From the Bench

REFLECTIONS ON 21 YEARS BEHIND THE BENCH: AN INTERVIEW WITH MAGISTRATE JUDGE SIDNEY I. SCHENKIER

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The author is a U.S. magistrate judge in the Northern District of Illinois.

Admittedly biased, I believe that U.S. magistrate judges serve a vital role in our federal judicial system. Among their many roles and responsibilities, magistrate judges are frequently tasked to manage the civil discovery process and serve as mediators to help the parties resolve the litigation (often saving the parties, and the court, substantial time and expense). Magistrate judges review and sign search and arrest warrants, preside over initial appearance hearings, and decide whether to detain or release individuals on bond pending trial. Indeed, when all parties consent, magistrate judges step into the shoes of the district court judge and manage the entire litigation. Magistrate judges are a critical part in the efficient administration of justice.

At the young age of 43 (yes, 43 is still young), Sidney I. Schenkier became a magistrate judge for the Northern District of Illinois. Spending more than two decades behind the bench, Judge Schenkier has become one of the most widely respected judges in the Northern District of Illinois, the third-largest federal judicial district, based in Chicago. After he announced his intent to retire in April, it seemed the right time to pay a visit to my former boss and mentor for one last conversation before he hangs up his robes.

Judge Harjani: Let's start off with some background. Can you tell us about your career before you became a judge?

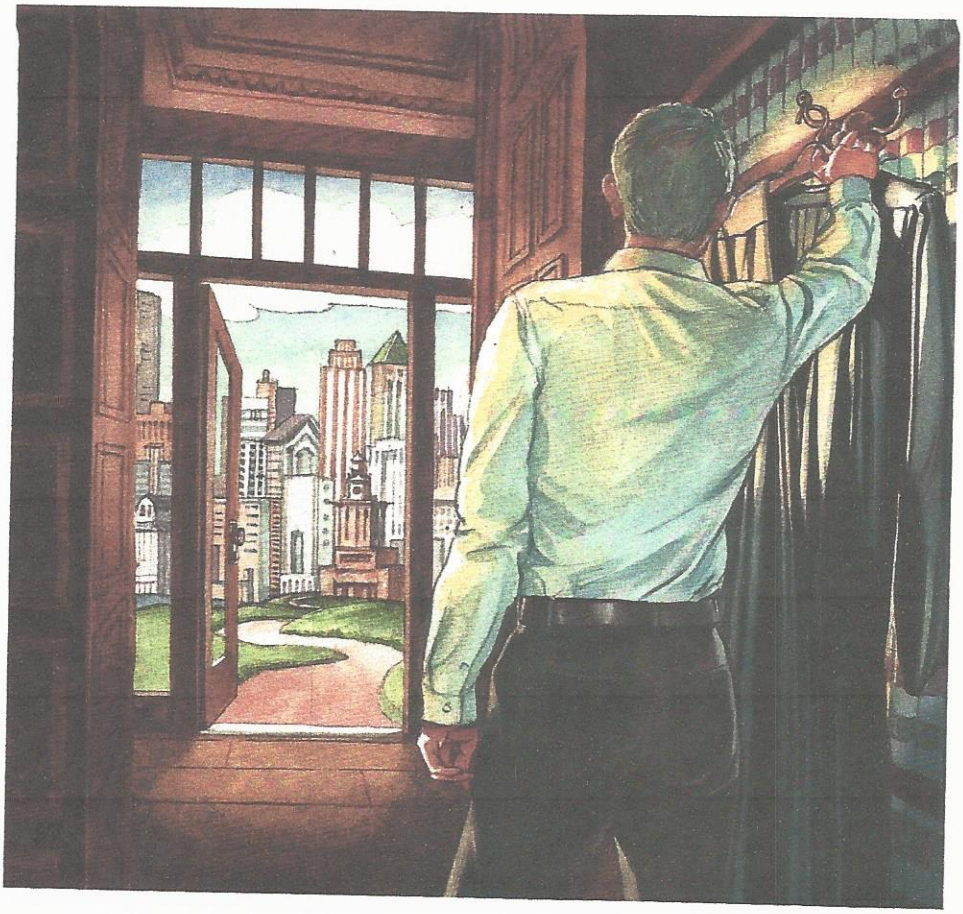
Judge Schenkier: After law school, I clerked for a district judge, Marvin Aspen in Chicago. I was his first law clerk in 1979 and clerked with him for a year. I then went to the University of Chicago and was a Bigelow Fellow teaching first-year students legal writing and argument. After that, in July of 1981, I went to Jenner & Block, a law firm where I had spent the summer before I clerked. I worked there as a lawyer for close to 17 and a half years. I was about as much a generalist as you can be. I did criminal and civil work. I did seven or eight jury trials down at the state criminal court. I also did appeals work. I had three cases in the U.S. Supreme Court, none of which I got to argue, but it was a rewarding experience nonetheless. With respect to the civil practice, I did a lot of employment defense work, but I also did a variety of cases—an architectural malpractice trial, an ERISA fraud trial, a punitive damages trial after a remand. I did trademark cases, patent cases, copyrights, large business disputes. So on reflection, it really was a great kind of training ground for what you do as a judge because judges are really the last bastion of generalists. We're expected to take anything that comes in the door, whatever the subject matter.

