

## KEVIN THOMAS DUFFY: A MASTERFUL TRIAL JUDGE

*The Honorable P. Kevin Castel\**

Imagine sitting as a law clerk to a great judge watching him preside at trial. Any young lawyer in that spot could be forgiven for having a fleeting fantasy of what it would be like to have that responsibility. There were no grand delusions about the future, but fate and good fortune stepped in and for sixteen years that law clerk became the judicial colleague of Judge Kevin Thomas Duffy on the United States District Court for the Southern District of New York. Today, my friend's oil portrait hangs in my courtroom. In tough spots, I ask myself: What would KTD do?

Judge Duffy successfully presided over many of the nation's most difficult and significant trials of the late twentieth century. Because of his forty-four years of judicial service and the declining frequency of parties electing to proceed to trial, his impressive portfolio of trials will likely stand as a great achievement as long as the record number of championship rings on the fingers of Michael Jordan and Tom Brady. This Tribute will review those trials and focus on some of his unique practices.

But to those who knew him, those trials are not the source of their love and admiration. He is remembered for his humanity, his disdain for arrogance and pomposity, and his frequent acts of small kindnesses to others. Many of his good deeds remain known only to their recipients. Week after week, he sat at the bedside of his friend, Judge Henry F. Werker, during his final illness, going over edits to draft opinions. He saw to it that the work of chambers went smoothly, hiring at least one of Judge Werker's law clerks as his own after his friend had passed. Judge Duffy rendered similar assistance to Judge John E. Sprizzo, taking over the Judge's lengthy 4pm calendar call.<sup>1</sup> Tongue firmly in cheek, Judge Sprizzo claimed that his physical recovery could be attributed to the host of prayers from members of the bar not wanting to see Judge Duffy continue at his calendar call. But John Sprizzo

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1. Longstanding practitioners will remember that the practice of calling a large number of cases for one set time was known as a "cattle call." Cases were heard in the sequence that both sides arrived and "signed in." Judge Sprizzo took the calendar in open court permitting lawyers in soon-to-be called cases to observe the Judge dispatching lawyers seeking needlessly lengthy adjournments. Wise lawyers would mentally modify their requests before their turn at the podium.

also privately remarked to this author: “With friends like Kevin Duffy, you don’t need many friends.”

Judge Duffy was appointed to the district court in 1972 by President Richard Nixon and retired in September 2016. He is the third-longest serving judge in the court’s 233-year history. Judge Duffy was born and raised in the Bronx to an Irish immigrant family under impoverished circumstances. He attended Fordham University and Fordham University School of Law, where he met his wife, Irene Krumeich. She later became a Family Court Judge and an Acting Supreme Court Justice for the State of New York. Judge Duffy affectionately referred to his wife as the “Real Judge Duffy” or “RJ.”

Young Duffy joined the Second Circuit family more than sixty-five years ago, while attending law school as an evening student at Fordham. Still a student, he served as a bailiff to Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit, who became a lifelong mentor. Judge Learned Hand of the Second Circuit took a liking to the young Duffy and gave him memorable advice on writing: “Give us the facts, give us the law and give it to us in Mother Goose language.”

Following his tenure with Judge Lumbard, he served as an Assistant United States Attorney in the Southern District of New York, where he tried nineteen cases. He later became the Assistant Chief of the Criminal Division. Judge Duffy was the Regional Administrator for the United States Securities and Exchange Commission in New York, where he oversaw a turbulent period of consolidation of broker-dealers and framed the proposal for what became the Securities Investor Protection Corporation (SIPC). All in, he spent fifty-five years in federal public service.

Judge Duffy received many awards,<sup>2</sup> but the one that made him smile the most was his name plate over his favorite booth at Forlini’s on Baxter Street, signifying his status as a forty-year patron. Along with the accolades, came 24/7 protection courtesy of the United States Marshals Service for a period exceeding ten years because of his role presiding over several terrorism trials. I can assure the reader that for Kevin and Irene Duffy, the thrill and mystique of having a security detail in their home and following their every move wore off quickly.

