

Oral History of Magistrate Judge John M. Facciola
Third Interview
January 15, 2010

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is the Honorable John M. Facciola, Magistrate Judge of the United States District Court for the District of Columbia, and the interviewer is Kali N. Bracey. The interview took place on January 25, 2010. This is the third interview.

MS. BRACEY: So, it is the morning of January 15, 2010, and where we left off was sort of the state of the legal world and I think we're going to move on to law clerks. Hiring, and choosing, and how great they are. So, how many law clerks, just of, sort of how many staffed —

JUDGE FACCIOLA: Well, when I first arrived here, to succeed Judge Attridge, he had already a secretary and I came out of a culture which was quite different from Judge Attridge because he was of a generation that wrote things out in longhand or dictated, and I was word processing-dependent from the U.S. Attorney's Office. So, the secretary I had wasn't busy, she didn't like it, she was bored, and she decided to retire. And upon her retirement I availed myself of the opportunity of converting that position into a law clerk position, because Magistrate Judges can now do that as can District Court Judges. So, from that point on, which was very early in my career, I have had two law clerks. One of them, Sarah Podger, has been a professional clerk, that's her career, she's been with me now, I think for eleven years. While the other is a rotating person, who serves for a year. I prefer to

have the rotator serve for a year for several reasons. Number one, I think a year does it, they gain enough experience, and I can't pay them very much. And the second thing is, I like the fresh, new blood coming in every year. So, I've had wonderful law clerks. I've grown very close to them. Recently at his portrait hanging ceremony; Judge Robertson described his law clerks' children, as his grandclerks. So I have six grandclerks. I don't know if it's unique in the federal judiciary, but if, you can see behind me, I have performed wedding ceremonies of many of my clerks. There are only two I didn't do, and they are both Catholics, and needed a priest, and I couldn't pass their physical. Amy Easton, I married. And Amy is an interesting story. I was at the U.S. Attorney's office and it decided to start using college kids as interns. And I was against it. And I said, "What in the world are these college kids going to do?" And she was assigned to me and she showed up in her Michigan sweatshirt. And I showed her how to use the library and within a week she was producing work better than most of the lawyers. So I told her, "Amy, if I ever become Judge, you'll be my law clerk." So, we lost contact with each other. And I tracked her down through the Ohio State Admissions Office where she was going to school. And I called her, and out of the blue I offered her the clerkship. So we were reunited. And she was my clerk. Then my first clerk was Julie Anna Potts. It was funny, she was, she had a thick Southern Alabama accent, and I had a Brooklyn accent. So for about

the first month, I think we needed a translator. But fortunately, down in Alabama, Judge Carroll, John Carroll, Magistrate Judge Carroll, his secretary was from Brooklyn. So we had a full-way translation system, if we didn't understand each other. She kept talking about somebody named, y'all, and I thought that was like a Swedish cousin. I didn't realize it was the plural view, y'all. "All y'all" was my favorite. And she was wonderful. She since has gone on; she became, just this past week, she's now General Counsel to the Senate Committee on Agriculture, having served as a lobbyist for the Farm Bureau, General Counsel for the Farm Bureau, which is the largest lobbying organization on earth. Kevin Muhlendorf, I married him as well. If you look over there you'll see in that picture my signing the ketubah, the part of the Jewish wedding ceremony, in which I sign the contract between the couples. And that's Kevin next to me. And Sarah, I performed her wedding at the St. Regis as well. She married a gentleman from Great Britain. And so I've been very close to my law clerks. And the fun one was this Katie Anderson. That's Judge Mary Ellen Coster Williams, of the Court of Claims, who is my dear friend. We worked in the civil division together under Judge Lamberth. And Cos is, I call her (she has to have a nickname with all of those names), Cos and I flew out to Michigan, and the reason for that is, my law clerk married her law clerk, and we performed the wedding ceremony and had a blast. Danced the night away in an old converted barn out in

Michigan right on the lake. It was very beautiful. So, now they have kids, and I have pictures of the kids here in chambers, and I think one's blowing into town today. That was another interesting wedding I did. She married a Remesh, a physician from India. And Meredith is about almost six foot tall, a very beautiful woman. And her Remesh's mother went to India to get the saris for the women in the wedding party, and they had a traditional Indian wedding, and it was just magnificent, and her hand was all decorated with the henna, and it was very beautiful. And then we did an American ceremony thereafter. And then the most recent one was a lot of fun. Michelle Tupper, my law clerk, married a guy who is a very gifted carpenter and works on remodels, remodeling, particularly buildings in Washington that have aged in magnificence. And they both love country music, and he has played at the Kennedy Center. He used to be with a band. And that was really a boots wedding down in Kentucky. So we had a lot of good country music, and had a lot of fun. So, it's been a really good kick.