Judge Harjani: When do you think you realized that becoming a judge was a career goal for you?

Judge Schenkier: After I clerked, right then, it was something that was attractive to me because I saw what you could do as a judge. I saw how many cases and people's lives you could touch as a judge, and that was very appealing. But I was so young in my career, and in my life, that it was hard to actually envision it. Once I got to my late 30s and early 40s, I had practiced for a number of years, and I had enough experiences in the law and in life that I thought it was something that I could do, and it was something that I wanted to do.

Judge Harjani: So after 21 years, you've now decided to retire. Why?

Judge Schenkier: When I left the practice, I loved what I was doing, but I could envision the day that I might not. Same thing now, I still love what I am doing. But I also could envision the day that I might not. Sixty-five years old is also kind of this nice demarcation. I've got seven grandkids who live in Israel. I have four grandkids in Chicago. So I'll do something, but I'd like to just have a little more time.



Judge Harjani: So let's reflect first on the concept of judging. Do you think that judging is for everyone, or do you believe it takes a certain characteristic or skill set to become an effective judge?

Judge Schenkier: The most important thing is you have to be willing to decide—because nothing happens in most cases unless you're willing to decide. The attorneys are there often because they can't or they won't, and so you must decide. I think that if the decision-making process is so gut-wrenching that every decision is agony, you will never be happy as a judge. And if you're taking a long time to decide things and you're saying, "I should decide that faster, but I really can't," you won't be happy.

Judge Harjani: When you reflect on the judge you were when you started versus the judge you are today, how would you describe the changes that have happened?

Judge Schenkier: In chambers, in terms of how I prepare for things, how I interact with staff, the care that I think we put into the decisions that we issue in writing, I don't think there's any difference. From the beginning and through now, I take a lot of pride in what we issue as a chambers and the written work product, and that will always be the case. In the courtroom, probably in some ways, I'm more patient and, in other ways, I'm less patient. I'm more patient with the frailties of human beings. Not everybody is always going to do what they should do, and I'm a little more understanding of that. On the other hand, I'm far less patient when the attorneys are not putting in any effort. In the dimension of the work that we do on settlement, I'm very different. I've done more than 2,000 settlement conferences. And you just pick up things over time. You learn things about people that you didn't know. You have more tricks of the trade than you had. I'm also a little freer with showing different sides of my personality. Part of that is when you first come on the bench, you're trying to figure out exactly who you are as a judge. And especially if you're younger, there's a tendency maybe to want to be tougher because you don't want anybody to think that you're a soft touch. But over time, I'm much more willing to do unconventional things in settlement conferences, joke around more, get people to laugh, because I think that laughter is humanizing, and it's hard to be a jerk when you're smiling.

Judge Harjani: Can you describe the highest point of your career as a judge?

Judge Schenkier: Something that I felt tremendous satisfaction in was a large class action case that I mediated. We met 50 times over three years. It involved changes in certain institutional practices, so we were bringing in various players from different institutions and walking through that process and working through it. It required figuring out how to take a case where, when the attorneys started, they were barely able to talk to each other, and by the end, they really had great respect for each other and great trust in each other. I felt that that was a significant accomplishment.

