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The Media and a “Dependent” Judiciary

*Hon. C. Darnell Jones II**

In asking me to contribute my thoughts on the role the media plays in ensuring or endangering an independent judiciary, the *Duquesne Law Review* editors suggested I draw on my experience as a participant on the “Third Branch Meets the Fourth Estate”¹ panel sponsored last October by the Pennsylvania Supreme Court’s Commission on Judicial Independence and Dickinson College’s Clarke Forum on Contemporary Issues. During the JIC/Clarke Forum panel discussion, I emphasized how strongly I feel about public access to court records. In 21 years as a state court judge, I sealed records on only two occasions. In the first instance, security issues were paramount. In the second, the parties themselves jointly requested sealing for purposes of promoting settlement prospects. As a general rule, I don’t seal records.

I candidly admit my own “triple interest” in preserving press access to the judiciary—as a citizen, a judge, and even as the father of a television journalist. The public does indeed have an absolute right to know what transpires in its courtrooms. I am ever mindful that the courtroom over which I preside belongs to the public, not to me.

Yet, during the panel discussion referenced above, I also expressed my disinclination towards allowing cameras in courtrooms unless sufficient safeguards were in place to protect the identities of victims and witnesses, and to prevent some members of the bar from overt and obvious pandering to potential clientele. That concern is not intended to impugn trial attorneys in any regard. Rather, it is simply acknowledging that there are some who may “cross the line” given the potential economic benefit.

As every participant on that panel noted, we need to be able to trust that the media will portray what transpires in an accurate manner. Personally, in 21 years as a state court judge, I was never misquoted nor placed in an ill light. As President Judge of Pennsylvania’s First Judicial District, which encompasses all of

* Judge, United States District Court for the Eastern District of Pennsylvania.

1. Audiotape: The Third Branch Meets the Fourth Estate (Clarke Forum on Contemporary Issues 2009), available at http://clarke.dickinson.edu/cms/wp-content/uploads/Third_Branch_10_13_2009.mp3.

Philadelphia, while I experienced some chagrin over questionable selective quoting of my statements rather than printing them in their entirety, I recognized that neither I nor anyone else has the luxury of editing the media's work product. Instead, I learned to self-edit and speak both precisely and concisely.

I began serving as a judge on the Court of Common Pleas for the First Judicial District of Pennsylvania in 1987, ultimately serving as President Judge of that Court from December 2005 until October 2008, when I was appointed to the United States District Court for the Eastern District of Pennsylvania. Each court has its own unique relationship with the media and its own comfort level with media access. In the court of common pleas, as in the district court, no outside recording devices are allowed in courtrooms. Most district courtrooms have voice activated recording systems and the media may be permitted access to those recordings. Nevertheless, in both judicial systems the press may wait outside the courthouse doors with a full battery of cameras, microphones, and reporters. Indeed, as a state court judge, I was more than once chased down the hallway outside my courtroom by committed writers and other members of various media on the courthouse beat, asking me to either repeat my words from the bench or give a quote, so that the statement(s) made deadline. As a trial judge on the court of common pleas, I did not give statements. As the President Judge however, it was my opinion that one of the obligations of the Office was to issue statements and respond to inquiries regarding issues affecting the administration of justice.

But in considering which position to pursue in this article, it occurred to me that perhaps, in a time of often mutual distrust between judges and the media, my most effective contribution might be what amounts to a feel-good story—an example of where the media not only got it right but served the public in a way that the court alone never could have accomplished.

In 2008, my court of common pleas colleague Judge Annette Rizzo and I were brainstorming ways to address the burgeoning mortgage foreclosure crisis in Philadelphia. We were acutely aware of the nationally publicized massive number of foreclosures occurring around the country and their negative impact upon many diverse classes of home owners, cities, mortgage companies, and judicial systems. We knew it was only a matter of time before our own judicial system would be threatened by the weight of these seemingly insurmountable problems. In fact, due to the significant input by members of the City Council of Philadelphia and the action (perhaps inaction would better describe his conduct) of