With that background, I now present an excerpt from his portfolio of significant trials:

- Two trials of those involved in the 1993 bombing of the World Trade Center, a terrorist act that resulted in six deaths and more than a thousand injured. The first trial lasted six months with more than a thousand exhibits and the testimony of more than two hundred witnesses. The second trial lasted three months. All tried defendants were convicted and the principal defendants received sentences of 240 years each.

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2. He received the William O. Douglas Lifetime Achievement Award from the Association of Securities & Exchange Commission Alumni, the Emory Buckner Medal from the Federal Bar Council, the Dean’s Medal from Fordham University School of Law, and an Honorary Doctor of Humane Letters from the College of New Rochelle.

- The three-month Bojinka Plot trial in which defendant Ramzi Yousef was tried and convicted of conspiring with his uncle Khalid Sheikh Mohammed of plotting to hijack twelve U.S.-bound planes and fly them on a coordinated schedule into the Pacific Ocean. Today, the plot is acknowledged as a precursor to the September 11 attacks. Speaking of his work in two terrorism trials, the circuit wrote as follows: “Judge Duffy carefully, impartially, and commendably conducted the two lengthy and extraordinarily complex trials from which these appeals were taken. The fairness of the proceedings over which he presided is beyond doubt.”<sup>3</sup>
- The five-and-one-half-month trial against nine members of the Gambino Crime Family, including boss Paul Castellano. Two and a half months into the trial, on December 16, 1985, at approximately 5:30 p.m., Castellano and his driver were shot and killed in front of Sparks Steak House in Manhattan. After extensive questioning of the jurors, Judge Duffy continued the trial. Six of the remaining defendants were convicted and the convictions of all were affirmed on most counts.
- The five-month long Brinks Robbery Conspiracy trial. Two police officers and a private security guard were murdered in Nanuet, N.Y. in the course of the robbery allegedly organized by members of the May 19th Communist Organization, the Black Liberation Army, and the Weather Underground. There were 129 witnesses.
- The trial of Carmine Tramunti, boss of the Lucchese Crime Family, and fourteen others; six severed defendants were convicted after a second trial (first trial: two months; second trial: one month). The original indictment named thirty-two defendants in thirty counts.

From these and other trials, Judge Duffy leaves a legacy of creative trial management and a unique style characterized by wit and plain speaking.<sup>4</sup>

#### *Jury Selection in the World Trade Center Bombing Cases*

Judge Duffy’s probing inquiry of potential jurors in the World Trade Center bombing trials demonstrated his deep commitment to fulfilling the constitutional promise of a fair and impartial jury. He set a high standard for those who follow.

In the first World Trade Center bombing trial, one defendant submitted seventy-nine proposed questions directed to jurors’ feelings about “Islam,

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3. United States v. Yousef, 327 F.3d 56, 173 (2d Cir. 2003).

4. Perhaps, the best-known example of his plain speaking was the first paragraph of an opinion denying a motion to suppress in which the Judge begins with his assessment of the credibility of a law enforcement witness. The paragraph in its entirety reads as follows: “John Spurdis is a liar.” United States v. Tramunti, 377 F. Supp. 1, 1 (S.D.N.Y. 1974).

Muslims and Arabs.”<sup>5</sup> Judge Duffy was not a fan of jury questionnaires.<sup>6</sup> They may lead to avoidable squabbles among parties who are jockeying for an advantage and a judge’s loss of control over the voir dire process.<sup>7</sup> He, instead, relied on his own methodology for probing possible juror bias.

First, the Judge examined jurors in three groups of fifty to determine hardship, knowledge of names of witnesses and places, and potential bias based solely on their knowledge of the general subject matter of the charges, the bombing of the World Trade Center causing six deaths and more than a thousand injuries. This round of questioning narrowed the venire from 150 jurors down to sixty.

Next, the Judge examined the sixty in groups of twelve, specifically focusing on potential bias. These were not superficial inquiries but required a search of recollection and conscience: “‘If you had to describe your religious views, how would you do it?’ . . . ‘Have you ever had an incident in your life that would make it difficult to judge another person because of their race or creed or color or national origin or anything like that?’” and “‘Have you ever moved out of an area because you were disturbed that the area was changing?’”