Judge Harjani: What was the lowest point of your career as a judge?

Judge Schenkier: The lowest point was when I was on criminal duty, and I granted bond to an individual who wound up going out and killing somebody. So that's a low point, and it certainly made me go back and reflect on the decision and look back at everything. And I have to say that, based on all of the considerations, I would do the same thing today. But, nonetheless, a decision you made put somebody out there who killed somebody. And that's kind of a low feeling. I think a challenge there, which I was very conscious of, was not to let that drive all future decisions. After a while, things recede into the past and you look forward.

Illustration by Bradley Clark

Judge Harjani: Can you think of one case in particular where, now that you think of it, you would have done something differently and why?

Judge Schenkier: This would cover probably several cases, and it speaks to what our role is as a judge: There are cases where I worked very hard when there was an imbalance in the attorneys. One side was clearly outgunned, not because of resources, but because the lawyer was just better. So there were times when I probably worked to level the field. And what I found in the few cases that I can remember where I did that, I regretted it because it just didn't turn out well in the case. It prolonged the case. I don't think it changed the outcome of the case. So the reason I kind of reflect back on that is that, as a general matter, those were exceptions to what I generally view as the trust that I have in the adversarial system. You get an attorney. You work the case. If you don't resolve it, somebody decides the case. That's what our system is. Burden of proof has meaning. If somebody doesn't develop evidence, and they have the burden of proof on that, they lose. If it's because an attorney didn't do the work that he or she should have done, then that's not for me to jump in on or correct. So a couple times when I've maybe tried to, as I say, level the field, I've regretted it.

Judge Harjani: In recent times, people have described judges as umpires. What are your thoughts on that description after 21 years?

Judge Schenkier: I think that the description of judges as umpires who simply call balls and strikes—with apologies to Chief Justice Roberts—is an incomplete description. If what that means is that I have the same strike zone for Sunil that I have for Gabe, that I have for anybody, then I think that that's right. My strike zone should not change and does not change based on, to continue the metaphor, who is in the batter's box. But to say that all umpires have the same strike zone blinks reality. In baseball, no two umpires have the same strike zone. For example, the American League was always considered a high strike zone league; the National League a low strike zone. And even though they all have the same equipment now, it's still the fact that each umpire has a different interpretation of the strike zone. And I think that that's true with judges as well.

Laughter is humanizing, and it's hard to be a jerk when you're smiling.

Judge Harjani: Let's reflect on the Federal Rules of Civil Procedure. After having worked with them for 21 years as a judge, if you could change one rule, what would it be?

Judge Schenkier: A case can be made to take a closer look at summary judgments because I can tell you that when I started in the practice, it was very hard to get summary judgment; and then in 1986, there was the trilogy of the Supreme Court cases that talked about summary judgment in a way that, I think, inspired courts to apply it more often. There is a risk that when you apply summary judgment too broadly, you lose sight of the fact that oftentimes the case looks different on paper than it does in the flesh in the courtroom. So a judge may take the view that the defendant says, "This was my reason for doing something." The plaintiff may not be able to contradict the defendant's sworn testimony about that. The judge may find that's undisputed. But in a courtroom at trial, a jury would be entitled to say to the defendant, "We don't believe you. We think you're being shifty on this." The jury would be perfectly within their rights to find the testimony credible or not. But summary judgment sometimes keeps the jury from having that decision. Now, that doesn't mean that somebody should be able to get to trial without any evidence other than the hope that somebody won't believe the other side. But we may overlook the consequences of granting summary judgment if applied too vigorously.

Judge Harjani: If you could change one criminal rule, which one would that be and why?

Judge Schenkier: It's not a procedural rule, but a closer look at the issues of bond in criminal cases would be worthwhile because there are a lot of detentions of criminal defendants. Even though the Bail Reform Act says—and the case law supports this—that detention is supposed to be extraordinary and not the rule, I think in our jurisdiction, about 50 percent of the defendants are detained. It's hard to say this is exceptional. So I think it's worth thinking about why is that. We also see in our cases, where we allow people out on bond, that there are very few revocations. I think the incidence of someone fleeing or not appearing in court is at or under 1 percent. You don't have new criminal activity being a significant basis for revocation of bond. So, certainly, it's hard to say that we're over-releasing on bond at that 50 percent mark.

