

## Foreword: The "Old" Second Circuit in 1951

Harold R. Medina

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## SECOND CIRCUIT NOTE 1977 TERM

### FOREWORD: THE "OLD" SECOND CIRCUIT IN 1951

JUDGE HAROLD R. MEDINA\*

Early in June, 1951, I was in Princeton to join my classmates celebrating the Forty-second Reunion of the Class of 1909. Those were happy days for me and, just before Commencement, I was strolling around the campus, wearing my 1909 blazer and chatting with some of my friends when a student rushed up and said, "Judge Medina, it just came over the radio that Learned Hand has retired and you are his successor." Well, I could not believe it. While I saw him in the courthouse almost every day, the Old Chief had not given me the slightest hint of what was coming. As a District Judge I was right in the middle of the trial of the Government's antitrust case against the seventeen leading investment banking houses, and this made it seem all the more incredible. There was no induction ceremony, no speeches by the presidents of the Bar Associations of New York, Connecticut and Vermont. I simply walked into the chambers of Thomas W. Swan, the new administrative head of the Court, raised my right hand, swore to uphold the Constitution and thus became a full-fledged active member of the Second Circuit. Judge Swan congratulated me, signed a designation order authorizing me as a Circuit Judge to continue the trial in the District Court of the investment bankers' antitrust case, we shook hands, and I walked out. As I am now, at the age of 90, the only survivor of the group of judges who then constituted the Second Circuit, I have been asked to give a brief description of the way the Court functioned at the time of my appointment.

The then active members of the Court were: Thomas W. Swan, Augustus N. Hand, Harrie B. Chase, Charles E. Clark, Jerome N.

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\* Senior Circuit Judge, United States Court of Appeals for the Second Circuit.

Frank and myself. For some years after 1951 the routine then in force continued. The Old Chief had a firm grip on the steering wheel and the procedures followed during his regime were adhered to with little or no deviation.

Each of us active judges usually sat each month, except in the summer, for one whole week, Monday, Tuesday, Wednesday, Thursday and Friday. Except in case of some emergency there was no shifting of the panels from day to day. Visiting judges sitting by designation were few and far between.

We went on the bench cold. That is to say, except in rare cases of interest to the news media, none of us knew in advance anything about the cases to be argued. As far as I am aware, it had never been suggested that we read the briefs and records before hearing the oral arguments. Monday was motion day and we saw none of the motion papers until the Clerk handed each judge his set of the motion papers in particular cases when the motion was called for argument.

At the opening of court the presiding judge called the Day Calendar, and on Mondays the Motion Calendar, and most of the appeals and motions were marked "ready." Court opened at 10:30 A.M. and the recess to the following day was taken at 1:30 P.M. Once in a while counsel was permitted to continue for a few minutes to close his argument. No sessions were continued, after lunch, into the afternoon. The result of this routine was that counsel in two or three of the cases might not be reached for oral argument on Monday. A number of cases for out-of-town lawyers were set down for argument on days certain and these cases were put at the top of the Day Calendar. Accordingly, the lawyers whose cases were not reached on Monday found on the following day that they were not at the top of the Calendar, and once in a while that went on during the whole week and these lawyers' cases were not even reached for argument on Friday.

Decision was reserved in almost every case, even when it was pretty clear that the Court had no jurisdiction to hear the appeal.

When the Court recessed at 1:30 P.M. on Friday, we had lunch and then spent Friday afternoon in the Chambers of the presiding judge deciding the motions on which we had reserved decision. Usually a memorandum deciding the motion was written on the reverse side of the notice of motion or order to show cause and each member of the panel signed or initialled these memoranda.

The most interesting and, I think, the most useful part of our work was the circulation by each member of the panel of a written, tentative, voting memorandum giving the detailed views of each judge with reference to the various points raised in the briefs and

on the oral arguments. As I have been told, this practice was in vogue only in our Court of all the appellate courts in the country. These memoranda were simply wonderful. In this way every judge gave careful consideration to every case and the man assigned to write for the Court or for a majority in a particular case received substantial assistance from each of the other members of the panel.

As regular as clockwork, by the laws of the Medes and the Persians, the members of the panel met on the following Wednesday in the Chambers of the presiding judge for a conference to decide the cases argued during the previous week. In the interval before this conference we were feverishly busy working on our memoranda, which were circulated piecemeal as we got them out. Not surprisingly, the time of the conference arrived on various occasions before the members of the panel had time to prepare and circulate all their memoranda, especially those in cases argued on the previous Friday.

The presiding judge had a schedule of the cases, perhaps 20 more or less, and, after discussion, which was often quite prolonged, the presiding judge marked each case on his schedule as affirmed, reversed, remanded, modified or otherwise disposed of, also noting separate concurrences and dissents. Only then did the presiding judge proceed to assign the writing of the opinions. As the person at the bottom of the totem pole, it was then that I began to learn the facts of life, one of which was that a number of the Friday cases in which there were no memoranda seemed to have a way of gravitating in my direction. Generally each member was assigned to write three full-fledged opinions, often it seemed without much regard to the difficulty and complexity of the various cases, and, to my amazement, no credit was given for dissenting opinions. One man might be writing two or three dissenting opinions and at the same time be given the same number of regular opinions as the other judges on the panel. There were also a number of Per Curiam, and these were written by the presiding judge or separately assigned. Of course, nothing was final until all the tabs were in and the judge writing for the Court or for a majority of the judges then filed the opinion, together with concurrences or dissents.

The meetings of the Judicial Council of the Circuit each month were fairly perfunctory affairs. Discussion was not encouraged. Suggestions were promptly voted on and generally rejected. Nor did we have a single case considered *en banc* as the Old Chief had his reasons for disliking them. The Judicial Conferences each year were far from the social functions they are today. We met in our courtroom, and one or two members of the bar were invited to speak.

Then we went across the street to Caruso's for lunch and the Conference was over.

The rest is history!

*October 18, 1978*