judge in a nonjury bench trial is entitled to ask questions but must beware of becoming an advocate.

More so than any other category of federal judge, bankruptcy judges need to be sensitive to pervasive asymmetries in representation and resources whenever parties are not evenly matched. In other words, judging is not merely calling balls and strikes. As Learned Hand put it, the duty of a judge to see that the law is properly administered cannot be discharged by remaining inert.[4]

When, as a trial lawyer in district court, my opponent was self-represented, I had the feeling during trial that the judge was the opponent's lawyer, because rulings on objections and simple procedural matters seemed disproportionately to favor the unrepresented opponent—but then the unrepresented party would lose in the end. In retrospect, the judge was leveling the playing field, as well as eliminating numerous grounds for appeal.

Bankruptcy judges, unlike district judges who are assisted by magistrate judges, are on the front lines of the unmediated adversarialism problem. They must cope with the largest population of unrepresented or poorly-represented litigants in the federal courts, and they do so not usually in a formal trial setting. Thus, adversarial asymmetries loom large.

Prof. Rapoport: I'd like to take us back to the 100,000-foot view. What are some of the differences between your docket and, say, a federal district judge's docket?

Judge Klein: A bankruptcy judge must deal alone with the greatest volume of parties in the federal courts while armed with fewer resources and low prestige within the federal judiciary. District judges have more law clerks than bankruptcy judges and have magistrate judges available to help.

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volume-civil-adjudication/.

[4] "A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert." United States v. Marzano, 149 F.2d 923, 925 (2d Cir. 1945), *quoted with approval in* JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL LITIGATION MANAGEMENT MANUAL 5 (2001).

The hearings docket of a bankruptcy judge is schizophrenic in comparison to a district court docket. When not in a multi-day jury trial or doing a criminal sentencing, district judges have controlled motions dockets with a limited number of items in civil actions in which amounts in controversy are at least five-digit numbers. In contrast, bankruptcy judges must cope with high-volume hearings dockets in which the underlying issues involve from three-digit to ten-digit numbers, all of which deserve equal dignity.

Despite lacking Article III status, all bankruptcy judges are "Judicial Officers of the District Court" in the fine words of 28 U.S.C. § 151.[5] As judicial officers, the office does command respect and does permit exercise of some powers of contempt. That said, bankruptcy judges know not to push that envelope. In the eyes of much of the Article III judiciary, bankruptcy judges are inferior. My experience is that some of the Article III judiciary tends to view bankruptcy judges as inferior in some form or other.

Looking down from 100,000 feet, the bankruptcy process serves the cleaning task of eliminating the detritus of debts that have become of little use to an economy in which production is a dominant value. Our grandparents spoke of not crying over spilt milk. Cell biologists speak of autophagy as the process by which bodies delete and recycle damaged cells. In financial matters, phenomenal resources are consumed chasing spilt-milk debt that will never be recouped and recycled. From the business perspective, the bankruptcy discharge operates to free capital and entrepreneurs for new productive activity. From the consumer perspective, the bankruptcy discharge fosters continued participation in a credit-based economy. The discharge discourages emergence of black markets that exploit those forced to rely on cash after denial of access to credit. Judges can be

[5] Section 151 provides,

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151.

confident in knowing that they are part of the solution, not part of the problem.

Prof. Rapoport: Can you describe some of the moving parts of being a bankruptcy judge?

Judge Klein: The work of the bankruptcy judge is an amalgam of litigation and of promoting dealmaking through the restructuring process. A job of every federal civil trial judge, including bankruptcy judges, is to manage litigation under the Federal Rules of Civil Procedure, as incorporated and supplemented by the Federal Rules of Bankruptcy Procedure. The judge who understands those rules can craft opinions that make good use of such determining factors as burden of proof or standard of review.

Prof. Rapoport: You're actually known for that in your opinion writing. You walk the reader, step by step, through the process by which you reach a decision, with plenty of citations to both sets of rules (Civil Procedure and Bankruptcy). I'll draw on one of your classic examples—the student loan case of *In re Love*.[6] Other courts had been wrestling with the undue hardship barrier for years, and yet you found a way to find "undue hardship" that I think has become bulletproof. Can you please walk us through how you approached that decision?

Judge Klein: The foundation for *Love* lies in the basics—findings of fact and standards of appellate review. There is nothing innovative about *Love*, which merely takes at face value the "undue hardship" provision of § 523(a)(8) as it has been in the Bankruptcy Code since enactment in 1978.

One of a judge's most important chores is the duty to make findings of fact and conclusions of law in civil bench trials per Federal Rule of Civil Procedure 52 ("Rule 52").[7] The matrix of the Rule 52 requirement of

[6] Love v. United States (*In re* Love), 649 B.R. 556 (Bankr. E.D. Cal. 2023).

[7] Civil Rule 52 provides, in relevant part,

> *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion

findings, with attention to essential elements, imposes a useful intellectual discipline that promotes sound decisions.[8] The rule also applies to adversary proceedings under the Bankruptcy Rules. Moreover, under Bankruptcy Rule 9014, "contested matters" are similarly subject to the Rule 52 requirement for findings. In short, a substantial portion of a bankruptcy judge's time will be consumed by making findings of fact. In view of the volume of cases and matters, a saving grace is that Rule 52 findings may be made orally on the record. Otherwise, a bankruptcy judge risks being overwhelmed.

With respect to findings of fact, it is key to bear in mind the general rule that, on appeal, if any evidence supports the court's findings of fact (as opposed to its conclusions of law), then the findings cannot be clearly erroneous.[9] Especially when making findings orally, it is prudent management of the record to be explicit about what are and are not findings of fact ("the Court finds as fact . . . "). The ensuing order should state something to the effect of "findings having been made orally on the record" or "for the reasons stated orally on the record" so that an appellate court will be alerted to the existence of such findings. Moreover, in bankruptcy appeals, Federal Rule of Bankruptcy Procedure 8009(a)(4) requires that the record on appeal include transcripts of oral rulings.[10] I am at a loss as to why

> or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

FED. R. CIV. P. 52(a)(1).

[8] Judge Jerome Frank explained: "As every judge knows to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942).

[9] Federal Rule of Civil Procedure 52(a)(6) governs: "(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence supporting the findings, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6), *incorporated by* FED. R. BANKR. P. 7052, 1018, 9014(c).

[10] FED. R. BANKR. P. 8009(a)(4). In order for the record to be clear about what are and are not findings so as not to confuse appellate courts, I have said this litany thousands of times over 36 years: "These are my findings of fact and conclusions of law made orally on the record pursuant to Federal Rule of Civil Procedure 52, as incorporated by Federal Rule of Bankruptcy Procedure 7052 and 9014 . . . ."

lawyers do not use these basic principles more often. A good lawyer is adept at using the rules and appellate standards to craft arguments that can withstand appeal. We need more such lawyers.

But there is even more to consider when I am staring at a motion for summary judgment. Summary judgment changes the equation by authorizing de novo review at all appellate levels. A trial judge acting on summary judgment is surrendering the tactical advantage of receiving deferential review.

Ambrose Bierce defined "appeal" as "to put the dice into the box for another throw."[11] Creating a record that will be reviewed on appeal for clear error loads Bierce's dice in favor of the trial court. It is a tactical advantage for a judge who prefers not to have to deal with the same case twice because a reviewing court merely disagreed and substituted judgment on de novo review. Likewise, a prevailing party at trial reaps a tactical and practical advantage resulting from increasing an appellant's burden of appellate persuasion from mere disagreement with trial court to clear error, thereby reducing the risk of the expense and delay inherent in having to rehash the entire trial on de novo review and potentially having to return to the trial court or take a further appeal.

There are prominent examples of excellent bankruptcy court "undue hardship" student loan opinions rendered on motions for summary judgment that were promptly squashed on de novo review on appeal. A bankruptcy court that elects to act on summary judgment licenses de novo review. My practice in student loan cases is to decline invitations for summary judgment and to order a prompt trial; the parties are welcome to try the case on stipulated facts, so long as the court gets to make findings of fact and conclusions of law that will be reviewed for clear error.