Finally, each remaining juror was questioned one-by-one on whether the juror: “(1) had ever traveled to the Middle East; (2) had any feelings about Israel; (3) would be affected in any way by the fact that the four defendants were Muslims; (4) had any friends who were Muslims; [and] (5) had any business dealings with Muslims . . . .” It was only after these and other inquiries were made, follow-up questions were asked, and challenges for cause were resolved that the lawyers were required to exercise their challenges. Judge Duffy showed an admirable unwillingness to rest on a shallow, perfunctory inquiry.

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5. *United States v. Salameh*, 152 F.3d 88, 120 (2d Cir. 1998). The methodology and content of Judge Duffy’s questioning of jurors is taken from the circuit’s opinion in *Salameh*.

6. The author has utilized a juror questionnaire in only one case which was narrowly tailored to the issues of hardship from jury service and extent of knowledge of the high-profile defendant. *United States v. Gotti*, No. 08 cr. 1220 (PKC) (S.D.N.Y.) Used that way, it still had unintended consequences; the press elected to print word for word the responses of some jurors before they arrived at the courthouse for in-person questioning. Other judges have reported satisfaction with the use of questionnaires.

7. The differing interests of judges and litigants during voir dire have been discussed by the Second Circuit in affirming Judge Duffy in a different case:

Court and counsel have somewhat different goals in voir dire. The court wants a fair and impartial jury to be chosen and to move expeditiously to the presentation of evidence. Counsel want a jury favorable to their cause—fair or not—and voir dire aids them in exercising peremptory challenges and challenges for cause. Counsel have an additional purpose in voir dire moreover and that involves exposing jurors to various arguments they intend to make at trial. Counsel view voir dire as an opportunity for advocacy similar to, albeit not the equivalent of, openings or summations. This additional purpose has led to a long struggle between bench and bar—in both the state and federal courts . . . .

*United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002).

*The Devil and Daniel Webster: Ruling on an Objection to an Anonymous Jury*

Sequestered juries were not uncommon in state and federal trials but fell out of favor in the late 1970s. Where there was a tangible basis to believe that the jury might be subjected to intimidation or worse, courts found that jurors could be protected without sequestration through a combination of withholding their identities and providing certain transportation by the United States Marshals Service.<sup>8</sup>

Judge Duffy was faced with a request by the government for an anonymous jury in a trial of defendants on federal conspiracy charges arising from a series of armored truck robberies and two murders in the Bronx and Nanuet, NY in 1981 and the prison escape of Black Liberation Army leader Joanne Chesimard.<sup>9</sup> Defendants opposed the government's application.

The evidence in support of the use of an anonymous jury was formidable. The trial evidence was expected to include “descriptions of the murders of four persons,” “recorded conversations in which the defendants discuss killing two government witnesses,” a “‘Wanted—Dead or Alive’ poster with a picture of another government witness,” a “reference to witnesses as ‘war criminals,’” and a “handwritten exhortation prepared by associates of one of the defendants [stating that] . . . ‘[w]e should also considered [sic] new tactics—for example, a campaign that targeted individual U.S. Attorneys or grand jurors and holds them accountable for the impact of their actions.’”<sup>10</sup>

The Judge's grant of the motion was not surprising, but his chosen words were vintage Duffy:

The defense . . . suggests that they will be unable to select a jury if denied the venireman's name, address, and place of employment . . . . It is true that the defendants will be unable to get the exact jury they want. That is not required by the law. And in any event, the one recorded situation in American literature known to the Court in which a party got exactly the jury he wanted—he lost. *See* S. BENET, *The Devil and Daniel Webster*, THIRTEEN O'CLOCK (1937).<sup>11</sup>

*The Murder of the Reputed Boss of the Gambino Crime Family During a Multi-Defendant Trial*

There is no single source of trial management difficulties in a criminal trial. They may be caused by jointly trying defendants with antagonistic defenses, the sheer volume of charges or evidence, or the occurrence of the unexpected. Cases with these types of complexities seemed to find their way on to Judge Duffy's docket.

