

A Law Clerk's Tribute to Justice Gary S. Stein

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I had the privilege of serving as a law clerk for Justice Gary S. Stein during the 1994-95 Term of the New Jersey Supreme Court. For many reasons, that clerkship was a deeply rewarding experience. Most importantly, the clerkship afforded me the opportunity to work with Justice Stein and to watch Justice Stein work. Working alongside this preeminent jurist instilled in me lifelong lessons about the law and about being a lawyer.

Justice Stein was completely dedicated to his position and to the Court. He worked tirelessly, comprehensively, and meticulously in performing his responsibilities. In approaching cases before the Court, Justice Stein obtained a detailed understanding of the record below, and carefully studied the briefs and lower court opinions. He frequently raised additional areas for his clerks to research, and read scholarly publications that addressed the relevant issues. In sum, Justice Stein consulted and analyzed any and every resource that might help him and the Court reach the right result in the case at hand. Regardless of whether the opinion deciding the case would appear on the front page of the *New York Times*, or would simply be studied by a small group of lawyers practicing in an obscure area of the law, he approached the case with the same dedication. Justice Stein's total commitment to his position stands as a model of excellence to which I aspire in my own professional pursuits.

While simply observing how Justice Stein approached his position was a tremendous learning experience, Justice Stein also actively assumed the role of a mentor for his law clerks. After oral arguments, he would meet with his clerks to discuss the cases. He always encouraged us to express our views and often facilitated spirited discussion. Justice Stein was always respectful of the views of his clerks, but challenged us to think through the implications of our positions. In evaluating a particular position, Justice Stein often would draw on his extensive and varied professional experience

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before joining the Court, which involved both private practice and public service, as well as experiences obtained from a life fully lived. These discussions provided quite an education.

Justice Stein always maintained an extremely collegial relationship with the other members of the Court, despite the fact that significant disagreements on the disposition of cases emerged throughout the term. He also facilitated a collegial atmosphere among everyone working in his chambers. We all worked together enthusiastically and as a team to assist Justice Stein and the Court. Justice Stein's commitment to collegiality, even in the face of sharp disagreement, serves as a guide for my interactions with both my co-workers and adversaries.

While the clerkship lasted only one year, Justice Stein forged a bond with his clerks that lasts a lifetime. An example of this lasting connection is the picnic that Justice Stein and his wife, Et, hosted at their home each year. All of Justice Stein's present and former clerks and their spouses or significant others, along with their children (or "grandclerks" as they are affectionately known) are invited. This gathering is also attended by Justice Stein's son and daughters, and many of Justice Stein's thirteen grandchildren. Each year a wonderful time is had by all, especially the "grandclerks," who take rides around the yard on a tractor driven by Justice Stein.

At the most recent picnic, many former clerks reflected on the importance of their year with Justice Stein, and indicated that the clerkship was the most challenging and rewarding job they ever had. Justice Stein's former clerks are a diverse group of people with varying professional pursuits. Some former clerks practice in large law firms, some head their own firms, some work in-house for corporations, and some are in public-service positions. While diverse, all of Justice Stein's clerks are united by deep feelings of admiration, appreciation, and respect for Justice Stein.

Justice Stein has written opinions that address almost every area of the law in New Jersey. Practitioners, scholars, and law students will be studying his many opinions for decades to come. While a comprehensive treatment is not possible in the context of this tribute, I will address a few of the opinions that Justice Stein wrote during the term of my clerkship that demonstrate what I admire most about his approach to deciding cases.

Justice Stein wrote scholarly opinions that thoroughly analyzed the applicable factual and legal backdrop before resolving complex legal issues in innovative and groundbreaking manners. This is

reflected in his opinion in *Rendine v. Pantzer*,¹ where the New Jersey Supreme Court confronted for the first time the calculation of a “reasonable attorney’s fee” payable to the prevailing party under fee-shifting statutes such as New Jersey’s Law Against Discrimination (“LAD”). In particular, the Court addressed whether the award of attorney’s fees may be enhanced because the prevailing party’s fee arrangement was contingent on a successful result. At the time Justice Stein wrote the opinion for the Court, the issues under review had been addressed by a multitude of federal courts, including two relatively recent cases in the United States Supreme Court that generated six separate opinions, and by voluminous scholarly commentary.² The case presented issues of paramount public interest because the attorney’s-fees provisions in statutes such as the LAD facilitate legal representation for citizens lacking financial resources, which is critical in preventing the rights provided by the Legislature from existing merely on paper for many people.