The *Love* decision was an effort to return the focus in student loan dischargeability back to the ABCs of conventional judging,[12] using the "undue hardship" tool that Congress placed in the toolbox in 1978[13] and

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[11] AMBROSE BIERCE, ENLARGED DEVIL'S DICTIONARY (E.J. Hopkins, ed.) (Doubleday 1967).

[12] Trial judges determine the facts at trial and apply the facts to the law. Appellate judges accept the facts found by the trial judge unless "clearly erroneous" and apply those facts to the law de novo. An appellate court that substitutes its judgment for that of the trial court on a question of fact is cheating, unless the trial judge opened the de novo review door by using the summary judgment procedure.

[13] The "undue hardship" standard has been a constant in the Bankruptcy Code's

exploiting the clarification by the Supreme Court in *Village at Lakeridge*: that mixed questions of law and fact are to be reviewed for clear error when factual issues predominate within the mixed question.[14]

Conventional judging assigns determining issues of fact to trial courts and, by way of the "clear error" standard, requires appellate courts to defer to trial courts on issues of fact. In contrast, issues of law are reviewed de novo, which permits the appellate court freely to substitute its judgment for that of the trial court.[15] The downside of summary judgment is that review is de novo at all levels of review.

For student loans, I had observed the multi-decade process of subtraction and addition in which Congress had narrowed the availability of a student loan discharge by eliminating the time-based automatic discharge and had expanded the categories of loans classified as student loans protected from discharge.[16] As a result, student loans had ballooned, especially from profit-oriented entities, consistent with my sense that every time the capital markets discern a "safe harbor" from bankruptcy discharge dysfunctional capital flows follow.[17]

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treatment of student loans. As originally drafted, student loans under § 523(a) were nondischargeable unless the debtor could prove that the loan first became due five years before bankruptcy or could establish undue hardship. 11 U.S.C. § 523(a)(8) (1978). For some background and history concerning the treatment of student loans in bankruptcy, see CONGRESSIONAL RESEARCH SERVICE, BANKRUPTCY AND STUDENT LOANS (updated July 18, 2019) [[STUDENT LOAN REPORT]], available at www.crsreports.congress.gov/product/pdf/R/R45113.

[14] *See* U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 583 U.S. 387, 395–96 (2018).

[15] In general terms,

> De novo review is generally reserved for the review of legal issues. De novo review of legal issues dates back to the formation of our country. The Latin phrase "de novo" means "anew" or "from the beginning." Courts using de novo review examine the trial court's application of the law without affording the lower court discretion.

Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 246 (2009) (footnotes omitted).

[16] *See* STUDENT LOAN REPORT, *supra* note 13, at 6–10.

[17] Consider, for example, the effect of the bar on modifying mortgages on primary residences contained in 11 U.S.C. § 1322(b)(2) as an incentive for fueling the housing bubble created by ever-greater pools of mortgage money for primary residences chasing ever-worse credit risks that ultimately burst into the Great Recession.

Throughout those decades, the § 523(a)(8) "undue hardship" provision remained intact. Things had gotten off-track for a variety of reasons, not the least of which was the myth of *Brunner v. New York State Higher Education Service*.[18] At the outset, the Bankruptcy Code's "undue hardship" was a narrow exception that permitted early discharge of government-guaranteed student loan debt that otherwise would be automatically discharged after five years. The question that the Second Circuit addressed in *Brunner* was "what showing is required for immediate discharge as 'undue hardship' when all the debtor need do is wait five years to get an automatic discharge?" The answer, logically enough, was that "quite a lot" must be shown.

The holding in *Brunner* paradoxically was transmogrified into new life as a mythic dictum regarding the *different* question of "what showing is required when 'undue hardship' is the only way ever to discharge student loan debt?" This myth of *Brunner* as promoted by the student loan industry is that it is virtually impossible to discharge a student loan as an "undue hardship."

It is also puzzling that the application of the *Brunner* test turned out to be so harsh. There was nothing harsh about the Ninth Circuit decision in *Pena*, which affirmed an "undue hardship" finding and adopted the *Brunner* test for the Ninth Circuit.[19] Applying what it understood to be the *Brunner* test, the Ninth Circuit discerned "undue hardship" based on a $41 imbalance in the monthly family budget,[20] and, expressly parting company with the original *Brunner* court on a key question of evidence,[21] ruled that the inferior education that had been provided by the subject proprietary school was admissible evidence probative of the second *Brunner* prong—future ability to earn income.[22] Paradoxically, after 1998, the debtor bar in the

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[18] 831 F.2d 395 (2d Cir. 1987).

[19] United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108 (9th Cir. 1998).

[20] *Id.* at 1113 ("[S]ubtracting the Pena's average monthly expenses ["$1,789] from their net monthly income [1,748], the Penas were faced with a monthly deficit of $41. Clearly, in these circumstances the Penas could not maintain a minimal standard of living and pay off the student loans.").

[21] The meat of the analysis in the original *Brunner* case is in the district court's opinion, which the Second Circuit affirmed per curiam. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 n.3 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam) (Ms. Brunner was pro se in both the district court and the court of appeals).

[22] *Pena*, 155 F.3d at 1114 ("[A]s part of the second prong analysis, the value of Ernest's

Ninth Circuit remained oblivious to the strategic implications of *Pena*.

The deck is stacked against the debtor. When a bankruptcy trial court finds "undue hardship," the appellate judges and their law clerks have had a pattern of disagreeing and substituting judgment for that of the trial court. In effect, the student loan creditor has three swings at defending against the "undue hardship" pitch:

(1) If the bankruptcy court finds "no undue hardship," then the creditor wins.

(2) If the bankruptcy court finds "undue hardship" and the district court disagrees, then the creditor wins.

(3) If the bankruptcy court and the district court find "undue hardship" and the court of appeals disagrees, then the creditor wins.

Yet, only the bankruptcy court is up close and personal with the debtor. You see the problem.

The stacking of the deck was exacerbated by the tendency of appellate courts to apply de novo review to "mixed questions" of law and fact. Appellate courts were disregarding the directive in Federal Rule of Civil Procedure 52(a)(6) to give "due regard to the trial court's opportunity to judge the witnesses' credibility." These courts were circumventing "clear error" review and reversing student loan "undue hardship" findings by bankruptcy judges properly made after trial by declaring the issue a "mixed question" and then substituting their judgment de novo for that of the bankruptcy trial court.

The Ninth Circuit appeared to have solved that aspect of the student loan problem in 2013 in the *Hedlund* case when it reversed a district court for applying de novo review and substituting its judgment for that of the bankruptcy court that had found "undue hardship" after trial. Making a law-of-the-circuit determination, the Ninth Circuit held that appellate review of § 523(a)(8) cases must be for clear error only.[23] Curiously, the debtor bar in the Ninth Circuit has remained missing in action and has prosecuted few § 523(a)(8) actions since *Hedlund*. In my experience, nearly all § 523(a)(8)

education is relevant to his future ability to pay off the student loans. The bankruptcy court did not err in considering that Ernest's income was not likely to increase as a result of his ITT education.").

[23] Hedlund v. Educ. Res. Inst. Inc., 718 F.3d 848, 854 (9th Cir. 2013).

plaintiffs are self-represented.

Along comes the Supreme Court in 2019 in *Village of Lakeridge* and unanimously rules that appellate review of "mixed questions" must be for clear error when, within the "mixed question," issues of fact predominate over issues of law.[24] The "undue hardship" mixed question is intensely factual. Hence, clear error review is now required in all circuits. In other words, when an appellate court encounters a "mixed question," it must determine whether the question is predominately one of law or, instead, predominately one of fact. If facts predominate within the "mixed question," then "clear error" review is required.

The *Village of Lakeridge* decision catalyzed my thinking about student loans at the national level. Student loan "undue hardship" analysis is always intensely factual. Hence, de novo review is out of bounds so long as the bankruptcy court does not fall into the summary judgment trap.

When Ms. Love (self-represented) filed a § 523(a)(8) adversary proceeding alleging "undue hardship," I set the matter for trial after completion of discovery on the basis that we should use the tool that has been in the judicial toolbox since 1978 and not defer to the uncertain possibility of politically controversial administrative relief.[25] After a half-day trial, I realized that the evidence would admit of a potentially persuasive opinion weaving the *Village of Lakeridge* effect into the student loan decisional literature in a manner that could be useful to other courts in other circuits.

