JUDGE GERALD B. TJOFLAT ORAL HISTORY PROJECT

Professor Nathan Chapman Interview

Recorded December 3, 2021

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Interview Transcript

Judge Gerald B. Tjoflat: Well, I'm joined today with Nathan Chapman, Professor Nathan Chapman, tenured professor at the University of Georgia Law School. And who clerked for me in 2007 - 2008 and who is Duke Law graduate. Good afternoon.

Nathan Chapman: Good afternoon, Judge. It's great to be with you. I'm looking forward to our conversation today. I understand we're going to focus today on litigation tactics and ethics in the bar over the course of your entire career, including beginning before you went to the bench. So, if you could start off by describing the kind of relationship that existed between opposing counsel, the standards of ethics, how criminal practice worked, those sorts of things when you entered the bar in Florida?

Judge Gerald B. Tjoflat: The bar was shaped like a very narrow pyramid in the sense that the law firms were shaped that way. And the newcomers had a lot of experience to look forward to in the senior lawyers in the firm. And as time went on, and we'll discuss this later on, especially beginning and during the litigation explosion. It started in the mid-seventies, the pyramids started flattening out. So, there was much less mentoring and examples set by senior lawyers for junior lawyers. So when I came to the bar you did what you were taught, and one of the things you were taught was to be very courteous to other lawyers, because the bar was not that big. Jacksonville's bar back then was about 350, I suppose. Maybe a little less at any rate.

And so things were done by handshake. Nobody ever took a default against an opposing lawyer for not answering a complaint or not complying with discovery or doing this, that, or the other thing. No such thing as a default. And that culture lasted, I'd say, probably into the early seventies. Anyway, you didn't even write a letter to confirm an agreement. Give me another 10 days to answer a complaint or file a motion or something like that. So that was by and large the way the bar operated in the civil litigation arena. If we go into the criminal litigation arena,

when I came, and that was before Gideon. And so we didn't have public defenders and indigent defendants were not entitled to counsel in state cases except in capital cases.

In federal court though, they were entitled to counsel. And so Judge Simpson, who was the only judge in Jacksonville at the time I came, he would call you up and he'd say, “Jerry, you've got to be here next Friday.” So, Friday would be arraignment day, and you'd show up for arraignments, maybe 20 people were being arraigned for offenses. And maybe three lawyers like myself were there representing them pro bono. You operated out of your own pocket. There was no pay. You paid your own expenses. The only thing the government paid would be the cost of serving, summons, subpoenas, things that. That was just part of the responsibility of members of the bar. And that's how I got acquainted with the criminal justice system and to the bar. Prior to going to the bench, it was all pro bono work for no compensation, basically.

Okay. So now in 1968, when I came to the state bench the one thing I said to myself is, I'm not going to try cases for the lawyers. They're going to handle their own cases. Sometimes judges have a hard time staying out of the case. I think I was able to stay out because I remembered trying cases before judges who did want to get out of the case and that not very good. In Florida, in criminal cases they had discovery. Florida was sort of a radical state at that point in time where defendants’ lawyers could take depositions of state witnesses. The prosecutors could depose witnesses too. So, a criminal case was almost like a civil case. This was by statute and by criminal rule.

And so, of course, civil cases were tried as they always had been. So, in 1970, when I came to the federal bench, I was indoctrinated with how cases were tried on the criminal docket. Of course, I had represented defendants in federal criminal cases during the sixties. There was no discovery back then. The developing constitutional rules of procedure started providing defense counsel access to some evidence. Early on, there was no discovery in criminal cases in federal court, except what was required by the Constitution. I remember the first case I tried a federal judge. It lasted three days. It was in Orlando. It was a case brought under section 1955 of Title 18, an organized gambling prosecution.

