INSTITUTE *of* JUDICIAL ADMINISTRATION
NYU SCHOOL OF LAW

# NEW YORK UNIVERSITY SCHOOL OF LAW – INSTITUTE OF JUDICIAL ADMINISTRATION (IJA) Oral History of Distinguished American Judges

## HON. LEE H. ROSENTHAL
## U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

with

Kellen R. Funk
Professor of Law; Clerk to Chief Judge Rosenthal (2016-2017)

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FUNK: Judge Rosenthal, thank you for sitting for this

00:00:28 interview for the Institute of Judicial Administration at NYU School of Law. As you know, I am Kellen Funk, Professor of Law at Columbia Law School, and your former clerk. And it's really my pleasure to get to conduct this interview with you today.

JUDGE ROSENTHAL: I want to thank NYU and the Institute for the privilege of being here. And having you, Kellen, do the interview is just wonderful. It reminds me of the first time we met, when you were interviewing to be a clerk. I think we turned a half-hour interview into a three-hour discussion, which we've kept on going.

FUNK: And that was in Philadelphia—

00:01:06 JUDGE ROSENTHAL: That's right.

FUNK: --on one of your many travels, so I'm sure we'll talk about it today. Now I know you've probably been reminiscing a lot these days, with the recent passing of your father, who was an extraordinary historian of law and politics. Tell us more about him and about growing up in an academic household.

JUDGE ROSENTHAL: It was different than a lot of my friends. It was different because we sat around the dinner table and we talked about ideas. We talked about how to think, how to talk, how to persuade, how to explain, how to listen. And I was well taught. The things that were prized

00:01:55 are the things that are necessary for a judge to be a good judge or for a lawyer to be a good lawyer: to read carefully, to think about it, to step back and approach things in a

disciplined manner, to resist the impulsive first response, to be careful. And I think that what I learned around that dinner
00:02:26 table, in car trips, in different campuses all over the country were the things that I've kept and I rely on every day.

FUNK: And so as you've traveled around to different campuses, sort of walk us through where you began and where you ended up, in an iterant academic family.

JUDGE ROSENTHAL: So if you ask me where I grew up, my answer would be all over. I was born in Indiana, where my father had his first teaching job at a little, tiny Quaker college, which is still a wonderful school, Earlham College, published his first book, and then started traveling around for periods of teaching in
00:03:19 different academic institutions. UCLA, stints over the summer, all over the place, Harvard, Johns Hopkins for a year, Phoenix—or Tempe, different places. I went to high school for several years in downstate Illinois. My father was at the University of Illinois, at a tiny, tiny high school that was part of the University. And then we moved, in my senior year, to Houston, where my father and mother both worked at Rice University. And Houston is where I graduated from high school, but I left there after only a year, thinking never to return. I was going to go to law school in Chicago, and then I would go to Washington and New York, or stay in Chicago, just like many
00:04:14 of my friends were. And instead, I clerked in Houston right after my last year of law school, and I met this person. And four children, a dog, and a house later, I'm still there.

FUNK: So do you consider yourself a Texan now, or are you still a transplant?

00:04:32 JUDGE ROSENTHAL: I consider myself a Houstonian, more than a Texan because like many big states, the urban areas have a different feel than other parts of the state. Houston has been a wonderful city for me and my family. I've had opportunities that I don't know I would have had elsewhere. So I'm grateful to Houston, and Texas, yes. Texas is a fascinating place, and I continue to learn a great deal, just by listening to the people around me. It's a reflection of this country in so many ways that are so interesting, and I feel it in my docket, whether it's immigration, advances in science, in medicine, technology, artificial intelligence, energy, it's all there,

00:05:30 and I feel very lucky to be part of that. So yes, I am a Texan.

FUNK: So when did interest in law and legal practice take hold, during your education years?

JUDGE ROSENTHAL: In college. None of my family is a lawyer. My father studied legal history, but the emphasis was much more on the history, rather than the practice of law. And in college, the University of Chicago, I fell in love with philosophy. But what I mostly liked, I discovered, was the philosophy of law. And that led me to want to go to law school. I entered law school, not thinking that I was going to

00:06:15 be a practicing lawyer. But I found out, by practicing—practicing—summer associateships in different places, different sized firms, I really like the practice of law. And when I

started, after my clerkship, practicing law, I discovered that I really did like it. But I like being a judge a whole lot more.

00:06:37

FUNK: So in law school itself, you were the student of a practitioner, Owen Fiss, right before he published the Civil Rights Injunction[1]. So did this interest in procedure and practice develop at law school? Or it sounds like it may have developed later on.

JUDGE ROSENTHAL: I was taught civil procedure by Professor Jo Desha Lucas[2], who was a wonderful person, and I wrote down everything he said, or tried to. But I didn't understand any of it. It turned out that he was teaching the footnotes to *Moore's Federal Practice*[3], which are really rich. But I kept those notes, and they are remarkable. I didn't really appreciate how remarkable at the time, but that started me thinking about procedure as the key to understanding the structure for resolving disputes. It was the framework for thinking about how the law proceeds, how the law can develop, how the law can be approached, how the law can be used, and how the law can be misused. So I ended up thinking that procedure was the way to understand almost every other part of the case book and the course curriculums, so I loved it.

00:07:17

[1] Owen M. Fiss is the Sterling Emeritus Professor of Law at Yale Law School and author of T*he Civil Rights Injunction*, Indiana University Press (1978).
[2] Jo Desha Lucas (1921-2010) was the Arnold I. Shure Professor of Urban Law at the University of Chicago Law School, who focused on local law and federal civil procedure.
[3] *Moore's Federal Practice: a Treatise on the Federal Rules of Civil Procedure*. Albany, N.Y.: M. Bender, a comprehensive and frequently cited treatise covering federal rules on civil procedure, evidence, criminal procedure, and appellate procedure, written by over 50 judges, lawyers, and professors.

00:08:08 FUNK: Including the legal philosophy interest you entered law school with.

JUDGE ROSENTHAL: Yes, yes, exactly. They meshed and it was the start of a lifelong love of civil procedure, quite unnatural. I'm sure that there's therapy or maybe an app to address that, but I have resisted. Civil procedure has continued to be my favorite part of a job that I really love. It has enriched the entire experience I've had in practicing law, in being a judge, in teaching law, and in thinking about how to make the law clearer, better, more helpful.

FUNK: So after law school, you clerked for John R. Brown, one of the Fifth Circuit Four[4], as they were known at the time. What drew you to his chambers, and what did you learn in clerking for him?

JUDGE ROSENTHAL: He was the first judge to give me an offer when I interviewed, and I started interviewing in the Fifth Circuit because Owen Fiss, at the time, was a real force at Chicago. He had left by the time I applied for clerkships, but he had started the pipeline to judges like John Minor Wisdom, Richard Rives, Elbert Tuttle, and John Brown. And they were the four appellate court judges who were the most active in the civil rights decisions that came out of the Fifth Circuit during that period and changed the world. John Brown was a

[4] "The Fifth Circuit Four" refers to Judges John Robert Brown, Richard Rives, Elbert Tuttle, and John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit who, during the late 1950s, became known for a series of decisions that advanced the civil rights of African Americans.

colorful, fascinating man. His background was in maritime law. He was funny. He loved what he was doing. He was Chief Judge at the time I clerked for him, which meant that he was 00:10:05 steeped in the administrative work of the Circuit. It was then the combination of the Fifth and what is now the Eleventh [Circuit].[5] They ended up being divided during that period. And it was something that he was very active in accomplishing 00:10:29 and in adjusting to. He was a real inspiration, not only because of his jurisprudence, but in his understanding that court governance is an important part of court effectiveness. And he developed ways to manage the work, manage the administration, so that it didn't get in the way of the work. And in a court made up of very strong individuals, that can be difficult. When I became Chief Judge, years later, of the Southern District of Texas, I thought of him often.

FUNK: And from that clerkship, you went into practice at Baker Botts. Is that where you learned the ropes of litigation?

00:11:28 JUDGE ROSENTHAL: I did. And I was very lucky because at the time, Baker Botts had a lot of cases that were smaller and were used as training materials for younger lawyers who wanted to be trial lawyers. They prided themselves on being trial lawyers, as opposed to being litigators, which was the somewhat derisive term applied to lawyers in big law firms on the East Coast, who had great skill at motion practice, but wouldn't know what to do with a jury if it bit them. That was the conceit. But the

[5] On October 1, 1981, under Pub. L. 96–452, Alabama, Georgia, and Florida were moved from the Fifth Circuit to the newly created Eleventh Circuit. The Fifth Circuit now includes the federal district courts of Louisiana, Mississippi, and Texas.

approach that they used was to develop a set of skills trying cases that you can apply to any kind of case. Subject
00:12:13 matter doesn’t matter; you can be effective with those skills. That’s what we want you to learn. That commitment to helping me and others learn how to try cases and to thrive in an adversary system-that was invaluable. I had wonderful mentors. And I was lucky because the consumer
00:12:40 protection statutes that were proliferating at the time came to Texas, and treble damages for consumer cases became available. Companies didn’t want to pay. They tried the cases. So I tried automobile warranty cases, and cases that involved cars that were lemons, cases that involved cars that injured people for various product defects. And I tried cases involving brokerage houses where people had lost money because the broker put them into something that was, according to them, wildly unsuitable. It was mostly defense work and it was a kind of practice that I don’t think is readily available now, big cases and
00:13:33 small cases, different subject matters, and giving younger lawyers the ability, the opportunity to watch, learn from really good people, and go out and do.

FUNK: Do you remember your first address to a jury?

JUDGE ROSENTHAL: Yes, I do. It was pretty scary. And I remember the first case that I first chaired. It involved a real challenge because the plaintiff communicated only with sign language. But it was very expressive. He was a terrific witness for himself. The issue was a car that kept on

developing steam leaks. And he would describe it as “psss.” And his lawyer’s argument to the jury was “psss.” And I had to
00:14:34 counter that. We won, but yes, I do remember very well.
FUNK: And those opportunities came very early in your career.
JUDGE ROSENTHAL: Relatively, compared to current practice, where it’s much harder to get to trial, yes. I was lucky and
00:14:52 well taught.
FUNK: Now there were not many women in law firms and especially women partners were scarce at the time you entered practice. So what was it like, entering a large law firm in Texas, as a woman?
JUDGE ROSENTHAL: They were very supportive. They understood that it was time. And they liked people who were smart and would work hard. I think I did work probably harder than some of my male counterparts because I felt keenly that I had more to prove. And I do remember the incidents that would no longer occur today, going with a group of male lawyers to eat in one
00:15:36 of the clubs that proliferates in downtown Houston for professionals and being kicked out because it was men only. I remember being confused for the court reporter, or on airplanes for a flight attendant because we were then dressed in basic female Brooks Brothers or early Talbots, with bow ties and navy blue skirt suits. And we all looked alike, and we were all very nervous about what we were doing. But I was not the first. There were people who had gone before and really made it much easier for me. I’m grateful to them as well. And when I had my first child, it was shortly before I became a partner,

00:16:29 and people thought I was crazy, that I was that close to getting to partnership and was I going to screw this up by getting pregnant and waddling around in depositions, right before the partnership decisions were going to be made. They made me a partner.