I wrote *Love* to call attention to the effect of *Village at Lakeridge* in the student loan context.[26] No longer is the "undue hardship" deck necessarily stacked against the debtor. The message is: "exercise the Court's authority under Federal Rule of Civil Procedure 16 to get the case to trial ASAP; only minimal discovery normally is needed; at trial the debtor plaintiff will testify and be cross-examined; the defendant will have little to offer; the total trial time will be about two hours; and the court can make proper findings, including credibility determinations." One can hope that the message takes root and that the debtor bar musters the courage to step up and do its job.

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[24] U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 583 U.S. 387, 395–96 (2018).

[25] The resulting opinion is found at Love v. United States (*In re* Love), 649 B.R. 556 (Bankr. E.D. Cal. 2023).

[26] *Id.*

Prof. Rapoport: Do you think that federal district court judges have the same leeway to shape cases in terms of thinking about how the Federal Rules of Civil Procedure can make their findings of fact bulletproof?

Judge Klein: Yes ("bullet resistant" is more accurate; nothing is "bulletproof").

Prof. Rapoport: Are district judges playing the same kind of three-dimensional chess that bankruptcy judges play?

Judge Klein: Yes. District judges are not naive and can be adept in the three-dimensional chess realm.

Prof. Rapoport: Bankruptcy judges are specialists who likely can play three-dimensional chess well, given the breadth of experience they've had. Do you want to hazard a guess as to who is better, within the bankruptcy realm, at playing three-dimensional chess: a top bankruptcy lawyer or a bankruptcy judge?

Judge Klein: Within the bankruptcy realm, top bankruptcy lawyers have the edge over bankruptcy judges. A top bankruptcy lawyer who knows and understands trial practice as well as how to make a deal has inherent advantages. The bankruptcy judge never knows the full background of a situation; one could say that judges are looking at icebergs and cannot see the 7/8ths below the surface. No matter how sophisticated the judge may have been about bankruptcy issues before donning the robe, the environment evolves so rapidly that top bankruptcy lawyers still have the edge. A judge has fewer third-dimensional chess moves available than counsel. I have learned never to underestimate the genius of counsel to devise a solution that has not occurred to the judge.

Prof. Rapoport: So that's the litigation side of the job. What about the dealmaking side?

Judge Klein: It is difficult to discern a clear boundary between litigation and dealmaking. More than 90 percent of adversary proceedings end in settlements, i.e., deals. In any adversary proceeding, I generally assume that

a deal is down the road and that any ruling I make will affect, and may effect, the ultimate deal. For example, by routinely awarding fees in Federal Rule of Civil Procedure 37 discovery disputes but deferring determining the amount until the time of trial one more bargaining chip has been added. Even a judgment is a deal. Cases commonly settle during an appeal.

While reorganizations are all about making deals, a neutral judge is not usually a participant. The main role of a judge is to establish the framework and the schedule for negotiations and to be available to facilitate the process. So long as the parties are managing a case efficiently, it suffices to let them do their jobs.

If the judge senses a client control problem that is impeding progress, it can be appropriate for the court to redirect the parties to a mediator. My district has a panel of volunteer neutral bankruptcy professionals who are willing to mediate disputes for up to a day pro bono and who have a good record of success. Sometimes, where there are otherwise intractable parties, another judge will agree to mediate.

A powerful tool in both litigation and dealmaking is the deadline.[27] A certain and definite trial date usually produces a settlement on the eve of trial. Deadlines for filing and confirming plans in small market reorganizations stimulate progress. Likewise, in problem chapter 11 cases where the warring parties are intractable or where the debtor-in-possession is having trouble complying with requirements such as monthly reports, the court's promise in an Order to Show Cause to consider ordering appointment of a chapter 11 trustee at a hearing two weeks hence often stimulates progress.

Another aspect of promoting dealmaking is the "courthouse-steps" phenomenon. Since deals are often made on the courthouse steps, a judge can create "courthouse-step" occasions that necessitate opposing counsel to deal with each other. Frequent status conferences are one device. Another is the refusal to grant continuances when counsel say they think they can settle if the court grants a continuance; my standard response to such a request is "if you agree this can be settled, then the best thing I can to do to help is to decline to delay the scheduled proceeding." Settlements routinely

[27] Samuel Johnson stated, "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." James Boswell, LIFE OF SAMUEL JOHNSON (1777) (available online at p. 152, https://quod.lib.umich.edu/cgi/t/text/textidx?cc=ecco;c=ecco;idno=004839390.0001.002;node=004839390.0001.002:2;seq=552;view=text;rgn=div1).

ensue.

Prof. Rapoport: Are there ways that a bankruptcy judge might be able to influence behavior even more than, say, a federal district judge?

Judge Klein: Bankruptcy judges and district judges have most of the same tools at hand for influencing behavior. Perhaps district judges enjoy more coercive muscle, while bankruptcy judges must rely more on nudging.

Bankruptcy judges preside over and referee the play of the reorganization process under chapters 9, 11, 12, and 13. Skilled reorganization lawyers are not necessarily skilled litigators, because different dynamics drive the process.

The apparent diligence (or lack thereof) of the parties affects a court's assessment of whether and how to be involved. Regular status conferences are a useful method of keeping the court's finger on the pulse and keeping the parties on task.

If a chapter 11 case seems unduly prolonged, interim fee awards may start diminishing. As noted earlier, deadlines may be imposed.

Prof. Rapoport: The best talent in bankruptcy, whether it's talent on the bench or at the podium, includes the ability to see several steps ahead—in particular, the ability to assess the viability of a case. How do you go about thinking about viability?

Judge Klein: Judges routinely need to evaluate whether, for example, an enterprise in reorganization is viable. There are myriad occasions for which some management analysis is useful to enable independent determinations, often without the help of an expert. In early status conferences, it is fair to ask about the debtor-in-possession's exit strategy. Judges can assess the organizational structure armed with the basic management precept that it generally is a mistake to separate authority from responsibility.

In the best of all possible worlds,[28] the bankruptcy judge can relax and let the lawyers handle their case in confidence that the professionals will manage the case appropriately. The best world is populated by sophisticated counsel who know how to manage a case and reach a resolution in an

[28] *Cf.* VOLTAIRE, CANDIDE *passim* (1759) (Random House 1975).

economically efficient manner.

When we do not have the best of all possible worlds, it is up to the judge to draw the line in chapter 11 cases between emergency room and health spa.

In the real world of small- and middle-market cases for operating businesses filed on a wing and a prayer, generally without seasoned counsel, immediate questions demand answers focused on the viability of the firm and of the case. In my cases, the questions to be answered are posed at an early status conference are: What is the nature and structure of the firm? Why is it in trouble? Why is there an imbalance in revenues and expenses? Does management know what it is doing? What is the strategy for addressing the problem? What about an exit strategy? How is the case to be financed? How can the court be of help to the process? Such questions are more in the nature of a business analysis, rather than a legal analysis.

Even so, a judge needs to suspend disbelief and give a debtor the benefit of some doubt. I once had a group of chapter 11 cases for some gold mines filed when the per-ounce cost of extraction exceeded the per-ounce price of gold by 15 percent, creditors were pursuing judgment liens, and Clean Water Act litigation was pending in our district court. My initial diagnosis was that the debtor was doomed, but I suspended my disbelief while the debtor worked hard on environmental remediation. Within a year, the market price of gold rose to 150 percent of the cost of extraction, and a white knight showed up showering money to purchase the debtor corporations, pay all claims in full, settle the district court litigation, and retain all employees and managers. Sometimes miracles do happen.

Business evaluations keep cropping up elsewhere. Temporary restraining orders. Stay relief—is there a prospect of an "effective reorganization"? Employment of professionals—is the employment appropriate to the case? Plan confirmation—is confirmation likely to be followed by liquidation or need for further financial reorganization? Monitoring monthly operating reports—are results as predicted, or are changes necessary?

Even chapter 7 liquidations have similar management-related issues. If there has been a fraud, how did it occur?

Time and time again, business finance problems, in 20-20 hindsight, are associated with separations of authority and responsibility. For example, the person authorized to make spending decisions is not held accountable for bad decisions.

Prof. Rapoport: That point also includes the disconnect between those incurring estate-paid fees and those paying those fees, right?