MS. BRACEY: You seem like you have a lot of women who are law clerks.

JUDGE FACCIOLA: It's interesting. If you look back over my career, there are very few times when you will find that I have men working for me. I had an all-female staff at the U.S. Attorney's office for a while and most of my law clerks have been women. I can't say I'm even conscious of that, but they just stand out in terms of their qualifications. I suppose it has

something to do with the fact that my three sisters were eminently qualified professionals. So, I'm very comfortable around women who are in a professional capacity and enjoying themselves.

MS. BRACEY: And what makes a good law clerk?

JUDGE FACCIOLA: The ability to say no. The ability to stand at the cliff and say, "No, Judge." "See the stop sign? Stop right there, cause you are about to drive right off of this cliff." As I tell them from the first day, you are not here to say yes, you are here to say no. "Judge, this is not what you should do." They're here to cool me off. Make sure I blow off steam and don't do anything that I shouldn't do in anger. And they are here to perform, you know, the disciplined approach of finding what the law requires and bringing it to my attention and helping me articulate it. We write a lot more than most chambers. I noticed this morning, I think, I was looking up something. I think I have 560 published opinions, which is after twelve years, about 40 a year. So, that's remarkably large, I couldn't have done that without the excellent work. And we do it a lot of different ways. There may be situations where they give me a draft, and I'll mark it up and then we'll talk it through. There may be other situations, perhaps more common, where I'll write and give it to them and they'll whack it. But it is an editorial process. Our law clerks learn, as I learned when I was very young, it's important to be a good writer but it's much more important to be a good editor. And to know how exactly to say things with power. I

have a lot of fun with my law clerks. I am of a literary bent of mind, and classically educated. So, I am always sneaking in literary references that they are giving me a hard time about. But I never took the job, they didn't tell me when I took the job that I would have to be dull and I refuse to have a dull prose style. Nobody is persuaded by something that's turgid and can't be read. And the law clerks help me immensely there. They also serve as sounding boards in terms of approaches. They also acquaint me with new things, you know, with new perspectives. The world keeps changing and the arrival of a new group, a new person each year, helps me understand how that new generation is seeing things, particularly in the area of technology. And how that generation views concepts of privacy, and so forth, is very important to me.

MS. BRACEY: And how, what have you seen trend-wise with your clerks?

JUDGE FACCIOLA: I've seen that the number of people applying has gone through the stratosphere. I think I had 1165 applicants for one job in the last year. Now, a lot of that is the product of the computerization of the system. So, in the old days, a law clerk would have to spend 47 cents for 200 envelopes and mail one to every judge in the system. Now he or she just pushes a key stroke and it goes. But we are overwhelmed with applicants. So the winnowing process is much more difficult, I think, although the computerization of it through this OSCAR system is very, very helpful. The second aspect of it is, I think the law schools are

doing a better job in having the students write more earlier in their careers. The one thing that distresses me, however, is I would like to see Law Review experience be traditional Law Review experience. I don't think you should escape from the Law Review experience without writing something.

MS. BRACEY: Oh, as opposed to just editing?

JUDGE FACCIOLA: As opposed to just editing. So, that's the only thing. But the quality keeps going up. And it's interesting they each bring different skills, they bring different attitudes, different ways of doing things. They are radically different. Some are aggressive, some are not. Some have views on a particular matter that are different from others. Kevin was our closet conservative, he was a, you know, a George Allen Republican from Virginia. And he was always being teased by the other law clerks for his ways. One of them brought extraordinary technical skills to the job and that proved very valuable to me. He had made his living for a while as a computer programmer and when he worked with me on the White House backup tapes and his understanding of the technology was crucial to my understanding of the technology. So that now has become particularly significant criteria and I look at that very carefully 'cause I want people to be comfortable in the 21st Century world we live and unfortunately that's a technical world, or fortunately.

MS. BRACEY: Could you just put, so we know what the OSCAR system is?