FUNK: And you followed that up with having three more

00:16:50 children.

JUDGE ROSENTHAL: I did.

FUNK: So what were those years like, as a partner at a law firm and raising four girls?

JUDGE ROSENTHAL: Very fuzzy. The hardest part of the day was every morning, getting everybody out of the house, me included. I was lucky, as I tell young women who clerk now when they ask me for advice on family-work balance, best advice is if you and your mother get along, live near her. I was lucky. My parents were very—

00:17:34 were close. I didn’t move there because my parents were there, but they were there. And my children were very lucky. They grew up with grandparents as an integral part of their lives. I was lucky because it gave me the buffer. I was lucky because my husband valued what I did and helped. But yes, it took help to get me out of the house in the morning. And I was lucky. Again, being a one-judge court can be isolating. Children keep you connected. You meet people who are not part of the world in which you work every day, the courthouse bubble. It’s vital to prevent the kind of judicial isolation that can otherwise occur. And I actually miss the kind of outward

00:18:32 connections that being part of school, being part of sports, being part of all their activities gave me.

FUNK: And what was your work like, as a partner at this time? Had it changed, from trial practice and trying cases to juries?

JUDGE ROSENTHAL: Pretty much the same. I left pretty early in

00:18:55 my partner part of the work. And so I never really got into the part of the practice of law that I think is much more vital now, and that's developing business, bringing a book of business wherever you went. I left with skills, but without any kind of book. Had I stayed, I would have had to do much more of that. So I'm pretty ignorant of that part of current practice. And one of the things that I value about the work I did as an associate and as a partner, is that I remember some of the challenges, the difficulties, the anxieties, the angst, the pressure of being a practicing trial lawyer. And I don't want to forget that because it makes me much more careful about

00:19:53 what I demand of lawyers and the kinds of deadlines I impose, and trying to think about what I'm doing, from the lawyer's perspective. Here is a procedure I've developed for managing cases. Is this really helpful to lawyers or is it really making their life unintentionally harder? If I can keep that perspective and keep trying to learn what the practice of law is now that's different from the practice of law I had 30 years ago, that's something that clerks help me do, if they come from practice, friends help me do. And I don't want to get too far away from that.

FUNK: I recall one case, a conference hearing when you were

00:20:46 getting a little exasperated with how little a partner knew about the case, so you called the associate up to actually talk about the details of the case, remembering that they sometimes know more about the case.

JUDGE ROSENTHAL: They did the work. They wrote the briefs.

00:21:00 They drafted the motion, exactly. And they've actually read the cases.

FUNK: So tell us, then, about the appointment process, how you became a judge of the Southern District of Texas.

JUDGE ROSENTHAL: Every judge has a story about how they got there. And they range from the funny to the improbable. I was the beneficiary of what was called the Biden Bill because then Senator Biden was Chair of the Judiciary Committee, and he was intent on reducing cost and delay in civil litigation. So he drafted legislation andgot it passed that did two things to try to help address those problems, which are problems in any civil

00:22:00 litigation system. It's worldwide, cost and delay of getting disputes resolved. So their approach was twofold: one, more judges. Five new judgeships were created for the Southern District of Texas, at once, five. That's a lot, even in a very big district. The second thing he did was—and still with us—he put in a practice of every six months making judges publicly report how many motions are more than six months old and how many cases have been pending for more than three years. No judge wants to have a big number in either of those columns on March 30th or September 30th, which are the reporting dates, not invasive, not intrusive, didn't make judges do something

00:22:52 that they otherwise wouldn't do. But it made judges publicly report how slow they were moving cases, very effective. And lawyers know that about the end of September and the end of March, they're going to see a real spike in the number of opinions coming out of the district courts. But five new
00:23:20 judgeships at one time: that meant that the senators who were making the recommendations to the White House didn't have to restrict themselves to what are often the usual paths to the bench, like political involvement. I had four kids. I had been trying to make partner. I had a busy law practice. And my oldest daughter is cognitively disabled. So I was a busy person. I was not politically active, didn't have time. So when my name was put out there by Senator Graham[6] with four others, we were approaching the end of Bush I's first term. And he was naming judges pretty quickly. But there was a big delay because he wanted to get past the March
00:24:15 primaries before he named the judges that he was going to ask the Senate to confirm. And during that period, my name got put out, thanks to friends in the legal community and partners at Baker Botts who were very supportive. And I was the so-called merit candidate because I didn't have political chops to get me there. But during that time, an organization then called the Eagle Forum[7], which was headed by Phyllis Schlafly, decided that I was really a bad candidate. I'd never met any of the people who were part of that movement, nothing to do with it,

[6] Senator William "Phil" Graham represented Texas in the US Senate from 1985-2002.
[7] Eagle Forum is a national volunteer interest group founded by Phyllis Schlafly and which focuses on conservative and pro-family issues.

had never made public statements on some of the issues that were most important to them, or even any private statements. But they decided that I was anathema because I was a Jewish woman. And everybody knows that Jewish women are flaming liberals, not to be trusted. So she started a petition to have Senator Graham withdraw the recommendation of me to the White House. He got angry. This was his prerogative to choose. And he did

00:25:40 it very carefully. I interviewed with him when I was about eight months pregnant with my twins. I couldn't go to Washington because the doctor was afraid that it was not a good idea, and I was the size of a house. So I waddled into his office in Houston, somehow got to the couch, and positioned on it, and had a wonderful interview with him. He was not going to withdraw his support. The miracle was that I actually got off the couch. But so my name goes in. And then there was a long delay because we have to get through the primaries. During that time, I have my twins. And when I got the call after the nomination was made public, it was—I barely remember

00:26:34 it because I was at home with brand new babies, trying to work from home. The babies were in a crib that was right near the fax machine, and that's the noise that they grew up with because work was being faxed to my house, so that I could work during my leave. Things were different then, in terms of accommodating new mothers and fathers, much different then. The expectation was that you would pretty much continue to work during the time that you were at home. You'd get back to work,

the office as quickly as possible. It was a much less forgiving time, for the stresses of being a new parent. But it all worked. I got through and I was very lucky because some of
00:27:31 the people who were nominated at the same time did not make it through before the window shut, as the election approached. Same thing happens now. Months before the election confirmation of new judges stops because everybody expects or hopes that they will have an ability to influence the choice
00:27:54 that they didn't have before the election. We're going to see it again.

FUNK: What was the intensity of the hearings like in those days for district judges?

JUDGE ROSENTHAL: By the time I got there, the advice that I was given was show up, answer the questions. And if you can, bring a small child, preferably female, preferably your own, but not necessarily.

FUNK: Did you take the twins?

JUDGE ROSENTHAL: The twins were too little, but I took my then four-year-old, who was adorable, of course. And I followed the
00:28:30 instructions. She was wearing a really cute smock dress, which I have saved. And during the hearings, the senator introduces me—and my family, and introduces my little girl, Hannah. And the senator who was in charge of the hearing was Paul Simon, from Illinois, famous for his bowties and his wit. He ignored me. He just leaned forward and looked at my beautiful little girl and said, "Hi honey." That was my hearing. I was asked one question by Strom Thurmond, which was, "Is it important to

have women as judges?" I gave the obvious answer, and we were done.

FUNK: That's great.

00:29:17 JUDGE ROSENTHAL: That little girl is now a young woman, is a doctor. Anything but law was the motto of my children. I have to think about why. But I don't think she remembers that day very well, but I sure do.

FUNK: Now since then, your judicial career has really been

00:29:35 marked by how much effort you have devoted to training judges, including this week, at NYU's Employment Law Workshop for [Federal] Judges[8]. But what was your own training like? How did you learn to become a judge, and who were your models?

JUDGE ROSENTHAL: Some of my colleagues on the Southern District of Texas were my chief models. And as I was waiting for the nomination process to grind through, I would go over to the courthouse and watch. I would watch some of the judges who my colleagues knew, and had appeared before and recommended. "This is a really good judge. You can learn from this judge." So I went over to this judge and just sat in the courtroom and

00:30:22 watched. It also helped me avoid the increasing puzzlement on the part of my partners. "Why are you still here? What are you doing here?" So I used that time. And that was really helpful. The Federal Judicial Center is the educational arm

[8] The Annual Employment Law Workshop for Federal Judges is a three-day educational program organized by the NYU Center for Labor and Employment Law in cooperation with the Federal Judicial Center, and the Institute of Judicial Administration at NYU School of Law. Each session is typically led by a judge along with an experienced employer and employee-representative counsel. For over ten years, Judge Rosenthal has taught in the workshop on topics ranging from jury instructions to case management.

for the federal courts, and they have a wonderful training program for new judges. They send you this big box first. It's my ACME judge kit. And it has all sorts of scripts in it. It has various books, *The Bench Book for District Judges*[9] and other aids. I read all that stuff and thought about the kind of judge I wanted to be. I had appeared before a lot of judges, and I had a pretty good idea of how important a good

00:31:18 judge was and how difficult a disinterested—no, not disinterested—uninterested judge, a judge who was not engaged, a judge who wasn't energetic in involvement in a case. I saw how much more difficult the whole process was, if the judge was inert, or worse: engaged in a way that put a thumb on

00:31:55 the scales. So I had models of really good judges, state and federal, and really bad judges. And both were helpful, in different ways. But yes, judging as a skill and case management as a set of tools that could be used well or badly fascinated me from the start. And the question of what makes a good judge 'good' is I think really hard. But there is one thing that all good judges, I think, have in common. They really care. They really like the work. They think it matters, even on relatively small cases, not small to the litigants, even on cases that are not going to affect anybody but the people before you, even on cases that are "run of the mill." It matters to the good judges. And I wanted to be a good judge.

FUNK: And so as you train judges today, judges who do care,

[99] Federal Judicial Center, T*he Bench Book for District Judges*, 6th ed. (2013).

what is it you most want to teach them to do? What skills are most important for you to train them in?

JUDGE ROSENTHAL: People who come to the bench, no matter what their background. Judges in this country, they have so many variations on the tools, the background, the concerns that they bring to the bench. But conscientious judges I think have, at the end of the day, they want to be right. They want to be fair. They want to be

00:33:47 thorough, and they want to be careful. They need to be modest about what they know because you're always the least informed person in the courtroom. They need to be aware of the consequences of what they are going to impose on the parties, whether it's an injunction, or a judgment, or an order, a

00:34:16 resolution of a motion, you have to understand the practical consequences. That's why being a district judge is so wonderful. And what is it that I teach, when I try to teach judges? And I learn more from the judges I teach than I ever impart. It's that we don't rule because of the effect it's going to have. But we have to rule with awareness of the consequences of what we do. And a district judge sees that more clearly, I think sometimes, than the appellate courts because you are making the record with the lawyers. You see the facts as they develop. You see the

00:35:12 people who are affected. It's a vital part of being a judge of first instance, which we are as trial judges. I find that a critical part of conscientious judgement is that awareness.

