

KRAVITZ'S LAW

by
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In the many thick volumes of “lawyer jokes,” there’s one about an eminent psychiatrist who, having passed away, reaches the gates of heaven. She’s greeted by an angel who seems especially gratified to see her, and who says, “Thank goodness you’re here. We need your professional assistance.” The psychiatrist is amazed, of course, and asks how she can possibly be of help. The angel drops his voice to a confidential whisper, and explains: “It’s the boss. He’s having delusions of grandeur. He thinks he’s a federal judge.”

This is likely to be one of the few lawyer jokes that was actually composed by a practicing lawyer, but one thing is certain: its author had never met Mark Kravitz. The two of us had that wonderful privilege, in a variety of venues, and most recently as members of the Advisory Committee on the Federal Rules of Civil Procedure during Mark’s time as its Chair.¹ And the joke doesn’t work for those who knew Mark because no one on or off the bench could have better embodied the virtues of wisdom, service, and yes, humility, or more seamlessly have combined great intellectual accomplishment with deep practical understanding and such an open and down-to-earth personal style.

Mark played two distinct professional roles. He was a judge with a docket of cases in which he was called upon to find facts, apply the law, and ensure fairness in specific disputes. As Chair of two Rules Committees—first the Advisory Committee on the Federal Rules of Civil Procedure,² and then the Standing Committee on Federal Rules of Practice and Procedure³ with jurisdiction over the full complement of federal

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¹ See ADMIN. OFFICE OF THE U.S. COURTS, COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/10_JULY_JC_Coms_JNET.pdf [hereinafter COMMITTEES OF THE JUDICIAL CONFERENCE]; ADMIN. OFFICE OF THE U.S. COURTS, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE 1 (June 12, 2012) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Members_List_Oct_2011.pdf [hereinafter COMMITTEES ON RULES OF PRACTICE AND PROCEDURE].

² COMMITTEES OF THE JUDICIAL CONFERENCE, *supra* note 1, at 12.

³ COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, Chairs and Reporters (June 12, 2012), at 1.

rules—he was an architect of the procedural structure within which he and other judges would operate. The first role required a focus on questions of law, and the second focused more on questions of legal policy.

But both drew on the same set of virtues. As a judge, Mark was highly intelligent; non-partisan, non-ideological, and evidence-based in his approach; open-minded in following the evidence wherever it led while being rigorous in assessing it; and possessed of a deep understanding of, and belief in, the underlying values our legal system seeks to serve. He deployed the same strengths of mind and character in leading the Rules Committees. No single tribute could come close to capturing the full range of Mark's many remarkable qualities and contributions, but we wanted to address one aspect of them in particular: how much he sought, in both of those roles, to engage directly with the profession and practitioners to a degree that is unusual within the judiciary, and the ways in which that engagement helped shape his work.

Mark's interest in serving on the Rules Committees stemmed in part, we believe, from the rare opportunity they present for direct “roll-up-your-sleeves-together” professional collaboration between bench and bar. By contrast, in the setting in which judges and practitioners must interact most of the time—the litigation of individual cases—there's formality and distance. There needs to be, because formality and distance are among the ways we have of promoting fairness and equal treatment among the parties and an orderliness to the proceedings. Mark respected that in his courtroom, but one of the reasons he enjoyed the work of the rules committees was that their structure, purpose, and traditions help create an environment that breaks those barriers down, enabling him to talk more directly with other participants in the system about matters of great importance.

Mark had been a brilliant and successful litigator before being appointed to the bench,⁴ so he had experienced the legal system from all vantage points, but he was always eager to hear what others thought and to test his own experiences and tentative conclusions against theirs. One of the first things Mark would ask when a rule change was proposed would be, “What do the practitioners think?” And he would listen carefully to what we had to say, but what we thought, standing alone, was just one of many starting points for further discussion and analysis. If our response was anecdotal, he would want to understand whether it was representative and whether empirical or other forms of research or data would back it up or refute it—and he would cast the net wide for opposing views from people with different perspectives and professional backgrounds. And although he had extensive experience as both a practitioner and a judge, he was no less demanding in thinking about

⁴ For additional reflections on Judge Kravitz's life and accomplishments, see David F. Levi, Lee H. Rosenthal & Anthony J. Scirica, *ALI Colleagues Remember U.S. District Judge Mark Kravitz*, 35 ALI REP., Fall 2012, at 7, 7.