Judge Harjani: You have done over 2,000 settlement conferences. When are you impressed by an attorney in a settlement conference?

Judge Schenkier: Preparation. That the attorney truly understands the case, understands the evidence, understands the law, understands the issues, not simply from their perspective, but from the other side's perspective. What impresses me is a willingness, not necessarily in a group session but when you privately caucus, to candidly discuss where the bones are buried, i.e., where there are problems. What impresses me is when a lawyer has prepared the client to understand where

there are difficulties in the case, and he or she has prepared the client psychologically to hear about that at the settlement conference.

Judge Harjani: What do you say to lawyers who feel like admitting weaknesses in front of their clients in a settlement conference is taboo?

Judge Schenkier: Well, I don't think it helps the process. At the same time, I have to accept that not every attorney-client relationship is the same. There are some attorney-client relationships where it's such that the attorney can have a candid conversation with the client. There are times when the client may not tolerate that—that the client may simply want a warrior. I wish that weren't the case. But I recognize that it is going to be the case, more often than maybe I would like, and so I accept that and I'll work with that.

Judge Harjani: As a judge when you walk into a settlement conference or mediation, what is your mindset?

Judge Schenkier: I would say that I have two principal goals. First, to try to get the parties to resolution. Second, if that is not going to happen, I don't want anybody to leave the conference without having some better knowledge of at least what one impartial person without a horse in the race thinks about their respective positions—what their risks are and what are the costs of going forward—so that if they go forward, they do that with eyes wide open.

Judge Harjani: Trials have declined in civil cases over the course of your career. There's certainly a view that now litigation is essentially a way for the parties to exchange information in order to resolve it through a settlement. Do you agree with that view?

Judge Schenkier: No. If that's all litigation is, then we're doing this all wrong. If the litigation process is viewed simply as a means of exchanging information, we've made it a far too cumbersome and expensive way of doing it. I think that there's a school of thought that we've done that anyway even if the goal at the end is to decide the case on the merits, whether it's through summary judgment or trial. If you look over the last 35 years, what the rule changes have consistently attempted to do is constrain the scope of discovery with the goal of decreasing the costs. But I don't think that the trial is dead. I think in certain kinds of cases, there are very few trials. Other types of cases, there are a fair number of trials. I think that the decrease in the number of trials does have an effect on the litigation process because what happens is that when you don't go to trial, that side of you as an attorney and that side of the client willing to go to trial atrophies; people start to be afraid of a trial. And, when you don't try cases, I think that that trickles down into how you view the discovery process. I see plenty of instances where I have a discovery dispute and I ask somebody, "Can you tell me how the discovery you want relates to an element of your claim?" It's clear from the look I'm getting back that if I asked them to recite the elements of the claim, they could not do that. If you're thinking about trying a case, you can't do that unless you understand the elements of the claim. So I think that does have a ripple effect on the discovery process.

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Judge Harjani: Among the things you've done off the bench while a judge, what has given you the most satisfaction?

Judge Schenkier: I'm going to give you three things. One is simply my colleagues. When you come over to the court, there's a thought on the outside that you're going to have this monastic experience. It couldn't be farther from the truth. Magistrate judges are a very tight, collegial group of people.

Another is the reentry court that a number of the judges, with the Probation Office, the U.S. Attorney's Office, and the Federal Defenders, use to oversee people coming off of federal prison sentences to try to help them reenter society and to be productive, all to avoid going back to prison. It's exhilarating when you're able to help somebody and they really move forward in a way that even they couldn't have imagined when they started.

Third, the term I served as president of the Federal Magistrate Judges Association. The FMJA has a 95-plus percent membership rate of all the magistrate judges across the country. We have more than 700 members. And then that led to now me being, for the last four years, on the magistrate judge committee of the Judicial Conference of the United States, which involves reviewing the magistrate judge system across the country and in every district—what's the correct complement of magistrate judge positions, should positions be filled, new ones created, recalled judges brought on, and dealing generally with overarching policy issues regarding the magistrate judge system.