Justice Stein thoroughly analyzed the various methodologies applied by the federal courts in evaluating a “reasonable attorney’s fee” under federal fee-shifting statutes, and evaluated how those courts treated the question of a fee enhancement in a contingency case.³ He also analyzed the scholarly publications.⁴

Justice Stein then forged an original approach that, while building on the best of the analysis that came before, moved beyond the existing case law to fulfill the purpose behind the fee-shifting provisions in New Jersey’s statutes while simultaneously avoiding the pitfalls that had led to the extraordinary volume collateral litigation in the federal courts regarding fee awards. Justice Stein addressed the collateral-litigation problem by setting forth clear guidelines to provide finality and preclude the need for frequent appellate review. His analysis required the trial judge initially to determine the “lodestar” by carefully and critically evaluating the number of hours reasonably expended multiplied by a reasonable hourly rate.⁵ Next, rejecting the analysis reflected in the United States Supreme Court’s most recent pronouncement on the issue, Justice Stein concluded that trial courts must consider whether to increase the lodestar fee in cases where the attorney’s compensation is contingent on a successful

¹ 141 N.J. 292, 661 A.2d 1202 (1995).

² *Id.* at 316-17, 661 A.2d at 1216.

³ *Id.* at 322-31, 661 A.2d at 1219-24.

⁴ *Id.* at 332-33, 661 A.2d at 1224-25.

⁵ *Id.* at 334-35, 661 A.2d at 1226.

result.⁶ That result, which requires an adjustment of the lodestar to “reflect the actual risk that the attorney will not receive payment if the suit does not succeed,” was compelled by “economic reality and simple fairness.”⁷ Because lawyers typically will not take a case on a contingency basis unless they are compensated for taking that risk, Justice Stein’s opinion facilitates legal representation for those least able to otherwise have their rights vindicated.

Although Supreme Court opinions frequently set forth broad legal principles that will govern matters in the future, Justice Stein always was sensitive to the particular litigants in the case at hand. His opinions reflect a deep concern for individuals lacking sophistication or bargaining power who have a dispute with a more powerful institution or corporation. He also scrutinized with painstaking care situations in which a litigant’s claims were dismissed by lower courts without reaching the merits of the claim. These various threads are reflected in Justice Stein’s opinion in *Volb v. G.E. Capital Corp.*⁸ In that case, Ronald Lee, an employee of T.D.E. Services, Inc. (“T.D.E.”), backed a dump truck over Charles Volb, an employee of J.H. Reid Construction Company (“J.H. Reid”), killing Volb.⁹ At the time of the accident, Lee functioned as a special employee of J.H. Reid. Volb’s widow, in her capacity as administratrix, on her own behalf, and on behalf of the Volb’s three minor children, brought a tort action against T.D.E. and Lee, among other defendants.¹⁰

The trial court granted summary judgment in favor of Lee because J.H. Reid controlled Lee’s activities on the day of the accident, and later entered summary judgment in favor of T.D.E. without opinion. The Appellate Division affirmed both rulings substantially for the reasons expressed to support summary judgment in favor of Lee.¹¹

Faced with a lack of clarity for the basis of the underlying dismissal of the claims against T.D.E., Justice Stein comprehensively set forth the controlling legal framework. He concluded that T.D.E. did not obtain tort immunity either derivatively as a result of Lee’s Workers’ Compensation Act immunity or based solely on its affiliate relationship with J.H. Reid.¹² Mrs. Volb’s complaint against T.D.E.

⁶ *Id.* at 337, 661 A.2d at 1227-28.

⁷ *Id.* at 338, 661 A.2d at 1228.

⁸ 139 N.J. 110, 651 A.2d 1002 (1995).

⁹ *Id.* at 114, 651 A.2d at 1003.

¹⁰ *Id.* at 114-15, 651 A.2d at 1003-04.

¹¹ *Id.* at 115, 651 A.2d at 1004.

¹² *Id.* at 121, 651 A.2d at 1008.

was thus reinstated and the matter was remanded to the Law Division.

While Justice Stein's approach to deciding cases is reflected in his majority opinions, his dissenting opinions, by their very nature, offer a more personal view. Justice Stein was a prolific dissenter. He never, however, dissented merely for the sake of dissenting. Each dissent was prompted by disagreement over significant points that Justice Stein believed needed to be expressed.

Justice Stein's dissents were at times prompted by his view that the majority's disposition of a matter was inconsistent with the proper institutional role the New Jersey Supreme Court should play in New Jersey's government. For example, in *State v. Haliski*,¹³ the Court addressed the tension between two provisions in New Jersey's Code of Criminal Justice ("Code"): one provision required a mandatory extended sentence for certain offenses involving the use of a firearm if the offender had previously been convicted of another firearms offense; the other provision limited the scope of a "prior conviction of a crime" to situations in which the time for appeal had expired.¹⁴ The majority opinion for the Court set forth a provisional-sentencing framework that authorized the imposition of an extended sentence, even if an appeal was pending on the prior conviction. That extended sentence could be vacated if the prior conviction were reversed on appeal.¹⁵

In dissent, Justice Stein reasoned that the provisional-sentencing framework the Court adopted was not authorized by the Code, which, to the contrary, required a different result.¹⁶ He found the majority's "rewriting" of the Code "deeply disturbing," and noted that the Court simply could have used the case "as a vehicle to flag the issue for the Legislature's attention, as the Court has often done in the past."¹⁷ Justice Stein's opinion went on to describe his view of the long-term consequence of the majority's decision:

[T]he cost to the Court of the institutional compromise that occurs when it ignores basic legal principles to achieve a result more consistent with contemporary public policy, apparently acceptable to the majority, is heavy indeed. I have no doubt that in the long run the compromise is not worth the result achieved by the Court's extraordinary holding.¹⁸

¹³ 140 N.J. 1, 656 A.2d 1246 (1995).