JUDGE FACCIOLA: OSCAR, O.S.C.A.R. stands for Online System for Clerkship Applications something or other. About 5 years ago, you can't imagine how badly this had gotten out of hand. Remember we're the home of two courts, and two of the most prestigious courts in the country. So, you can imagine the number of applications we got. We had to hire contract people to go through the mail. Thirty-five to 40 buckets of mail would arrive the day after Labor Day. And they all had to go through the machine and be sorted and all of this. And then, another aspect of this is that there were no restrictions on recruiting in terms of the year that a person was in law school. So, people were interviewing 1L's and there was all this one-upmanship. So, finally everybody came to their senses. The first aspect was the agreement that we would only hire, only interview 2Ls for permanent positions, that we wouldn't do so before September 8, the day after Labor Day. And then, that led, under Jim Robertson's leadership primarily, to the creation of a computerized system by which law students apply. And basically, each student in the database has a package: opening letter, résumé, letters of reference, transcript. And I can look at all of those without leaving the computer screen. Then I can box them. You know all the ones I'm particularly interested in. All the ones maybe worth a second look. And then I can search in a lot of different ways, e.g., law review experience. In my case, I frequently, and have been

successful most of the time, look for some experience between college and law school. And then, some experience after law school. I very rarely hire right out of law school. I like people with experience in various areas.

MS. BRACEY: So, what areas?

JUDGE FACCIOLA: Usually the law firm or governmental. It works out better, I think, because a year of experience is good. Coming out of law school to a clerkship can be, you know, a real cold shower. And law firm experience or governmental experience, I think, sharpens writing skills. Also, it puts you in the position where you got to get work out on a deadline. It creates people I can talk to about you so I can see how you functioned in game conditions. So, there is a natural trend in the federal judiciary accelerating year-to-year of insisting upon some experience after law school. And given the market, you know, you can insist on anything you want these days, because the market favors the buyers as opposed to the sellers. Now, it's interesting in my law clerks, I've corrupted all of them. They've all gone on, most of them have gone on to public service, I'm proud to say. Amy was with a firm for a while, didn't like it. She's at the Department of Justice. Katie's at, in the Inspector General of IHS. Kevin is making a heck of a career for himself at the SEC. So, as I say, I corrupted all of them, they're all in public service, with one or two exceptions.

MS. BRACEY: Very good. Are there any judges on your court who are particularly effective at influencing other judges getting them to get things done?

JUDGE FACCIOLA: Yeah, but not by force of personality. Probably by force of their opinions and so forth. I think you'd have to say that Hogan is a leader. You know, if you're disagreeing with Tom Hogan, you better really give it a heck of a lot of thought because it's been very, very carefully done. And again, they have different perspectives, but I think of the ones I've met, I think Tom really leads the pack; just as recently as yesterday, I noticed a particularly principled decision. I know now, after I read his decision, the question became, is whether a contrary decision would make any sense, and if it doesn't, then he's right. In other words, I don't have to accept what he says because he's a coordinate judge, but nevertheless he has an important leadership role in a lot of my thinking. And that is true of several of them. I can't think of any whom, whose opinions I would disregard, that's certainly not true. But, you know since we are coordinate judges, what we try to do, is try to interpret what the circuit has said. One of the problems I have now, and I think it's the most distressing change I've seen, is computerized legal research permits young associates to think that if they find a district court case in Nebraska it's the law. So, you have this unfortunate situation where a phrase is taken from a case and said to be the law, as opposed to the old idea of pulling down the circuit authority and seeing where it is before you do anything else. And I

don't know if that's the product of legal research or the product of computerized legal research, but something has gone wrong there, and it leads to a mountain of work that is kind of misdirected.

MS. BRACEY: And is that, is the work that your law clerks then have to find the circuit, because it exists —

JUDGE FACCIOLA: Oh no, I have to find it. That's exactly what I'm doing when you walked in.

MS. BRACEY: Okay, because it actually, because sometimes they cite Nebraska because there's no circuit law —

JUDGE FACCIOLA: Or because Nebraska's cool. It's got a phrase in it they like. And that is not really the methodology that they're required to engage in. And my law clerks always come back to me and say, "Judge I read this brief by this party and there are no citations to any district cases or any circuit cases." I say, "Well, then we've got work to do, don't we?" We go in and there it is, there is circuit authority and it's not been handled, it's not been grappled with. There's just maybe too much information out there, you see what I mean?

MS. BRACEY: Right, so you can't filter.