FUNK: So there have been some criticisms of the six month list

system, that it undercuts this kind of conscientious judging because it may put undue pressure on a judge to just push, push work out the door. Do you agree with that or—

JUDGE ROSENTHAL: No, I don't. The six month list is not anything that you're going to be impeached over. It's a matter of personal pride. There may be a necessity for a

00:36:05 case to stay on the books for more than three years, for a motion to linger for more than six months, it may not be ripe. There may be all sorts of reasons why you're not going to get to it. So I don't think it pushes judges to resolve cases that shouldn't be resolved at that point. It does push judges to

00:36:28 tackle those cases that are, for one reason or another, at the bottom of the pile. They've sunk because of the weight of the materials the parties have brought, because of the difficulty of the questions presented. Maybe it's just procrastination. Maybe you've got some kind of judge's writer's block on some of these issues. But for some reason or another, there are always cases that are in need of resolution but have sunk to the bottom. The six month list makes you get to the bottom of the pile. And that's not a bad thing.

FUNK: It's also much easier to let cases continue through a dispositive motion—

00:37:08 JUDGE ROSENTHAL: Yes.

FUNK: --than to write the disposition. So if you want to take your time and explain to the parties the dismissal—

JUDGE ROSENTHAL: Exactly. And it also reminds judges that sometimes the parties just need an answer. They don't really

need a beautifully written 30-page opinion that will be one more opinion resolving a motion for summary judgement in an employment case, or a civil rights case, or a business case, or whatever. They want an answer. And the six month list makes sure that they get, finally, the answer they've been waiting for.

00:37:49 FUNK: So you have been a district court judge for over 30 years now.

JUDGE ROSENTHAL: Hard to believe.

FUNK: You already alluded to your having some appellate experience too because you frequently, usually annually, sit by

00:38:01 designation at other courts. When did that practice start, and why do you like to travel to the appellate courts?

JUDGE ROSENTHAL: A couple reasons. One is that I am a one judge court. It is great to be part of a much more collaborative process, where you've got to make sure that at least one other person agrees with you before you can get the opinion out the door and where you really do reach results by talking. The conference that in every circuit follows the argument is great. The exchange of the drafts, the editing not by law clerks but by a colleague is great. And it reminds me of the standard of review, which is always good for a district

00:38:47 court to be mindful of. I have liked opportunities to meet and work with really interesting, accomplished people all over the country. Now many of the vacancies that plagued the appellate courts for years are filled. So many of the courts that were borrowing other judges to keep up no longer need that help.

The Ninth Circuit continues to be a borrower, in part because they have such a huge caseload of immigration cases. And I have loved being able to do that. It's also good for my clerks. They get to get out, see other clerks, see other chambers, see other judges. And I've tried to
00:39:38 have my clerks look at proceedings in other courts, get to know the chambers, staff of other judges. But it is not the same as working on a case, on an opinion, on a result with other people. Appellate court sittings let us do that. But I always love coming back to my trial bench and having a trial,
00:40:02 and having the lawyers and the parties in front of me, and wading into the discovery disputes, and the evidentiary issues that appellate courts only see after the fact. I like the trial bench drama, the opportunity you have to see parts of people's lives that they would never otherwise share with you. That's a wonderful part of being a district court judge.

FUNK: Your clerks know the answer to this from vivid experience. But how many times have you sat by designation at circuit courts?

JUDGE ROSENTHAL: I really don't know the answer to that. But I should look it up.

00:40:46 FUNK: Give us a sense. Where have you visited?

JUDGE ROSENTHAL: Second Circuit, Eleventh Circuit, Ninth Circuit, Third Circuit, Fifth Circuit and yes, Sixth Circuit. I think that's it.

FUNK: Some of those in the same year.

JUDGE ROSENTHAL: Yes. Now that may not have been the wisest

use of my time because all this work is on top of the usual district court caseload. But it's worth it.

FUNK: Speaking of clerks, your clerks recently got to have the pleasure of celebrating your 30th anniversary on the bench. And one of the words that was continually invoked in all the

00:41:30 after-dinner speeches was "family." So how have you thought about hiring clerks? How is it that after their experiences with you, they all come to feel a part of the Rosenthal family?

JUDGE ROSENTHAL: We spend more time together than with any other single person in that year. And we share a lot of not

00:41:55 just time. The challenge of getting stuff right, getting stuff done, getting it done well is something we share. And from the beginning, the clerks are an integral part of what we do together. And I have worked hard to make sure that the clerks really learn what they came to a district court to learn. And above all, they're going to learn different styles and the confidence that comes from watching a lot of proceedings in different cases, with different lawyers, the confidence that they can do that even better than what they're seeing. And the clerks are the best part of being a judge, by far. I keep in touch with clerks after they leave. During the

00:42:57 year that they're there, we meet other clerks. We spend most lunches together, and —I think it's just the sense of doing the work together that makes us feel close, even after the clerkship ends. And I do keep in touch with pretty much all the clerks. We talk about careers. We talk about family. I give advice. They give me advice. It's been an ongoing

relationship. Whenever I travel, like being in New York today. Yesterday I had breakfast with my law clerk alums who are here. And I'll do the same thing when I go to other cities. I always connect with the former law clerks who are there. And they keep in touch. They return the love. And that bond of that
00:43:58 shared experience has endured. And it's truly the best part of being a judge. And I never had a permanent clerk or even two-year clerks, even though that means every year you start over. But they're so bright, and they work so hard. And I learn. Every year, I get a fresh
00:44:28 perspective. I get someone with a different style, a different approach. They've learned more recent things. They are computer savvy. That really helps. And having that fresh injection every year, I think it has helped maintain the edge, if that's the right way to describe it.

FUNK: Do you have and cultivate relationships with your state judge counterparts?

JUDGE ROSENTHAL: Not enough, not enough. And it's frustrating because the state courts are far ahead of many of the federal courts and judges in case management techniques, in the use of computers in courtrooms. Many of the state courts have been
00:45:18 incredibly innovative. And we need to learn more from them. Yes, I have tried—when I was chief judge during the pandemic, I spent time with state judge counterparts, trying to figure out how we would manage trials and other tasks and work during the pandemic. That was a good opportunity for collaboration, and then we all got busy after and it sadly takes so much work to

keep it going. But it needs to. Some of the states have been much better about institutionalizing federal-state cooperation. And we've seen some wonderful innovations in federal-state cooperation, in some of the mass or class actions, multi-district litigations that are simultaneously

00:46:16 proceeding in state and federal courts. That's been a great opportunity for state and federal courts to work together on individual cases, substantive matters. But more opportunities for exchange, are needed to do more.

FUNK: So you've invoked this phrase several times, "case

00:46:37 management."

JUDGE ROSENTHAL: I love it.

FUNK: Which is sometimes a pejorative term across the legal academy.

JUDGE ROSENTHAL: Yes.

FUNK: So why is case management a virtue, in the way that you employ it?

JUDGE ROSENTHAL: In 2010, I was at a conference at Duke University Law School. And the purpose of that conference—I am going to answer your question—the purpose of that conference was to look at the federal rules of civil procedure, look at

00:47:03 civil litigation, soup to nuts and see if there were changes that needed to be made in the rules that would improve the practice of law in civil cases, that would improve judging, and that would, going back to the Biden Bill and the eternal search for ways to cut cost and delay. So we went into this conference and two days—it was preceded by lots of papers, lots

of brilliant academics talking to each other, judges talking to each other. This was when I was very heavily involved in the rules committees in the Judicial Conference. And it was a gathering of people who, like me, had a natural love of civil procedure. And we spent two days talking about what could be
00:47:53 better and how to achieve that. And at the end of the two days, there were very few suggestions, some but not many on improvements to rules or additions to rules. The one message that came across from that conference that didn't change, no matter what side of the v. you were on, was that
00:48:16 judges need to be more involved in the cases that need it. And that's the art of case management. Judges need to be engaged. Discovery needs to be tailored to particular cases. Motions need to be planned in relationship to the discovery, so that cases that need to go to trial get to trial without having spent the entire budget on pretrial work that ends up driving people to settlement, not because of the merits of the claims or the defenses, but because they are exhausted, financially and otherwise. That's not why cases should get settled. Cases should get settled because people agree that the merits and the downsides deserve a settlement, merit a settlement. Trying
00:49:19 cases has become something that happens much less often than it used to. That's a concern, in both state and federal courts that trials are vanishing. We've heard it all. We've heard that a lot, before. Case management, I think, well done, is a way to manage individual cases so that the cases that need to go to trial, that should go to trial get there in a reasonable

time, with reasonable expense, and that the cases that can be settled, that should be settled or dismissed, resolved pretrial involuntarily or voluntary, get that opportunity. I don't think that happens reliably without good case management. And Rule 16 in the Federal Rules of Civil Procedure[10], my favorite, 00:50:19 gives judges a wealth of tools to use, not to tell the lawyers, top down, how to work, but to work with the lawyers and pro-se litigants, which we have a lot of, to get to a result that is right, fair, cost effective, and timely. It doesn't happen in every case, by any means, but that's the kind of judge lawyers 00:50:54 want. And that's what case management lets judges do.

FUNK: And what are some of those tools, specifically? What have you found most useful in managing cases?

JUDGE ROSENTHAL: An in-person, real time conversation, under Rule 16 in the initial conference. Many judges, understandably, simply say, "Look. If you agreed on a schedule for the case, I'll enter that as a scheduling order and you don't have to come. We don't have to talk." That's not the approach I have found most effective. In that initial Rule 16 conference, I learn the case a little bit, enough so that we can have an intelligent discussion about the best way to 00:51:48 resolve it. What kind of discovery is going to be needed? How many depositions do you think you're going to take? Do you really need experts? What experts do you need? What kind of plan for staging discovery, motions, and getting ready for trial makes sense for this case? And often, you'll have an

[10] Fed.R.Civ.P. Rule 16 covers Pretrial Conferences, Scheduling and Management.

opportunity to think about what needs to be done on an interim basis. It lets you be creative. In some cases, you can even be helpful. You can figure out how to keep people in their houses or if they've really got to move out because they defaulted on the mortgage or some other reason, that they have time to do so, things like that, that really let you be more
00:52:35 creative than you would think a judge can or should be. And I'm not talking about requiring people to know at the beginning of the case all the discovery they're going to need to prepare for trial. I'm talking about an early plan that lets you begin the process, exchange the information that you think you need
00:53:00 the most from the sources that are most easily accessed, get that information. If that's enough to resolve the case, great. If it's not more discovery is going to be more refined because you're using what you've already learned to figure out what it is that you still need. And it is a conversation. That's what we do in Rule 16 conferences. We have a conversation. What is unusual about this case? What makes sense? What makes sense to do first? What do you think I can do to be most helpful? Sometimes it's get out of the way. But there are lots of tools that let Rule 16 be an important case management tool. And Zoom has made that so much easier so I can do a Rule 16
00:53:49 conference without making lawyers get on an airplane or without making them get in their cars, drive across a very big city, find a parking place, walk through what is either very, very hot weather or storms, and get through security, come to the courtroom, wait their turn, and then repeat the process. Zoom

has freed us from those kinds of burdens. So Rule 16 on Zoom, in most cases that is as effective as in person. Sometimes it's not. You use your judgement to figure out when you make them actually come to the courthouse. And sometimes they want to. Fine. But the Rule 16 initial conference, I do, and that is something that I find enormously helpful to keep the cases,
00:54:50 at the beginning, to put them on a path where they can really be more productively moving towards the end.