It probably had six or seven defendants. And the only discovery basically that was provided in the federal realm was pursuant to the Jencks Act. If the government had a statement of a witness, at the conclusion of direct examination the government would have to turn the statement over to defense counsel. So here I am in Orlando, and the first witness took two hours. The witness had given the government a long statement. At conclusion of the direct examination, defense counsel asked for the statement. I took a recess to allow defense counsel to prepare for cross-examination. I read the statement of several pages. Before noon, I had made up my mind. We were not going to do that anymore. So, I got the prosecutor and the defense counsel around the bench, and I said to Kendall Wherry, the prosecutor. I said, “Kendall, we're not going to do this anymore. What we're going to do is you're going to give all of your statements to defense counsel the day before the witness is going to testify. Because otherwise,” "Oh, judge, but you can't do that. That's against the law. I don't have to give the statements over until after the witness has testified. That's, that's what the law says. That's the

Jencks Act judge." I said, “I understand. Here are the alternatives. If I'm going to stick with the Jencks Act, after the witness has testified, I will take a recess, and I will tell the jury, explain to the jury why we're having a recess. It's because the defense counsel is entitled to a statement that the witness has given to the government. The defense counsel hasn’t seen the statement. They need time to prepare. So, after every witness we’ll take a recess.” After lunch, he decided we wouldn't do that anymore. So, from then on, I tried criminal cases as a district judge like they were civil cases.

There was a new judge seminar at the Federal Judicial Center in Washington in March 1971, and the deans of the federal judiciary were there, really experienced district judges. There were probably 25 of us there who had been appointed over the previous 18 months. And I learned about a hearing that a judge in San Diego had been conducting. He called it an Omnibus Hearing where he tried cases like they were civil cases. So, I made an inquiry as to how and what he was doing. What he had was an order called an Omnibus Order, and it had a bunch of empty boxes in which you could put check marks.

There was a box for every conceivable motion. A defense lawyer could check the motions needed. It was difficult for the lawyer to be ineffective, because everything he had to do was right there on a piece of paper. Then, the order had a provision for listing witnesses and exhibits. And so I said to myself, we ought to do that in Jacksonville. So, when I got back from Washington, I got together with my two colleagues in Jacksonville, and with the U.S. attorney and with some defense lawyers. The U.S. attorney privately said, “Judge, you know, we don't have to do that. We don't have to tell anybody who our witness are unless the Constitution requires it.” I said, “I know that, but we can try cases more efficiently and have less error. We do it this way.” So, the prosecutor here---there were about five people at the prosecutor's office — and the defense bar, they agreed to this.

We tried criminal cases in the Jacksonville Division like civil cases with a pretrial stipulation in the form of this Omnibus Order. And so we start off that way.

Then John Briggs, the U.S. attorney in the Middle District of Florida, happened to be here, and he said “Judge, we've got to go down to Orlando or Tampa. We have got to go to Tampa,” where there were three prosecutors, “and equate them with this idea, which I think was going to be pretty good.” So, we flew down there to Tampa one day, say in April, 1971. He and another fellow owned an airplane, a 1940 Stinson that had a wing over the top. And so he said, “we'll fly down on my plane.” So I took Harvey Schlesinger, who now is a retired federal district judge and was then a prosecutor, and Joseph Hatchett, who had been a federal prosecutor and was now the first magistrate we had in Jacksonville, with me, and they were in the backseat. We flew to Tampa and acquainted the lawyers and the prosecutors down there with this new way of trying criminal cases. And then we flew back. Well, John Briggs was a former Navy pilot. He had flown everywhere in all kinds of aircraft. And he checked the Stinson at the Davis Island airfield, where we flew into, and it was all right. So off we went for Jacksonville. We're flying at about 8,000 feet. We're north of Orlando over a bunch of orange groves. And all of a sudden, the windshield of the airplane is covered with oil. The oil line is broken and the oil's going

everywhere. And the plane is shaking as the propeller is beginning to freeze. The propeller is grinding slowly, and Briggs is hollering mayday to the St. Pete Tower, and the two guys in the back of the plane are waking up, and he's telling me to look for a road or highway or something we can land on. And I said, “John, there's nothing but orange groves.” But then all of a sudden, there was a landing strip in an orange grove. And so from about 7,500 feet, we came east, went over some high tension wires, and he made a perfect three point landing on this little landing strip in the orange grove. And so that is how the Omnibus Hearing was launched.