Judge Klein: Consider a classic example in business contract litigation, namely the problem of the macho manager who tells litigation counsel to spare no expense, believing that the fee-shifting provisions in the underlying contract mean that the opponent will have to bear the expense of the scorched earth instructions. If the macho manager's job is not on the line when the fees are not, in the end, recovered, then there has been a separation of authority from responsibility because the manager has made a spending decision without expecting he will have to take the blame if it turns out badly.

Going back to my point about paying attention to the realities of the business, a bankruptcy judge who keeps an eye on the business viability issues will be able to act timely when trouble arises. Timely action can save a case, even if only to stanch a hemorrhage and preserve some value for a chapter 7 case.

Prof. Rapoport: There's also the administrative side of the job. Part of the fun of bankruptcy practice is also part of the frustration about managing cases, from the parties' viewpoint, and managing dockets, from the bench's viewpoint. It seems to me that you do not have a great deal of control over your day.

Judge Klein: "Fun" is your term, not mine. My terms are "chore" and "duty." There are several different calendars to be managed.

Motion Calendar Management. The court is not a medical office that blithely says that the next appointment is not available for eight weeks. Rather, the court must be immediately responsive. The solution in my district has been a published schedule of weekly or semi-weekly self-set calendars, pursuant to Local Rule, on which dates counsel can set matters and will be heard, at least on a preliminary basis on specified notice. There is a safety valve for emergent situations, and counsel soon learn that the judges in my district have a dim view of self-inflicted emergencies

Adversary Proceeding Calendar Management. We know that more than 90% of all civil litigation settles before the beginning of trial—colloquially referred to as settlement on the courthouse steps. One successful strategy is to create as many "courthouse-step" occasions as possible by having a series of status, scheduling, and pretrial conferences such that each adversary is always on an upcoming calendar. While the new era of remote appearances may have affected some of the courthouse-step occasions, the dynamic of trying to nudge either progress or settlement still seems to be effective, because it dampens the out-of-sight-out-of-mind phenomenon.

Cost Control. Litigation is expensive. The most effective method I have discovered for minimizing costs is to avoid unnecessarily prolonged periods in scheduling orders. Parties who want a year for discovery have to be persuasive about why they cannot do the job in six months. Where the discovery rules provide for response periods greater than 14 days, the court can shorten all response periods to 14 days and set litigation schedules accordingly.

It may be a fool's errand to try to limit fees, but fixing schedules can limit the opportunities to run up fees. For example, if discovery is limited to 180 days, the maximum billable hours are 24 hours x 180 days x the number of billers.

Schedules can also promote efficiency. When trial is a year over the horizon, parties have the luxury of time to take expensive fishing trips. When trial is 60 days away, there is no time left for fishing.

My personal philosophy is that any reorganization should be confirmed or on the verge of plan confirmation within a year. For example, the plan in the chapter 9 case of the City of Stockton, California, was confirmed at the one-year mark. It was an enormously complex case with many novel issues and extensive mediation and could have dragged on for years. But it was diligently prosecuted by first-rate lawyers on all sides. My primary function was to fix deadlines, police extensions of deadlines when there were good explanations, hold a trial on the order for relief immediately after mediation over solvency issues hit a logjam, schedule a plan confirmation trial, and otherwise let first-rate lawyers do their jobs.

Chapter 11 Status Conferences. For as long as a chapter 11 case is open, both pre-confirmation and post-confirmation, it is on my calendar for a

status conference at intervals suitable to the dynamics of the case. I prefer that all chapter 11 motions be set for a status conference calendar so that I can address all business in the case at the same time.

Continuances. The statement, "Judge, we are confident we can settle if only you defer the trial date by two months" routinely elicits the following response, "counsel, if you think this matter can be settled, the best thing I can do to assist you is to deny your request." Amazing, it always settles.

Prof. Rapoport: Are there any "good" reasons to grant continuances?

Judge Klein: Yes, but not to delay courthouse-step moments.

Prof. Rapoport: How do you keep things moving, given how busy a bankruptcy judge's docket is?

Judge Klein: An average annual caseload exceeding 5,300 cases during my first 28 years on the bench put a premium on efficient hearings, especially in routine Bankruptcy Rule 9014 contested matters. Having bench notes prepared before the hearing by law clerks enabled preempting the time-wasting aspects of speeches by counsel at the start of the hearing. Rather, noting from the bench what the matter appears to be about, what the facts of record appear to be, and eliciting agreement or correction by the respective counsel enables zeroing in on salient issues and determining whether factual disputes will necessitate evidentiary presentations. The goal is to get in a position to make the findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52 orally on the record, rather than having to draft and polish them after the hearing. With a high volume of hearings and little time to give the full consideration that each item deserves, I will liberally entertain motions for reconsideration, which will cause me to take a second and more careful look at the matter.

When it comes to opinions, I do all my own writing. My law clerk, whose main mission is preparing bench memos for upcoming calendars, is a sounding board and is involved in any related research assignments. The law clerk reads and critiques drafts.

Prof. Rapoport: In particular, how do you keep things moving at trial?

Judge Klein: Judicious use of time and limits tailored to the nature of the particular trial matter are a start.

Framing the structure of the trial on the record at the outset also sets the focus: Opening Statements, Plaintiff's Case, Defendant's Case, Plaintiff's Case in Rebuttal, Closing Arguments in the order of plaintiff, defendant, plaintiff.

No Ping-Pong matches in examinations. We adhere to the traditional order for each witness: Direct Examination; Cross-Examination; Redirect Examination limited to Cross. No re-Cross and no Re-redirect without good cause.

If counsel seems to be flailing with a witness to little effect, I may impose a time limit; for example, "you have 30 more minutes with your witness, use your time wisely" and ostentatiously start my stopwatch and may interject a 10-minute warning. The examination promptly becomes more surgical. When counsel says, "no further questions," I pause to say, "are you sure? I would have let you ask a more questions?" The inevitable answer is "no, thank you," and there you have it: appellate issue of unreasonable limit on examining witness waived.

Prof. Rapoport: Are you seeing any shifts in courtroom behavior because of remote appearances? What do you do about lawyers who are not as technically up-to-speed as you would like them to be?

Judge Klein: Virtual hearings have introduced new elements. In general, virtual hearings are a salutary development. My court has long benefited from the participation by first-rate counsel in nationwide practices who are not forced to travel to Sacramento for in-person appearance. We were early supporters of Court-Call; the advent of Zoom has increased its efficiency and effectiveness.

Out-of-district lawyers have special challenges. I regarded (and still regard) it as malpractice not to have read at least some of the decisions of a judge before whom one will be appearing. My experience when at the Department of Justice of always being the lawyer from out-of-town also made me hyper-sensitive to local sandbagging practices and secret local rules. Our local practice rules are freely available on the court website and need to be consulted by out-of-district lawyers, who also should procure the assistance of local counsel.

One cost of the trend toward virtual court proceedings, however, is that there are fewer occasions when counsel must be in the same place at the same time. The fact of life is that much work is accomplished by lawyers who are spending time eyeball-to-eyeball. Accordingly, in the interest of promoting dealmaking, it may be appropriate for the court to exercise its discretion to order everybody to attend in person.

Likewise, lawyers who start lobbing brickbats at each other from remote locations risk being ordered to show up in Sacramento for an in-court session. Impugning the integrity of an opponent can be a quick ticket for a trip to a Sacramento in-court session.

In short, where virtual appearances are permitted, they are a privilege, not a right. If the lawyers are not technically savvy, we may have to do it the old-fashioned way in the courtroom, which in my district is hybrid so counsel can decide whether to attend in person.

Prof. Rapoport: Can you talk a little bit about how to control behavior in the courtroom?

Judge Klein: Managing a courtroom is largely a function of the judge's personality. What is essential is that individual judges be comfortable within themselves and, in particular, that they be comfortable in the knowledge that they have the last word (which need not be rendered in open court). The knowledge that one has the last word, need not rule in open court, and need not prove to the room who is in charge saves a judge from engaging in contentious debate to no good purpose.[29] To remain calm and collected is the goal.

When things get unduly contentious, or if a party might become volatile in the heat of the moment, it can be productive to restate the views of each side as calmly as possible, get confirmation that I understand their positions, promise to think about it, and take the matter under advisement.

