

1992

A View from Below

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Southern District of New York

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Recommended Citation

Denis J. McInerney, *A View from Below*, 3 Fordham Intell. Prop. Media & Ent. L.J. 17 (1992).
Available at: <https://ir.lawnet.fordham.edu/iplj/vol3/iss1/5>

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A View from Below

Denis J. McInerney*

The Honorable Kevin Thomas Duffy is a man of great stature, both intellectually as well as physically. He is also a vigorous judge with a multifaceted personality. Because of this, it is only natural that different people (e.g., colleagues, clerks, lawyers and parties) see him differently—as a humorist, a “no nonsense” judge, an iconoclast, an enigma, and so on. To his growing legion of former law clerks, he is all of the above, and much more. I am deeply honored, as one of his sons-at-law, to have been asked to contribute to this occasion. Since there is no single anecdote which could possibly capture the man, I offer the following few examples of Judge Duffy’s manner and mind.

THE VIVID TEACHER. As part of their training, Judge Duffy frequently gives his law clerks the first shot at drafting decisions on motions. I’ll never forget the first draft opinion I worked on—a motion to amend a complaint. Having never seen a motion of any kind before, and anxious to make a good first impression, I spent about 10 days researching every case on the subject, double-checking them in Westlaw and LEXIS. Eventually I proudly handed to the Judge what I considered to be a 27-page masterpiece. Without a word, the Judge took my masterpiece to his room, from which he emerged two minutes later. He placed the notice of motion in my hand, placed the masterpiece in the wastebasket, and silently went back to his room. I asked the senior law clerk what this meant. She took the notice of motion, turned it over and read it to me. It said: “Motion granted. So Ordered.” Thus began my tutorial in the art of brevity.

THE CAREFUL WORDSMITH. One of the most enjoyable aspects of my clerkship was the opportunity to go to court and observe the Judge’s keen sensitivity to the treatment of those before him (with

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the exception of possibly pettifogging lawyers). He is especially careful about what he says to juries because he knows how much he can influence them.

There was one occasion, however, on which his choice of words was less than perfect. In *United States v. Castellano*, he had given repeated instructions to the Government and defense attorneys that expressions such as “mafia,” “the Family,” “La Cosa Nostra,” etc. could not, under any circumstances, be used in front of the jury. However, in discharging the jury one day during this lengthy trial, he said the following:

Jurors 129 and 134 are going to go inside with me. The rest of the jury, I want you to do me a favor. I don't think there should be anything in the newspapers or the media. If there is, please don't read it Don't talk to anyone about this case . . . [Jurors 129 and 134], you go into the room right here (indicating). And the rest of you, get out of the building and get into the Lexington Avenue Subway before the mob gets you.¹

THE CANDID JURIST. Judge Duffy is neither shy nor reluctant to speak his mind. He can be, in a word, direct. John Spurdis, once a witness in a suppression hearing before the Judge, is painfully aware of this fact. What follows is the opening of the Judge's opinion denying the motion:

John Spurdis is a liar.

District Judges are charged with the responsibility of determining credibility of witnesses because our court system recognizes that the signs of credibility are more than just those found in a cold record. Spurdis' testimony is, in and of itself, inherently incredible. It is clear that he changed his story from time to time as it suited him; but my conclusion as to his credibility is dictated not only by these factors but by watching a man of supreme ego

1. Transcript at 822, *United States v. Gaggi*, 632 F. Supp. 1019 (S.D.N.Y. 1986) (No. 84 Cr. 0063 (KTD)), *aff'd in part and rev'd in part*, 811 F.2d 47 (2d Cir.), *cert. denied*, 482 U.S. 929 (1987) [successor case to *United States v. Castellano*, after the murder of Castellano during trial].

attempting to toy with the truth and with our court system. The record does not show that Spurdis as a witness attempted from time to time to whisper instructions to me so that he could have complete control over the proceedings. The record cannot show his demeanor, the way he shifted uneasily as he spun out his tale nor his fleeting smiles of unwarranted contempt when he thought he had blunted the cross-examination and avoided provable perjury.