JUDGE FACCIOLA: No. In the old days, you just pulled down, you just looked at what this circuit said. Now, you can do that in the system and I'm surprised not

more people don't do it, or at least their work product suggests that they hadn't done it.

MS. BRACEY: Anything else on that? Like what you are seeing in terms of trends and what you're seeing from litigants?

JUDGE FACCIOLA: Yeah, that's one of the concerns I have. The second concern I have is there's still a lot of time being burnt up on stuff that's really not that important. In other words, if you're around the adversary system long enough you know its values. But you also see, one aspect of it is it leads to fighting for the sake of fighting. Lawyers actually take seriously that a judge is going to read an opposition to a motion for an extension of time. I have news for them. Nobody has time to do that. So, I see a perceptible trend among judges, losing patience with adversary system for the sake of the adversary system. And as recently as yesterday I was invited to the conference in May that's being run by the Advisory Committee on the Federal Rules under Judge Koeltl in New York. And we're going to be looking at these surveys that were recently done in terms of the cost of discovery, electronic discovery, by the FJC, by the Institute for the Study of American Law, and by American Trial Lawyers Congress. But the point of all of that is, is trying to look very carefully at cost and benefit ratios and doing something about that. So that trend is, I think I see greater emphasis by the judges on the value of cooperation as opposed to the naked adversary system burning up time and money. So that's a

very perceptible and obvious trend. And I'm very excited about being a part of it, or at least being there kind of at the inception of the thinking.

MS. BRACEY: And do you think what's driving the issues in the adversarial system is the availability of all this electronic information, or is there something else ?

JUDGE FACCIOLA: Well, yeah. I think what the problem, the first problem I think is that there's just so much of it. In other words, if we all managed our electronic data better than we do, we wouldn't have a problem. However, there is a natural temptation now, because storage capacity is so cheap to save everything. Well, if we save everything the cost of finding anything is that much more. And I'm a bad offender of it myself. I realize that if I could clean up that hard drive and get rid of these cases from five years ago which nobody cares about because they've been resolved on appeal, and if the case is over, it certainly would be a lot easier to find it. But, you know who has the time to do that? And I'm not disciplined enough to go back in there. As a result, finding things is that much harder. It leads to this whole sub-industry of search of vendors selling search capability and others. So, I don't know if it's, it's hard to say, was it the chicken or the egg? Whether we were thinking about these issues and electronic discovery came along, or electronic discovery coming along and we got thinking about these issues. But there now has been this perfect storm of all of these

things coming together. You know, a friend of mine, Pat Oot, was employed by Verizon and they spent 4 million dollars in discovery in a particular case. And I had a discussion of this at Georgetown this summer. Justice Breyer was there. I said, “Can you imagine the good we could do for the children of the District of Columbia with 4 million dollars? Where is this money going?” And as a result, Pat was hired by Verizon with the single responsibility: get those costs down. So we’re going to see that trend is perceptible and it’s leading to whole new ways of thinking about it. So this conference in May could be terribly significant. Then the other development I think is very interesting and it’s a coincident development is the interpretation by the District Court’s of the Supreme Court’s decisions in *Twombly* and *Iqbal* and where that will take us as a coincident sort of development.

MS. BRACEY: And have you seen any, any —

JUDGE FACCIOLA: The first thing I’ve noticed, and I’ve been, is I’m looking at it, some of the statistics, I think we’d all agree, that the rate of dismissal is going up in those judicial districts where there are prisons, which is understandable.

MS. BRACEY: The rate of dismissal is going up?

JUDGE FACCIOLA: Yeah.

MS. BRACEY: Okay.

JUDGE FACCIOLA: Because the pro se petition is the plaintiff's. *Iqbal* was a qualified-immunity case. And I handled a lot of those cases when I was an Assistant. So I could see that. The general trend, there was a good article in the Northern Illinois Law Review by a lawyer who studied the cases post-*Twombly* in a Title VII area without the benefit of *Iqbal*. And he saw a perceptible trend upward in the rate of dismissal and came up with some proposals of how to meet *Twombly*'s requirement in terms of what, a Title VII complaint? And I think we'll see more of that, assuming Congress doesn't push back with legislation, which is, you know, is pending.

MS. BRACEY: Right, right.

JUDGE FACCIOLA: That's a very, very; I think that's a very important trend that bears a lot of watching.

