FRANCIS MCGOVERN: A PERSONAL REMEMBRANCE

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At the conclusion of argument, the judges of the Fourth Circuit come down from the bench to thank the lawyers for their advocacy. Born, reared, and educated at law in the state where the Fourth Circuit makes its home, Francis McGovern spoke in that region's distinct accent and had the grace and good manners epitomized by the Fourth Circuit's custom. Thus nurtured, Francis nonetheless reached far beyond.

First, as an undergraduate at Yale followed by four years as a Marine captain focused on small unit tactics in Viet Nam, Francis began his legal career at a large Houston law firm. He was soon drawn to teaching. That brought him to Birmingham, Alabama where the late Sam Pointer enlisted Francis to assist in a re-write of the Manual for Complex Litigation. Before going on the bench, Pointer had been a deal lawyer. He took a deal maker's approach to the re-write, abandoning the formalist waves of discovery and pretrial proceedings in the first edition of the Manual. Instead, complex litigation required a more flexible and ad hoc approach, he believed. All editions of the Manual since have adhered to that approach.

This approach suited Francis. He was intensely smart, but never intimidated others with his intelligence. Wit and good manners paid more dividends. So too, to speak ill of others was not Francis' way. As honey draws more flies than vinegar, so patience and good cheer smooth controversies. Smoothing controversies became Francis' craft. The vehicle he used for this vocation, of course, was teaching. He started at Cumberland and then the University of Alabama, finally becoming tenured at Duke Law School, firmly nestled in the Fourth Circuit. It must have been a homecoming of sorts.

Francis had visiting teaching assignments at Yale, Stanford, Villanova, the Universities of Chicago, Kyoto, Pennsylvania, Southern California, Idaho, and many more. In addition, there were speeches and lectures before law groups and lay groups on at least five continents.

But Francis did not confine himself to the classroom or the lecture hall. He was not content merely to write law review articles, conduct symposia, or the like. Francis dived into the real world of resolving legal disputes. Two highly instructive assignments with Judge Robert Parker in the Eastern District of Texas

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dealing with asbestos cases and then with Judge Robert Merhige on the Dalkon Shield litigation led to Francis' highly influential article about mature mass torts.[1]

The practice reached broadly. It entailed disputes about the waters of the Snake River, public housing contamination in New York City, asbestos-related bankruptcies, the Deepwater Horizon oil spill in the Gulf of Mexico, international victims' compensation programs, air crash disasters, toxic torts, and many more.

It also led to a peripatetic life. At each place, Francis seemed to know a legion of people who were involved in law, litigation, and life. If Francis found himself in a place where he did not know at least someone, he filled that void with a new acquaintance who quickly turned into a friend by Francis' unerring ability to sense what interested and moved people. He brought to this innate gift a range of interests that could intersect with almost everyone: he farmed, boarded horses and rode hunt in Virginia, played golf wherever there was a course, kept up with sports and politics, and was always on the move, once giving his address as Delta Airlines.

This is where Francis came into my life. In these peregrinations, Francis met Katy Hungerford who lived in Ross, California. Katy is smart, charming, social and a born traveler. It did not take long for their relationship to gel. Katy and I had friends who intersected and soon I was drawn into Francis' orbit.

By this time, I was a federal judge. Francis was something of a judge magnet: he attracted judges and they attracted him. We knew many of the same people in the bar and on the bench. To deny that this involved a bit of lawyer/judge gossip would be disbelieved and properly so. He understood the job judges do and he studied how that job could be accomplished better. We found much to talk about that touched on the law as well as the federal judiciary and its cast of characters and personalities.

Francis knew most of the judges involved in complex litigation, the subject of his scholarship and practice. If Francis did not know them, he found a way to get acquainted. Francis was never one to overlook the personal attributes of those who practice law, decide cases, or involve themselves in the legal enterprise. He advised, counseled, commiserated, and enlightened all of these with his practical insights and passion for problem solving.

It makes sense at this point to explain what it was about Francis that enabled him to foster his relationship as a special master to so many federal judges. Judging is essentially a lonely profession. Federal district judges have law clerks who are very bright and eager, but inexperienced. They have colleagues, but these colleagues have their own docket of cases. So, the amount of collegial support and assistance that colleagues can render in dealing with knotty issues is limited. And guidance from the higher courts is often opaque and contradictory. There are training and continuing education programs for federal judges, but

1. Francis E McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV 659 (1989).

these too can go only so far in assisting a judge to deal with a massive piece of complex litigation.

The lawyers who represent parties in such litigation provide a huge amount of information on law and the facts, but it is both conflicting and undigested. Furthermore, dialogue between bench and bar is subject to constraints that inhibit candor. In most complex litigation, there is a great deal going on affecting the case that never gets to the judge who thus needs an intermediary to deal with counsel and the parties to enable them to move the litigation to as prompt, just, and fair a conclusion as possible. Francis' gifts of affability, intelligence, insight about others, and persistence enabled him to carry out this task almost as an art form.

Francis and I never had a relationship of judge and special master. Ours was purely a personal friendship that entailed dinners, traveling, hiking and just plain good times together. After about ten years or so of this, Francis suggested that we co-teach a course together. It was in teaching together that I came fully to know Francis. In teaching, I had entered the intellectual realm that occupied Francis' almost constant attention.

