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Retired Justice Offers Insight Into Supreme Court Dynamics

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"Not to be flip," C. Ian McLachlan, then a nominee for the state Supreme Court, told a state senator who was quizzing him about the death penalty, "but the question really isn't what I think about it. What do you think about it?"

McLachlan was at the judicial equivalent of his job interview with the legislative Judiciary Committee. He was making a point on principle: "As far as I'm concerned, capital punishment is a political decision. It's been held to be constitutional. It doesn't mean that I wouldn't look at a new constitutional challenge. But if the legislature wants to change it, change it."

McLachlan is mild-mannered and personable, but beneath his polished manner he has the backbone to state his firmest beliefs out loud. After 27 years of private legal practice, seven years as a trial judge, and six years on the state Appellate Court, McLachlan spent the past 3 1/2 years on the state Supreme Court.

McLachlan was known for being on the "conservative end of the spectrum," said appellate advocate Wesley Horton. "I have been very impressed with his time on the court."

Now, having reached the mandatory retirement age of 70 in June, McLachlan is leaving public service to take up family and civil arbitration work at the Hartford office of McElroy, Deutsch, Mulvaney & Carpenter.

On McLachlan's 70th birthday, Gov. Dannel P. Malloy called to thank him for his service. "He was very gracious, and he didn't have to do that," said McLachlan.

Still, the courtesy calls doesn't stop McLachlan from expressing displeasure that Malloy has not yet filled McLachlan's spot on the Supreme Court. There have been suggestions that neither that opening, nor the one created by Justice Lubbie Harper's imminent November retirement, will be filled until next year.

"I respect the governor, and he has every right to appoint who he chooses, as long as they're qualified," said McLachlan. "But it really puts a strain on the court. And I think that disrespects the court, a little bit. It's an equal branch of government and it has a function to do, and this impairs it."

Nothing Personal

Over the course of several discussions this week, McLachlan was not reluctant to weigh in on the dynamics of the state's high court and of the practice of law, specifically on the payment of lawyers and retired judges. Some highlights:

- McLachlan said he was a "big advocate" of Chief Justice Chase T. Rogers' decision that all cases would be heard en banc by the seven-member court. "I think the litigants and the public were entitled to the opinion of the [entire] court. And I think people thought the composition of a [smaller] panel made more of a difference to the outcome than perhaps it did — but even allowing that perception was not helpful."

•McLachlan acknowledged that discussions among the justices can get contentious. "On my last session on the bench, I talked about the commenting process, and the benefit of the exchanges of views. It makes better opinions. Sometimes you get frustrated with somebody because you thought you were right and they were wrong, but in the end, on most occasions, I think it just strengthens the opinion... In spite of the disagreements that the court has had in the last decade, I don't think that it's personal to the extent that people can't talk together, can't work together."

•In the past few weeks alone, the Supreme Court has issued split decisions in a number of criminal cases, including those involving the sexual assault of a handicapped woman; potential double jeopardy; and whether a fist is a "dangerous instrument" under state law. "My perception is that we have more multiple opinions" in criminal case, said McLachlan. "I'm not sure that they're helpful. At the Appellate Court, we learned from [former Chief] Judge Antoinette DuPont. Her view was that we were there to give guidance to the bench and bar, and that multiple opinions don't give as much guidance."

• In addition to proposing salary increases for full-time judges, Rogers wants to boost the per diem payments for judge trial referees from \$220 to \$288 by 2017. Many judges who retire at 70 become JTRs, a route that McLachlan has decided against. "I agree that the \$220 a day should be more," said McLachlan. "It's not just about the [per diem amount]. They're now restricting the number of days a referee can work, which compounds the compensation problem."

Gold Coast Career

McLachlan's legal career has long focused on family law, which he practiced at Stamford-based Cummings & Lockwood from 1969 to 1979, before joining Westport's Berkowitz & Balbierer, a matrimonial boutique, as an associate and partner.

After four years there, he returned to Cummings and a pure family law practice. The Gold Coast of Fairfield County produces the state's richest divorces, and its best-paid divorce lawyers. In the early 1990s, McLachlan's reputation grew in family law circles, and he represented the state as president of the Connecticut chapter of the American Academy of Matrimonial Law, and other leadership positions in the family bar.

As a family lawyer at Cummings, McLachlan said, I settled a lot of cases." He said he also "really liked trying cases — it was a lot of fun." The demands of litigation work had a price. "I don't think my family was crazy about it," he acknowledged. In his own matrimonial history, McLachlan has three children from the first of his three marriages, and is currently married to Superior Court Judge Cynthia Swienton. They live in Chester, a small town of 3,800 that's home to over 100 lawyers and five judges.

In many ways, McLachlan said, settling divorce cases leads to better results than winning at trial. "You could really tailor a settlement to the needs of the family, and you could do things in a settlement that a court didn't have jurisdiction to do...

"You don't typically settle cases in a very one-sided way. Typically they're in the middle, with their own level of settlement. Sometimes a case would settle, and you would wonder why. I always knew that the parties knew things I didn't know."

Alternative Billing

McLachlan believes lawyers — including family law practitioners — should be able to be compensated for extraordinary results, above and beyond flat hourly rates. In recent years, lawyers who engaged in "bonus" billing have been sued by clients and run afoul of the state Office of Chief Disciplinary Counsel, because the arrangements seemed too close to an improper contingent fee, which ethics rules do not permit in divorce or criminal cases.

Back when he was previously in private practice, McLachlan said, "[I]f I thought the matter was resolved expeditiously at a reasonable or good rate for the client, I might charge [for] more than the time."

If lawyers were able to bill for results, not hours, there would be less built-in incentive to take more time to complete the work, McLachlan said. He added that value billing would not only work well in contested divorce cases, but in "securities law, tax law, trade regulation. You go to an expert. They understand the problem immediately.

"They can call the SEC, they can do whatever, and within a relatively short period of time, even a few hours, they can get a tremendous result for somebody. And even if those people have rates of \$900 or \$1,000 an hour, they may have, in five or six hours, created tens of thousands of dollars in value. Not that it should be a contingency, but it's worth more than the flat hourly rate, in my view," McLachlan said.

So how does a lawyer write this into a fee agreement? "Well, you say [to the client] we'll send you periodic bills or notices letting you know what the time is, and if at the conclusion of the matter, we'll agree. So to some extent," he said, "I suppose it's a contract to make a contract."

'Worked Miracles'

Billing aside, McLachlan is looking forward to his new role as a mediator in family law and other civil cases. It's a route that several other Connecticut judges have taken in recent years. McLachlan isn't surprised. "Connecticut may be late to the game. Some states require that you have a mediation before you get a trial," he said.

His peers think he'll be good at it. Darien matrimonial lawyer Gaetano Ferro, who practiced with McLachlan briefly at Berkowitz & Balbierer, said he and opposing counsel Sam Schoonmaker III once settled a difficult divorce case in New Haven before McLachlan in his Superior Court years. "He worked miracles in a half a day together," said Ferro. "There were no concerns about potential biases, and he's really a scholar in the area. "

For two years as a Superior Court Judge, McLachlan handled a complex litigation docket, and he's planning to offer civil case arbitration to lawyers and their clients. "He knows value," said William F. Gallagher, a veteran New Haven plaintiffs' lawyer.

Gallagher noted that some of McLachlan's new competitors in the mediation field charge up to \$2,000 a day. That figure, Gallagher said, could lead some attorneys to court-annexed mediation services rather than private firms.

McLachlan seems ready to prove his worth. "I think 70 is a little bit young to retire.?? I'm not ready to put my pencil down.??I liked being a lawyer."•

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