

Mary-Beth Moylan: Hello, I'm Mary-Beth Moylan, Associate Dean for Experiential Learning at McGeorge School of Law, sitting down today with Judge Consuelo Callahan from the United States Court of Appeals for the Ninth Circuit. This is an In Practice session of the CAP-impact Blog. Judge Callahan, thank you very much for taking the time to talk to me today.

Judge Consuelo Callahan: Oh my pleasure, thank you.

MBM: I'd like to just jump right in and ask you first if you could give us a brief description of a day in your judicial life.

JCC: Well, I don't think that any day is ever exactly the same, so that's probably one of the most exciting parts of this job. But I think it's easier to understand a day in my life if you sort of understand the overview of what we do.

We're always getting ready to go to court. We're preparing for oral argument for court, and then when we finish oral argument, we're writing our opinions and dispositions from that particular sitting. And so we're on sort of a constant treadmill preparing for court, resolving cases, and then we're constantly preparing for the next calendar. We have a lot of cases, so there's not any real rest for the wicked here. And where we are in the cycle really depends on what individual day is.

For example, today, after I speak with you, I will be meeting with the lawyers in my chambers and we're preparing for a calendar several months off and we're discussing briefs. They will have read the briefs, I will have read the briefs and I have them make and oral presentation to me and then I give my comments about it and just some preliminary views before we write any bench memos or anything along those lines. So it's a constant team project because the attorneys are assigned cases with me and then prepare with me and I'm giving input all along the way, we're exchanging memos with other chambers and then we actually go to court. And so-

MBM: And when you go to court because of the reach of the Ninth Circuit, you often have to sit with judges from other localities within the Ninth Circuit, correct?

JCC: Well we do literally ride the circuit, and so we- I always have to travel when I go to court. There can be judges coming from any of the nine western States and even from Hawaii, Alaska, and we also have judges that sit by designation from other places in the country.

So, the panels vary widely and I would describe for students the best they could understand, court week is like finals week, and so it's something that you've constantly prepared for but then it's game time and then I actually have to go to court. Then after court we conference on the cases and we make assignments on the cases, who will have the writing disposition on the case and then we go write them, so that's really the culmination of everything and then we go pen to paper, but that can still change after that.

MBM: Right.

JCC: Because there's the constant process, circulating dispositions, you have to get concurrences in the dispositions. So it's really just a constant process and even though technically I'm not in court every day, like I was when I was a trial judge, I'm preparing for court every day and you have to be very inherently mindful of your schedule because if you don't put out as much as you take in, you can fall desperately behind, and you will never catch up.

MBM: Yeah, that's not a good feeling. So just one more follow-up on how the conferencing works, obviously, with judges working together from all different locations, I assume you do a lot electronic transmitting of proposed opinions and that kind of thing.

JCC: Well, we do. And prior to court I think which would probably be interesting to people, many times I don't know what my colleagues think about a particular case or how they would, what their tentative views are going into oral argument, and I don't know that until after oral argument until when we conference. And even though we exchange bench memos, those are memos that are written by our law clerks and it varies from chamber to chamber how much judges exercise their own input into the bench memos.

For example, I don't send out bench memos I don't agree with. There are other chambers that send out bench memos, they say 'this is a bench memo from my law clerk, I haven't reviewed it. I hope you find it helpful,' so you have no- it's not a clue into anything. Then after we finish, we mostly do electronic exchanges. It would be unusual- occasionally we might have to re-conference by phone, but it's very hard to reconstitute the panel because we are coming from all over.

MBM: Yeah. Let's turn a little bit to your background and what area of law did you practice before you became a judge?

JCC: Primarily criminal. When I was in law school, I worked for the Public Defender's office here in Sacramento for a whole year and a summer and worked as a certified law clerk there. So that was my interest but then I took my first job as the Deputy City Attorney which had a wider range of civil matters and I was counseled for the Civil Service Commission and any number of advising city government on city issues, but the bulk of my career before I went on the bench was as a prosecutor. I- the Public Defender's office offered me a job the day after the DA's office and so that's what kind of cast the die there and so I did criminal prosecutions, I began the first Child Abuse/Sexual Assault Unit in the DA's office. I did- I headed the Career Criminal Division, I also did Homicides and Capital Cases included.

MBM: I'm sure that you did a lot of things very well when you were in practice as a District Attorney, but when you watch attorneys in practice today, what do you see that you think they are doing well?

JCC: Well I think what's interesting is how well they do is directly correlated they to how well prepared they are and how much time they spend. And what's interesting, I generally have a law student that works for me in chambers and they're allowed to go to court, and I think one of the things that surprises them is how wide the spectrum is in terms of the quality of the briefs and the quality of oral argument. And I think that they realize that they actually can compete if they work really hard at it and they really prepare. The law is not very complex in the sense that if you work really hard and you're really prepared, you're going to do much better. And people that tend to try to fly by the seat of their pants do not do well...

MBM: Right.

JCC: ... in the practice of law. So even as a young practitioner, I really try to encourage people, the standards you set in the beginning are how you are going to be as a lawyer and you should never set them low, you should always set the highest standards.