Well, that was the beginning. The director of the Federal Judicial Center at that time was Judge Alfred P. Murrah, who was a giant of a judge. He had been chief judge of the 10th Circuit. He'd been appointed a district court at age 33 or so in Oklahoma. He'd been on a 10th circuit for a long time. He was now about 68 years old, had taken senior status. He had sat on most federal courts in the United States at one time or another. He had replaced Justice Tom Clark, who was the first director of the Federal Judicial Center. Justice Clark, stepped down from the Supreme Court in 1967 because his son Ramsey Clark had become Attorney General. And then he became the first director of the Federal Judicial Center. So, at any rate, I had been introduced to Judge Murrah by Judge Warren Jones of the Fifth Circuit. He was my Godfather, as it were. And because Warren Jones had sat with the 10th Circuit and with Judge Murrah. Judge Murrah sort of took me under his wing, as it were, as a young judge. And so I told him about the Omnibus Hearing and how we were doing it.

I'll give you an example of the power of that procedure. We had an indictment of about 55 men in an organized crime gambling enterprise. There had been a lot of wiretaps and statements given by witnesses. The FBI had tapped a lot of phones over a long period of time. And so the defense counsel and the prosecution decided to use the an Omnibus Hearing procedure. I'm at a convention in Savannah while this is happening. The prosecution goes to the courtroom and stacks up on the courtroom tables all of the recordings of all the telephone conversations that were tapped. They have had all of the taped conversations typed up. They had statements of the witnesses. The prosecution sold copies of the conversations and statements to the defense council. So, defense council had everything the government had. The only thing they didn’t have was the testimony the witnesses would actually be giving, but they knew who they were going to be because they had their statements. Fifty-two or three of those defendants pled guilty. And I tried the two or three who remained. So that was Exhibit A of what could be done with an Omnibus proceeding.

And Judge Murrah thought that was the greatest thing in the world. And he said, “we’ve got to go over and visit the number two man in the criminal division of the Department of Justice, Henry, I forget his last name. But anyway, he was a career man. So, we went over there, and Judge Murrah pitched the Omnibus Hearing. And of course, the department's position was that the U.S. Attorneys in the 94 districts were not going to like it because if they had to disclose the identity of witnesses, they might be threatened and might be killed. So, they said no. The Omnibus Hearing was too risky.

Well, then Judge Murrah introduced me to Justice Clark, who now was the chair of the ABA Committee on the Implementation of the Standards for Criminal Justice. And I became vice chair of that committee and went around the country six or seven places in programs involving the standards, which went from the police function all the way through to the parole function, through discovery and the trial of criminal cases. So, my part was discovery, which was basically on the Omnibus Hearing. And so we presented these standards to judges in lots of states, especially the judges that had aa rule making function. Sometimes we made the presentation to the legislature's judiciary committee because they had power to promulgate rules. And so anyway that that took up four or five years, my part of it.

But now I go to the Fifth Circuit.

Nathan Chapman: Well, before we do, I wonder do you have a sense of how many of those states, either the states or the federal courts within them, adopted the Omnibus Hearing as a procedure?

Judge Gerald B. Tjoflat: I don't know of any.

Nathan Chapman: Don't know of any?

Judge Gerald B. Tjoflat: Well, what is required is, first of all, the prosecution has to have confidence in the defense bar. They don't want their witnesses known until the last minute because, in some cases, the witness may be in danger.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: And so you have to have a bar, which is very cordial and has a lot of interaction. Then you have to have judges who, in a case where there's a very delicate witness, will write the Omnibus Order in a way that protects the witness. For example, the witness will be available for an interview the afternoon before the witness is going to be testifying. And the judge would do that or make the witness available at the courthouse in a room where counsel can question the witness, and so forth. But I think the Omnibus procedure was just kind of unique. I don't know, of course, in this day and age, with a great amount of hostility in the bar, basically, I think that it is beyond reach, except that it can be done, I'm convinced in some areas where you have a highly ethical prosecution and defense bar and judges who could bring the idea to the criminal justice system.

Nathan Chapman: Did the court of appeals have any problems with the Omnibus Hearing approach? Or did they like it?

Judge Gerald B. Tjoflat: Yes they did, because criminal cases came to the court almost error free. I mean, the errors that would occur would be errors that occur at trial, but nothing before

trial. And the number of claims that the defense lawyer was ineffective. The lawyer didn't do this. They didn't do that. The claims all but vanished because the Omnibus procedure drew out of the lawyer all the objections he could possibly want to make prior to trial.

Nathan Chapman: Yeah, it makes sense. Good. So, from there, you went to well, let's talk about civil cases. Maybe before you, we talk about heading to the court of appeals, unless you want to talk about them in the context of the Court of Appeals?