whether and to what extent his own experiences were typical and could be a basis for broader policy decisions. “This is what I’ve seen in my courtroom in Connecticut—what have others seen?” he would ask. The span of time in which information, data, points of view, and policy implications were gathered and debated was often considerable; as Chair of these Committees, Mark knew that one of his responsibilities was to move the deliberations toward the reaching of decisions, but those deliberations often lasted for years because of the complexity of the subject matter and the breadth of relevant information. Mark never cut those discussions off while they continued to be productive, but always channeled them—masterfully—in the direction of narrowing the issues over time, reaching provisional conclusions, and achieving consensus among diverse participants based on the process of open inquiry and rigorous analysis which he led.

What is perhaps most striking to us are the ways in which Mark’s passion for directly engaging practitioners was expressed not only in the rulemaking process, which is structured with an eye towards facilitating such engagement, but also in his approach to deciding cases. As much as any judge in the country, Mark sought to engage with the advocates before him as a way of understanding the issues in his cases and resolving them in the most fair and informed way possible. In an era in which oral argument is granted with declining frequency, and more and more judges say they don’t have time for it and don’t find it helpful, Mark made it his practice to schedule an oral argument on every substantive motion in every one of his cases and bring the lawyers in to discuss the issues.⁵

His reasons for doing so revealed much about his approach. He originally adopted this practice as an expression of respect for the lawyers, but he came to decide that he was actually its “chief beneficiary” because of the assistance it provided him in reaching his decisions.⁶ He characterized an oral argument as a “conversation,” stating “[h]ow I use oral argument [is] to turn a case, or an issue, upside down and over and over again, hoping to see its hidden side, to ensure that I fully understand it and all of its implications.”⁷ Indeed, he said that “[t]he value of this process leads me to believe that in our headlong, and not altogether inappropriate, rush toward judicial efficiency, we should not—indeed, we must not—forget the value of reflection and the role that oral argument can play in that most critical of all judicial endeavors.”⁸ There isn’t an advocate anywhere that wouldn’t be grateful to have his or her case

⁵ Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 247–48 (2009).

⁶ *Id.* at 269–70.

⁷ *Id.* at 264, 271.

⁸ *Id.* at 271.

assigned to a judge who thinks like that—a judge who is certain to be really listening to the arguments being pressed.⁹

That is not, however, because such encounters would be relaxed and easy. To the contrary, they would be intense and demanding, precisely because the judge was indeed listening and reacting to what he heard. “Lawyers are held accountable at oral argument,” Mark explained, because “[t]here is no place to hide when one stands at the lectern”—a “lonely spot” where “[c]ounsel have no choice but to respond to the court’s questions about aspects of the case that they might have purposefully ignored in their briefs.”¹⁰ More extreme positions taken in the written submissions give way to more reasonable ones, he explained, when they have to be stated orally as part of a dialogue with the court, and give way even to concessions on some points that enable the judge to narrow the issues in dispute.¹¹ And the argument is the last “opportunity” for “the party who may soon lose the case” to “straighten the judge out if she needs it.”¹² But that opportunity was a genuine one in Mark’s courtroom, where, he professed, “[C]ases before me often turn out to look quite different after oral argument than I may have supposed before argument.”¹³ These insights into the essential role of oral argument in improving legal advocacy and optimizing the end result—judicial decision making—should be required reading for those who doubt the value of oral argument at both the trial and appellate levels.

Mark’s decisions as a judge were a reflection of his abiding qualities of care, thoughtfulness, insight, and humanity—qualities, indeed, that he applied to everything he did. For while we have talked up to now of Mark’s commitment to engagement with the *profession*, Mark never forgot that cases are always ultimately about the parties, not the attorneys. There are many examples, but we particularly remember his decision in *Mitchell v. City of New Haven*¹⁴ because it was one of his last. *Mitchell* was a case brought by members of the Occupy movement who had been living for months on the New Haven Green as part of their protest, and who sought an injunction under the First Amendment that would bar the City of New Haven from removing them.¹⁵

Mark’s opinion in that case confirmed that, although ALS had weakened him physically in very cruel ways, it had left his extraordinary mind and temperament untouched. The opinion deftly navigated through complicated legal issues involving First Amendment law, municipal authority, and the standards for preliminary injunctions in the course of

⁹ Mark once noted, in a variant on a comment attributed to Yogi Berra, that “[y]ou can hear a lot by listening.” *Id.* at 267 (internal quotation marks omitted).