When counsel cannot resist speaking out of turn, I revert to a military command voice with a sharp "Not your turn!" That seems to work. But what works for me and my personality after a pre-law career leading Marines could be laughable in the hands of another judge with a different

[29] There is a saying that the problem with wrestling with a pig is that the pig likes it, and you get dirty.

personality.

Prof. Rapoport: What do you do when you get irritated or impatient with how a proceeding is unfolding? How do you cool off?

Judge Klein: Time for recess, and perhaps a temperature check with a colleague.

Prof. Rapoport: I've heard from many judges that discovery disputes are their least favorite part of the job—that it's akin to playing "kindergarten cop." How do you deal with discovery disputes, and do you think that the way that bankruptcy judges handle them is significantly different from how a federal district judge handles them? After all, those judges have magistrate judges to help them.

Judge Klein: I give priority to resolving discovery disputes. In my early years on the bench, discovery disputes were entertained after presiding over breakfast with three spirited, sometimes-contentious children. Listening to the discovery disputes on tap often took me back to breakfast. Pro tip: when stating discovery disputes, try not to sound like children quarreling.

Prompt resolution of discovery disputes is effective in moving matters toward the ultimate trial. It is a delay-inducing mistake to allow counsel to award themselves continuances by raising discovery disputes. Prompt and firm resolution chills enthusiasm for the game. Prompt resolution means holding myself available to appear on the record of a deposition to rule on objections or to hear other discovery disputes.[30] Firm resolution means enforcing counsel's certification duty under Federal Rule of Civil Procedure 37(a)(1) and implementing my view that Federal Rule of Civil Procedure 37(a)(5) ("Rule 37(a)(5)") is a cost of doing business in the discovery arena.[31]

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[30] Contrary to predictions of colleagues in 1988 that I would be buried by deposition disputes, it happens only a couple of times annually.

[31] Civil Rule 37 provides, in relevant part,

> (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.
>
> (1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith

Litigants arrange discovery hearings by contacting my courtroom deputy, who gives the requestor a date and time and, if during a deposition, instructs that all counsel finish all of the questions that can be answered before dialing in and to have their checkbooks at hand for Rule 37(a)(5) awards.

When, for example, I appear on the record of a deposition to resolve a dispute or instruction not to answer, my ruling routinely includes identifying the prevailing counsel's billing rate, assessing the amount time involved in the dispute and directing the loser, in front of everybody, to pay the billing rate for a certain amount of time. Of course, if it is a principled, fair objection that really did warrant judicial intervention, I spare the loser the humiliation.

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conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

* * *

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

FED. R. CIV. P. 37.

A problem with discovery disputes in the district court is that they are fobbed off on magistrate judges. That is another illustration why it is undesirable to separate authority from responsibility. In contrast, the bankruptcy court discovery dispute is heard by the bankruptcy judge, who also happens to be the trier of fact. It is not a good idea to annoy the trier of fact, especially in a trivial matter.

Another discovery practice that yields dividends is a warning in my pretrial orders that, if discovery was timely requested but not complied with, then such items or information will be excluded from evidence at trial. Period! It does not matter whether there was a motion to compel discovery. The offended counsel may choose to lay in the weeds until trial. Never have I been reversed for excluding evidence on that basis.

Prof. Rapoport: That's a good point. Speaking of being the ultimate trier of fact, how quickly do you tend to form an opinion about a witness's (or a lawyer's) credibility, and what are the things you look for as you form that opinion?

Judge Klein: One always must suspend disbelief before hearing the evidence and the arguments.

Since appellate courts are obliged by Federal Rule of Civil Procedure 52(b)(6) to review for clear error and to "give due regard to the trial court's opportunity to judge the witnesses' credibility," careful trial judges bolster the record with credibility determinations when making findings of fact.[32] A credibility determination need not brand anyone as a liar. It suffices to say: "the evidence on this point was in conflict; the evidence the court chooses to believe is …" Particularly with testimony, a usual reason for resolving the conflict is that other objective facts line up with the evidence that is believed. Since it is not always evident whether any particular ruling in a set of findings is one of fact or law, it is useful for a trial court to be clear about whether it thinks a ruling is one of fact or of law.

Forming a view of credibility of a witness depends upon the testimony when and as delivered. Although the law indulges a fantasy that a trier of fact can assess credibility by observing the witness testifying, social science research casts considerable doubt on the proposition. I am only confident in

[32] FED. R. CIV. P. 52(b)(6), made applicable in bankruptcy cases by FED. R. BANKR. P. 7052 and 9014.

my credibility assessments when the testimony is consistent with other objective facts. Witness demeanor rarely helps me decide credibility.

Credibility of counsel is a vitally important and completely different subject. A lawyer has no greater capital than the lawyer's reputation with the court. I have explained to junior lawyers that, sooner or later, something important to your career will necessitate persuading a judge on a "trust me" basis to do something when the evidentiary record is thin—the judge will stare at the ceiling and ask whether this lawyer might mislead me. The answer to that question could make or break a career.

Another way to look at credibility of counsel is as a deposit account. Every interaction with the court is either a deposit in the lawyer's credibility account or a withdrawal. Deposits gradually accumulate over time. A single withdrawal can take the balance to zero.

Prof. Rapoport: What are some of the other lawyer missteps that can play into "don't forget that I'm the ultimate trier of fact here" point?

Judge Klein: New judges, including me when I started, tend to succumb to the illusion that they can improve the performance of the bar by educating them about the defects in their pleadings and other papers. Sadly, it is mission impossible. Learned Hand, as a district judge, had the same instinct and made no discernible progress.[33]

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[33] Judge Learned Hand wrote in 1921:

> I dare say that an ingenious actuary might find upon irrefragable computation that in general loss of time, misprision of judges, consequent appeals, discouragement of suitors and the like, the annual loss to our country through bad pleadings equaled the cost of four new battleships, or a complete refashioning of primary education. . . .
>
> I must own that in my salad days, when the lust of combat still raged within me, I rather welcomed the opportunity afforded by the meandering trickle of a sloppy pleading. Here was indeed an occasion to teach practitioners that unless they had learned their craft, they should have a short shrift and a long rope. . . . [But now] I make no effort to disentangle from the junk pile presented to me those structural pieces, which, had they been properly chosen and erected, would have made a fair building. . . .
>
> [T]he cure to poor trial procedure lies in a "change of heart in ourselves," not in "formal changes" for] Without a bar which is willing

A judge's perception of the quality and credibility of a lawyer may be influenced by sloppy work. Poor grammar, typographic errors, and omissions all erode that perception. When bad pleadings sink a case, the court's ruling may explain why. But the judge might not have the time, patience, or perseverance, in Hand's words, to disentangle from the pleading junk pile presented those structural pieces that could have made a fair building.

Even greater damage comes from not taking responsibility for mistakes. The classic version is blaming the secretary or support staff. Every lawyer who signs, files, submits, or later advocates a petition, pleading, written motion, or other paper is personally on the hook for Bankruptcy Rule 9011 certifications. Blaming someone else invites disapprobation.

Lawyers often stumble at the "Gee—all the other kids get to do it" problem. The stumbling block is that the judges, like parents, tend to talk with each other. When a lawyer tells me that Judge X permits that which I have criticized (often involving pleading or procedure), I am going to ask Judge X (whose chambers might be geographically near mine) if that is correct. If, as usual, it is not correct, it plays out in one of two ways: either Judge X at that lawyer's next appearance before Judge X will ask about the statement, or when the judge is nearby, there may be a brief recess before Judge X steps into my courtroom and we let the lawyer repeat the assertion. Moral: Parents compare notes with each other.

Prof. Rapoport: Judicial temperament is an art. How did you go about learning to work with the bar—in particular, how did you teach counsel to learn what you would and would not tolerate?

Judge Klein: Cooperation by the bar is essential to a smoothly functioning court. Fortunately, the experience of nearly five decades of

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> to co-operate, a bench more virtuous and wise than any we are ever to get would do very little. . . . You get out of a community what there is in it, out of a bar . . . what the character and capacity of that bar contains, and neither laws nor principalities nor powers will in the end help you jot or tittle."

Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 87 (Macmillan 1921), in GERALD GUNTHER, LEARNED HAND: THE MAN & THE JUDGE 146–47 (1994).

practice under the Bankruptcy Code has smoothed out rough edges with respect to basic rules of practice. But local legal cultures vary. Moreover, every judge is an individual with quirks, preferences, and pet peeves.

The bar wants the court to be consistent (read: predictable[34]) and timely. Lawyers know that they must comply with the rules of the game and will do whatever it takes to get their matters before the court resolved. When counsel can predict the probable ruling on a particular matter, they can resolve disputes among themselves and formulate their strategies. Timeliness is equally important. Myriad orders daily cross bankruptcy judges' desks, and many of those orders are more administrative than adjudicative. Nevertheless, the judge must be assured that each routine order is correct and warranted after compliance with the applicable rules of procedure. Delays in making those nearly infinite numbers of seemingly small decisions inflict larger delays that lead to frustration.

There are several ways of dealing with orders drafted by counsel that contain something not part of the court's actual ruling. If minor, the offending language might be ostentatiously lined out and, if presented in open court, publicly commented upon. If the order is more complicated or substantive, it may be rejected, putting counsel back to the drawing board and suffering the inconvenience (of worse) of a prolonged delay.

When I started in 1988, the local practice was to have lawyers prepare and submit orders after hearings. The result was delay that stretched into weeks, confusion about appeal deadlines, and the administrative time cost inherent in keeping track of them in paper files. My practice evolved to have my staff presumptively prepare all routine orders so they can be entered on docket within two days of the hearing. If the simple order needs to be embellished, then counsel may tender a more comprehensive form that can be entered as an amended order.

Now my hearing on each motion matter ends with a determination

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[34] Karl Llewellyn, focusing on appeals, would say "reckonable":

> [T]he work of our appellate courts all over the country is reckonable . . . quite sufficiently for skilled craftsmen to make usable and valuable judgments about likelihoods, and quite sufficiently to render the handling of an appeal a fitting subject for effective and satisfying craftsmanship.

KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3–4 (1960).

whether the order will be prepared by court staff or by counsel (and who will approve it as to form).

Prof. Rapoport: What happens when you find out that a draft order is not compliant with the ruling?

Judge Klein: Plan on a delayed entry of the order. The length of the delay will depend upon the circumstances and the deviation. Perhaps judicial interlineation will enable the order to be signed. Perhaps it will be rejected and bounced back to the preparer. Lawyers who cannot resist embellishing orders with things they wish the court had said may start wondering why it takes so long for their orders to be entered.

Prof. Rapoport: What about local procedures and national counsel?

Judge Klein: National counsel make a mistake by not having at least the advice of local counsel to help them navigate the rocks and shoals of local practices.

The bar, in general, can be driven to distraction by idiosyncratic local procedures. This problem can be acute in multi-judge courts and for lawyers with multi-district practices. Federal Rule of Civil Procedure 83 and Federal Rule of Bankruptcy Procedure 9029 address part of the problem by condemning inconsistency of local practices with the published national and local rules and by preventing loss of rights because of nonwillful failures to comply with local requirements of form.[35] Nevertheless, dreadful localism

[35] FED. R. CIV. P. 83; FED. R. BANKR. P. 9029. Federal Rule of Bankruptcy Procedure 9029 provides, in relevant part,

> (a) LOCAL BANKRUPTCY RULES.
>
> (1) Each district court acting by a majority of its district judges may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are consistent with—but not duplicative of—Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are consistent with—but not duplicative of—Acts of Congress and these rules

persists, which is why national counsel need local counsel to help them navigate the hazards of local practices.

Idiosyncrasies are exacerbated internally within the court by the desire of deputy clerks of court to cater to the individual judges with idiosyncratic rules of which the respective judges are often unaware. "Judge A wants it this way" and "Judge B wants it another way," while, when asked, Judges A and B would be happy to conform to a common practice if only they were aware of the issue. We have found it useful to have the Clerk of Court occasionally inventory nonstandard practices among judges so that notes can be compared in a judges' meeting in the name of improving the efficiency of court operations.

Involving the bar in court administration fosters cooperation. Every district court is required by the Rules Enabling Act[36] to have a local rules committee; the same applies for bankruptcy courts in districts in which the district court has delegated rulemaking authority to the bankruptcy court. The lawyers on local rules committees provide useful input about administrative issues. Judges benefit from encouraging input for the local rules committees because of the dialogue that is fostered.

Prof. Rapoport: What happens when you see counsel making mistakes while they are trying a case? What is going through your head as you watch them?

Judge Klein: I sit quietly, suspend disbelief, and pay attention. What looks like a mistake at first glance may be sound strategy.

Prof. Rapoport: Do you give the lawyers some verbal cues to get them back on the right track?

> and which do not prohibit or limit the use of the Official Forms. Local rules shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.
>
> (2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

FED. R. BANKR. P. 9029.

[36] 28 U.S.C. § 2072.

Judge Klein: In the interest of trial efficiency, I may observe that a lawyer seems to be wasting time off on a tangent and advise using the limited trial time wisely.

Lawyer testimony from the lectern, which I view as improper, draws this verbal clue: "Counsel have you any admissible evidence to support the facts you just asserted? Or perhaps your opponent will stipulate those facts."

Prof. Rapoport: There are two factors that I think indicate that someone has a judicial type of personality. One is the quest to get the answer right, because you are not beholden to any client. You are there to find the right answer. But the other is that you are, in fact, able to decide issues. (When I was a law clerk, I noticed how fast judges were at deciding everything, including how fast they were at perusing menus to pick their lunch orders.) Given that we've all heard that "justice delayed is justice denied," what is your process for reaching a decision?

Judge Klein: The advice to me when I was selected for the judgeship was: "Son, you are going to be a trial judge. Your job is to decide cases. You let those library judges decide them right." The wisdom in that advice to me from a senior district judge from another circuit back in 1987 still echoes. The worst thing a trial judge can do is to be so paralyzed when deciding a matter that the dynamic bankruptcy process is unduly delayed.

An implication of the "Coase Theorem" that garnered a Nobel Prize in Economics for University of Chicago Law School professor Ronald Coase[37] teaches that if a trial court gets it wrong (i.e., misallocates resources), then the parties will tend subsequently (i.e., during the appeal period) to negotiate to a satisfactory (i.e., economically efficient) solution. The Ninth Circuit has an elaborate appellate mediation program designed to facilitate such negotiations. When an appeal from me settles through that process, I usually do not know the terms unless the result required Bankruptcy Rule 9019 scrutiny.

The implication for judges that they should do their best to get it right

[37] Ronald H. Coase, *The Problem of Social Cost*, 1960 J. LAW & ECON. 3. Rigorously, the Coase Theorem assumes the fantasy of efficient, competitive markets, perfect information, and zero bargaining (transaction) costs. The gist of the theorem is what matters here.

but not allow that search to become a quest that gets in the way of getting it done.

When there are negative reviews from appellate courts, do some self-critical analysis focused on how to do a better job next time.

Prof. Rapoport: What might give a judge judicial paralysis?

Judge Klein: A complex issue in important case always gives pause. Paralysis may come from misguided concern about the consequences of the decision as if the decision will be the end of the line. Mistaken because the trial court decision is not necessarily the end of the line.

It is sort of like baseball. The play when a ball is hit to the infield always requires that someone back up the player to whom the ball is hit to guard against mishap. Trial is similar: the bankruptcy judge is the fielder; the appellate judges are the backup. If the trial judge muffs a play, the appeal provides the backup.

When I am on the fence, returning focus to who has the burden of proof helps overcome the indecision. I make the call and rely on any ensuing appeal to get it right.

Prof. Rapoport: Even the best judge gets a decision wrong sometimes. It doesn't happen very often, but it does happen, because judges are still human. Do you lose sleep at night about that?

Judge Klein: Sleep may have been lost while puzzling out the decision, but no sleep is lost after a decision is rendered. The next sleep lost is part of puzzling out the next case.

The Coase Theorem assuages my guilt about having made a dubious ruling. The litigants during an appeal are in a position to recognize the respective strengths and weaknesses of their cases and negotiate to a satisfactory solution. Hence, I view timely decisions as at least as important to the process as correct decisions; until a decision is made, nobody gets anywhere. While I do not like to be incorrect, the parties can negotiate to a satisfactory solution after the fact. Secondarily, if negotiations fail, the appellate court may impose a solution. Either way, I am too focused on the next cases to look back and second guess myself.