the Sheriff who had the responsibility of carrying out sales of foreclosed properties, in April 2008 Judge Rizzo and I created the Residential Mortgage Foreclosure Diversion Pilot Program (RMFDPP). That program was devised in order to prevent an owner-occupied home from being sold at a sheriff's sale without the owner first having a formal opportunity to take part in a conciliation session.² The RMFDPP was a court-ordered case management program created “to provide early court intervention in residential owner occupied mortgage foreclosure cases, which was designed to assure timely determination of eligibility under various federal, state and local programs.”³ The key was a timeline that required “a meeting of the borrower, the lender and their attorneys within 30 to 45 days of a foreclosure filing. The hope [was] that lenders [would] alter the terms of high-cost loans to make them affordable.”⁴ While a plethora of media publicized the program locally, nationally and even internationally, I quote the *Philadelphia Inquirer* and the *Philadelphia Tribune* analyses here to emphasize how critical the local media was to the success of this program. From its inception, the city's press was the reason that Philadelphia residents heard about this program and were willing to engage with it. To our pleasant surprise, our program caught on nationally and even resulted in honors from England and Sweden. What was unique about RMFDPP was that mortgage companies were *required* to participate—they had to take part in the reconciliation process in good faith or were prohibited from proceeding with a sheriff's sale—and we needed our local press to make sure people knew it.⁵ Of significant value was the cooperative spirit with which attorneys representing mortgage companies entered into the process, along with numerous attorney volunteers representing indigent homeowners, as well as attorneys who served as judges pro tem to assist the judiciary with the high volume of cases. Again, media publicity was the key.

As is often the case with new efforts to grapple with longstanding problems, we had our skeptics who wondered, first of all, who would pay for all the lawyers involved. The *Inquirer* helped us to

2. See Editorial, *Avoiding Foreclosures: A Hometown Solution*, PHILA. INQUIRER, July 6, 2008, at C04.

3. Rod L. Wilson, *Fighting the Fallout from Predatory Lending*, 7 PHILA. TRIBUNE 50, Oct. 26, 2008, at 5B.

4. Harold Brubaker, *Advocacy Key to Philadelphia Foreclosure Plan*, PHILA. INQUIRER, April 17, 2008, at C01.

5. Peter S. Goodman, *Philadelphia Gives Struggling Homeowners a Way to Stay Put*, N.Y. Times, Nov. 17, 2009, at A1.

sing the praises, loudly and clearly, of the battery of city attorneys who donated their professional time for RMFDPP:

Counselors and lawyers volunteer to help the homeowners at no cost. If the homeowner and lender can't agree on a deal, they go before a temporary judge—another lawyer who is volunteering his or her service. [In 2008], about 200 lawyers from the Philadelphia bar donat[ed] their time in the program.⁶

And why would the mortgage lenders themselves be willing to share in this endeavor? As I shared with a reporter, “lenders were participating, in part, because it [was] in their interest not to be stuck with a foreclosed property . . . the program recognized homeowners' contractual obligation by not allowing a blanket moratorium on mortgage foreclosures.”⁷

We also heard complaints that the court was essentially providing a welfare program for individuals who were allegedly too irresponsible to keep up with their mortgages. It was crucial for us to combat that misrepresentation and to convince our citizens that foreclosures were unpredictable. Again, the local press refused to oversimplify the complexity of the crisis: “Not all homeowners get in over their heads through carelessness or stupidity. Some lose their jobs; others suffer a catastrophic illness. Some are embarrassed to admit they've fallen behind in their payments, which only leads to deeper debt.”⁸ As I strove to impress upon anyone who asked:

People are saving and working hard for these homes, most of which are single family homes with great amounts of land, then all of a sudden the father or mother gets laid off, this is what we are facing These are cases where families just fell behind. We also have graceful surrender for those that just can't recover or refinance.⁹

The results were deeply gratifying—in the first three months of the program, 230 of the 552 homes referred that had been scheduled for sheriff's sale were permanently removed from sale, and 200

6. *Avoiding Foreclosures*, *supra* note 2.

7. *Id.*

8. *Id.*

9. Wilson, *supra* note 3.

had their planned sales postponed for one to five months.¹⁰ The RMFDPP’s success prompted its renewal through 2009. I knew it was not “the be-all and end-all,” but it *was* a “real, viable solution” that was “working because [the parties] sit down voluntarily.”¹¹

As the program flourished, the news coverage began to spread beyond Philadelphia: “There’s no reason other cities and counties couldn’t replicate what Philadelphia is doing. Already, New York, Houston, Chicago and other cities are expressing interest in Philadelphia’s model.”¹² Ultimately, national government officials began to take notice—as the press had been hounding them to do all along: “Congress should look to Philadelphia as lawmakers wrestle with a bill to help homeowners stave off foreclosure.”¹³ As Congress considered funding housing counseling for families facing foreclosure, the Philadelphia press urged legislators to take such a commitment seriously: “The Senate bill would provide \$150 million for housing counseling for families facing foreclosure. It’s a small fraction of the bill’s overall cost, but it could be the most effective money spent because it targets workable solutions for individual families and their lenders. It’s not a bailout.”