MBM: What do you think is the common mistake that attorneys make when appearing before a Ninth Circuit panel?

JCC: Well, there are several. Some of them are that they don't really anticipate what the court is going to be interested in. They haven't really turned their case inside and out. They come with an agenda of what they want to tell the court and sometimes they regurgitate the arguments that were made in the trial court that were unsuccessful. And the standard of review changes very deferentially when you come up on appeal. And they fail to recognize that particular point.

But I think if you start with the understanding that three judge panel, or what if it's an en banc panel, eleven, is going to be making the decision in your case: what do they need to know in order to come to the conclusion that you want? Not what do you want to tell them. And if you forget to answer the questions that the court and, obviously, perish the thought if you tell the court that their question is not really relevant and it's not really what you want to talk about. If you recognize that that's the deciding- these are the deciding people- they obviously thought it was important so that's not- that's really not a step in the right direction.

But I think you can't be- you cannot be over-prepared, you can't practice enough, and good oral advocates use a very short period of time that you come in and maybe- maybe it's different from a trial court.

A trial court you have a little bit more opportunity to make up for mistakes. You have days and sometimes months of trial to go through. Here, you have ten minutes, twenty minutes, thirty minutes. It's very compact and every word has to matter and every answer has to matter and the best oral advocates don't waste that opportunity. And even as an outsider sometimes you might listen to it and you might think, well that doesn't really sound that smooth. That's not really the point. The point is addressing the court's concern and being really targeted and approaching the case thinking 'what would a judge want to hear? What opinion is the judge going to write in this and how can I assist the court?'

MBM: We tell our students that every question is a gift and that they should- because it gives you insight into what the problem the judges having with your case is- so that you should relish those questions because they give you an opportunity to help focus the court on what the court cares about, right? So, its-

JCC: It's a gift when you know the answer, it doesn't feel like- I don't think people feel like it's that cherished of a gift when they get the deer in the headlight looks, but I think good attorneys try to anticipate the weaknesses of their cases and also anticipate the questions the court will ask. Also if you moot yourself- if you have thorough mooting before you come and go in front of murder boards and people that are experienced practitioners, then I think you shouldn't be surprised by the questions.

MBM: Yes. And hopefully they'll feel like a gift.

JCC: Well and the best- you're right in terms of if you at it as a gift and if you look at it as an opportunity, then, just- I don't want to say have fun but be relaxed about it and

think 'well I'm glad they asked that question because if it's on his or her mind and they didn't ask me they might resolve it in a way that I won't like and now I have an opportunity to give them a pathway headed in my direction.

MBM: Exactly. Okay, my next question for you is whether - we know there are circuit court rules, we know there are local rules of the Ninth Circuit - do you have any local local rules? Things that you require that are unwritten in or practices that you like to see?

JCC: Well. I think one of the things I asked- I asked some of my former law clerks, you know from a practitioner's standpoint because sometimes they give you insight into things that might be your idiosyncrasies. One of my law clerks that is a- very excellent appellate practitioner, made the comment is 'consider what is the narrowest way that the court can write an opinion and still come out your way' because I think less experienced people just think about the win. And they don't think about- the win can take on many forms. And sometimes you start in a very grandiose fashion but courts tend to like to decide things narrowly and if you go that whole process about what are you asking for, how can the court get there, but what is a narrow way it can be written? And you give all of those opportunities to the court and I really only see more sophisticated practitioners thinking that through.

I also think there are things behind the scene that maybe people don't think about that- we have an excellent mediation program. That we have some of the best mediators and they settle a lot of cases and they do it particularly on civil cases and where there's representation. Please avail yourself to it, don't get discouraged about it because it has been very fruitful and people have been very complimentary about that.

As well, we have an appellate mentorship program which is run by our appellate reps. If you're new to the Ninth Circuit, it's on our website. Take advantage of that. I'm surprised a lot of people that don't take advantage of it and these are the people that- most of them have been law clerks, they're appellate reps to the court, they know everything inside and out. You'll be assigned someone that is a specialist in the area of law and that- all of the really great appellate practitioners- many of them have been law clerks. They surround themselves with people that are experienced practitioners and you're very foolish if you don't take advantage of that.

MBM: That is really great advice and we will put a link to that mentorship program together with this podcast so that people can just click right on it and get there. I think that's excellent that that exists and that people can avail themselves of it.

JCC: If you- and the thing is if you create bad habits in the beginning, and you can win sometimes and still have done a horrible job. And that's not really the appellate practitioner that you want to be. I will tell you we will do our jobs regardless of whether you do your job.

MBM: Right.

JCC: If you really want to be excellent at what you want to do winning isn't your only measure.

MBM: Let me ask you about what you've learned about the practice of law sitting as a federal judge and maybe a little bit about how judging at the federal appellate level is different than judging in state court and maybe how both are different from practice.

JCC: Well I think one of the things that I often talk about and I think people that are appellate practitioners don't necessarily think this through. For example, I think oral argument is much more important at the federal courts than it is at the state courts. And in many of our state courts in California, and having been a state appellate justice, I know this. The draft is written, it's signed off and very rarely does the court change from that. And also too, in the state court, you have a right to an oral argument unless you choose to waive it. In the federal court, you don't. We decide who we want to hear from.