FUNK: Now this view from the trial court bench is a very different view of the world than one might get, just reading
00:55:10 sort of Supreme Court opinions about plausibility pleading, which makes it sound like everything begins or ends with getting that plausible complaint, which you've sort of said nothing about in this discussion of case management. So how does the gatekeeping function of pleading work, within this world of case management?

JUDGE ROSENTHAL: Sometimes, by the time the Rule 16 conference happens, the parties have already filed motions. So the Rule 16 conference is argument on those motions. Sometimes it's a question. Are you going to file a motion to dismiss? Yes. Do you want to amend first, plaintiff, in light of that response, or do you want to have the motion get filed and then figure out
00:55:54 what makes the most sense? Yes, there are lots of motions to dismiss. Yes, we have lots of summary judgment motions. And I do find that the Rule 16 conference helps frame, helps the parties frame those motions, and it helps them think about when it's most productive to file them, and what they need in order

to file a motion. And lots of discovery is discovery in order to file a summary judgment motion. It's not until that motion is decided, discovery for trial. And that's often a different kind of discovery. So yes, we have those discussions. Yes, having to decide whether a pleading is plausible or not, whether it's nudged over the line, to use the Twombly and Iqbal[11] discussion,

00:56:51 is not always easy, and that's why the opportunity to amend is so vital. And most people do. After I rule on a motion to dismiss, usually there is another opportunity to amend. But at some point, we conclude that further amendment would be futile, and the case then ends. And it does take a fair amount of

00:57:17 confidence to tell a lawyer or a litigant, just because of the way you pleaded your claims, you can't go further. Judges have to be really thoughtful about that because again, we're the least informed people in the room.

FUNK: It sounds like using the rules of amendment and the timing rules with Rule 16 together means actually a lot of information can be exchanged before the pleading questions actually need to be decided.

JUDGE ROSENTHAL: Yes. And in some cases, we have developed what we call protocols, categories of cases that are routine discovery requests and obligatory responses that we issue at

00:57:59 the very beginning of the case. You don't have to ask the questions to get the information that is core to that kind of

[11] Based on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556, U.S. 662 (2009), *Twombly/Iqbal* pleading standards require sufficient factual allegations that make a claim plausible.

case. And we develop those for employment cases, adverse action cases, FLSA[12] cases, slip and fall cases, trip and falls, mortgage foreclosure, cases that you know are going to require the exchange of certain core information in every one of those cases. So you arrange, through these protocols, for the early automatic exchange of information that is core. And sometimes that's enough, not only to amend your pleadings, if that's what is needed. But sometimes that's enough to go have a meaningful discussion and resolve the case. Not always. That's fine, too. But it does jumpstart the case.

00:58:54

FUNK: Another topic on which academic proceduralists or maybe appellate judges have strong opinions is the quality of the American jury system. What's your view, from the trial bench?

00:59:13

JUDGE ROSENTHAL: I'm a big fan of the American jury system, with one strong caveat. I really believe that a 12-person jury is a magic thing[13]. In civil cases, the habit of having much smaller juries I think produces a less reliable and less trustworthy result. I can't prove that. But there is a reason why we require a 12-person jury in a criminal case, where the most vital decisions on a person's future are being made. And the Supreme Court has now made it clear[14]. You can't have a 10-2 verdict in a criminal case. You have to have all 12. Judge Pat Higginbotham[15] and others tried very hard to get a 12-person

[12] Fair Labor Standards Act of 1938, 29USC §201, et. seq.
[13] See Higginbotham and Rosenthal, *Bringing Back the 12-Person Civil Jury*, 104 Judicature 2 (Summer 2020).
[14] *Ramos v. Louisiana*, 590 US__(2020).
[15] Judge Patrick Errol Higginbotham is a senior judge on the US Court of Appeals for the Fifth Circuit.

minimum jury written into the civil rules. It failed. It
01:00:19 failed by a very narrow vote. And judges have developed habits
of calling juries, as little as six, few as six, somewhere
around the eight to ten range. I think that's a false economy.
Lots of judges do it and I understand that. But I really do
believe that a 12-person jury gets you a better cross-section,
which is important, reduces the likelihood that a really strong
personality is going to dominate the jury, and just produces a
more robust discussion inside that sacred thing, that sacred
space that we call the jury room.
FUNK: So are civil jury trials vanishing in your courtroom, or
what is your rate of trying cases to juries in recent years?
01:01:11 JUDGE ROSENTHAL: I have never figured out the rate. Yes,
there is a national trend that's been going on for a long time
of jury trials declining. People have disagreed about what the
causes are. And there are lots of candidates for being the
prime or contributing cause. God, I still talk like a lawyer,
01:01:34 don't I? There's arbitration and mediation, a thriving
industry that's attractive for certain kinds of cases, that's
written into a lot of contracts, that's written into the stuff
you buy over the internet now that you used to buy in stores,
when we used to buy things in stores. There are all sorts of
different possible causes. But it is a concern. It is a
concern because the skills of trying cases are skills that are
heavily dependent on practice and use. And if you are unused
to being in front of a jury, in a courtroom, trying to
communicate in ways other than writing a motion, writing

letters, writing emails, or drafting documents, if you don't
01:02:31 use and hone those skills, they wither. And that's not—that's
true not only of lawyers, but of judges. And I'm really
worried that we are going to have a system that is built on the
assumption of a trial being available, and the way in which
that promise or threat, depending on how you view it, affects
what you do, how you develop the case, what decisions you make,
what behavior you engage in to try to avoid that or try to get
to it as soon as possible. When that pressure is off, it's a
different system. And we're moving more and more to that
system as we develop a generation of lawyers who infrequently
try cases in front of judges who have infrequently tried cases
01:03:27 before they became judges, and then infrequently tried them as
judges. That is not a good trajectory. Law firms are making
this up by having different kinds of in-house training, outside
training. Judges have judicial training available through the
Federal Judicial Center and other kinds of opportunities. You
01:03:50 need to do it, in order to have it be at a level of skill that
is important. We can't lose that. We risk it. So yes, back
to case management as being a way to get to trial. Some of the
academic skepticism about case management came from a belief
that judges want cases to settle and judges manage cases to
exert pressure to settle[16]. I don't think that's true. It may
have been part of judicial teaching at a time before I became a
judge. But when I became a judge, the way judges are taught is
not, "You're a failure if the case doesn't settle." Far from

[16] Resnik, *Managerial Judges,* 96 Harvard Law Review 374 (1982)

it. You're a success if the cases that deserve to go to trial get there within a reasonable time period, for a reasonable cost.

01:04:55 And the cases that should be resolved short of trial get to that end without undue delay and excessive costs. That's a good case manager. And if cases settle, that's up to the parties. I agree. Case management to force settlements or pressure parties toward settlement, bad idea, bad idea. Case management that allows parties to settle when and on the terms they think are most advantageous for whatever reason, fine. But we are not settlement creators.

FUNK: So what are the marks of a case that is good for trial or set for trial? How, in the process of case management—when do you recognize this is a case that really needs to go to

01:05:51 trial?

JUDGE ROSENTHAL: It's kind of the summary judgment standard. Are there factual disputes that under the law need to be resolved? If there are no factual disputes and one party or the other is entitled to judgement in their favor or a ruling

01:06:12 in their favor as a matter of law, my obligation is to get to that point as quickly as the parties allow me to. And I often fail that, I have to say. It's really tough to get stuff out as quickly as the parties want. But that's the goal. Cases that deserve to go to trial are the cases where the parties are not interested in the contract that is a settlement, where there are issues on which reasonable minds can and do differ and questions about what really happened. Whose account is

credible? Whose account is contradicted by other people, documents, where recollections vary? Those cases need to go to trial.

01:07:06 FUNK: So even if it's a small sort of swearing contest as we sometimes call them.

JUDGE ROSENTHAL: Absolutely.

FUNK: He said this and I swear to it. I didn't say that, and I swear to it. There is no case too small for trial, basically.

JUDGE ROSENTHAL: No, there really isn't. Now there are cases that as an economic matter may be too small for trial, not cost effective. But that's up to the lawyers and the parties. There are cases in which the point being made is not one that can be measured by money alone. And the proportionality

01:07:40 factors recognize that there are cases for which the value is measured or the downside is measured by something other than dollars, or in addition to dollars. So yes, there are cases that you scratch your head, why are they spending more money than the case is worth, in order to try the case? There are

01:08:02 often reasons for that, though it's for the parties to decide, not for a judge to decide. And the notion that judges really want cases to settle is even less true for the big cases, so called, where you have really good lawyers and really interesting issues. I'm happy to try those cases. Bring them on. We want more of those. Those are the cases that will develop the law. And if they're not tried or resolved in a public way with published opinions, with reasoning made clear,

that is going to retard the development of the law in areas that need that development[17]. So for all of those reasons, yes, case management to get cases to trial that in some sense can and should be tried is great. And one way you do that is by identifying as early as is practicable, a word I otherwise hate, or fair, and reliable, and accurate, identifying those cases that can and should be resolved in a different way or dismissed.

FUNK: Sometimes in our system, we get to trial but no jury is available or required by law. And you, the one-judge court, serve in the role as the equitable chancellor that has to decide the whole case. How do you decide hard cases?

JUDGE ROSENTHAL: They're hard. You listen, bench trials in both civil and criminal cases. A suppression hearing is a bench trial in a critical area of a criminal case. We have a lot of those. We have bench trials every time an injunction is the relief that is sought, even though damages may follow later. There are lots of issues in which we have judge-only resolution, based on evidence. How do you decide? The same way. You bring your ears. You bring your brain. You bring your common sense. You bring the knowledge of the case law and you figure out how all of those together result in findings of fact and conclusions of law. And it's harder, in many ways, than a jury trial because you are judge and jury. But it is— for certain kinds of cases, it really makes sense. And I will

[17] Resnik, *Whither and Whether Adjudication?,* 86 Boston University Law Review 1101(2007)

say that when you think about how trials in the future will be conducted with the technology that is with us now and only getting better, Zoom trials for juries, it was tried during the pandemic. I don't think that it has been replicated since, that I'm aware of, for good reason. Remote hearings, by Zoom
01:11:22 or other platforms, they work incredibly well for many kinds of proceedings, even evidentiary proceedings. Jury trials, I don't think we're there yet. And I would not trust a jury trial to be done by Zoom. Other judges are braver than I am. And certain kinds of cases, all civil so far—I'm not aware of criminal cases being tried by Zoom. That would be tough, jury trials. But bench trials I think can effectively often be done by Zoom. Cases that depend heavily on credibility judgments may be the least appropriate for Zoom presentation. But when the pandemic hit, just as an example, I was in the middle of a bench trial in a CERCLA[18]
01:12:17 environmental remediation case. And it was literally cut off in the middle of somebody's sentence, as we all fled, in the middle of March of 2020[19], not knowing what was safe and wise to do. So we had a very crowded courtroom, with lots of lawyers and expert witnesses, and lots of boxes. And
01:12:45 after about a month break, to give the parties time to figure out how we could proceed, they got the technology in order and we had a bench trial on a huge CERCLA case, one phase of it, the last phase. At the end of that, we wrote a hundred page

[18] CERCLA is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 USC § 9601-9675).
[19] Judge Rosenthal said 2000 in the video interview, though meant 2020.

opinion, and of course they settled on appeal. But it was incredibly instructive. It gave me the confidence to have proceedings, over the next two years, by Zoom, evidentiary proceedings among them, not jury trials. And to go back to one of your questions on the size of the jury, there is one other advantage that a 12-person jury brings, besides a greater cross-section of views and a greater representation of
01:13:39 different kinds of views and experiences, and a better likelihood that you're not going to have a runaway jury or a jury dominated by one person. There is one other advantage that the 12-person jury gives us. Judges are not very good at publicizing the importance of what the judiciary does. And at a time when the judiciary is increasingly under attack as a trustworthy institution, one worth lavishing care, attention, and resources on, having people aware of what it is that judges do, what happens in courthouses, why that matters. The best education tool we have are jurors, jurors who come in reluctantly because they've been summoned, are mad because they
01:14:35 have to be there. And after the trial when, like many judges, I go in and talk to the jurors, they have had a fulfilling, gratifying experience. They have seen and done justice. They walk out of there thinking that this matters. That matters. Jurors are our best ambassadors. And if we can double the
01:15:10 number of jurors hearing a case and having that experience, and walking out telling their friends, the better off we are. So we're kind of giving up a great opportunity in civic education, if we reduce the number of jurors who have the experience of

serving.