MS. BRACEY: And would you like to see it go down, I mean, or you want it to be accurate, and sort of —

JUDGE FACCIOLA: Yeah, I think there's a fine line. This professor convinced me, that for example, in a Title VII action you should at a minimum say, what was the discriminatory act, and what its consequences were, all right? And conclusory pleadings are just not going to do it. And I think Rule 8, that's what Rule 8 means, a short, plain statement. So, I think that trend is good, but it may be of academic interest if leave to amend is always permitted. So, that really was where the rubber is going to

meet the road. I don't know, we'll see. But in the pro se cases it could have a very dramatic impact.

MS. BRACEY: And it seems like it already is.

JUDGE FACCIOLA: It seems like it is, yes. I've even heard the verb, oh, I think that should be "iqballed."

MS. BRACEY: Wow, and once it becomes a verb.

JUDGE FACCIOLA: Once it becomes a verb, it's like Kleenex, you know, we've got a problem.

MS. BRACEY: Right, in Xeroxing.

JUDGE FACCIOLA: We got a thing in Xeroxing, yeah, so. But I think that's, if you ask me one of the most, one of the most significant developments that I've seen in the past five years, I'd say it's impossible to exaggerate the importance of *Twombly* and *Iqbal*. They could have a very dramatic impact.

MS. BRACEY: Let's turn for a moment, to sort of your memorable and difficult cases. And right now, you're sort of on the forefront of this e-discovery thing, if you want to talk a little bit about that.

JUDGE FACCIOLA: Yeah, interestingly enough they are not the most difficult. I don't know why or how this happened. But I'm comfortable there. In 19, I guess 97, there came before me, the *McPeck* case. And it was the first case I ever touched that had anything to do with electronic discovery.

And I got thinking about it and I said, “Well, this is a situation where we’re going to have to measure cost against benefit.” And I remembered the principle of marginal utility from my economics courses and I said that the value of doing any more discovery than we’ve already done is at the margin. And the next thing I know I’ve created a test for e-discovery of marginal utility. I did, really? You know, it was news to me. But that began my involvement in that. And my involvement took a lot of different forms. But the two most significant were my involvements with Georgetown in the CLE programs devoted to e-discovery at the Law Center and my work with the Sedona Conference. Georgetown is the more traditional CLE while Sedona is a conference. It has more of a goal of creating the best practices that are going to be used. And I’ve been involved in Sedona, for, I guess, about 10 years now. I serve on the Advisory Board, the Advisory Board of Judges who try to govern the conferences, to what are appropriate topics on how things should be approached. And then I work on various working groups. To get back to what we were talking about, most specifically on the one I like working on, is proportionality, cost and benefit analysis, and all of that in terms of the overall trends. I’ve also done a lot of work at Sedona in a lot of different areas. In complex litigation, with particularly attorney-client privilege and Rule 502. So, those two aspects have predominated. Then throughout the year there are other opportunities

to speak. And the D.C. Bar, then groups that ask me to speak in front of them. And I particularly like speaking to records managers, to operation people in corporations. Because they tell me how it actually works and what their actual problems are with the technology constantly jumping ahead. And then I got involved with something called the RSA. The RSA is named for three Israelis who created a security company. Security in computers is very much related to cryptography, because it's really, when you think about it, the same principle. It's a kind of coding. And when I went out there I think I was like the dodo, I was the first judge anybody had ever seen. And I thought, well, this isn't going to work, and because they first began talking about things that frankly I didn't understand. And then I was on a panel and I looked around and realized, God I'm the only guy on this panel without a PhD from either Cal Poly area, or MIT in advanced mathematics. This is going to be fun. This is going to be something. But I began to learn a lot and they began to learn something from how a judge looks at these issues. So, now I have a really pronounced interest in information security. The security of information. How do we know that this thing is produced by the computer and it is what it purports to be? That's what RSA does. That leads me into other issues in terms of protection of that data from invasion by others and so forth. And to the general questions of security. And I never stopped learning. Serge Jorgensen was a

speaker last year and he got talking about encrypted data and the hard drives and all of this. Serge did a survey for the Transportation Safety Administration, and I still find this hard to believe, but it is true. Last year, how many laptops do you think were left at the Atlanta airport last year?

MS. BRACEY: Ooh, I've read this. It's a lot though, it's a lot.

JUDGE FACCIOLA: Yeah.

MS. BRACEY: It's like 50,000 or something.