Judge Gerald B. Tjoflat: Well, I would say a word before we get to the Court of Appeals on the civil side. While I was on the district court, we never had discovery disputes, for example. And why didn't we ever have discovery disputes? The reason we didn't have discovery disputes, and I speak for a lot of judges who served back then, is that the district judges handled the cases, managed the cases very carefully themselves. So, if you had pleadings in a case that you couldn't make heads or tails out of, you would just bring the lawyers into the chambers and you'd say to the plaintiff's lawyer, "John, I don't understand what you're alleging here. Tell me more about your case." So, you turn the defendant's lawyer and say the same thing about the defense. This is squeezing the case down, as it were, and making it simple. And this eliminates the possibility of discovery disputes because you know what's relevant. The problem with loose pleadings is that you don't quite know what's relevant. Almost anything can be relevant. And so it was because the judges handled their own work, as it were, and did not want to see discovery disputes that they managed cases in a way that made them fairly simple and narrowed the factual disputes to a minimum.

Nathan Chapman: Right. Probably reduced fishing expeditions quite a lot. I said that probably reduced fishing expeditions quite a lot.

Judge Gerald B. Tjoflat: Yes.

Nathan Chapman: Yeah. Okay. What about, I mean assume were, was Rule 11 something that you had to employ an awful lot at a district court level?

Judge Gerald B. Tjoflat: Well, Rule 11 was not changed from its original writing until 1983. That's 40, 44 or 45 years after the rules were opted. And the reason why it was not changed, tinkered with basically, I think, is because for a long time the bar was small and it was collegial. I'll give you an example. As a result of this Omnibus Hearing project, Chief Justice Burger assigned me to sit in Boston on a criminal docket for about two months in 1972. They were short of judges there. And I went there for two purposes. One was to try cases, and another one was to introduce the Boston lawyers, especially in the prosecutor's office, to the Omnibus Hearing. So, at nighttime we would sometimes have dinner and talk about all these things, and I would meet with the lawyers.

But one thing that I noticed about the bar in Boston, it was a very close bar. It was almost like the Jacksonville, Florida bar, although Boston looked much larger, but the lawyers all knew each other, and they had respect for one another back then. And so that's, let's go back over to the civil side, I would say until the pyramids started flattening in the late seventies, there was not much need to invoke Rule 11. Lawyers did not like to invoke the rule against each other for obvious reasons, because they had to deal with each other. They still had the handshake deal where you could talk on the telephone and make binding deals without even having to write a confirming letter. There was no behavior that would generate a Rule 11 proceeding. So now what happened after the mid-seventies with the pyramid flattened, you have a lot of younger lawyers who don't have any mentoring to amount much.

And then you start having poor pleadings, a lot of it simply because of a lack of ability and a lack of experience on the part of the lawyers. And you have more and more Rule 11 situations arising so that by 1983 when the Rule was first amended, the first amendment of any kind to Rule 11, the judiciary and the bar basically thought something had to be done because there were too many violations, too many lawsuits brought for an improper purpose or defenses raised for an improper purpose, all in violation of the rule. So, a combination of the flattening of the pyramid, the enlargement of the bar, the lack of training for the new lawyers coming in--- the higher, the older echelon, they were the same. They were still collegial, but the further you got down into the bar that that was not the case.

And of course, we lost a lot of district judges during the seventies, especially by 1980 because of failure of Congress to increase the salaries of Article III judges. There were no increases between 1970 in 1980. And during the last four years of President Carter's administration, we had interest rates going up as high as 20%. And we had inflation as high as 15%. And so we lost the cream of the crop of the district court bench. And so we bring in new judges. Now, where are they going to come from? They're probably going to come from the prosecutor's offices because the prosecutors will get a little tiny bit of a pay raise. Because their pay can't exceed the judges, so they'll get a little pay raise. But a lot of these prosecutors had never seen a civil case of any kind. They knew nothing at all about civil pleadings. And so they had less ability to squeeze the case down as we did in the olden days. So, you have a bar which is less knowledgeable, less ethical, and they don’t know what they are doing a lot of times. And then on top of that, you have judges who didn't have a lot of expertise in managing that kind of law practice. That brought on the amendments in 1983 of Rule 11.

