

2021

## Tribute to Judge Duffy | A View From Below

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### Recommended Citation

Denis J. McInerney, *Tribute to Judge Duffy | A View From Below*, 90 Fordham L. Rev. 75 (2021).

Available at: <https://ir.lawnet.fordham.edu/flo/vol90/iss1/12>

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## A VIEW FROM BELOW

*Denis J. McInerney\**

It is only natural that different people (clerks, colleagues, court reporters, lawyers, marshals, parties, et cetera) saw KTD differently (as a humorist, a “no nonsense” judge, a loyal friend, an iconoclast, an enigma, et cetera). I am deeply honored, as one of the Judge’s sons-at-law, to offer just a glimpse into what it was like to be within his orbit with a few illustrations of his unique manner and mind.

### *The Interview*

Although it was thirty-nine years ago, I still clearly remember the day I interviewed with the Judge to be one of his clerks. Already nervous, I knocked on the door to his chambers and was greeted by Ida, KTD’s beloved and long-time secretary. That did not help my anxiety. After escorting me to a seat by her desk, Ida left to see the Judge. When she returned a few minutes later, I quickly learned that Ida wasn’t one to mince words. While shaking her head as she walked past me, she trumpeted to the clerks in the next room (and I’m quoting her verbatim here): “Boy, did that turkey just blow it!” When I asked what she was referring to, Ida explained that she was talking about another clerk applicant who had just interviewed with the Judge. After swallowing the last of my saliva, I stuttered, “how did he blow it?” Just as Ida was about to respond, her phone buzzed. It was the Judge. He was ready to see me. Now.

Trying desperately to absorb the untaught lesson I had just experienced, I tottered to the Judge’s side. Upon entering his room, I could barely see the Judge through the thick cloud of cigar smoke that surrounded his desk. His first words to me were “Hello Denis.” Those were also the last words I was sure I understood because as I was sitting down, the Judge turned on his air conditioner—full blast. The stark combination of this thunderous air conditioner (which must have been run by a used Concorde engine) and the Judge’s barely audible whisper—which was in equal parts Latin, Spanish, Hebrew, and English—turned the ensuing hour into a crash course in lip reading. Somehow, I mustered through the experience and got the job.

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\* Counsel, Davis Polk & Wardwell LLP; clerk to Judge Kevin Thomas Duffy from 1984–1986.

*The Vivid Teacher*

As part of our training, Judge Duffy gave his law clerks the first shot at drafting decisions. 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 days researching every case on the subject, double-checking everything on Westlaw, and carefully composing each line of the draft with the precision of a brain surgeon. Eventually I proudly handed to the Judge what I considered to be a twenty-seven page masterpiece. Without a word, the Judge took my masterpiece to his room. I anxiously awaited his verdict. Two minutes later, he returned to my desk. Again without uttering a single word, he placed the notice of motion in my hand, placed my masterpiece in the wastebasket, and silently went back to his room. Devastated, I asked my co-clerk what this meant. She took the notice of motion, turned it over and read it to me: "Motion granted. So Ordered." Thus began my apprenticeship in the art of brevity.

*The Careful Wordsmith (Most of the Time)*

One of the most enjoyable aspects of clerking for the Judge was having the opportunity to go to court and observe the standards to which he held himself and others. I was particularly struck by how careful he was about what he and counsel were allowed to say and not say to juries. In *United States v. Castellano*, for example, he had given repeated instructions to the government and defense attorneys that expressions such as "mafia," "the Family," "La Cosa Nostra," et cetera, could never, under any circumstances, be used in front of the anonymous jury in that case. However, in discharging the jury one day during the lengthy jury selection process, even the Judge demonstrated that he was human:

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.<sup>1</sup>

Needless to say, on more than a couple of occasions when the Judge was upset with an attorney who had misspoken in front of a jury, we enjoyed reminding him that sometimes these things happen—even to KTD.

*The Candid Jurist*

Judge Duffy was never reluctant to speak his mind. He was, in a word, direct. John Spurdis, once a witness in a suppression hearing before the

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1. Transcript of Jury Selection at 822, *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985) (on file with author).

Judge, became painfully aware of this fact. What follows is the opening of the Judge's opinion denying the suppression 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 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.<sup>2</sup>

#### *The Imaginative Psychologist*

In 1985, 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 her supporters, reporters, and many others. Ms. Buck limped into the courtroom—she had earlier unintentionally 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 the Judge's options were: order Ms. Buck to turn around and, upon her almost certain non-compliance, 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 for 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 what he was doing without facing him and looking closely at his lips in complete silence. Within less than a minute, 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 remainder of the proceeding.

#### *The Innovator*

From his very first day on the federal bench, KTD challenged the status quo. At his first sentencing of a criminal defendant, Judge Duffy confronted

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2. *United States v. Tramunti*, 377 F. Supp. 1, 12 (S.D.N.Y. 1974).

the system. Before imposing sentence, he asked defense counsel if he had seen the pre-sentence report. Counsel responded that he had not, explaining that parties have never been permitted to see pre-sentence reports. After the Assistant U.S. 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 was later mandated by the Federal Rules of Criminal Procedure.

#### *The Public Defender*

Prior to ascending to the bench, Judge Duffy was the head of the New York Regional Office of the Securities and Exchange Commission from 1969 through 1972. In 1969, as one of his first acts on the job, he sent a twenty-eight page letter to SEC Chairman Hamer H. Budge detailing the need for protecting customers of brokerage firms from losses resulting from the increasing number of such firms going into bankruptcy—which in turn was causing a public crisis of confidence in Wall Street. He was a pioneer in recognizing and campaigning for this much-needed customer protection. Within approximately one year, the Securities Investor Protection Act<sup>3</sup> was passed and the Securities Investor Protection Corporation was created.<sup>4</sup> 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, the Honorable Henry F. Werker, was stricken with cancer. Without any hesitation, KTD 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 never sought any recognition for such innumerable acts of loyalty and friendship, of which this is just one example. He instead simply concerned himself with how he could make things better for those close to him, which he did in countless and immeasurable ways throughout his life.

#### *The Paterfamilias*

In his forty-four years on the bench, Judge Duffy employed sixty-five law clerks. However, he was always far more than an employer. He made it his business to develop close personal friendships with each of us, and he continued to nurture what became life-long friendships by regularly cheering us on in our lives and getting together with us long after we handed him our last draft opinion. As just one example of the Judge's steadfast and loving interest in us years after our clerkships, below is an order he issued the day

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3. Pub. L. 91-598, 84 Stat. 1636 (1970) (codified as amended at 15 U.S.C. §§ 78aaa–78lll).

4. See 15 U.S.C. § 78ccc.

after my daughter Sarahlynn was born (in a case he captioned *United States of America v. Denis J. McInerney*):

It is hereby

FOUND that Sarahlynn McInerney, a/k/a “Baby Face,” entered the world on May 18, 1992, at 6:26 p.m., weighing 7 pounds and 5 ounces, bearing strawberry blonde hair and permitting her mother, Deborah Bers, a co-conspirator, a short delivery; and

It is hereby

ORDERED that Sarahlynn McInerney, a/k/a “Baby Face,” her mother Deborah Bers, her sister Lia, and her father DENIS J. McINERNEY, the defendant, will be happy, healthy and awake for many nights to come; and it is further

ORDERED that the defendant will bear all costs.

As part of his extended family, I was extraordinarily fortunate to have been one of the many recipients of KTD’s kindness, friendship, and wisdom over the years. I will be forever grateful to have had the privilege of being included in his family at law.