JUDGE FACCIOLA: It is. Exactly right, it's 50,000. And so, then as recently as yesterday, the San Francisco Chronicle had a piece where somebody took the medical records from Kaiser Permanente home to work on them, and then her car was burglarized. So these kinds of things, the security community that I'm learning more about led me to think about authenticity of documentation as well as some other issues. And the security officials also get involved in production questions in terms of electronic discovery, trying to create a matrix of having an electronic records system that is secure but can yield quickly and efficiently that which is required whether by discovery or otherwise. So, that has become really a fascinating part of, you know, what I do, and it's very interesting. I haven't had that many, thank God, that many data breach cases. Let's hope I never have them. But I had one involving the V.A., the computer that was lost.

MS. BRACEY: Oh right, right. That was big.

JUDGE FACCIOLA: That was big. Fortunately there were no damages. They, the V.A., did a commendable job of cleaning up almost immediately, changing passwords, setting up a place where people could go. And fortunately no one was harmed. One guy had to wait one day to get mortgage clearance cause there was some confusion about his bank records. But that was cleared up.

MS. BRACEY: So, tell me a little bit about how the marginal utility, the principle sort of has cases . . .

eJUDGE FACCIOLA: Yeah, McPeek sues the Attorney General. McPeek is at the Bureau of Prisons. And he says that things start going downhill for him when he rejects the homosexual advance of the Director of the Bureau of Prisons, which is quite startling accusations because the Director of the Bureau of Prisons is Mike Quinlan. I used to represent Quinlan when I was at the U.S. Attorney's office, known him for years, and he was a pretty upright, and standup guy. Well, in any event, so it was, the question became that there were some e-mails that transpired back and forth at a particular point in time, and they couldn't be found. And the question was whether you should search the backup tapes to find them. And I said that the search had to be, whether you do the search, had to be function of marginal utility. How likely is it that that search will yield what we're looking for? So, we did it in two stages. Stage one,

we did a cursory review to see where the stuff might be. Then we stopped. And the second *McPeck* decision deals with the question of, given what we know, is the additional search worthwhile? And I concluded that it was not. Because what was on the backup tape was so distant in time from when these events occurred that it was inconceivable to me that people were still talking about his departure nine months after he left. So, that's how marginal utility works. Marginal utility is nothing more or less than what Rule 23 says. That in determining whether how much discovery to permit_____, you take in these factors and it's a broad discretionary judgment. Now the question is how do you do that cost-benefit ratio in terms of evaluation of the case and this amount of discovery? I said in *McPeck*, we cannot have a system where we spend \$300,000 for an e-mail. And I still am of that view. Now the question is, how do we balance those two factors, how do we find what we've got to do? And that's a legal question, it's also a technology question. Because as search technology becomes more sophisticated, ever more sophisticated, there is a shot that the cost of search will go down. What's defeating us is storage capacity. Because storage capacity keeps increasing geometrically, there is very little motivation to have a true records management policy and throw things out you don't need anymore. And that's what we're seeing.

MS. BRACEY: Well, other than discovery, other than it might be found, you know, sort of, the trend to have the automatic delete from your inbox, and that sort of thing.

JUDGE FACCIOLA: Yeah. And so, that over the period of time in Sedona, Sedona working groups worked on various things and then a bunch of us got thinking about the possibility of seeing if we could come up with a new paradigm. And to that end, I guess it was last year, we promulgated what we call the Sedona Proclamation Cooperation in which we urge a cooperative attitude towards this. And we've gotten so far 100 judicial endorsements of it. So there's a working group applying the Cooperation Proclamation, for example, to in-house counsel, from an in-house counsel perspective, then from litigation counsel, from an IT department, from a judicial perspective. And so what we're trying to do is build up a series of two kits that people can use in an effort to cooperate without jeopardizing their client's interest. Now whether that model will become the model remains to be seen.

MS. BRACEY: And who, what, who makes up the Sedona Conference, and how did you —

JUDGE FACCIOLA: The Sedona Conference is the brain child of a man named Richard Brayman. Richard was once a hard-charging plaintiffs' antitrust lawyer, who always wanted to put together a think group that would step back a bit and think about these issues in several areas. And they

were electronic discovery, antitrust complex litigation, patent, in those four areas. The idea behind the Sedona Conference is that unlike the traditional CLE program you see, membership is restricted to a group of people who are committed to it. And those people are really a working group. They are working towards the ultimate creation of best practices and guidelines in these various areas. So, then they are published and then refined as time goes by in each of those areas.