¹⁴ *Id.* at 7, 656 A.2d at 1249.

¹⁵ *Id.* at 17-18, 656 A.2d at 1254-55.

¹⁶ *Id.* at 30, 656 A.2d at 1261 (Stein, J., dissenting).

¹⁷ *Id.* at 31-32, 656 A.2d at 1262 (Stein, J. dissenting).

¹⁸ *Id.* at 32, 656 A.2d at 1262 (Stein, J. dissenting).

While Justice Stein's rebuke of the majority opinion is strongly worded, it is driven by his deep respect and appreciation for the Court as an institution. His opinion challenges the Court to consider not only the technical sentencing issue presented by the case, but the broader institutional currents. Justice Stein's opinion also expresses the profound pride he has in his Court, and the consequent frustration when the Court, in Justice Stein's view, fails to live up to its lofty standards.

Justice Stein's dissenting opinions also reflect his principled commitment to preserve and enforce the constitutional rights of all citizens, even those who society may revile. For example, in *Jacobs v. Stephens*,¹⁹ the Court held that although a prisoner did not receive written notice of the charges against him twenty-four hours in advance of a disciplinary hearing as required by the Constitution, the harmless-error rule applied because the right implicated was not "essential to the fundamental fairness of his hearing."²⁰ The Court thus did not remand the matter for another disciplinary hearing.

In his dissenting opinion, Justice Stein reasoned that "[i]n upholding the sanctions imposed on Jacobs in the face of an undisputed violation of his due-process rights, the Court undervalues the importance of full compliance with the minimal constitutional protections afforded in prison-disciplinary hearings, and overestimates the importance of affirming the result in this proceeding."²¹ Justice Stein believed that the Court's disposition "overlooks the purpose of affording due-process protections in prison-disciplinary proceedings, which is to assure that the hearings are fairly conducted and that the inmates have adequate opportunity to assert a defense."²²

In *Doe v. Poritz*,²³ the most widely reported case during the period of my clerkship, the Court held that New Jersey's Registration and Community Notification Laws, commonly known as "Megan's Law," were constitutional. Those laws required certain convicted sex offenders to register with law-enforcement authorities, and provided for notice of the presence of such offenders in the community.²⁴

After thoroughly analyzing the relevant statutes, the record in the case, the United States Supreme Court's punishment

¹⁹ 139 N.J. 212, 652 A.2d 712 (1995).

²⁰ *Id.* at 220, 652 A.2d at 716.

²¹ *Id.* at 229, 652 A.2d at 720 (Stein, J., dissenting).

²² *Id.* (Stein, J., dissenting).

²³ 142 N.J. 1, 662 A.2d 367 (1995).

²⁴ *Id.* at 18-19, 662 A.2d at 376.

jurisprudence, and the methods of punishment in colonial times, which relied on elements of stigma and humiliation, Justice Stein concluded in his dissenting opinion that the Community Notification Law made the punishment for a crime more burdensome after its commission and thus violated the Constitution's prohibition against ex post facto laws.²⁵ He was sensitive to the wide-spread public concern that prompted the Legislature's passage of the laws under review, but recognized that the Court must still perform its role of testing those laws against the protections afforded by the Constitution:

The Legislature's value judgment about these laws is entitled to great respect, but that judgment comprises only one part of the constitutional equation. The judiciary's task is to complete the equation by evaluating the legislative determination in the context of settled Constitutional principles. Those principles are neither negotiable nor flexible, their importance having been conclusively determined more than two hundred years ago by the founding fathers.²⁶

Justice Stein's opinions were fueled by the combination of a brilliant legal mind and a tireless commitment to expend any and every effort to reach the right result in the matter before the Court. The legal principles set forth in his opinions frequently protect those people in society most in need of protection, whether they be the poor or average citizens involved in a dispute with a more powerful institution. He also took principled, unpopular stands because he believed they were right.

Justice Stein's retirement from the New Jersey Supreme Court is a tremendous loss for both the Court and the citizens of New Jersey. However, the legacy he leaves behind in the form of his opinions, his colleagues, and his clerks will have a continuing impact for decades to come.

²⁵ *Id.* at 147, 662 A.2d at 442 (Stein, J., dissenting).

²⁶ *Id.* at 145, 662 A.2d at 442 (Stein, J. dissenting).