Prof. Rapoport: I know some trial judges who are so rarely reversed that, when they are, they carry their annoyance at the reversal with them for years and can go point-by-point about why the appellate court got things wrong. How do you feel when a decision of yours gets appealed?

Judge Klein: Although no self-respecting judge likes being reversed on appeal,[38] annoyance with reversal is a waste of emotional energy impeding getting the job done.

First, nobody is perfect. Given the volume of cases (5,300 per year average in my first 28 years), it is little wonder that some were incorrect. There are numerous decisions I would, in retrospect, like to have back. That is why trial judges are not bound by their own prior decisions.

Second, appeals are not threats. Just because a trial judge is reversed on appeal does not mean the trial judge was wrong, at least with respect to a question of law. One needs to peel a layer off that onion. A trial judge reversed for not doing the trial judge's job to apply the basic rules of procedure and evidence ought to be chagrined. A ruling of clear error on facts is embarrassing. Yet, there is no shame for a trial judge reversed on a debatable question of law for which review is de novo—an appellate court is entitled to substitute its judgment for that of the trial court. In the hierarchy of decisions, appellate courts go last.[39]

Third, there is no guarantee that the appellate court is correct. A four-step ying-yang example from my docket comes to mind. First, the bankruptcy court (me) ruled on an issue of law. Second, the BAP reversed (2-1) in a published decision not further appealed. Third, in a later appeal in a different case involving same issue, the court of appeals agreed with the bankruptcy court's earlier result, noted the existence of, and expressly disapproved the prior published BAP decision. And fourth, the Supreme Court eventually faced the same issue, reaching the same decision as the BAP.[40]

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[38] Judge Learned Hand on being reversed: "I wrap my head in my toga, like your friend, G.J. Caesar, and fall before the daggers of ruthless men who do not understand the force of reason." Pre-Conference Mem, *Deitel v. Reich-Ash Co.* (Mar. 27, 1933), in GUNTHER, *supra* note 33, at 299.

[39] As Justice Robert Jackson famously noted about the Supreme Court, "[R]eversal by a higher court is not proof that justice is thereby better done. . . . We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 463, 540 (1953) (Jackson, J., concurring).

[40] The issue was whether "defalcation" under 11 U.S.C. §523(a)(4) is based on strict

Finally, an oddity about appeals is what does and does not get appealed. Compelling issues that deserve appeal often are not appealed. Correlatively, trivial issues are appealed. Sometimes it does not make sense.

Prof. Rapoport: So, which hurts worse, being reversed by the BAP or being reversed by a district court?

Judge Klein: Neither hurts. The appellate courts are entitled to their views. As just noted, they are not necessarily correct in the long run. If there is something that better informs me for the future, I am grateful. As it is painful to have to re-try a case, a remand is less desirable than a simple reversal. It is also annoying if a reversal or remand is the result of the parties providing the appellate court with an incomplete or misstated record; my criticism on that account, however, is directed at the counsel who bungled the appeal.

Prof. Rapoport: I'd like to talk more about how to make a decision significantly more difficult to reverse on appeal.

Judge Klein: Many a judge has looked at a reversal on appeal and commented, "if that had been the case in front of me, I might have ruled the same way." Some of those situations result from the self-inflicted harm of producing sloppy, incomplete, or inaccurate trial records. For example, if a foundation is required for admission of evidence over objection, careful judges will be explicit about the foundation so that an appellate court will not be misled that the judge ignored the foundation.[41]

Electronic trial records can be vulnerable to confusion. It must be clear who is speaking. Permitting counsel to talk over each other invites trouble. Traditional stenographic court reporting sometimes does better at capturing

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liability or requires proof of scienter: Fidelity & Deposit Co. of Md. v. Martin (*In re* Martin), Adv. No. 91-2211 (Bankr. E.D. Cal. 1992) (strict liability), *rev'd*, Martin v. Fidelity & Deposit Co. of Md. (*In re* Martin), 161 B.R. 672 (B.A.P. 9th Cir. 1993) (scienter), *overruled by* Lewis v. Scott (*In re* Lewis), 97 F.3d 1182, 1186–87 (9th Cir. 1996), *overruled by* Bullock v. Bank Champaign, NA, 569 U.S. 267 (2013) (holding that § 523(a)(4) scienter requires intentional wrong).

[41] Think, for example, of the Federal Rules of Evidence, particularly Rule 702(a)–(d) or Rule 807(a)(1).

who said what. When multiple counsel talk during a colloquy electronic recording can be confusing about who is speaking. Careful judges can facilitate clarity of who is speaking by referring on the record to the person who just spoke ("Mr. Smith what is your response?" or "Ms. Jones just said"), particularly when there are multiple parties with inconsistent positions.[42]

Make credibility determinations when any evidence or testimony is in conflict. "The evidence/testimony on point X is in conflict; the evidence I believed is … ." This exploits the provision of Federal Rule of Civil Procedure 52(a)(6) requiring appellate courts to give "due regard" to trial court on credibility. Appellate courts have difficulty disregarding credibility determinations.

The standard of appellate review is not just a problem for the appellate court, it is a problem for the trial court. While nothing requires the trial court to consider the likely standard of review, ignoring it is at the trial judge's peril.

If a trial judge is mindful of the standard of appellate review that will be applied regarding various points in the event of appeal, the judge can craft a record that is less vulnerable to being upset on appeal. That is what I did with the *Love* case. Findings of fact are ordinarily reviewed for clear error as to which the general rule is that, if any evidence supports the fact found, then it cannot be clearly erroneous. A trial judge is well-advised to be precise about which determinations are findings of fact and to mention the evidence that supports the fact being found. An appellate court's review task on an issue of insufficiency of evidence is an unwelcome chore that can be obviated, and less vulnerable to misconstruction, when the supporting evidence is cited by the factfinder.[43]

The "mixed question of law and fact" is a special problem. Until recently, appellate courts have had a tendency to review all mixed questions de novo and to substitute their judgment for that of the trial court. Then in 2018, the

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[42] For example, "Counsel for X said . . . , so what does counsel for Y have to say in response?"

[43] Under Federal Rule of Bankruptcy Procedure 8009(b)(5), an appellant must include in the Record on Appeal a transcript of all relevant testimony and copies of all relevant exhibits when the argument that a finding or conclusion is unsupported by evidence or contrary to evidence. FED. R. BANKR. P. 8009(b)(5). Speaking as a veteran of hundreds of BAP appeals, such a sufficiency-of-evidence argument and the record behind it in a trial of any length were always greeted with a groan.

Supreme Court ruled in *Village at Lakeridge* that "not all mixed questions are equal" and concluded that the "standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work."[44]

After *Village at Lakeridge*, when dealing with mixed questions, I have taken care to note in my findings whether factual questions predominate, with the consequence that review would be for clear error, or whether legal questions predominate so as to be reviewable de novo.[45] Despite the fact that the trial judge's explanation of what is intended does not bind an appellate court, there are on the books many mindless (and now incorrect) de novo reviews of mixed questions that antedate *Village at Lakeridge*. By stating that the issue before the court is a mixed question as to which the facts predominate with a citation to *Village at Lakeridge* will alert appellate courts to the need to re-examine pre-2018 mixed question de novo review precedents.

A fact of life in busy appellate courts is that there is a tendency for the court to dust off its other decisions on the same issues without taking time, especially on the standard of review issue, to revisit the standard used in the prior decision to consider whether the law has evolved recently. The trial court's record can be explicit in a manner that politely obviates error in an appellate chambers.

Prof. Rapoport: Given how busy bankruptcy judges are, what goes into deciding whether to publish one of your decisions?

Judge Klein: For me, the test is whether I think my analysis will be helpful to other judges in future cases, which usually equates with a paucity of precedent. Sometimes it is a new look at an old problem. The acid proof is whether over time it is cited by other judges. If there is useful precedent that covers the ground, there is little point in going to the extra effort.

Trial judges, whose opinions lack precedential value, should publish decisions for two reasons. First, early in a judicial career, some short opinions inform the bar how the judge thinks about law and procedure so lawyers can prepare to appear before the judge. Thereafter, preparing formal

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[44] U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 583 U.S. 387, 395–96 (2018).