Nathan Chapman: Got it. That makes a lot of sense. Well, we're sort of beginning the transition to your time on the appellate bench. Why do you think the judges in the, since 1983, the amendment of Rule 11, do you think judges have been too reluctant to impose sanctions? Or have they been about right?

Judge Gerald B. Tjoflat: I think judges were reluctant to impose sanctions, and part of that was all the uncertainty. In a way, we judges are partly to blame. When you have unruly pleadings,

which are not corrected, where the judge doesn't draw the parties in and make them replead the case so they can make it simple, the judge is essentially giving his or her imprimatur to that. And so the judge is partly to blame. And so that's my thought, the judges were reluctant to do it.

Nathan Chapman: So let's talk a little bit about the specifics of the pleading practice. I know that something you've written a lot about in your opinions are what you call shotgun pleadings in civil cases. would you like to describe shotgun pleadings for us? And then we can maybe talk about their ills.

Judge Gerald B. Tjoflat: I sent you a complaint and an answer.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: In a case that was litigated in Alabama in Birmingham, a classic shotgun complaint and shotgun answer. A discrimination in employment case. It had seven counts, seven individual claims. Count two incorporated count one, and count three incorporated counts one and two. So, when you get to count seven, count seven now consists of seven claims. And you can't figure out which facts applied to which count or claim.

Nathan Chapman: Reading the complaint, the facts, there were only about 10 paragraphs of facts.

Judge Gerald B. Tjoflat: The lawyer that filed that complaint, she had been a member of the bar for 34 years, and she had Martindale Hubble rating of AV. Now, that's the highest. The defense counsel had been practicing 31 years, and he had an AV rating. And the answer he filed contained, I think, 32 affirmative defenses. Each of one line, you imagine a one-line affirmative defense, and they applied indiscriminately to the seven counts. Now they have a discovery plan. If you can imagine under Rule 26(f), they get together and have a discovery plan and the discovery plan is as wide as the sea and almost anything is admissible. You have all kinds of discovery disputes. And so, what happens ultimately in that case is a motion for summary judgment is filed.

The district judge took this mess. And in deciding the summary judgment, he never once mentioned any of the 32 affirmative defenses. They just went by the boards, and he never mentioned any of the seven counts. Rather, the judge simply reformed the plaintiff's case factually and then disposed of part of it and sent part to the jury for a trial. So, what's happened is that the court itself is approving of this method of pleading and a violation of all the rules. For example, what had happened is the pleadings got amended without a Rule 15 motion for leave to amend.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: Rule 15 is just cut out of the books and thrown in the trash can.

Nathan Chapman: So, you mean it's amended by the way that the court reformulates the case for summary judgment?

Judge Gerald B. Tjoflat: Well, because the party's reform it, the party's during discovery, and they file their motions for summary judgment. So, the plaintiff says, here is my case. All the plaintiff does is describe a factual scenario. So, the plaintiff is basically amending the complaint, dropping two or three or four claims. But the scenario doesn't fit any of the counts. And so the defense comes in with a memorandum and its opposition to the plaintiff's facts.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: A factual memorandum. It says, I disagree with your factual presentation. It never says anything at all about its defenses. So, what's happened is the defendant has violated Rule 11 by incorporating 32 affirmed defenses in an answer, which will never be considered by anybody, except it takes a time. It takes up space and it creates an administrative problem. And the plaintiff files this complaint that can't withstand any kind of scrutiny under Rule 8. So, the court, accepting all of that, throws the case out, grants summary judgment. So, now the case comes to us, and here's the problem we face. We are unable to deal with the parties' disregard of the rules in drafting their pleadings. Why? Because the district judge never mentioned any of the affirmative defenses and any of the claims by count and the briefs don't either. We can't review or say anything really about these pleadings---I call them fraudulent pleadings—because they're not before us.

Nathan Chapman: So, I want to talk about—

Judge Gerald B. Tjoflat:

I mean think about that.

Nathan Chapman: I know—

Judge Gerald B. Tjoflat: Create a system in which the district judges don't have anything to do with the case until they get the case from a magistrate judge to whom it was referred and who doesn't have any Article III power. The magistrate judge can't take out the scissors and snip away any of the 32 affirmative defenses because they're worthless. And the magistrate judge can't reframe the complaint. These seven claims are all balled up and can't be separated. The magistrate judge can't undo that, doesn't have the power to do that. So that's what we've created.

