STEPPING DOWN

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I left the Maine Supreme Judicial Court for the federal trial court in 1990. At the time, I expected to miss the collegiality of the appellate bench and the satisfaction of resolving legal issues deliberately and studiously. But I looked forward to a more active, less monastic, professional life, interacting with lawyers, witnesses, and jurors, and gaining the opportunity to see if I could manage a trial docket fairly, speedily, and efficiently.

As a former appellate judge, I knew that I should explain my rulings as a trial judge. But I believed that I should do that simply, and leave it to the appellate courts to elaborate upon the law. I viewed it as my trial judge responsibility to decide even complicated issues in a timely manner, doing the best I could, but not trying to write for the law reviews or posterity. I would become what a former Maine Supreme Court colleague, Justice David Roberts, used to describe as "a working judge."

Has experience followed expectation? To answer the question, I consider "then" and "now."

THEN

In 1990, when I became the sole federal trial judge in Bangor, Maine, I spent virtually every available hour in the courtroom. From my first trial, a criminal fraud trial of a former Bangor mayor, to the host of ready and waiting civil cases, the life of a federal trial judge was what I had anticipated: presiding at trials; ruling quickly on motions to permit the cases to come to trial; and dealing with difficult criminal sentencing issues. Because I had temporarily left my family 135 miles behind

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while my daughter finished her senior year of high school, I was ready for the task—full days in the courtroom followed by evenings of reading briefs and writing short decisions. There was enough trial business that my Portland colleague came to Bangor from time to time so that we could run joint trial lists (nothing like the jeopardy of a trial, coupled with the uncertainty of which judge you would get, to move the parties to settle even the most difficult case).

I often felt insecure: What was the just sentence in a criminal case? What was the proper result in high-profile cases involving elections, or campaign finance, or the request of a church group to use school premises?

I did miss the luxury of discussing a case with colleagues and letting judgment mature over the course of seasoned deliberations. But it was satisfying to set my own schedule, to manage my own docket and cases so as to reduce the backlog, and to meet with the local bar to generate joint ideas for improving how the federal trial court should function.

I particularly enjoyed talking with jurors after they returned a verdict, listening to their criticisms and comments, and answering questions about the general operations of a federal court.

I kept my judicial opinions short; I often delivered them from the bench to speed the process and avoid the delays that come with polishing a written product. I was confident that the First Circuit would take care of the law-elaboration function for me . . . not to mention the error-correction function.

NOW

In 2007, federal trials—particularly civil trials—have become a luxury in Maine.[1] Fifteen years ago, I was a tireless advocate of alternative dispute resolution, both locally and nationally. I used magistrate judges and my own efforts to settle as many cases as I could, so that there would be time to try the

1. The decline of federal trials has been documented nationally, and is a long-term trend. *See e.g.* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Leg. Studies 459 (2004). There are, of course, regional exceptions, particularly the southwest border courts dealing with huge numbers of immigration and drug cases.

cases that would not settle. I advocated settlement even during a trial, often speaking to the parties in the presence of their lawyers after excusing the jury for the day. No longer. Most lawyers and clients now understand ADR thoroughly, and there is little need to advocate it. The costs of litigation are such that the parties almost always explore settlement fully before they approach a trial date. I savor the civil trials I do get. I no longer exert myself as much in spontaneous judicial settlement efforts, although I do my best to facilitate settlement when I am asked to do so. But there is not the same personal urgency to settle a case. After all, I have time to try it. The available judge, jury, and courtroom have always been the best settlement incentive; thus, ironically, the decline in trials increases the incentive to settle, because the threat of trial is even more certain and imminent.

Criminal trials, as well, have diminished severely. There, federal judges never did have any role in encouraging "settlements" (guilty pleas), because the Rules forbid it. But the Sentencing Guidelines (even now that they are advisory), together with mandatory minimum sentences, have created an overwhelming incentive for a defendant to cooperate with the prosecutor. Only then can the defendant get the prosecutor's motion that permits a judge to go below the prescribed sentencing level without provoking a prosecution appeal. The result is that few defendants risk a trial, because conviction brings the virtual certainty of a significantly longer sentence than would result from a guilty plea.