Judge Harjani: When you see young lawyers today, is there anything that concerns you?

Judge Schenkier: Well, I am concerned about the level of experience that young attorneys get in the courtroom before judges. In many instances, young attorneys are not coming in on matters even when they're kind of routine matters, or they're coming with more senior people who are doing all the talking, including introducing the person. And that's a real problem. I don't want to speak too much about the law firm economics or client relationships, but in terms of marketing young attorneys, the more experience they have in varied ways, the better you are able to market them. It also has an effect on people's enjoyment of the practice. I know that there are efforts by some judges to encourage people to have young attorneys do more talking in court.

Judge Harjani: When you look at young lawyers today and you talk to them, in and out of court, what gives you hope?

Judge Schenkier: One of the things that gives me hope is that they're there; that we are still a profession that people want to get into, and the infusion of young lawyers is really the lifeblood, ultimately, of the system.

Judge Harjani: From your vantage point as a judge, what is the hallmark of a really excellent attorney?

Judge Schenkier: I'd say that one of the things that is a hallmark of a really outstanding attorney is to have a 360-degree view of the case—not just the particular dispute, but how that fits into the whole case. That leads to an ability to know where you can compromise, where you can't compromise, when you need to actually have a ruling. What are the ramifications, and how is that going to play out later? Playing the tape all the way through to the end. That is the product of preparedness. It is the product of hard work. But it's also the product of having a mindset that goes beyond the particular moment and looks at something more broadly. That is something that I think separates really outstanding attorneys from people who are fine attorneys.

Judge Harjani: Reflecting on your career as a judge and as a lawyer, what do you think is the single biggest issue facing the practice of litigation today?

Judge Schenkier: The cost structure of litigation is an enormous challenge. You look at the changes in the rules and they are all driven, over the last 35 years, to narrowing discovery because the cost of it has become too high. The cost structure, however, also has an impact on what the experiences are that young attorneys get and the development of young attorneys and their satisfaction in the work.

Judge Harjani: On to our finale. We are now going into a lightning round, which consists of short questions, short answers. First question. A word or words that many litigators use that you dislike?

Judge Schenkier: "With all due respect."

Judge Harjani: Word or words that litigators use that you like?

Judge Schenkier: "Yes." "No." "I don't know."

Judge Harjani: Body language that you see in court that you dislike?

Judge Schenkier: Dismissive gestures or frowning or rolling eyes up to the ceiling when the opposing counsel is arguing a point.

Judge Harjani: Body language you see in court that you like or appreciate?

Judge Schenkier: Where the attorney shows that he or she respects the opponent and is showing that respect by the way that he or she is paying attention and listening to what the opponent says.

Judge Harjani: Most overused word in a brief?

Judge Schenkier: "Clearly."

Judge Harjani: Most underused word or item in a brief?

Judge Schenkier: Understanding and playing to your strengths. When you read an ineffective argument, it makes you wonder about the strength of the other arguments that are made.

Judge Harjani: Complete the sentence: I wish lawyers would say this more often. . . .

Judge Schenkier: "I reached out to the other side before filing this motion and we had a really thorough discussion and narrowed the issue, but there is this one issue that we just could not come to agreement on and we'd like to present it to you."

Judge Harjani: Things that lawyers say in court all the time that you wish they didn't?

Judge Schenkier: "I'm here in good faith."

Judge Harjani: Favorite technique that you use to defuse tension in the courtroom?

Judge Schenkier: Make a joke.

Judge Harjani: Least effective technique in the courtroom for defusing tension for a judge?

Judge Schenkier: Raising your voice.

Judge Harjani: Final question. When lawyers remember you as a judge, what words do you hope they would use?

Judge Schenkier: We're all transient. We occupy a role. When we leave, someone else occupies the role, and then the focus really should be on the present and not on the past in that respect. But I would hope that when people would look back, the words that they would use would be that he was not afraid to decide, that he was fair, that he was prepared, and that he was hardworking. I could live with that. I would also like them to say that they thought he was actually funny even though he was a judge. ■