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8. *See* *United States v. Barnes*, 604 F.2d 121, 141–43 (2d Cir. 1979). The Second Circuit approved the use of an anonymous jury in the trial of alleged drug kingpin Leroy “Nicky” Barnes presided over by Judge Henry F. Werker, Judge Duffy's good friend.

9. *United States v. Ferguson*, 758 F.2d 843, 846 (2d Cir. 1985).

10. *United States v. Shakur*, 623 F. Supp. 1, 3 (S.D.N.Y. 1983).

11. *Id.* at 4.

In a case indicted by the grand jury and ultimately assigned to Judge Duffy, there were seventy-eight counts against twenty-four defendants, alleging eleven different conspiracies relating to the affairs of the Gambino Crime Family.<sup>12</sup> The Judge severed counts and defendants and proceeded to trial of the first phase.

Paul Castellano aka Big Paulie, the reputed head of the Gambino Crime Family, and others were on trial in the first phase on a total of twenty-three counts arising from a stolen car conspiracy. Two and one-half months had passed and there was much more testimony to come. The level of press coverage was high and on Friday, December 13, 1985 with the weekend at hand, the Judge told the jurors to go home, relax, and confine their television viewing to sports, suggesting Monday Night Football's Miami Dolphins-New England Patriots game.<sup>13</sup>

Big Paulie and one other were gunned down by three men in front of Sparks Steakhouse in mid-Manhattan that Monday. It was a major story. During the Miami Dolphins game, there was a crawl at the bottom of the screen with the news and it was front page news the next day.<sup>14</sup> This is a trial judge's worst nightmare. Loss of life aside, two and one-half months had been invested in the trial. Now it might all be for naught. Predictably, the remaining defendants moved for a mistrial. Judge Duffy will tell you what happened next:

On December 17, 1985, the day after Castellano was killed, I conducted a separate voir dire of each juror . . . . All of the jurors knew of Castellano's death and basically how it came about. Approximately six of the jurors also had heard something to the effect that Castellano had been the head of organized crime. Without exception, however, none of the jurors had heard anything about the remaining nine defendants or about the trial, other than the fact that Castellano had been a defendant in it. The jurors all stated that they would still be able to decide the case fairly and impartially and that what they had learned about Castellano would in no way affect their ability to judge the other defendants.<sup>15</sup>

The Judge directed counsel to collect the media reports, including transcripts of broadcasts, and adjourned the trial and set oral argument on the motion for a mistrial for January 6, 1986. At the argument, the Judge noted that (1) the publicity was prejudicial to the defendant and (2) it became known to jurors. These circumstances met only the first two prongs of the Second Circuit's test in *United States v. Lord*.<sup>16</sup> The third prong required

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12. *United States v. Gaggi*, 811 F.2d 47, 50 (2d Cir. 1987).

13. Don Shula's Dolphins prevailed over the Patriots 30-27. See *New England Patriots at Miami Dolphins - December 16th, 1985*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/boxscores/198512160mia.htm> [https://perma.cc/W3GS-7QG2] (last visited Mar. 23, 2022).

14. *Mafia's Number One Blown Away*, N.Y. POST, Dec. 17, 1985, at 2; Robert D. McFadden, *Organized-Crime Chief Shot Dead Stepping From Car on E. 46th St.*, N.Y. TIMES, Dec. 17, 1985, at A1, col. 2

15. *United States v. Gaggi*, 632 F. Supp. 1019, 1020-21 (S.D.N.Y. 1986), *aff'd in part, rev'd in part*, 811 F.2d 47 (2d Cir. 1987).

