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Judicial Independence – Law Firms

Judges Under Siege: Some Thoughtful Observations By A Veteran Practitioner

The Editor interviews Douglas S. Eakeley, Litigation Partner at Lowenstein Sandler PC.

Editor: Mr. Eakeley, will you tell our readers something about your professional experience?

Eakeley: I have been litigating for more than 30 years. I started out with a judicial clerkship in the Southern District of New York and went on to work for Debevoise & Plimpton. In 1980 I came home to New Jersey, and except for a two-year sabbatical with the New Jersey Attorney General's Office, I have been in private practice ever since.

Editor: Your trial and appellate experience goes back a long way. How has the practitioner's courtroom experience changed over the course of your career?

Eakeley: It has changed in a variety of respects, and much depends on which courts we are talking about. In New Jersey, the federal courts have been, relatively speaking, much better resourced than the state courts. This difference in resources means, for example, that each federal judge has at least two law clerks and access to a technologically advanced support system, including IT. In the New Jersey state court system, most judges have one law clerk, even in the populous urban counties, and the available technology is not up to date. In addition, the facilities are often inadequate, as is the space.

Editor: You have expressed strong views on judicial independence as one of the



Douglas S. Eakeley

principal underpinnings of the rule of law. For starters, how does the failure to compensate judges adequately affect the judicial system?

Eakeley: Almost by definition, you cannot have an independent, impartial and objective judiciary that functions efficiently and effectively without that judiciary being properly resourced. That means that judges must be provided sufficient incentive in the form of compensation to leave private practice to go on the bench. It also assumes a judiciary that is selected solely on the basis of merit and a court system that possesses sufficient administrative, logistical and technological support to enable judges to do their job.

Editor: Most commentators agree that

inadequate court funding leads to clogged dockets. How does this affect costs and outcomes?

Eakeley: Court congestion leads to a variety of inefficiencies. For the judge, the decision-making process is impaired if that judge has too many cases or a paucity of administrative support. The inability to concentrate on a case, as a result of such conditions, may result in its improper adjudication. From a practitioner's standpoint, the more congested the docket, the longer it takes to bring the case through to conclusion. And the longer the process, the more likely it is that the practitioner is going to have to put the case aside and then return to it on a periodic basis, which may result in evidence becoming stale or even the interests of the parties shifting over time. There is a real sense that failure to have a case decided in a timely fashion often translates into less than a full and fair appraisal of the issues. In a very real sense, justice delayed is not justice at all.

Editor: How about the failure of courts to take the time to consider motions for summary judgment?

Eakeley: I don't think our courts generally "fail" to take the time necessary to consider motions for summary judgment. More frequently, crowded dockets and insufficient resources mean that judges will take longer to review the evidence and render decisions on complex motions. There is no question that we have situations where a summary judgment motion may not receive the attention it deserves in a timely fashion. Let me add that New Jersey has a

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merit selection system for the appointment of judges, and compared to a number of other states we really have a fine state court bench. Our judges are extremely conscientious. They are attempting to provide the best justice possible in rather trying conditions. However, at least at the margin, the quality and timing of decisions in complex cases can be adversely affected by the lack of resources.

Editor: How about admission of expert witness testimony that would not be admissible under *Daubert*?

Eakeley: Another very sore point of contention from the standpoint of defense counsel and that of the New Jersey business community is the relative leniency of our state courts in letting expert testimony go to a jury without a judge providing the gate-keeping role that the U.S. Supreme Court described in *Daubert*, which does not apply to our state courts. In New Jersey we have an older rule that is much more porous, and because of the ease of admission of expert testimony we have out-of-state lawyers bringing cases against New Jersey enterprises. Our rules of the game are perceived as more plaintiff-friendly than those of other states. I am involved in extensive litigation on behalf of several large pharmaceutical companies with corporate headquarters in New Jersey. Some 90 percent of the mass tort cases currently pending against one well known company, for example, are brought by out-of-state plaintiffs. That fact has all sorts of implications for congested dockets. It also makes for a hostile business climate, increasing the cost of doing business, the cost of insurance and the cumulative impact of litigation exposure. This, in turn, acts as a definite deterrent to attracting and retaining business in our state.