For all of these reasons, I reject entirely the testimony of the witness John Spurdis.²

THE IMAGINATIVE PSYCHOLOGIST. In the summer of 1986, one of the fugitives from the Brinks Robbery case, Marilyn Buck, was captured by federal agents. The day she was arraigned, the courtroom was filled to capacity with supporters from the Black Liberation Army and the Weathermen, reporters, and many others. Ms. Buck limped into the courtroom—she had earlier shot herself in the foot—and, to demonstrate her contempt for the Court's jurisdiction, turned her chair completely around, sat down and began a dialogue with her boisterous supporters while treating the Judge to a view of her back. I immediately ran through what I thought were the Judge's options: order Ms. Buck to turn around and, upon her certain noncompliance with this order, either enlist the aid of Deputy United States Marshals, find her in contempt, or refuse to continue with the proceeding.

Predictably unpredictable, the Judge approached the problem from an entirely different perspective. Without hesitating a moment, he calmly proceeded with the arraignment with just one slight modification to his normal practice. He lowered his voice to an absolute whisper, thereby making it impossible for anyone further away than the court reporter to understand him without facing him and looking closely at his lips in complete silence. Within seconds, Ms. Buck stopped speaking to her audience, turned her chair around and, along with everyone else in the courtroom, strained intently to hear what the Judge was saying for the

2. *United States v. Tramunti*, 377 F. Supp. 1, 1-2 (S.D.N.Y. 1974).

remainder of the proceeding.

THE INNOVATOR. From his very first day on the federal bench, he challenged the status quo. At his first sentencing of a criminal defendant, Judge Duffy confronted the system. Before imposing sentence, he asked defense counsel if he had seen the pre-sentence report. Defense counsel stated that he had not, explaining that parties have never been permitted to see pre-sentence reports. After the Assistant United States Attorney on the case confirmed the defense attorney's statement, the Judge ruled that such a practice was nonsense and ordered that both parties be given an opportunity to review the pre-sentence report before proceeding with the sentencing. Though novel then, such disclosure is now mandated by Rule 32 of the Federal Rules of Criminal Procedure.

THE PUBLIC DEFENDER. Prior to ascending the bench, Judge Duffy was the Regional Administrator of the New York Regional Office of the Securities and Exchange Commission from 1969 through 1972. In 1969, as one of his first acts in this job, he sent a 28-page letter to S.E.C. Chairman Hamer H. Budge detailing the need to protect customers of brokerage firms from losses resulting from the increasing number of brokerage firms going into bankruptcy—which in turn was causing a public crisis of confidence on Wall Street. Regional Administrator Duffy was a pioneer in recognizing and campaigning for this needed customer protection. Within approximately one year, the Securities Investor Protection Act was passed and The Securities Investor Protection Corporation was created. Consequently, virtually all securities investors are now insured against the losses for which Judge Duffy sought their protection.

THE TRUE FRIEND. In 1983, Judge Duffy's close friend and fellow district judge, the Honorable Henry F. Werker was stricken with cancer. Without any hesitation, Judge Duffy immediately and quietly assumed his friend's full caseload. He adopted Judge Werker's law clerks as if they were his own and, working nights and weekends, managed both dockets for almost a year. He has never sought nor received any public recognition for such acts of loyalty and friendship, of which this is just one example. He has, instead, simply concerned himself with how he could make things

better for those close to him.

THE PATERFAMILIAS. In his 20 years on the bench, Judge Duffy has employed over two dozen law clerks. However, he has been far more than an employer. He has consistently made it his business to know personally and develop friendships with his law clerks, keeping track of us long after we have handed him our last draft opinion. I, for example, finished my clerkship in 1986. Yet it is a rare month when I have not had some contact with the Judge, by phone or in person—often for his advice on a particular matter, personal or professional. As part of his extended family, I have been fortunate indeed to be one of the recipients of his interest and guidance over the years.

In conclusion, I want again to express my gratitude for this opportunity to try to describe what this warm and highly talented human being brings to the bench and to those of us privileged to know him.