16. 565 F.2d 831, 838 (2d Cir. 1977).

that an exposed juror be questioned out of the presence of other jurors “to determine the extent of the exposure and its effect on the juror’s attitude toward the trial.”<sup>17</sup> Judge Duffy described his approach to the third step:

The voir dire of the individual jurors lasted the entire day on January 7, 1986. I found the jurors to be sincere and candid in their responses to detailed questions regarding what they had seen or heard since Castellano’s death and what their present impressions were as to the remaining defendants. The jurors exhibited a conscientious desire to avoid the publicity regarding this case and an insightful understanding of the irrelevance of any publicity that they were exposed to. Not one juror heard or saw anything that gave him or her the impression that the remaining nine defendants were involved in organized crime. In fact, no one heard or saw anything at all about the remaining nine defendants or the trial.<sup>18</sup>

He denied the motion for a mistrial and issued written findings. On appeal, the Second Circuit noted “that the trial court complied in every respect with this Circuit’s guidelines”:<sup>19</sup>

Once it saw ‘a potential for unfair prejudice,’ it held, not one but two, *voir dire*s of each juror outside the presence of other jurors, to determine the extent of the juror’s exposure to the reports and its effect on his or her attitude toward the remaining defendants. Under these circumstances, the measures taken by the district court were adequate to insure a fair trial.<sup>20</sup>

Of the original nine defendants (other than the murdered Castellano), Judge Duffy dismissed the charges against one defendant at the close of the government’s case and two were acquitted. The acquittals powerfully illustrated the jury’s ability to follow the Judge’s instructions and fairly and impartially assess the guilt or lack of guilt of the defendants based solely on the evidence at trial.

*Robinson Crusoe and The Bully: Other Examples of Use of Language with Jurors*

Judge Duffy understood that jurors are often anxious about whether they will understand unfamiliar legal jargon. He often would break the ice during jury selection by promising the jurors that during the trial he would not allow the lawyers to use any words longer than “delicatessen.”

In framing directions to jurors, Judge Duffy would ask jurors to imagine themselves or their family members sitting at one of the tables in the well of the courtroom facing a trial: “Wouldn’t you want jurors who only considered the evidence brought out in this Courtroom?” The substance of his

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17. *Id.* at 83839.

18. *Gaggi*, 632 F. Supp. at 1022.

19. *Gaggi*, 811 F.2d at 52.

20. *Id.* Of the six defendants who were convicted, two had their convictions under the counts alleging a violation of 18 U.S.C. § 241 set aside because the government failed to prove they were citizens, a necessary predicate under the statute; the convictions on other counts were otherwise affirmed.

instruction may not have been different from that given by other judges but his language choice—placing the juror in the picture—made it more impactful.

In crafting the final instructions to the jury, Judge Duffy was not content to use a bland hypothetical for explaining circumstantial evidence.<sup>21</sup> Instead, he would take the jurors on a vivid mental journey to a desert island, and he managed to work himself into the story:

[Do you r]emember at the beginning of trial I gave you an example of circumstantial evidence? I told you about Robinson Crusoe and the fact that I had to do a book report in the second year of high school on that. I told you that he was ship wrecked and ended up on a desert island that was totally uninhabited. He knew it was uninhabited because he had been all over the desert island and he could find nobody else there. One day, he goes down to the shore, and there in between the line where the tide had been and where the water was when he arrived was a big set of size 13D footprints. Robinson Crusoe had 9s. He walked over. He said, they are not mine. That's circumstantial evidence. Of what? Of the fact that somebody else is on the island. If the issue [was] is the island totally uninhabited except for Robinson Crusoe, do you think he would have any difficulty in figuring out that somebody else was there? Do you think he did? No, of course not, from circumstantial evidence, he drew the inference that somebody else was on the island.<sup>22</sup>

The Second Circuit viewed the Robinson Crusoe hypothetical as “entirely appropriate.”<sup>23</sup> But the Judge’s instruction continued with an example about the school bully:

When you were a kid and you were in school, do you remember there was a bully. There was a bully in every kid’s class, I am sure of it. Some kid, he’d come along and he’d step on the toe of the person beside him. The victim would yell. And the bully would look at the teacher and say, oh, it was a mistake. I didn’t mean to do that. That was an accident. Every other kid in the neighborhood knew that it was no mistake. Right?