MS. BRACEY: And how did you join?

JUDGE FACCIOLA: Ken Withers (was at the A.O.) and I had known each other. And after the *McPeck* case there was some interest in some of my thinking on this issue and I was invited. And I've been involved ever since.

MS. BRACEY: And you've also gotten some press for the Center for Responsibility and Ethics in Washington?

JUDGE FACCIOLA: Yes, I did. That was the White House backup tapes. Yeah.

MS. BRACEY: In *U.S. v. O'Keefe*?

JUDGE FACCIOLA: Yeah. *O'Keefe* dealt with two men, one of whom is accused of bribing the other to get visas out of the Department of State in Canada, and it involved searching the Department of State records. And *O'Keefe* and another case that I worked on, I got thinking a lot about search terminology and expressed my concern in that case, that that might involve a more sophisticated expertise than most lawyers had. And

that led me to do some more thinking about technical competence, which has become, you know, one of the things I'm really interested in. I guess it was two years ago, I spoke at the New York Legal Tech about that, and I'm surprised they didn't ride me out on a rail, but I expressed my concern that a lot of lawyers who appeared before me didn't have any understanding of any this, and it was getting scary.

MS. BRACEY: Sort of like, what they were asking for, search the backup tapes —

JUDGE FACCIOLA: Or, yeah, they had no idea. Let's search this. Or, you know, in criminal cases, we had a child pornography case in which it was important to understand how the police were capturing the information in the chat room. And the lawyer got up, who represented the defendant, he said, "You know, Your Honor, I just don't understand this computer stuff." I said, "Come here." I said, "You can't say that. Now you're confessing your ineffectiveness. This is absurd." And I've been, so at the New York Legal Tech I try to bring all of these into my thinking to bear on this, and I pointed out that I live with two people, my wife and my son, whose competence to do what they do, is tested on a yearly basis. This morning, at 6:45, as I was going out the door, my son was getting, or grabbing a glass of orange juice, and I said, "How did you do?" He said, "Fine." He had his certification test last night, he's 33 years old. And he's certified in three areas. He's certified as a network administrator in computers, he's certified as a coast guard captain, and he's certified as a scuba diving instructor,

okay. My wife is going to class to get her certification. Then I turned to the audience, and I said, "My capability to do my job was last tested 40 years ago." Oooh. And I said, and when I say, when I propose that the bar give serious thought to certification in this area, in meeting certain conditions in doing what other industries do, and there is a lot of back talk about that. I will say, "Okay, somebody name the last lawyer in America who got disbarred from being incompetent. If doctors were trained and certified as poorly as lawyers, we'd all be dead." So, this is very controversial. And I can see when it comes to certification there are concerns. There's a licensing concern.

Licensees have a tendency to be monopolistic. There are politics involved. For example, in Michigan the private investigation industry got concerned that forensic scientists would start taking their business so they prevailed among the state legislature to pass a law that requires forensic scientists get licenses as private investigators. So, that licensing can be out-and-out monopolistic and I concede all of that.

And I'm one of the few judges who believes in this. But I'll continue to believe in it. I believe what I've learned from this is that these are highly complicated areas and it is well worth it for us to take a hard look at the people who do it. You could say, I suppose, well the market will work, right? The market will, as this becomes more and more prevalent as we go to medical records. I mean, for crying out loud, Jiffy Lube has a computer. The market will insist that lawyers

have this capability and this understanding. Well, I don't know, but while we wait for the market we ought to have some other way to do this. In the computer industry itself, there is a constant process of certification. And the people in it take great pride in the certifications they get and they work hard to get them. And they don't quite understand why the lawyers with whom they work don't have equal obligations. And I don't either.

MS. BRACEY: And no one really wants to fix that.

JUDGE FACCIOLA: Well, as I say, I think, I think it is fair to say that the market will do it. I mean, I'm already seeing how lawyers who build up a competence in this area, the world beats a path to the door, and they're making a lot of money. One supposes that the race will be to the swift. And the lawyers who don't want to get involved in this will find something else to do with their time. But while we wait for all of that to occur there are other problems that I think that have to be addressed.

MS. BRACEY: And there will always be people who still get the business cause they're cheaper even if they don't understand.