In July 2008, Senator Bob Casey contacted Steve Preston, Secretary of Housing and Urban Development, urging him to educate and inform other cities about Philadelphia’s RMFDPP. Now the national press carried the story, giving readers even more reason to believe in the program’s efficacy.¹⁴ The *New York Times* noted that Senator Casey had also reached out to Treasury Secretary Henry M. Paulson, Jr. to adopt the plan across the country.¹⁵ Ultimately other cities, from Pittsburgh to Chicago to Louisville, examined RMFDPP and signed on for similar programs.¹⁶

But most importantly, publications like the *New York Times* gave voice to those who were in danger of losing their homes—the mothers and fathers, employed and unemployed, who were struggling to navigate the byzantine maze of mortgage regulations they

10. Jon Hurdle, *Success Seen in Program to Save Homes*, N.Y. TIMES, Sept. 27, 2008, at A22.

11. *Avoiding Foreclosures*, *supra* note 2.

12. *Id.*

13. *Id.*

14. See *Casey Promoting Foreclosure Intervention Program*, 70 PHILA. TRIBUNE 124, July 18, 2008, at 4B; Press Release, Robert P. Casey, Jr., Casey Urges HUD to Inform Other Cities about Philly’s Successful Mortgage Foreclosure Prevention Program (July 15, 2008), available at <http://casey.senate.gov/newsroom/press/release/?id=a8bacb54-054c-42cb-bf99-9719f17b2ac5>.

15. Hurdle, *supra* note 10.

16. Goodman, *supra* note 5.

faced, and simply looking for a way, as a *Times*' headline put it, to "stay put."¹⁷ The media put a spotlight on a program that provided relief for homeowners but also more efficient business for mortgage lenders:

At a hearing for 84 foreclosure cases in a Philadelphia courtroom [in September 2008], Debra McGrath, 52, was trying to save her home of 23 years, which was scheduled for sheriff's sale in October because she owed about \$8,000 in mortgage arrears.

Ms. McGrath, a nursing assistant, said she had refinanced her \$64,000 loan at 9.75 percent to help pay medical bills. She had expected to pay \$1,406 a month, but from the start of the loan she was presented with bills of \$1,886, which she could not afford.

"This has been nothing but a nightmare," Ms. McGrath said.

After a courtroom negotiation between Ms. McGrath's lawyer, court officials and representatives of the lender, Franklin Credit, the company agreed to accept a \$1,500 lump sum as payment of the arrears and a resumption of the \$1,406 monthly mortgage payment at an interest rate reduced to 6 percent, allowing Ms. McGrath to stay in her home.

"I'm going to cry," Ms. McGrath said on hearing the news.

Mike McKeever, a lawyer who represents participating lenders, said the banks had cooperated because agreeing to restructure a loan or forgive some arrears was cheaper than going through foreclosure proceedings.

"We are in favor of it," he said. "It has brought both parties to the table."¹⁸

To spread the word about RMFDPP, I and Judge Rizzo spoke to television news crews and print media outlets who arrived on City Hall's doorstep from as far away as Sweden. Philadelphia Mayor Michael Nutter funded support for the program, and took to the local airwaves to lend his approval as well. This is not a traditional approach for a judge, to be perceived, perhaps, as courting

17. *Id.*

18. Hurdle, *supra* note 10.

elected officials and the media. But this mortgage foreclosure program was not traditional, and that was part of its appeal and its triumph. The media allowed our program to succeed by educating the average Philadelphia citizen as to what resources were available should he be in danger of losing his home—often the only asset he held.

The courts and the city were under no legal obligation to intervene in the mortgage foreclosure crisis, but we felt a moral one, and the press extended its reach for us beyond our own radius. I bear this in mind when my instinct might otherwise be to assume an “arms-length” posture towards reporters who want to talk to me about my cases and my decisions now. I would be naïve not to exercise caution in those discussions, but when I am able to explain my position clearly on the record, I know now how my neighbors might benefit some day down the road. As my experience with RMFDPP has shown me, it’s usually worth bringing both parties to the table, even when the “parties” are the media and the courts.