FUNK: We've referenced hearings on Zoom, a product of the COVID-19 pandemic of 2020.

JUDGE ROSENTHAL: Right.

FUNK: During which you were not just a judge on the Southern District of Texas, but the Chief Judge of the District. So it was not just a technology you had to adopt, but one you had to

01:15:53 adopt for your court and instruct others in. What was it like being the administrator of your court during a disaster?

JUDGE ROSENTHAL: That disaster was different. We've had lots of disasters in the Southern District of Texas, and we had some during the time I was chief, besides the pandemic. We had a record-breaking freeze. We had a hurricane or two. We had floods. It's a happening part of the world.

FUNK: And not just any hurricane, Harvey.

JUDGE ROSENTHAL: Yes.

FUNK: Which directly hit Houston and flooded not your courthouse but many of the state courthouses.

01:16:31 JUDGE ROSENTHAL: Exactly.

FUNK: And it shut down the state judiciary.

JUDGE ROSENTHAL: So we tried a number of—the state judges came over and tried some felony cases that had to be tried in the federal courthouse, when they were out of commission. You

01:16:43 asked about cooperating with state judges. The pandemic helped that. It helped that because it called for a unified response from all sorts of different people. We had to work with the prosecution and the defense, the Marshalls, Border Patrol. We

had to work with state officials and different parts of the Department of Justice that ordinarily we wouldn't have needed to work out arrangements with. Now we did. So we had actually—nobody wants to say there was-a silver lining to the pandemic. But the former Chief Justice of the Supreme Court of Michigan[20] I think said it best, "COVID was not the crisis the courts wanted. It was the crisis we needed." And it really

01:17:36 made us do several things. A, it made us embrace technology as an improvement for not only efficiency, but access. The technology let people come to court or attend a court, listen, without having to actually, physically be there. In the state courts, for dockets in family law, eviction cases, consumer cases in which people may be unrepresented, it let them have access to the courts in a way that had never been possible. That's something we need to preserve. When I was Chief, our district had a particularly challenging set of problems and opportunities. We have seven divisions. Four of them are hard on the border. They go from Houston, which is a busy docket,

01:18:47 fourth largest city in the country, has a diverse docket of complicated civil cases, criminal cases that are—include a large number of immigration cases, but a different docket mix than is present elsewhere in the district, different bench-bar cultures, different kinds of cases. We had to figure out how

01:19:14 we were going to continue to do the essential parts of our

[20] Bridget Mary McCormack (NYU Law '91) served as Chief Justice of the Michigan Supreme Court from 2019 to 2022. She delivered IJA's 28th Annual William J. Brennan, Jr. Lecture on State Courts and Social Justice on *The Disruption We Needed: Accelerated Innovation in Courts and Access to Justice*. Watch here.

functioning when courthouses had to be closed, when jails and prisons were sources of infection that were terrifying. It really did take the village to come together. And that sounds very Kumbayah-ish. It wasn't like that. It was a lot of 5 a.m. phone calls and conference calls, weekly meetings, often by Zoom, of people who lived hundreds of miles apart, talking about what made sense for Laredo. Conditions were different in Houston. Laredo needed to figure it out. For other things, we needed to have a consistent, district-wide policy, figuring out when we were in that space, as opposed to

01:20:09 each division figuring out what made sense for that division and being free to do that was a huge part of the work. And figuring out how to manage to get criminal cases tried when people were locked down in prison. It took some rule changes that were adopted by a very responsive Judicial Conference that then had to be implemented in every district and every division[21]. And we wrote, on a weekend in March, orders were being drafted. Scripts were being written, to get waivers from prisoners to do remote proceedings that could be enforced, so that we could have guilty pleas accepted. We could have arraignments. We could have initial appearances. We could

01:21:02 have different kinds of sentencings, in case—some kinds of cases, that we could keep this going. And it worked. It worked. It was far from perfect. And I don't think we should forget that period, from March of 2020 until the following January, when the first vaccinations were available, just the

[21] In reference to the new standing committee on Emergency Rules.

01:21:28 uncertainty and fear that pervaded. I was very proud, still am, of our clerks' support. Seven different clerk of court offices in each of these divisions who worked incredibly hard to make us continue to function, as cases continued to be filed, motions kept on getting filed, people kept on getting arrested. Prosecutions had to happen. They did a great job. Our probation and pretrial services officers did a great job. The courts really, I think, acquitted themselves well. It was a relief, having said all of that, to get back to being able to have jury trials, even with plastic partitions in the jury box, masks required for everybody, plastic shields for people to use
01:22:33 while they were testifying, so that their faces were visible, even though they weren't able to operate the way they usually did. It was a relief when we could go back to jury trials. It was an even greater relief when we could relax those precautions, and take down the partitions, and operate with confidence that were safe from at least that threat, relatively. But the challenges that were present, to get from March of 2020 to today—and we're still climbing out of the COVID backlog—they were fascinating.

FUNK: And during that time, to be clear, as Chief, the way the administration of the courts works, there were no instructions
01:23:29 coming in to you, on when or how to close a courthouse, how to adopt Zoom.

JUDGE ROSENTHAL: No, we were making it up as we went along.

FUNK: The buck stops with you.

JUDGE ROSENTHAL: Yes, with a lot of help. And to be clear,

01:23:41 being Chief Judge of a large and busy district court that's dispersed and has a great diversity of conditions and dockets—to be clear, I don't have any more authority over my fellow judges the day after I became chief than I did the day before. You have responsibility but no added power. But you do have opportunity, opportunity to work with other parts of the agencies, and entities, and units that make it all work. And that was the gift of COVID, if you will. It made us all really think about how we could get through it and emerge better, in a collaborative way. And during the time, we had an additional challenge, shortly—not during the height of the COVID panic,

01:24:36 but the Biden Administration wanted to close privately-run incarceration facilities. And that was a real problem for the districts that had divisions on the border because there was no other places to put the large number of people who are arrested, as part of immigration enforcement. And that was a very well-intentioned decision by the Biden Administration in policy change, but it had an unforeseen impact for the border courts. And that was even exacerbated by COVID because there were fewer places where we could put more people in facilities that were already overcrowded. And the California judges, and the Arizona judges, and the New Mexico judges, and us, we all

01:25:38 got together, and we worked with the Biden Administration, and we got them to relax the policy for districts that had large numbers of federal prisoners or detainees, and no other place to put them, but privately run facilities. So we got that kind of an exemption, worked out that would meet our needs, without

01:26:07 interfering with the intent of the overall policy. And that was—that kind of collaboration between districts in different circuits and the executive, is something that we don't usually have the opportunity or the need to do, and it was fascinating. It was absolutely fascinating, and it worked.

FUNK: There was a time when the model of a judge sort of excludes that kind of policy advising or policymaking [crosstalk].

JUDGE ROSENTHAL: Right. But it's the governance, the administrative side of what we do. And it reflects the—two other things. It reflects the fact that courts have been

01:26:53 tasked with a lot of areas that you would ordinarily prefer a legislature to handle. But for various reasons, Congress has been slow to act in different areas. And the default has been the courts have to work this out. I'm not sure that is good in the long run, but it is here, now.

FUNK: It's the reality of what the judges have to take on.

JUDGE ROSENTHAL: Yeah, it really is. And it's not because we are grabbing and reaching for more authority in different areas that ordinarily policymakers or voters would be in charge of. We are responding to a vacuum.

FUNK: And so from the pandemic, it sounds like the judicial

01:27:47 uptake of technology, especially in the federal courts, and maybe of Zoom or some kind of videoconferencing, is something that should stick around.

JUDGE ROSENTHAL: Yes, both of those things are true. And some judges adopted it more enthusiastically than others. Some

judges are going back to the default being everything in person in civil cases. I am not among them. But I do recognize that in-person proceedings are a vital part of what we do, and I'm not going to give those up either.

FUNK: And from the other notable disaster, during your chief judgeship, Hurricane Harvey[22], you developed some protocols to assist with cases coming in. What were those about?

JUDGE ROSENTHAL: It goes back to the kind of case management techniques that we were talking about. All of a sudden we got hit, as we suspected we would be, with a huge wave of first-party property insurance cases, property damage because Hurricane Harvey was a very effective roof destroyer throughout the region. Flooding and hurricane force winds create a lot of insurance claims. So we developed a protocol, a set of routine discovery requests and obligations for dealing with those claims, and set up a system where people would exchange their basic information, get a little bit more, if that was needed, usually because in Rule 16 or in a subsequent hearing, we would tell them, "Don't wait for it. Just give it to them. Give them the non-privileged parts of your file. Give them your notes. Give them all your receipts. Just exchange them." And then there was a group of mediators, some magistrate judges and some private providers, who became very skilled at taking the kind of information that the protocols required in early automatic exchange of taking that, with the parties, and

[22] Hurricane Harvey was a devastating Category 4 hurricane that made landfall on Texas and Louisiana in August 2017.

resolving the cases in a way that made sense. And that was very effective. It still is because there is no shortage of
01:30:15 big storms or weather disasters in the country. Other parts of the country have done this in response to Hurricane Sandy. Florida is quite expert at this. So we learned from them, state and federal courts. And we ended up improving our own efficiency in the process.

FUNK: We often talk about how the Federal Rules of Civil Procedure are aiming at trans-substantivity, right, a uniform mode of procedure across all kinds of cases. And yet, sometimes particular cases, like insurance claims or—just depending on the docket of a particular court, it seems like they may require something else. So how do you find that
01:30:55 balance between—the rules seem to be driving at let's do all cases the same way, procedurally; but, then there are some cases that it seems like you may want something different.