The first was at Stanford. The bargain, of course, was that we could pinch hit for one another when the other one was unavailable. With his busy travel schedule, he might miss a class or two and I could fill in, he proposed. And I did, on occasion. Substituting for Francis was hardly filling in. His classroom style was less Socratic than Homeric. He related stories and events that led to a lesson about how litigation works in real time. He could be riveting in the classroom.

He brought to students not just the rules, statutes, and cases under study, but a rich practical experience in how these operated in the real world of litigation and commerce. Francis was a scholar of the real world and how it operates. He did not seek merely to teach principles that judges had applied in the cases studied. His interest was not in illuminating the law by explaining a legal problem after it has been solved. Instead, he focused in the classroom on how the students would address and resolve a current or anticipated dispute or controversy.

Nor was Francis content to rail against the inconsistencies, injustices and missed opportunities of the world and preach and plot for change in the law or society. He knew that the future lawyers he was teaching would have to deal with the world as it is, not as the self-appointed enlightened of the world would change it. The students should be prepared to face that reality. He viewed that his task was to prepare them.

But Francis's approach was no endorsement of stasis in law. He carried the students along by striking new and sometimes untried paths to resolution of a controversy using the rules, statutes, cases, and the like available at present. It was a dynamic form of pedagogy. To a discerning student, this frequently made a more compelling case for change than a diatribe against the status quo.

Our teaching worked well, and we followed this up at Berkeley and most recently at UC Hastings. In these endeavors, I was Sancho Panza to Francis'

Lamancha. We were about halfway through the semester of a mass torts class at Hastings when Francis died.

Torts, of course, was the legal realm in which Francis labored. It was a natural choice. Torts is a body of law that derives from custom and expectations of acceptable conduct. It is a field in which practice drives theory, unlike other fields of law in which statutes, rules and regulations drive practice. Through tort law an aggrieved person can, by meeting its requirements and constraints, invoke the coercion of the civil justice system to obtain redress. The openness and flexibility of tort law renders strategy crucial to the law's outcomes.

When the numbers of cases, parties, and interests increase, the importance of strategy increases exponentially. Francis focused on strategy. This was, in part, a product of his three years as a Marine infantry captain in Viet Nam. He had learned how small unit tactics can influence an entire battle. So too, in complex litigation, he taught that the seemingly detailed tactics of litigation can influence the resolution of a major business or social problem that finds its way into the legal system. Students, he urged, need always to keep in sight the larger context as they slog through the mud of evidence, cases, statutes, and rules.

Mass torts was the species of torts that became Francis' specialty. I mentioned to Geoff Hazard, with whom I also co-taught at Hastings and who taught me first-year civil procedure, that Francis had had a lot of experience in the field of mass torts. "Experience, hell," was Hazard's retort. "Francis invented mass torts." That was barely an overstatement. Francis' contributions in the field were legion. Read almost anything in the field and Francis' name pops up time and again in one way or the other. I kidded him that when the class seemed to lag, all I needed to do was say, "Francis, what do you think about such-and-such." Off he would riff, learnedly and interestingly sprinkling his commentary with examples of real-world problems he had either addressed himself or had a hand in addressing with others.

If there was a tension between us in teaching, it was Francis' emphasis on the ad hoc nature of dealing with mass tort litigation. I questioned whether, from his approach, students could discern the difference between being conversant with the tools of civil litigation, deciding to ignore or bend them, and simply neglecting to learn them in the first instance. Francis' view, doubtlessly reflecting his mentor Judge Pointer, was that such litigation did not follow a set path. The students needed to learn that the maturity of a mass tort is a stochastic process, not a defined one. It is the varying interests of the participants through the process that drives the matter to resolution. He focused the students less on rules and more on incentives.

During our mass torts class at Hastings, always in the background and on his mind was Francis' work as special master in the National Prescription Opiate Litigation.[2] This is Francis' great unfinished work. So far, this work has produced a path-breaking law review article co-written with Harvard professor William

2. *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio).

Rubinstein,[3] and acceptance by the judge handling the opioid MDL of an innovative putative class action for the purpose of negotiating a settlement.[4] The judge's order was reversed by the Sixth Circuit,[5] which probably would not have surprised Francis, but simply sparked him to search for an alternative path forward.

Francis will never see the outcome of his work in attempting to bring that litigation to sufficient maturity to foster a resolution. This denies him the fulfilment he would have obtained no matter the outcome. Yet Francis understood that the process of the law never reaches an end. Each of us steps into the process at a certain point and then steps out. But the process moves on. Most do so but leave no mark or lasting effect on the process. Others, like Francis, do so but in so doing redirect the flow, marginally to be sure, but noticeably, nonetheless. We, too, will also step out of the process at some point. I wish only that we could, like the judges of the Fourth Circuit, come down from our respective places in the process and thank Francis for all he has brought to us. It is the only satisfaction that he has denied us.

3. Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholder*, 99 TEX. L. REV. 73 (2020).

4. Cnty. of Summit v Purdue Pharma L..P. (In re Nat'l Prescription Opiate Litig), 332 FRD 532 (N.D. Ohio 2019).

5. *In re* Nat'l Prescription Opiate Litig., 976 F.3d 664 (6th Cir. 2020).