So what am I doing in place of the trials? In part, I am doing what I vowed not to do: I am writing long opinions on issues of increasing complexity. Now, that is not just an application of Parkinson's Law—work expands to fill the time available for its completion—nor of the fact that life and therefore lawsuits have become more complex. Several factors contribute. For example, appellate judges sometimes apply their own work model to trial judges, and increasingly demand more elaboration of detailed reasons for the trial judge's decisions. If that is an overstatement, it is certainly true that we trial judges feel more confident that we will not miss a particular element in

the ever present "multipartite" analysis for a given decision point if we approach the topic in writing.[2]

Then there is the growth of federal class actions. Both the drafters of the Federal Rules and the courts of appeal have imposed substantial and demanding requirements on trial judges to make detailed findings and to evaluate sophisticated issues.[3] Failing to do so in a written opinion carries a clear risk of reversal and having to "do it over," the bane of every trial judge's existence.

Ironically, a class action that settles (and most do) creates even more work for the trial judge. According to the appellate courts, the trial judge then becomes the fiduciary for the class in evaluating the settlement, marshalling the information and explaining to the appellate court (and often to the public in a high profile case) why a particular settlement should be accepted or rejected. That is most safely done in writing, canvassing the host of factors identified by the courts of appeal.

Additionally, with the growth of federal multi-district litigation, more of those cases have found their way to Maine. Multi-district cases tend to have very complex issues that cannot be resolved easily in an oral disposition or even a short opinion.

Finally, sentencing too has become more complicated. Congress requires a written statement if a judge departs from the Guidelines, and many judges find it advisable post-*Booker*[4] to give a written explanation of why the advisory Guidelines do not produce a sentence that fulfils the statutory purpose. The Judicial Conference has devised a multi-page form that a federal

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2. Professor Arthur Miller has argued persuasively that, since the *Celotex* trilogy, federal judges have also granted an increasing number of summary judgments (too many, he contends). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. Rev. 982 (2003). The grant of summary judgment, unlike its denial, requires a detailed written opinion setting out both the facts and the law, to avoid reversal.

3. *See e.g.* Fed. R. Civ. P. 23 (available at http://uscode.house.gov). The district judge is required first to make findings about whether the class is large enough to make joinder of all class members impracticable; whether there are questions of law or fact common to the class; whether the claims or defenses of the representative parties are typical of the claims or defenses of the class; and whether the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). That is but the first step. Succeeding sections of the Rule are even more complex. *See e.g.* Fed. R. Civ. P. 23(b), (c).

4. *United States v. Booker*, 543 U.S. 220 (2005).

judge must complete for each sentence, but sometimes it seems preferable to write an opinion and attach it to the form as well.

Beyond the increased writing, there are other changes. Before the Sentencing Guidelines, defendants released early from prison were supervised on parole by the United States Parole Commission. Now, parole has been abolished, we have "real time" sentences, and the sentencing judge must impose a period of supervised release to follow the sentence. The Probation Office, an arm of the federal court, performs that post-imprisonment supervision and, if there are violations, brings the offender back before the sentencing judge for a new hearing and new punishment. First, however, there is the paperwork of warrant applications and perhaps the review of a consented-to disposition such as compulsory drug treatment, home confinement, a domestic violence program, or a halfway house. So, as defendants sentenced years ago to federal prison emerge and fail to overcome their drug or alcohol addiction, their domestic violence, or their other criminal proclivities, they demand a growing amount of federal judicial time, which is spent resolving disputed facts and deciding what incremental punishment is appropriate.

And there are the broader national efforts to improve federal court administration. While administration is a fact of every job, I have been surprised at the level of satisfaction[5] that flows from working with colleagues on a national level and with the dedicated professionals at the Administrative Office of the United States Courts and the Federal Judicial Center in Washington, D.C. Together, we have taken steps to improve the management of justice within the federal judiciary. And there is plenty of such work.

To sum it up, I now tell law clerks when I hire them that their experience will be far more like that of appellate clerks than it would have been in 1990, and that they will spend much more time studying written briefs, listening to oral arguments, and writing opinions than struggling with jury instructions and

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5. My late colleague, Richard Arnold of the Eighth Circuit, also remarked upon the opportunity to contribute through administrative service. *See* Philip S. Anderson, *Richard Sheppard Arnold*, in 27 *ALI Rptr.* 5, 15 (Fall 2004) (also available at http://www.ali.org/ali/R2701_07-MemorialMinutes.htm). Judge Arnold served in various Judicial Conference roles, as have I.

evidentiary rulings in the courtroom. Of course, when I tell them this, I am talking about my own professional worklife. I do miss the constant trial work. There really is nothing better than watching good lawyers try a case in front of a jury.

But this is still a wonderful job!