JUDGE ROSENTHAL: I don't have the freedom to contradict the rules with my local practice, however innovative or clever I think it is. Nor do I have the freedom of leaving only the rules as what we live by because the rules are written at a level of generality that makes them capable of trans-substantivity. They are specific enough to be helpful. But they are general enough to accommodate different subject areas and changes in practice from technology. So that
01:31:52 does create a need and an opportunity to supplement what the rules require by some of the things we've been talking about, discovery protocols that requires kind of expanded initial

mandatory disclosures that expand what the rules allow by having, prior to formal discovery, an opportunity to get the 01:32:21 same kind of information that in every case like that you know is going to be needed. You can't do that in other kinds of cases that aren't as predictable, in terms of the core information that will be needed and the sources from which that information can be obtained. So we have never tried to develop a set of protocols in antitrust cases, in securities cases, in complex breach of contract cases, or even simple breach of contract cases. Simple is a generalized term, not always accurate. It works in certain categories of cases, and I'm not sure we have reached the end of those. We just recently developed, a magistrate judge and I, working with lawyers on 01:33:14 both the plaintiff and defense side, we develop a set of these protocols for slip and fall cases because during the pandemic, we were seeing a huge increase in the number of slip and falls, once people got out and started shopping again. And my theory was they weren't sweeping the floors because of staff shortages. But we were getting so many of these cases that we wanted to figure out a way to make them more efficient for us and the lawyers to handle. And these protocols have worked out very well. You still try the cases. And we tried a very interesting case involving a crayon that gave the clerks a lot of opportunities to laugh after the fact. But it was a serious 01:34:01 trial, slip and fall, personal injury. It was the kind of trial that was terrific for clerks who come from Ivy League schools and large firm practices to be able to see. And

protocols allow those cases to move a little bit faster and a little bit less expensively.

01:34:26 FUNK: So from the fun cases. Let's talk about the hard cases. You once described to me a case in which you assigned the clerks to actually write the opinion up, going either direction, before you could decide which way you were going to rule. What makes a case like that, or what makes a case hard?

JUDGE ROSENTHAL: The intellectually hard cases are the cases that really press the edges of established law in ways that are factually complicated. That combination and a uncertainty about what is not only legally correct but also prudent and careful, makes for a hard case. The case that I talked to you about, years ago, that required me to think about which of two possible ways I should go was a case involving the limits of religion in the public world, and it was hard. I really didn't know the right answer. But lots of judges have told me, over the years, when I was a clerk, when I was a lawyer, and then when I worked with appellate judges and my colleagues, if you don't know, see how it writes. And so we did. We saw how it wrote. And I still use that expression when I talk to clerks and we have an issue that we are uncertain how to resolve, see how it writes. When you write it, when you try to get the analysis down on paper, you may end up seeing how it should

01:36:29 end. But you have to see how it writes, before you have the confidence in the conclusion. So we did.

FUNK: And you are a one-judge court when you decide these hard cases.

JUDGE ROSENTHAL: Yeah.

01:36:42 FUNK: But you always judge with the awareness that there is an appellate system out there.

JUDGE ROSENTHAL: I do.

FUNK: How does that enter into your calculations, that there is a court reviewing you?

JUDGE ROSENTHAL: You have to be aware of it, but you're not going to write to ensure no risk of reversal. You can't do that, in part because there are issues on which reasonable minds can and do differ, in part because the facts will take you in one direction. You think that maybe there are certain judges on the appellate court who will be grading your work,

01:37:15 who won't like that direction. You think it's the right direction. You're not going to write for the few judges who you are worried about being on the appellate panel. That makes no sense. And you have to have a certain, not bravado, but confidence that even though you are worried about the direction you're going in relation to the direction that you see some of the appellate judges going, you cannot write to assure affirmance. It simply doesn't work. You're not writing from a top down perspective. You're writing from a bottom up perspective. Where do the facts take you? What are the facts? What is the law, not only as it's been clearly enunciated, but

01:38:11 in the nooks and crannies that may not have been as well developed, may not be predictable. You've got to write it as you see it, not to achieve external goals, including the external goal of never being reversed. A, it's not going to

happen. You are not going to get through your life driving in
01:38:33 a city without a ding on your car. I'm driving on a very busy
highway in a very busy jurisprudential city. And you're kind
of talking about the hot-button cases that make the headlines
that are more politically or philosophically, or
jurisprudentially charged. Even in those cases, yes, you have
to be bound by precedent, absolutely. I am a lower court. I
am keenly aware of that. You have to follow the precedent.
But there are lots of areas in which the precedent is not
clear. It's not detailed or your facts are different. You
have to write in a way, in those areas, when you're not bound,
in a way that you think is right. And it's not some cosmic
01:39:38 sense of right. It is a very practical sense of accurate,
reliable, clear, sensible, fair. It is, in a way, the hardest
part of the opinion writing job to walk in between those lines.
And sometimes you write an opinion in which you say, "I don't
like this, but I have to do this." It doesn't happen very
often, and it's really not my place, in a way, to editorialize
about what circuits have done, my circuit has done. But
sometimes, if you are reaching a result that you are obligated
to reach, that you think deserves more attention from an even
higher authority, I think it is part of the job to, in a very
careful way, point that out.
01:40:49 FUNK: I'm sure there have been times where not difficult
cases, easy cases, have nevertheless been reversed over some
issue you—
JUDGE ROSENTHAL: Sure, I overlooked, yes. And I hate that.

Those are the ones—I don't mind getting reversed, usually, if
01:41:07 it's just a tough case. To be reversed because I missed
something in the record, I just hate that. I hate that, but it
happens.
FUNK: And at the same time, there are probably some
affirmances that you might not have been expecting on difficult
cases.
JUDGE ROSENTHAL: Yes.
FUNK: Do you have a most treasured affirmance?
JUDGE ROSENTHAL: No, I treasure every affirmance. That's
probably the right answer, every one of them. You are right.
The most satisfying, however, is when you write an opinion, and
01:41:42 it's a tough issue, and you get reversed, and then the Supreme
Court reinstates your result. That's a good feeling. It
doesn't happen that often, but yes. That's when a district
judge really feels a strut coming on.
FUNK: So from judging and chief judging, which involves a fair
amount of administration.
JUDGE ROSENTHAL: Yes.
FUNK: You have also served on the administrative side of the
courts in various other ways, especially on the rules
committee. What is a rules committee and how do you get
selected for service on that kind of thing?
01:42:20 JUDGE ROSENTHAL: Good questions, though the most brilliant
piece of legislation that I have encountered is the Rules
Enabling Act[23] that was enacted in the 1930s that you and I both

[23] Rules Enabling Act, 28 USC § 2071-2077

think is just a wonderful treaty between the different branches of government. And it works. It is

01:42:39 Congress telling the courts, “Look. You are not legislators. We are legislators. But you have the authority to legislate within your own area. You have the authority to write the rules to govern certain areas of practice in the federal courts.” There are five of those areas, civil procedure, criminal procedure, evidence, appellate procedure, and bankruptcy. Those five areas each has an advisory committee appointed by the Judicial Conference of the United States that is overseen by an omnibus, or overarching committee called the Committee on Rules of Practice and Procedure, affectionately known as the Standing Committee, even though it spends most of

01:43:30 its time sitting around big tables in conference rooms, talking to each other and talking to others. The Standing Committee reviews proposals for new rules or rules changes that come from each of the advisory committees. And the advisory committees develop these in response to requests by lawyers or by litigants, sometimes by lay people who write in and say, “This doesn’t make any sense.” Often it comes from different organized power groups, but it can come from individual lawyers, and does. The advisory committee takes usually about three years to five years, before the very transparent and robust process of developing a new rule or changing a rule is

01:44:20 finished. So the advisory committee will propose something. The entire committee has to review it. And if it is approved for further action, it is published for a period of public

comment. It goes to—back to the advisory committee after revisions are made. It goes to the standing committee. And
01:44:42 there is another standing committee step in that process, between the advisory committee and permission to publish. So that takes time. Then it goes back to the standing committee, which then can make the decision to approve it or send it back. And at the end, it goes to the Supreme Court, which has a period of time to then decide whether to send it to Congress. Then it goes to Congress, which has a period of time to decide whether or not to do anything to stop or amend what is proposed. Congress usually does nothing. And at the end of that period, you have a new rule or a changed rule. That is a very long and careful process. The result is that these rules
01:45:28 are very carefully drafted. It’s the best quality control I’ve ever seen in a manufacturing process. It is slow. So when the rules are felt to be inadequate for short-term reasons, like a pandemic, when the criminal rules had to be suddenly supplemented, amended to permit remote proceedings where they hadn’t previously been permitted, the system permitted that. Now we’re at the stage in the Rules Committee’s process of figuring out which of those changes should be permanent. And should they be different if they are made permanent than they were when they were temporary. What did we learn that we should now incorporate into a final rule? It’s going to be a
01:46:20 long process. So there’s lots of work that the rules committees do in response to changes in practice, changes in technology, changes in the kinds of cases that the courts are

seeing. The trick on the rules committees and the thing that makes them so wise and important a part of the process is to
01:46:46 stay within the lines. There are lots of things that could be improved in our civil and criminal justice systems, trial and appellate levels, bankruptcy and criminal, and the courts in which I sit. But a lot of that is not appropriate for rule making. Some of the ways in which we can improve are the stuff of good practices, of manuals that assist courts in figuring out how to deal with certain kinds of cases, of different kinds of aids, templates, forms, not a rule. So the rules committees are a vital part of our system. Congress has lived up to its promise that this is an area where the rule makers in the federal courts are going to be a better, more nuanced, careful
01:47:48 source of rulemaking than Congress would be. We are not subject to some of the same political forces that buffet Congress. We try very hard, within the rules committees, to stay well above the political fray. That’s the commitment of the rules committees. I got on the rules committee, the Civil Rules Committee, shortly after I became a judge because Pat Higginbotham, who was a wonderful Fifth Circuit judge and one of my kitchen gods, recommended me for membership on that committee. And from 1996 to I think 2011, I was part of the process, and I loved it. We did great work. And the work of the committees continues.
01:48:49 FUNK: The system you describe has a lot veto points in it.
JUDGE ROSENTHAL: Yes.
FUNK: And so it is very difficult, actually, for the text of

the rules to change, pandemics and emergencies aside.

JUDGE ROSENTHAL: Right.

01:49:01 FUNK: But you helped change the rules. What rules change did you work on?

JUDGE ROSENTHAL: Oh, I worked on Rule 23[24]. I worked on the E-discovery amendments[25] that were required when all of a sudden, information wasn't just on papers. And then, all of a sudden, shortly after that, almost all information was not on paper. And the way in which it was generated and exchanged, and preserved or destroyed kept changing. So we had to develop rules that could accommodate those kinds of changes in technology. We did that, and we did a lot of work around the so called "Style Project," which is one of the projects that

01:49:46 was I think a lasting gift to the law students of today and the lawyers of tomorrow. These rules had been written and amended over the years in an often disjointed way. They reflected some of the writing styles of the 1930s and 1940s with words that we don't use anymore, in formats that were difficult to follow, dense blocks of print that were hard to wade through. So the Style Project had the very difficult task of changing the words, without changing the meaning, changing the words to be more congenial to modern readers, less antiquated. We took out a bunch of stuff that people no longer knew. There was even a reference in one of the rules to something called "Mesne

01:50:39 Process," M-E-S-N-E. What is Mesne Process? Nobody knows.