So, your mindset should be at least one of the three judges wants to hear oral argument because that's sort of our behind-the-scenes rule. And so we don't to submit it on the briefs, we haven't conferenced about your particular case and some cases we haven't even exchanged bench memos. So, oral argument is really important. You're coming in with three people that have not talked about the case, they haven't written a draft opinion, and they may only have a tentative view- if that- going into it.

So you have an opportunity not only to convince the various judges but also to have a say in how an opinion might be written and enter into the legal landscape. I think also too, particularly the Ninth Circuit. There are 29 active judges when we're full. We're up to about 50 with our senior judges and we have judges sitting out of circuit. There are so many different combinations of three judge panels. It is not- I would say- I don't want to say that makes for inconsistent results but it makes for people that don't sit together as frequently, as often as on the state courts.

And so I think there's the perspectives are- tend to be more diverse and I've seen situations that I feel when I was on the state court, I think the justices would have all agreed on a certain line and a decision and whereas on the federal court, the diverse

principles have I guess resulted in some surprising results for me. So don't feel - I really feel like you have a lot more opportunity to win your case on the Ninth Circuit. And even - and as a trial lawyer and appellate lawyer or whatever, you should never - you should never give up anything. Never assume that you're going to lose because I've seen results where I've been surprised at what the result are so, hang in there.

MBM: *laughs* That's a good - that's good advice. Always persist.

JCC: Yes.

MBM: So can you say one thing that attorneys could do to make your life easier?

JCC: Well, the better the lawyers, the easier my life is and I would probably say that most of my law clerks do not believe in the death penalty but they might call it in especially for people that write bad briefs. And the people that don't know the law, that can't give a recitation accurately, the facts. So our job is much more difficult when the lawyers are bad.

So to any extent of lawyers being, you know, working on their own practice is really important. In an ideal sense, I would like to see the facts in the case in my view should be the same whether you are the appellant or appellee. It should be all the facts that are necessary for the court to decide the case and that should include the bad facts too from your perspective.

MBM: Right.

JCC: You get to argue about that later, but the facts should be what are the facts that we need to decide. The law should be the appropriate law and that includes the cases that are adverse to your particular position. Because you need - you can take an opportunity to distinguish them. Parties don't do that very often. They start their advocacy in the facts and then they start them in the law by leaving things out, and then there's a loss of credibility. It makes our job much harder because we will find the facts, we will find the law because we ultimately have to decide that case correctly but it makes it much more difficult for us.

And I will read your briefs no matter what, but I will tell you but I start - I start with the appellants then the appellees then go to the reply brief. People have different orders, if the appellants brief doesn't give me any of the necessary facts, it's just - just argues what they want me to do without giving a dispassionate recitation of the relevant facts and law, I go to the appellee's because I think like 'I can't get to the bottom - I can't even

figure out what's going on' so if you want me to read your briefs in the order that they come in, then make your briefs what they should be.

MBM: Mhm. Great. Is there anything else you'd like to add about your practice or your perception of practitioners? This is the free-for-all moment.

JCC: Well I, you know, I think that we also have for people that love appellate work. Generally tend to be people that having been a trial lawyer, having been a trial judge I understand the excitement of the court, and that really is sort-of the different dynamic. But in the appellate court, I think people generally have a love of the law and the development of the law. And it's really exciting to have an opportunity to participate in that.

So I hope that people spend a lot of time getting ready for their moment in the sun as it were, because even coming- you'll watch live-streaming arguments in the Ninth Circuit, you can watch them. If you can't come and sit and actually watch them, I've had people come and watch me all week and they have a case on Thursday or Friday because they want to see, you know, how do I ask questions? How do I prepare for that?

MBM: Right

JCC: And I- I just feel like the law and being an advocate- I have loved it all of my life and it's like preparing for battle and it's like you put your armor on and every part that you should do with just extreme particularity and then, you know, and then like I said - persist and at every level, don't give up and do your very best and I enjoy, you know, I enjoy seeing the attorneys and I love as judges when we have both a great appellant and a great appellee's lawyer. I mean, we go back and we're just completely buzzed.

We also talk about, I'm going to tell you, when people have been really bad, we go back in and we go 'Oh my gosh, they, you know, that, if I were just deciding on the advocacy even though that person has the facts...' so we do talk about you. So don't think that we don't notice but I would like to think that our results are never a reflection of that part of it, but the level of advocacy does make a difference and many times people point things out to us that perhaps, maybe we would have missed if they hadn't - if they hadn't told us.

And remember, we're not experts in all of these areas of law. We're experts in deciding cases and finding the law. For example, I'm an expert in criminal law. There's not a whole lot you can pull over on me on that, but there's a lot of other areas of law that we

really hope the attorneys will bring their expertise to bear and assist us in framing the picture as we decide the case.

MBM: Great. Thank you so much for taking the time to talk with me today. We're going to close. This has been an In Practice session of the CAP·impact Blog of McGeorge School of Law. Again, I'm Mary-Beth Moylan, with me today was Judge Consuelo Callahan. Thank you very much for listening.