Editor: And the failure of the courts to control demands on e-discovery?

Eakeley: I would not call this a failure of the courts alone. Electronic discovery has been the name of the game for some time. In both state and federal courts it is the activity that generates the highest costs and the most motion practice. We have yet to perfect the standards that govern e-discovery. But I have to fault the litigators as well as the courts for failing to find the appropriate balance – and boundaries – for e-discovery. Even before e-discovery, America's courts were known for the high cost of litigation because of our discovery

rules. E-discovery has made litigation infinitely more difficult, more expensive and more time-consuming.

Editor: How about overhasty consideration of business cases resulting in more reversible errors?

Eakeley: I don't think that business cases get any less attention than non-business cases. However, a complex case that may be one of first impression before a particular court is going to require a great deal of attention. Many other states have set up special business courts, and I think New Jersey would benefit from an examination of this concept. I hasten to add, however, that I believe New Jersey's judiciary is very conscientious and does not mete out less effective justice when it comes to business cases.

Editor: Is the fact that so few cases are resolved in court indicative of uncertainty as to the outcome if the matter is taken to court?

Eakeley: That is certainly one of the factors. We are seeing fewer cases go to trial, and that appears to be a national trend. Outcomes can be particularly uncertain where a jury trial is involved. Much of my work is in class action litigation. In many cases once a class is certified, a defendant is almost compelled to settle because class certification creates a "bet the company" situation, where the stakes are simply too high to go to trial.

Editor: To what extent does merit selection improve the quality of judges and contribute to judicial independence?

Eakeley: Merit selection is essential to judicial quality and independence. Under New Jersey's 1948 Constitution we have enjoyed a system of bipartisan merit selection. This has served us well. A capable and independent judiciary is a major factor in terms of quality of process and outcome. Better judges make better decisions and that builds confidence in the system overall.

Editor: It has been suggested that because of inadequate compensation more judges are being drawn to the bench from the public sector and fewer from the private bar, leading to less attention being given to business cases. In your experience, is there any validity to this assertion?

Eakeley: Well, it is true that we have fewer civil litigation practitioners going on the bench after distinguished careers in private practice. That means that the bench strength of the judiciary with respect to business cases is not what it once was. Now, it is up to me as an advocate to present my case to the finder of fact in a way that effectively communicates my client's claims and the evidence to support those claims. So long as I am appearing before a judge who is independent, intelligent and fair-minded, the fact that he or she doesn't have a business litigation background does not necessarily prejudice my client in a business litigation case. In large complex cases that go on for several years, there are numerous opportunities to educate the judge about the facts and the law.

Editor: It has also been suggested that more experienced judges are leaving the bench to join law firms or pursue careers as arbitrators. How does this affect costs and outcomes?

Eakeley: We have seen the early retirement of experienced federal and state judges. In such circumstances, we lose decades of experience and a perspective that has been shaped during those decades. Such a loss has to have an impact on the quality and the timing of the resolution of cases going forward.

Editor: Have you seen judges attacked – and by members of the bar – for their decisions in the media?

Eakeley: Occasionally, although not very often here in New Jersey. We enjoy a culture of civility in New Jersey, and the bar-bench relationship is excellent. I can think of a couple of matters where judges have been censored or criticized for statements made, off or on the bench, that have not been in conformity with that culture of civility, but I have not seen any situation where an attorney has gone out of his way to attack a particular judge or that judge's decisions. Most of the time, in light of an unfavorable determination, there is a public announcement by the attorney to the effect that he or she respectfully disagrees and intends to appeal.

We have recently seen more political attacks on judges at the federal level, by Administration officials and by some of the Congressional leadership. The Terri Schiavo case comes to mind. This can threaten judicial independence, and clearly can have a chilling effect.