[24] Fed. R. Civ. P. 23 Class Actions
[25] Now in Fed. R. Civ. P. 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

It's a medieval French legal term. It's gone. References to certain kinds of information, capturing technologies that we didn't use anymore. Phono records is a good example. Those things were gone. It just made the rules easier to read,
01:51:06 easier to understand, easier to track so that the physical structure of the rule on the page follows the logic of the rule, with paragraphs that are broken up, subheadings, different lists, vertical, not horizontal. It makes a big difference, particularly for a set of commands that you have to have command over, so that in a courtroom, in a deposition, when you're drafting, when you're arguing, you are able to call them readily to mind and understand how to use them, and use them easily. The Style Project did that, took enormous amounts of time and energy from very smart people. I think, at the end of the day, we counted thousands of emails, umpteen numbers of
01:51:59 drafts, and it was fabulous. The end I'm very proud of. One of the words that we took out, and this is just a wonderful reflection on language, we took out every use of the word "shall," because shall is inherently ambiguous. Shall can mean *must.* It can mean *should*. It can mean *may*. We took it out and we replaced it with *should*, soft imperative; *must*- clear imperative; *may*- discretion; *will*- yes. We took out the *shalls*. We put in the words that made sense, with one exception, Rule 56, Summary Judgment has the word "shall." "Courts shall grant summary judgment if," fill in the blank. There was a huge debate on what word to put in its place.
01:52:58 Courts must grant summary judgment? That seemed way too

confining, inappropriate for the vast run of cases and the variations in clarity that they presented. Must wasn't going to work. May? Well that may be too soft. I don't have to. I don't care what the facts—if there are undisputed facts that
01:53:24 entitle you to judgment as a matter of law. May? Do I have that much discretion? Nobody could come up with an answer that we were confident was right for the trans-substantive nature of the cases that would come before us. *Shall* is still in Rule 56.

FUNK: As your former law clerk, I think I've heard the *shall* lecture about 13 times.

JUDGE ROSENTHAL: At least. So I was very proud of the Style Project, and I was proud of the Electronic Discovery Project. The other thing that we did, that I was very proud of was the Timing Project. The federal rules had about eight different
01:54:06 ways of calculating when deadlines happened. It was utterly unclear. It was a trap for the wary. We cleaned it up. We cleaned it up so that the period of time in which something had to be done was clear and clearly stated in one place, and all the rules of that time period were consistent with that one method accounted in increments of seven days, accounted for holidays, accounted for federal holidays and state holidays. It accounted for local holidays, tried to figure out when courthouses would close, and again, it was kind of a clean-up-the-beach project. But it really helped the practice of law. I'm very proud of that project, too. And since then, the rules
01:55:02 committees have done wonderful work in what lawyers are very

familiar with, elevating the concept of proportionality as a limit on discovery and in clarifying how judges should handle discovery matters, how lawyers should bring them, how judges can resolve them[26]. And we still have a world in which people 01:55:29 are horrified by the cost and amount of discovery. We are still trying to figure out why the electronic transformation that was supposed to make all of this more efficient, and easier, and cheaper has instead created so much information, so widely dispersed, in so many forms, some of which are permanent, that shouldn't be, some of which are ephemeral that should be permanent, and all of which may threaten privacy interests at some point. We are still trying to figure out why this electronic revolution hasn't better transformed discovery, instead of making it worse. But the rules committees have, I think, tried to figure out, on an ongoing basis, what in the 01:56:19 rule's text could be changed to make that better and what needs to be worked out in other kinds of ways, manuals, good practices, lists, judicial education. We often know less about the technology that brings the information that we are going to use to resolve the case than the lawyers do. And they often know less than the clients do, and they may know less than the vendors do, and it goes on and on. It is going to be the big task, I think, of the courts, going forward.

FUNK: So when you worked on the E-discovery amendments in the '90s or early 2000s, how did you and the committee—what was the process of learning about the technology that was being used

[26] Fed. R. Civ. P. 26(b)(1) Duty to Disclose; General Provisions Governing Discovery

01:57:04 and how to regulate this?

JUDGE ROSENTHAL: We were quickly persuaded that we didn't need to know all of the deep, hidden details of how the electronic messages were assembled, conveyed, made to fly through space. We didn't need to know the stuff that the software engineers

01:57:29 know or the hardware engineers know. What we needed to know is what characteristics of the information that was produced affected what matters in discovery. How hard is it to get? How hard is it to identify where you get it from? What obligations are there to preserve, and when do they kick in? What obligations are there to search when the searching is far different than looking through boxes, or looking through a packrat engineer's garage, or the intricacies or the desks or offices? All of a sudden, searching has a different concept. And we had to figure out the kinds of burdens and costs that this new technology, this new set of tools that generated

01:58:29 information, that led to the exchange of information, that stored the information, that automatically destroyed the information, without the user sometimes being aware. Every time you turned your computer on, it changed the contents. Every time you opened a document, it changed. All of those things we had to learn enough about to understand what the new opportunities for discovery were, what the new risks were, and what standards we should set for what was reasonable, in terms of asking, searching, and providing. That took years, and we're not done because the technology is not done. But we didn't—we couldn't write a rule that was so narrowly tailored

01:59:24 to a particular technology. That would be dumb. First of all, it takes three to five years to change the rule. Three years from now, I cannot predict what all my electronic devices are going to be able to do, but I can confidently predict it will be more and different from what they do today. So we couldn't write the rules, geared to the limits and benefits of today's 01:59:46 technology. They would be obsolete by the time they became effective. So we had to be general enough to accommodate the inevitability of further changes in technology that we couldn't even imagine. We spent years. This is something that just reminds me of the vanity of rule makers. We spent years worrying about the burdens of storing electronic information. What was the burden that we were worrying about? These huge containers that were used to store information that had been generated. People were worried about the physical space. Okay. This stuff takes no space now. The cloud has come. We 02:00:42 were not even thinking, imagining a cloud as a place in which information lived and could be retrieved. Cloud was something that we only attended to for weather purposes or to describe a mood. It all changed. It changed while we were working on it. And that was a valuable lesson. So backup tapes, we don't have backup tapes anymore. If we had written a preservation rule that was geared to backup tapes, that would have been dumb. We didn't. And the rules committees continue to be knowledgeable just enough. And some of the members of the committees, like some of our law clerks and people that we work with, are incredibly adept and knowledgeable about what the computers can

02:01:41 do for us, and the difficulties they can present to us. You don't have to be. And most judges know just enough and not much more.

FUNK: It sounds like a delicate process, where you're not on the committee now, but you might advise them they should be

02:01:58 thinking about AI and discovery.

JUDGE ROSENTHAL: They are.

FUNK: But be very careful about writing anything.

JUDGE ROSENTHAL: Exactly. And I know that you went to Yale Law School. I made an appearance at Yale Law School during this whole process, and we were talking about some of the difficulties. These two very bright students came up and offered to help because they had been computer engineers and were certifiable geeks, in addition to being brilliant law students. I expressed some concern that they—I was grateful for their assistance, and they wanted to come and testify at

02:02:34 one of the public hearings that were part of the rulemaking process and still are. Every rulemaking process includes at least three public hearings where anybody can come and talk. It's not like a congressional hearing where the attendants are carefully chosen and screened. Anybody can come. Yale students wanted to come because they had a lot to say that would be helpful. And I of course worried about the expense that they would incur in traveling to a committee meeting, and I was assured that Yale would take care of it. And they did, and it was helpful.

FUNK: And it's another whole process, where what people speak

02:03:14 of as the traditional judge actually has a lot of policymaking work to do.

JUDGE ROSENTHAL: Yes, within the limits of the Rules Enabling Act. And those limits are clear. We cannot enlarge or abridge substantive law, which means that the line between substance

02:03:33 and procedure has to be something that we can actually draw, figure out where it is. That does not mean that substance is not affected by procedure because you and I both know, and everybody who was ever taught civil procedure, and everybody who has ever practiced law or been a judge knows that procedure impacts substance. But you cannot, under the guise of making a procedural rule change, enlarge or abridge substantive rights. That’s our command, as rule makers.

FUNK: Which means that the stakes of many of these rule changes can be quite high.

JUDGE ROSENTHAL: Yes.

02:04:20 FUNK: And there are many interested parties that appear before and—if this were Congress, we might say “lobby,” the rule makers.

JUDGE ROSENTHAL: We certainly saw that with Rule 23, class actions, which attract a huge amount of money, distribute huge amounts of money, and are a source of not only money, but power. When you are amending rules like Rule 23, where we have seen, since the 1960s, when Rule 23 was amended to be the current—in its current form, when you have consumer class actions, damages class actions that can involve hundreds and thousands of people, thousands of lawyers, state and federal,

02:05:09 and much, much money, you get a lot of attention when you try to propose to change a rule, even in a minor way. So when the proposal to amend Rule 23 was first made in the early nineties, there was a lot of attention, a lot of criticism. And the rules committee went back to the drawing board. But the
02:05:35 problem with a rule like Rule 23, which does have a set of procedures that we have seen have a huge impact on substantive rights and obligations, the rule has developed in a way that makes it really hard to amend, or improve, or change, without impacting substantive rights. That's a problem. It's a problem for the whole enterprise. CAFA, Class Action Fairness Act[27] was in part an attempt to do what the rules committees were limited from doing and changed class action practice in a way that clearly was going to impact substantive rights, was intended to. Rules committees can't do that. There's always that delicate, essential analysis. Is this procedure or is
02:06:41 this substance? It's a great question. You can spend nights awake thinking about that one. And I do.

FUNK: I've seen it done as well.

JUDGE ROSENTHAL: Yes.

FUNK: Now when you sit on the bench and you hear arguments from—you hear from interested parties all the time.

JUDGE ROSENTHAL: Right.

FUNK: Is that meaningfully different from your work as a committee member, hearing from interested industries?

[27] Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332 (d), 1453, 1711–15, granted federal subject-matter jurisdiction over large class action lawsuits.

JUDGE ROSENTHAL: Yes. The committees work very hard to learn what people who have experience and knowledge about an area
02:07:17 have to say. But we are keenly aware that there are financial interests and policy interests that underlie a lot of what we hear, a lot of the advice we are given. So yes, we have to be open to learning from all of the stakeholders, the people who are interested, the people who know. We cannot be lobbied.
02:07:46 And that line is, again, very difficult. Early on, we were told, “Nobody buys you a glass of wine. Nobody buys you a meal. Do not create even the appearance of impropriety. Keep yourself open but distant.” And that’s what the rules committees are devoted to doing. The people on the rules committees, and this sounds like pie in the sky, but I have seen it. And it happens. The commitment that any individual member—every individual member of the rules committees makes is that when you walk into those rooms, and you exchange those emails, and you talk on those phone calls, and now the Zooms, you have taken off your advocacy hat. You have taken and left at the
02:08:35 door the weapons you use to represent particular clients, particular interests on particular sides of the ‘v.’ You have left those at the door. You haven’t forgotten what you learned, but you bring them into the room with a commitment that you are there to improve the process. You are there to make systemic changes that will benefit all, that will be a rising water that will lift all boats and swamp none. There really is a commitment not to advance particular interests,

particular clients, particular goals that are limited in who they benefit or disadvantage, targeted. The goal is to avoid that kind of particularized view, which is a different kind of 02:08:35 partisanship and leave that outside. And it works. It renewed my faith in a legislative process, which the hurly burly of politics, if I can use a very ancient term, often leaves you wondering about whether that kind of discussion and commitment to improving the overall system without looking to advantage or 02:10:09 disadvantage select parts of it. The rules committees legislate in a way that is a model. Now it takes a long time. You cannot make that a model of government. You're not going to be able to respond to world crises using the rules committee model for legislation. But for what the rules committees are entrusted to do, they do very well.