Nathan Chapman: So let's talk about that a little bit. What the magistrate can do and why you think that leads to this kind of behavior, or if it contributes to it.

Judge Gerald B. Tjoflat: I have talked to magistrates, former law clerks as a matter of fact who were very broad lawyers, generalists. And I've said to them, "how do you deal with these situations when you don't have any power?" The response is that by persuasion, pure persuasion. You sometimes will get a party to throw away all these worthless defenses. Or sometimes reframe the case that way, but it's not done under Rule 15.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: "No motions for leave to amend. What do you say about that?" And they say, "well, judge, that's the way the case comes to us from the district judge." The district judge allows this broken machinery, as it were, as if you had an erector set and had everything put together wrong.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: And gets shipped to the magistrate. And the magistrate can't unscramble it.

Nathan Chapman: Well, I'm interested in hearing why you think the parties do that. I can imagine why a plaintiff might because the plaintiff has an interest in you know, getting as much as possible and pushing for a settlement. But the defense you would think would want in general, to make things as clear as possible, unless they don't really have an interest in doing that. But what would be their motive?

Judge Gerald B. Tjoflat: Depends on what the fee arrangement is. If the defense is on the hourly rate.

Nathan Chapman: Yeah. Right.

Judge Gerald B. Tjoflat: That's fine. We can burn a lot of hours. That's why, as I understand it, as I've been to a few seminars over the years, discussing feedback with clients, some clients change the fee arrangement. They say to the lawyer, here's the matter. Here's the amount of money we're going to give you for this case. But if you do that, they're not going to file 32 affirmative defenses.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: They'll file a motion to dismiss, try to get rid of the case right up front.

Nathan Chapman: So, what do you think is driving the district judges to send these to magistrates in such a mess?

Judge Gerald B. Tjoflat: I think it's just a culture. I think it's a lack of education. I don't know what the Federal Judicial Center is doing. They do a lot of seminars. I don't know of any seminar in which the Federal Judicial Center has had judges discuss in depth this kind of a problem. And what it does is that the judges breed disrespect for the rule of law by doing this, and we don't want to talk about it. But we do breed disrespect. One, I say that if we took our docket, say we were the old Fifth Circuit, we're now the 11th and the fifth, and we looked at its docket in the early seventies, and then we looked at our docket, say in 5 year or 10 year increments, and traced what kinds of cases we have, you would find a loss of commercial cases.

Nathan Chapman: Mm-hmm.

Judge Gerald B. Tjoflat: And where are the commercial cases? The parties realize it's too expensive to get tied up in this jumbled up litigation machine. So, they hire somebody from JAMS. JAMS is a collection of retired judges. And they get very good retired judges. So, the parties have this judge either try the case or do it by arbitration, but they do it much less costly from the discovery point of view. The judge sits there like the British judges do now. If you went to a court in Britain or Scotland or Wales, or over in Ireland and filed any of our civil cases there, and you sat there and watched what the judge would do about discovery, you'd find they would just do like we did 45, 50 years ago. The judge would just sit down with the parties, narrow the issues down and decide, here's what's at stake. And these are the facts we're going to try. So that's,

Nathan Chapman: So that is it your sense that that takes out a vast majority of the federal civil causes of action except for those that are more kind of unique plaintiff tort kind of problems. Kind of like—

Judge Gerald B. Tjoflat: We're left with federal statutory claims.

Nathan Chapman: Mm-hmm.

Judge Gerald B. Tjoflat: The civil rights claims, 1983, damages, actions, things of that sort.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: Or constitutional claims.

Nathan Chapman: Right. Or—

Judge Gerald B. Tjoflat: Or another variety of claims. You'll have an insurance company and they'll have two or three parties making claims on the insurance proceeds. So, they implead the case and let the parties fight it out. Or there's an insurance coverage issue in in the case raised by a self-insured or excess carrier or whatever. And they get into federal court because there are all sorts of claims involving the policy or coverage. And there are the cases against sheriffs and police officers for using excessive force in an arrest.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: Two actions basically.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: And the employment discrimination cases, if we took those out, we wouldn't have anything to do.

Nathan Chapman: Yeah. But you'd have very few civil cases left, I think. For sure. Not, I guess if you count immigration as civil cases, which they do count.

Judge Gerald B. Tjoflat: Yeah. And immigration cases are all on a cold record anyway from the board of immigration appeals.