[45] *See, e.g.*, discussion of *In re Love supra* notes 23–26 and accompanying text.

opinions for publication is worth the effort primarily to deal with uncertain points of law or procedure for which the opinion may eventually assist another judge grappling with the same problem.

Since written decisions are now generally available to the public on court websites, there is little a judge can do to prevent publication. My practice is to designate "Not For Publication" in decisions that I am not electing to publish. If there is information in findings of fact that should not be public, then the relevant portion of the findings can be put in a separate document and filed under seal.

Prof. Rapoport: As you're writing an opinion that you have decided to publish, do you approach the crafting of that opinion any differently from those opinions that you don't choose to publish?

Judge Klein: Researching and crafting a formal opinion is a major chore entailing multiple drafts. I tend to be more deliberate about explaining the message in the opinion when I am writing for publication. The intellectual or legal history of an idea may be set forth. Care is taken to have the introductory paragraphs encapsulate the analysis on the premise that readers ought to know by the end of the introduction whether the opinion is worth reading. In the end, it is an exercise in persuasion.

In addition to the rich body of literature on effective legal and judicial writing, two points are worthy of comment regarding bankruptcy decisions.

Audience. First, consider the audience. Remember that the real audience of the written product is the appellate judiciary that may review the decision. Speak their language, especially the Federal Rules of Civil Procedure (most of which apply in bankruptcy), the Federal Rules of Evidence, and the basic principles of federal jurisprudence. If a bankruptcy doctrine might seem odd to a generalist, try to explain either why it really is in the mainstream of basic civil law or why the variant bankruptcy doctrine is warranted.

One way to show the mainstream of the law is to explain how a bankruptcy doctrine is consistent with the various American Law Institute Restatements. At a minimum, every bankruptcy judge must have a command of the Restatement 2d of Judgments because of the pervasiveness of prior judgments as claims and as a guide for how to manage bankruptcy litigation in a manner that could satisfy the dictates of claim preclusion and issue

preclusion on other fronts.[46]

Claims litigation, for example, can be resolved in summary fashion or it can be resolved through a full-blown trial. If the latter, there is a better chance that the rules of claim and issue preclusion will obviate further litigation.

Language. Second, flowery language and obscure words tend to blur the clarity of thinking. As Sir Edward Coke advised in 1616, "[H]e that busily hunteth after affected words, and followeth the strong scent of great swelling phrases, is many times . . . at a dead loss of the matter itself, and so abandon colorful language and long words: to speak effectually, plainly and shortly, it becometh the gravity of this profession."[47] Cicero said essentially

[46] In view of the breadth of the definition of "claim" in § 101(5), an underappreciated source is the RESTATEMENT (3d) OF RESTITUTION AND UNJUST ENRICHMENT (2010). 11 U.S.C. § 101(5).

[47] EDWARD COKE, NINTH PREFACE TO COKE'S REPORTS (1616) in *Preface*, THE THIRD PART OF THE REPORTS OF SIR EDWARD COKE xxi (George Wilson, ed.) (1793).

the same thing as Coke.[48] So did Strunk and White[49] and Bryan Garner, too.[50]

While we are on the point, take Strunk and White, as supplemented by Garner, to heart. Write with nouns and verbs, not adjectives. Be cautious about overstatements. Avoid qualifiers.[51]

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[48] Cicero explained:

> ⟦We can ensure that what we say may be understood⟧ by talking correct Latin, and employing words in customary use that indicate literally the meaning that we desire to be conveyed and made clear, without ambiguity of language or style, avoiding excessively long periodic structure, not spinning out metaphors drawn from other things, not breaking the structure of the sentences, not using the wrong tenses, not mixing up the persons, not perverting the order. In short, the whole affair is so easy that it often strikes me as astonishing when it is harder to understand the case as put by an advocate than it would be if the client who has retained him put his own case for himself. In fact the members of the public who entrust their lawsuits to us usually give us such satisfactory instructions themselves that one could not want it to be put more clearly; whereas the moment Fufius or you gentleman's contemporary Pomponius begins to plead, unless I pay fairly close attention I do not understand their meaning so well—their speeches are so muddled up and inverted that there is no head or tail to them, and they use such a flood of out-of-the-way words that oratory, the proper function of which is to throw light on the facts, only contributes additional darkness, and that they actually seem in a sort of way to be shouting themselves down in their own speeches.

Cicero, DE ORATORE, III, xiii, 48–51 (Harvard Univ. Press Loeb Classical Library, Cicero IV, at 39–41, H. Rackham tr., 1999).

[49] They wrote: "Do not overwrite. Rich ornate prose is hard to digest, generally unwholesome, and sometimes nauseating." WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 58 (1959).

[50] BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 53–57 (2d ed. 2002).

[51] More Strunk & White:

> Write with nouns and verbs, not with adjectives and adverbs. The adjective hasn't been built that can pull a weak or inaccurate noun out of a tight place.
>
> Do not overstate. When you overstate, the reader will be instantly on guard, and everything that has preceded your overstatement, as well as everything the follows it, will be suspect in his mind because he has lost confidence in your judgment or your poise.

Prof. Rapoport: One last question—because you're a judge, I'm assuming that you get your fair share of, for lack of a better phrase, people kissing up to you. How can you tell if you are getting good feedback (or not) when people discuss some of your decisions or actions with you?

Judge Klein: The capacity for self-critical analysis is essential for a judge. Adulation may be ego-gratifying, but always to be mistrusted. Nobody is going to tell a judge some criticism the judge might not want to hear. A judge needs constantly to stare at the ceiling and ask what have I been doing? How can I do it better?[52]

Judges do compare notes. Judges need judicial friends who understand issues in judging, who are willing to provide unvarnished critiques, and can be consulted for occasional temperature checks. I regularly have such conversations with such friends.

I think it also important to have a long view and appreciation of how our system of appellate review and precedents operate as a stabilizing influence. For those who perceive instability, things are rarely as bad as they seem.[53]

> Avoid the use of qualifiers. *Rather, very, little, pretty*—these are the leeches that infest the pond of prose, sucking the blood of words.

STRUNK & WHITE, *supra* note 49, at 57–59. *Accord* GARNER, *supra* note 50, at 200–01.

[52] In speaking of the choice of a leader, C.P. Snow wrote, "I want a man who knows something about himself. And is appalled. And has to forgive himself to get along." C.P. SNOW, THE MASTERS ch. vi (1951).

[53] Karl Llewellyn observed that the appellate process promotes in the law a sense of stability and reason:

> Of course, ever since lawyers began to lawyer, there have been losing counsel aplenty who have so believed in their causes that they have bitterly blamed the court. And, of course, ever since issues in court have had political flavor, i.e., roughly since before Genesis, each new crucial decision has been for some vocal citizens, the brink of perdition. And, of course ever since men began to generalize, the particular decisions of the day or week have been enough to make many see the whole system as in decay. And of course and as usual "never in history" has there been a crisis to match today's crisis.

Prof. Rapoport: Before we end, I want to share a personal story. I was a mid-level associate who filed a document in a case of yours, and that document had the wrong attachment. You excoriated me in open court (for what felt like hours but was probably not that long in real time) for my sloppiness. I never forgot the lesson that making triple-sure that everything is in order is a mark of professionalism, and I think it's lovely that you and I can now share moments like this interview, which was far more fun.

Judge Klein: I apologize if I was rude. Like a student called upon the first day of law school, you had the misfortune to be in the wrong place at the wrong time during the first months of my tenure. The Ninth Circuit had parachuted me into the Eastern District of California from a Washington, DC, federal practice with an implicit message that the quality of local practice needed to improve. My focus with the entire bar was raising the quality of practice and rooting out sloppiness.[54] When I critiqued any particular deficiency, I was actually speaking to the 30+ lawyers in the room, letting them all know I read their papers, and trying to be firm about what is and is not acceptable practice. Nothing personal was intended. Once the message was delivered, I mellowed into denying deficient motions without public comment. Hug.

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LLEWELLYN, *supra* note 34, at 3.

[54] I concur wholeheartedly with Judge Learned Hand's observations at *supra* note 33; my success was limited to what lawyers figured out was necessary to their orders signed.