The direct evidence would be his declaration that it was a mistake and an accident. But by circumstantial evidence, ladies and gentlemen, you knew that it wasn’t a mistake. It was him being a bully. You know, grown-ups are just big kids. We think the same way. You can conclude from circumstantial evidence what someone’s intent or knowledge was. Direct evidence i[s] often misleading. Circumstantial evidence is quite sufficient.

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21. To explain circumstantial evidence, trial judges frequently use the example of a hypothetical courtroom with the draperies drawn tightly closed so no one can look out. Into the courtroom walks a person with a dripping umbrella. Later a person enters with a raincoat with water spotting on the shoulders. Jurors are told from this combination of facts that it would be reasonable to infer that it had been raining. Despite its prevalent use, not all judges have been fans of the example. *United States v. Gleason*, 616 F.2d 2, 13 n.7 (2d Cir. 1979) (“I never know how that is helpful to a jury. You are not really trying to decide whether some weather condition exists . . . .”) (quoting Judge Thomas P. Griesa).

22. *United States v. Salameh*, 152 F.3d 88, 141 n.7 (2d Cir. 1998) (alteration in original) (quoting the trial transcript).

23. *Id.* at 140.



One thing you should recognize, it still must be proved beyond a reasonable doubt.<sup>24</sup>

While the circuit disapproved of the instruction because it started from the premise that the “kid” was in fact a bully,<sup>25</sup> it found no prejudice in the overall context of the charge and affirmed.<sup>26</sup> This author submits that Judge Duffy was on the right track in endeavoring to make the instructions come alive for lay jurors. Innovators do not always succeed on their first attempts. Judges should be inspired by Judge Duffy’s example to put thought into crafting jury instructions that use language and storytelling to explain opaque legal concepts.

In one lengthy trial (in which this author was present as law clerk), there was a suggestion that jurors may have seen certain defendants in handcuffs. The Judge could not exclude the possibility that this had occurred, but no party requested that he question the jurors, which might only serve to highlight the issue. Instead, he delivered an instruction that largely took the sting out of the possibility of an accidental sighting. In the words of the circuit affirming Judge Duffy:

[T]he instruction quite appropriately point[ed] out that the reason for some defendants (not identified by the court) being in custody while others were not was that some defendants were able to afford bail and others were not and that the jury was to draw no inference from whether or not a defendant was able to afford bail. The inquiry made and the curative charge together served, we think, to supplant the voir dire of the allegedly exposed jurors.<sup>27</sup>

Because the Judge’s folksy style was not lifted from a hornbook or style manual, his language choices could lead to appellate issues. The following is an excerpt from a voir dire of a juror who had a family member in law enforcement:

THE COURT: Now, there will be people coming in here who are with law enforcement. Do you think because there is a person in your household that’s also law enforcement that you might be biased towards them? Let me put it to you this way. Have you ever gotten a ticket?

JUROR: Yes.

THE COURT: Now, as the cop was walking away did you question whether his parents were actually married?

JUROR: No.

THE COURT: Could you recognize that people are people, no matter what they are?

JUROR: Yes.

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24. *Id.* (alteration in original) (quoting the trial transcript).

25. A second unmentioned problem is how “[e]very other kid in the neighborhood” knew he was a bully and why this was not akin to endorsing the use of propensity evidence.

26. *See id.* at 142–43.

27. *United States v. Taylor*, 562 F.2d 1345, 1359 (2d Cir. 1977) (citing *United States v. Acosta-Garcia*, 448 F.3d 395, 396 (9th Cir. 1971)).

THE COURT: Do you think you have any problem with that at all?

JUROR: No.<sup>28</sup>

While not endorsing this unorthodox line of inquiry, the circuit majority nevertheless affirmed, noting the broad discretion afforded a trial judge.<sup>29</sup>

### *Jury Entering: Remain Seated*

In pre-pandemic times, it was the near uniform practice of judges to require parties and counsel to stand when the jury entered or exited the courtroom. Jurors were told that this was a sign of respect to them as judges of the facts.<sup>30</sup>

But Judge Duffy did not follow convention. He required parties and lawyers to remain seated while the jury was entering and exiting the courtroom. He explained that his practice was born of experience:

Simply put, while I was still an active litigator, my opponent was standing while the jury was walking from the courtroom, and he inadvertently stepped on the forelady's toe, stumbling into her and almost knocking her down. I wondered whether the successful result my client obtained in that case was due to abilities of counsel or to the toe-stubbing inflicted by my opponent.<sup>31</sup>

In the civil case in which the Judge described the origins of his contrarian practice, the lawyer violated the Judge's direction to remain seated as the jury exited for the apparent purpose of displaying his displeasure at one of the Judge's rulings and provoking a mistrial. The Judge found the lawyer, who had not been admitted to the bar of the court *pro hac vice* or otherwise, to be in contempt but later vacated the finding noting that "there is little time to be wasted on the antics of people like [this]. It would add nothing to the dignity of this court to continue this proceeding."<sup>32</sup> Along the way, the Judge also took a jab at those he felt took too narrow of a view of a court's contempt power: "I do recognize that for at least some appellate judges, contempt is a tightly choreographed minuet where a trial judge can be reversed for any missed step or missed beat."<sup>33</sup>

### *Conclusion*

It takes a special person to excel at a job that requires you to sit passively, listen intently, and exude optimism. This is especially hard when you are watching strategic errors by trial lawyers, listening to testimony that you heard before, and harboring your own concerns about how the pace of the trial will affect the jury. There are lofty aspects to the position, but it is still a job. Yet few jobs come with an array of other folks who are paid to probe,

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28. *See* *United States v. Lawes*, 292 F.3d 123, 133 (2d Cir. 2002) (Pooler, J., dissenting).

29. *Id.* at 128 (majority opinion).

30. The practice has been suspended under certain COVID-19 protocols in order to avoid unnecessary movement.

31. *Santa Maria v. Metro-N. Commuter R.R.*, 879 F. Supp. 10, 11 n.1 (S.D.N.Y. 1995).

32. *Id.* at 13.

33. *Id.*

uncover, and present your actual or perceived errors. The finest moments and biggest gaffs of trial judges are on public display long after their demise. Wise trial judges appreciate that they are privileged to be seated in the front row as life's dramas unfold—and often participate in how the stories end.<sup>34</sup> It is endlessly fascinating, challenging, and rewarding.

Kevin Duffy had the right disposition for the job. He understood that a good trial judge does not strive to be the star of the show. Instead of raising his voice when displeased, he lowered it to a faint whisper requiring all to strain to hear him. The message could be a tough warning, but he usually secured immediate and complete compliance.<sup>35</sup> He understood that most trial management issues should be resolved with one-part case law<sup>36</sup> and two-parts intuition and experience.

No judge will ever be quite like Judge Duffy, nor should anyone strive to copy his unique style. He would be the first to tell you of his own imperfection. Perfect trials are rare and perfect judges are nonexistent. But my good fortune was to benefit from his wisdom as a law clerk and then as a friend and valued colleague on the bench. Those whose lives he touched all have stories to tell.

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34. The front row seat metaphor comes from the late District and Circuit Judge Joseph M. McLaughlin, former dean of Fordham Law School. Judge Sprizzo preferred to compare a trial judge to the narrator in Geoffrey Chaucer's *The Canterbury Tales* where pilgrims would stop along the way to recount their travails before continuing their journey.

35. Among his quips in chastising lawyers were: "If you pull that stunt again, you'll get to know your client really well" or "If you plan to try that again, remember to bring your toothbrush." Both were intended as cryptic references to the possibility of incarceration for contempt.

36. The Judge was inventive in his use of case law. He would cite *In re Rachmones*, when a case cried out for compassion or mercy (using the Yiddish word for same). Judge Cathy Seibel of the Southern District of New York recalls him citing *In re Toyota*, harkening to the advertising slogan "You want it, you've got it, Toyota," as a warning that the proffered evidence might be opening an evidentiary door that she may later regret.

In fairness, Judge Duffy, his colleagues, and his law clerks did not have access to computerized research tools in his early years on the bench. This author, from his days as law clerk, can attest that finding a case law answer to a specific case management issue utilizing the West Key Number system is close to impossible.