Nathan Chapman: Right. Yeah.

Judge Gerald B. Tjoflat: It's really a shame because our statutory authority would allow us to entertain all those cases we used to have.

Nathan Chapman: Yeah. Well, Judge, is there, is there anything else, do you see any hope for the bar or any ways that things could be improved, even if incrementally?

Judge Gerald B. Tjoflat: I think that the leaders of the bar have got to realize that they set the ethical and professional tone for the profession, and they need to exercise that responsibility. And it's got to go back, trickle down.

Nathan Chapman: Mm-hmm.

Judge Gerald B. Tjoflat: We have to have better mentoring than we have today. We've got all these young lawyers out on the street and nobody for them to go to, where they can cry on your shoulder.

Nathan Chapman: Mm-hmm.

Judge Gerald B. Tjoflat: To seek help. They have their peers, but they just copy what they do.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: I think the law schools have got a heavy responsibility. And I think they could carry that by having people come in, maybe encourage bar participation, all sorts of things.

Nathan Chapman: Yeah. I think all those things matter. I mean, it's so difficult based on my experience and what I see with my own students now you know, the economic model of the large firms lends itself so much to a very, very wide pyramid. In fact, their model depends on young lawyers not wanting to become partners. If they stuck around, they'd have a real problem, the firms would have a real problem.

Judge Gerald B. Tjoflat: Well, and there are so many young lawyers at the ceiling.

Nathan Chapman: Yep.

Judge Gerald B. Tjoflat: Only so many people can move up.

Nathan Chapman: That's right.

Judge Gerald B. Tjoflat: They leave and form their own offices.

Nathan Chapman: Right. Well, Judge, is there anything else about this dynamic you want to talk about?

Judge Gerald B. Tjoflat: No, let's see. I made a couple of notes. I think we sort of covered the waterfront.

Nathan Chapman: We covered a lot of ground. Very efficiently and very clearly. You know, I, I appreciate the opportunity to do this. I've learned so much about these things from you and when I teach procedure and teach ethics they're always in the back of my mind. So, it's a pleasure to do this today. Any final thoughts before we go?

Judge Gerald B. Tjoflat: No, I think I'm an optimist.

Nathan Chapman: Yeah.

Judge Gerald B. Tjoflat: Things travel in ups and downs. I think we're maybe at the end of a down, and the profession, at some point, is going to say we have to do something about the situation we're in.

Nathan Chapman: Yeah. In the sweep of things, it seems like, you know, a part of what I study is legal history. And it does seem like procedures often change organically before they get reflected in formal changes. And it seems like in many ways, the federal courts right now are in a period of, at least at the district level, a period of informal organic changes happening. You see it a lot with the multi-district litigation. You see it with the use of magistrate courts to handle all of discovery and not really squeeze the case down, as you say. And the result is everything's decided on summary judgment. And you've got de facto amendments of the pleadings. I wonder if these will not eventually get set before some committees who have to make decisions about how to iron out the best way to go and then propose some actual rule changes that reflect the practice and that improve the practice.

Judge Gerald B. Tjoflat: Well, of course, one of the problems of rule-making is every time we write a rule to solve a problem, we create some other problems.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: Because there are always unintended consequence. A former law partner of mine, William Adams, was a member of the National Conference Uniform State Laws, addressing things like the UCC. Anyway, he and this goes back, he was a member of that conference for 15, 20 years, he said there came a time in the late seventies, early eighties when they realized that in writing too many rules, the more problems we create, and then we have to write more rules to solve those problems. And if you look at the rules of civil procedure from the beginning in 1938 to now, you would see lots of places in the rules where a rule was amended to solve a problem. When you change the rules and say to lawyers, “here's the rule now, here's how far you can go.” They will say to themselves, “I didn't know I could go that far.”

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: You have a breadth there. I didn't know I could go to the edge of the highway.

Nathan Chapman: Right.

Judge Gerald B. Tjoflat: I usually went down the middle, but I didn't know I could go that far. So that's the problem with rule making.

Nathan Chapman: Sure.

Judge Gerald B. Tjoflat: Pays to have limits.

Nathan Chapman: That makes sense. Okay, Judge, this has been wonderful.

It's been very good. A good visit.

Judge Gerald B. Tjoflat: Yes.