FUNK: And how does the work of the committees that are set up by the Judicial Conference differ from the work that you've done for the American Law Institute[28]?

JUDGE ROSENTHAL: The American Law Institute doesn't have to worry about substance versus procedure. The American Law 02:10:57 Institute just celebrated 100 years of work. It's pretty amazing. The American Law Institute, as many people know, is an organization made up of members who are elected to the institute. And there are thousands of them. But in proportion to the number of lawyers that exist in this country, it's a very small number. The American Law Institute is made up of

[28] The American Law Institute is an independent organization founded in the early 1920s comprised of selected judges, legal practitioners, and scholars who discuss and produce scholarly work to clarify and improve the law.

people who embrace the notion that the law is living, and that there are opportunities to improve it, to clarify it, and to make it more accessible to the people it's intended to serve. And it's a group of selected academics, judges, lawyers, people who are in government, who all come together once a year to
02:11:57 meet in person. We had a few pandemic Zoom meetings, but thankfully those are behind us, to meet in person and to discuss particular projects that are designed to achieve just that goal, improve and clarify the law. So the products of the American Law Institute are Restatements, their most famous
02:12:20 product, also some principles projects, occasionally a white paper. The Restatements are the most prominent and important project. And the Restatements do just that, improve and clarify. The Restatements are not intended to remake the law or to create law. They are intended to restate existing law. And there is a huge amount of ongoing and very healthy debate about what limits that properly imposes and whether a particular provision or a particular project goes too far towards making new law, instead of restating and improving, clarifying existing law. But the projects that the American Law Institute has done endure. And it is a process—the process
02:13:22 that creates these products in a different, great variety of subject matters, is very similar to the rules committee process of having a group of people with expertise and time to commit develop proposals for what the product should be, and put them out there for periods of comment, both by advisors and then by—and outsiders, by members of consultative groups that gather to

study a project over time, and periodically to present it to the counsel, which is the governing body, and then, if it gets by the counsel, to the entire membership. There are robust discussions. People get passionate over some of the issues that the Institute has recently taken on, and is going to take
02:14:23 on. But again, time is taken to ensure quality. Every word is carefully considered. Experts and people who are not experts, but have lots of common sense and are really smart, all look at the words. And the results range from, unfortunately, this really isn't speaking to where the need is at the time it's
02:14:57 published. That doesn't happen very often. The results can be quite profound, enormously helpful. The current projects reflect the complexity of today's world. Move forward 100 years. Today we are doing a work on good standards of police conduct, good policing. It's not a restatement of law, principles of policing. We're looking at copyright. Can you think of an area of law that has been more profoundly shaken by the internet, by social media, than copyright? It's hard to. Consumer contracts, we revised just recently the Model Penal Code sections on sexual assault. When those sections were first published in the early 60s, they were viewed as
02:16:01 progressive and enlightened. But move forward from the 60s to today, and you become quite horrified by the fact that the 1950s version, 1960s version didn't recognize that a husband could rape a wife, didn't recognize same sex relationships, didn't address sexual trafficking. It has changed. It now takes on those issues. They were difficult issues. What does

consent mean, in today's world of complicated human interactions of the most intimate sort? The American Law Institute decided on a definition that the Institute could accept and that could be the foundation piece for a rethinking of when sex should be criminal and when it shouldn't be. That 02:17:03 was a brave project. Just beginning is a new project on constitutional torts, [42 U.S.C. §] 1983, a project on how to manage mass filings of small consumer claims which in our global marketing world are only going to increase. The American Law Institute, you may think of that as a stodgy group of people who are 02:17:34 thinking about arcane points of law. No. We are thinking about some of the most important issues that face the country, and we are thinking about it in a disciplined way that invites the participation of people who don't agree, but who can work towards a solution, a resolution that both can live with well. It's kind of a magical process. I know I sound hyperbolic. I'm not. It has been one of the great satisfactions of my professional life to—and personal life—to work with the American Law Institute. As an adult, it's hard to make new friends. Some of the best friends I have in this world came from my years of working on projects with people much smarter 02:18:40 than I am, who wanted to work on hard things that mattered.

FUNK: And what has your role and engagement been with the ALI, over the course of your career?

JUDGE ROSENTHAL: Over the years, and I've been a member since I think 1996—over the years, I have been more involved in

different kinds of projects. I worked on the Transnational Litigation Project with Professor Geoff Hazard[29], who is one of the great giants, worked on the restatement of Employment Law which was headed by people from NYU[30]. I'm working on the Restatement of Conflicts. I worked a lot on the Model Penal Code revision of the sexual assault rules. And because 02:19:27 Council, and I've been a member of the Council for a while, is required to pass on all of the work. I've been educated in a huge number of areas that I never would have been exposed to otherwise, unless I had a case, and then I would operate on a need to know basis, which is what district judges do in their day jobs everywhere. 02:19:48 But the American Law Institute lets people pick how they want to be involved, and I got involved in projects as first a member in the consultative group, and then on some projects in which I had more of an exposure and experience, became advisors—an advisor on some of those projects, and got involved in the governance of the institution, which has been great. And I am vice president now, but I am the perfect vice president. I have no ambition to be president. So I think that it works well for me and I hope it works well for the institute.

[29] Geoffrey C. Hazard, Jr., a highly regarded legal scholar and teacher, served as Director of the American Law Institute from 1984-1999. During his tenure, the Institute expanded to international scoped-projects including Transnational Civil Procedure, and Transnational Insolvency. He also was Co-Reporter for the ALI/UNIDROIT Principles of Transnational Civil Procedure (2006), a model of civil procedure for international commercial disputes.

[30] Estreicher, Samuel; Bodie, Matthew T.; Harper, Michael C.; and Schwab, Stewart J., *Restatement of the Law Third, Employment Law* (2015). Chief Reporter Samuel Estreicher is the Dwight D. Opperman Professor of Law at NYU School of Law, who also serves as Faculty Director of NYU Law's Center for Labor and Employment Law as well as of the Institute of Judicial Administration (IJA).

FUNK: So in describing the aims of the ALI, you referenced the
02:20:37 debate over whether the institute is really restating the law or in some ways making the law. In describing the achievements, the recent achievements of the ALI, you talked about the profound influence of some of these codes, and restatements, and principles.

JUDGE ROSENTHAL: Right.

FUNK: Does that mean you have a particular side in the restate versus remake debate or you—

JUDGE ROSENTHAL: No, I don't. The commitment of the ALI is to, within the confines of a Restatement, to be a restatement. If it is less moored to existing law, then our self-imposed
02:21:14 discipline is to say, that's not a Restatement. You can call it a principles project, but you can't call it a Restatement. And that discipline has been really useful because it has forced us to acknowledge when we are going beyond restating, and moving towards creating. It's not bad to do that. It just
02:21:36 has to be done within the proper framework, in the proper boundaries. And it's an ongoing debate because the line moves. You can describe it abstractly. But when you're in a particular project, and you're looking at a particular provision, you have to figure out, as applied, where the line is between restating and remaking, or make it. And there's nothing wrong, if there are majority trends and minority trends, nothing wrong with the American Law Institute saying, in this instance, we think the minority trend has it right, and we are going to propose in what we call the black letter, the

summary of the major principles that come out of the
02:22:25 project. We are going to be identifying the minority position as the one that we think is right, and here is why. But if there is a third, a third, a third of the jurisdictions going in different ways, it's very hard to discern a majority. And then it gets tricky. What is it that we are restating, which of the three positions? How far can we get from whatever trend we can discern? And how do we explain it and justify it? Is it convincing?

FUNK: And inevitably, as a judge, I'm sure you have, on the bench, had to use some of the Restatements you may have had a hand in drafting or certainly the civil rules on E-discovery
02:23:16 that you had a hand in drafting. How do you think of those when you are wearing the robes, as a judge? Do you ever rely on, "Well, I know what these are really about, and after all, I know what debate there was over these things", or is this just an artifact that's external to you and something you have to
02:23:32 apply?

JUDGE ROSENTHAL: Both are true. And sometimes I get impatient with, or I laugh at lawyers who step back and try to lecture me on the meaning of something that I was there. I know what it says. And I think I know what it's intended to mean. But we can't—I can't be too wedded to that because context matters. Applications matter. Cases differ. And the way in which something is going to be applied and work out may be different than we imagined when we were in the conference room, in the drafting sessions. So the further I get from being present at

the creation or the modification, the more it is simply like
02:24:16 dealing with any rule that I have to apply. It's not something
that I have equity in. It's something that I need to
understand and follow.
FUNK: So I know and you know judges who sit by designation on
sister courts, judges who serve on advisory committees, rule
committees, serve the ALI, work on Restatements, judges who
teach in law schools, or train lawyers or judges. Most of the
judges I know that do this, maybe do one or two of those
things, and none until after retirement. How is it that you do
*all* of these things? Where do you find the energy? Where do
you find the inspiration to be so involved in giving time and
02:25:06 energy to thinking about law?
JUDGE ROSENTHAL: It's not that being a judge, my day job, is
easy or something that I can do part time. It's not. I work
hard, but I really like it. And part of the reason I started
getting involved in these external, co-curriculars maybe is the
02:25:28 right word, is that I became aware early that being a one-judge
court could be limiting, isolating. You had to be careful of
that. Going to a rules committee meeting, going to an ALI
meeting, going to a law school, sitting on different panels,
you learn a lot. And I am convinced, to the very bottom of my
judicial soul, that my involvement in these other enterprises,
which are part and parcel of the larger enterprise, I'm a
better judge because I was involved in rule making. I'm a
better judge because I work with people in the ALI and think
about restating and clarifying different aspects of the law.

I'm a better judge because I've been exposed to areas that the 02:26:25 caseload hadn't yet presented me or would present me. It has kept me, 30 years in, grateful for the variety, for the challenge, for the uncertainty, even for the disappointments of the changes in different areas of the law. I really like my job. This is year 31, and I really like my job. I think being a district judge in a district with a diverse docket and being involved in areas that mean something, with people who are really smart and really talented, I can't think of a better recipe for a really tasty professional life, a rich life. So I feel very lucky that I've been able to do all of these different things. I feel very lucky that I have a family 02:27:36 that's supported this and enjoyed it, and that I get to continue to do it.

FUNK: All right, Judge Rosenthal. On behalf of the Institute of Judicial Administration, I want to thank you again for taking the time. It has been an absolute pleasure and honor to 02:27:53 learn more about you and to learn from you during this time.

JUDGE ROSENTHAL: Thank you, Professor Funk. It's been a great pleasure to be here, and you and I have done some fine work in the past, and I know that you'll continue to do that. Thank you for this opportunity.