¹⁰ *Id.* at 265.

¹¹ *Id.* at 265–66.

¹² *Id.* at 264.

¹³ *Id.* at 267.

¹⁴ *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238 (D. Conn. 2012).

¹⁵ *Id.* at 240–41.

concluding that the injunction should not issue.¹⁶ It dealt with silly arguments by observing that they were, well, silly—as when, in response to the City's contention that no issue of First Amendment expression was even present, the court noted drily that it “would have to have lived in a bubble for the past year to accept Defendants' claim that Occupy's tents ‘could simply mean that the plaintiffs enjoy camping.’”¹⁷ But the opinion was also deeply respectful of both sides' fundamental claims, including—perhaps especially including—the plaintiffs against whom the court would rule. In response to the City's argument that the protestors could convey their political message through other means, like their website, without needing also to occupy the Green, Mark wrote that there was “something unsatisfying about telling a movement that aims to make visible an often unseen, ignored population that it should content itself with forms of communication that are only seen when someone seeks them out.”¹⁸ And although he could not order it to do so, he urged the City to use restraint in effectuating its decision to clear the protestors from the Green.¹⁹ No lawyer or party likes to lose, or will easily agree with a decision that goes against them. But a court that treats them and their claim with dignity, and demonstrates that their position was understood, can take away at least some of that sting—and remind us all of how our judiciary functions when it functions at its best.

We live in an age of polarization, of impatience with process, of ready derision for opposing views, and of the demonization of those who hold them. At its best, the law counteracts such disquieting trends by guaranteeing a fair and thoughtful process, dignity and respect for all participants, and an opportunity for claims and defenses to be heard and decided on their merits, without regard to popularity. In short, it is the task of the law, and especially of legal procedure, to secure to each of us a due measure of dignity and worth.

As lawyers, we stake our careers on the rule of law, and we defend and love it even when, in a particular case, it does not seem to love us back. We do so because of our faith that the law transcends, in the long run, the vagaries and weaknesses to which individual humans succumb. And yet the law is a human endeavor. It depends for its existence and

¹⁶ *Id.* at 244–49, 254.

¹⁷ *Id.* at 247 (quoting Defendant's Supplemental Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 23, *Mitchell*, 854 F. Supp. 2d 238 (No. 3:12-cv-00370), ECF No. 28).

¹⁸ *Id.* at 253.

¹⁹ *Id.* at 254 (“The Court expects that the City will work with Plaintiffs and their fellow protesters to facilitate an orderly removal of the structures they have erected on the Green. The Court asks that the City allow Plaintiffs until at least noon tomorrow to clear and clean the encampment area. Should the City need to dismantle any structures on the Green after that time, the Court's hope is that the City will do so during daylight hours, that it will make every reasonable effort to avoid destroying personal property, and that, when possible, it will allow owners a chance to reclaim any property that is removed.”).

force on the dedication of the best of our kind. We therefore give thanks and pay tribute to Mark Kravitz, who was a great judge and a great human being—and the two are not coincidental.

We have quoted Mark extensively in this Tribute because his voice was distinctive, and we so miss it. We will always be indebted to him—for his commitment to the improvement of the legal system; for the care and skill he applied to that cause and the scope and quality of his accomplishments in that work; for his personal qualities of kindness, openness, and integrity; and for the example he set for us and others in all of those respects.

There is one more quote, not from Mark himself, but in his spirit, that resonates on this occasion. It is one from another leading jurist, California Supreme Court Chief Justice Roger J. Traynor, who famously declared that: “The law will never be built in a day, and with luck it will never be finished.”²⁰

Actions speak louder than the finest of words. It is a true measure of Mark Kravitz’s greatness, as a judge and as a human being that, upon facing the close of the finite project of his own life, he chose to devote such a generous portion of his remaining days to the infinite, unending project of building the law. We are lucky in that choice, and we are grateful.

²⁰ 39 Cal. 3d 953, 955 (1986) (In Memoriam tribute to Chief Justice Traynor). These words are inscribed on a wall at Boalt Hall, U.C. Berkeley’s Law School, as inspiration, or perhaps warning, to aspiring lawyers.