JUDGE FACCIOLA: Yeah, but that would be a terrible cost for those people to pay 'cause they just may be represented by people literally that don't know what they're doing. And the impact of this is not just isolated to the market place. It has a significant impact on the judicial system, because what we found and I think everybody agrees, and why Sedona came out the

way it did on the Cooperation Proclamation is that cooperation is a function of competence. The more competent the lawyer, the less intimidated, and the more willing to talk to the other side. Let's try these search terms; my guy says this, what's your guy say? What are we going to do about this, what are we going to do about that? When you have asymmetrical parties before you, one with a lot of knowledge, and one with none, that's when the judicial role increases markedly.

MS. BRACEY: And so, do you find yourself doing a lot of educating?

JUDGE FACCIOLA: Oh yeah. One of the reasons I do as much lecturing and speaking and writing as I do is because I want to be a part of that process. I think it's a crucial process. And when my career ends, I don't know if I'll be remembered more for being the judge than being the lecturer. But I don't care, because I see them as intimately connected.

MS. BRACEY: And how, and do you also have to do education with the litigants who are in front of you, in the courts?

JUDGE FACCIOLA: Yeah, but they welcome that. You know, as recently as this morning, there are, the parties were having difficulty there, and I said I had some ideas I want to share with you about how we might be able to do that. And one of the elements of the Cooperation Proclamation is it takes as a given, judicial intervention at the earliest possible time to prevent problems before they occur. And I take that very seriously.

Please, I don't need 50-page motions, get in here. What's the problem? Well Judge, he says that he can't get this e-mail system, because you know its legacy data. I don't think it is. And I say, what does your expert say, what does your expert say? Let's get them in here, maybe there's a way to do this. All of this is quite revolutionary in the way judges deal with things.

MS. BRACEY: As opposed to waiting?

JUDGE FACCIOLA: As opposed to waiting, and as opposed to waiting for the traditional adversarial briefing, and that, I just don't think that's a luxury we have anymore. Now maybe, you know, an economy in a downturn may teach everybody that lesson anyway. The lawyers are telling me that the clients are not going to pay for this kind of discovery. So, the problem may quickly take care of itself, I don't know.

MS. BRACEY: Can you talk about the White House backup tapes?

JUDGE FACCIOLA: Yeah, it was a terribly complicated matter. And as I say, I was blessed by the fact that my law clerk at the time had made a living as a computer programmer. And over a period of time I really had to learn very quickly all the technical requirements of two very complicated systems. And then I made the rulings I did. I don't remember exactly if they were appealed. But I thought the most interesting aspect of the case is when I got caught between the transition between the two administrations. And wondered what was going to happen. And what

the new administration would do. And in my opinion I describe myself as being between a rock and a hard place, with 48 hours before the new administration arrived. And as I, what I did was I put all of the information in the custody of the archivist. And that seemed to resolve it. And the case has now been resolved and stipulated. So, I was very pleased by all of that. And it was complicated, it was difficult. Because again, you had a relatively diverse system in a way of keeping things without uniformity. And a system that changed as time went by as all systems do. So, in a sense it was aberrational because it was the White House but it, in a sense it was very normal as a reflection of American business constantly being forced to make technological change when the consequence of that technological change maybe to obliterate it or destroy the data that's there, even though everybody is working in good faith. So, in that sense it was unusual but it was very normal and it was a good education for me.

MS. BRACEY: And what did the parties want in terms of just, so when everyone listens to your history, they know sort of how the —

JUDGE FACCIOLA: Well, yeah. The plaintiffs contended that due to deficiencies in, due to the changes that the Bush administration made in the way records were kept at the, in the White House Office of Administration, that e-mails, a large number of e-mails had disappeared, all right? So, the whole theory of the case was, where are they, and can we find them? And what can we do to restore back online from legacy sources, from other

data, where this stuff might be. So, the heart and soul of my job was try to figure out all of the available depositories of this information and what we could do to preserve them, so that they could ultimately be searched, and we could ultimately determine where this material was.

MS. BRACEY: And when you said during the change in administration, what did you do, you had everything sent to the Archives?

JUDGE FACCIOLA: Well, what I did was, I made the archivist who was already a party to the laws of the custodian of all of this information so that it would not go into a lacuna. And that must have worked because I saw last week they stipulated to its dismissal. But, in that, in the opinion, I think it was interesting in that the opinion is the opinion written by a history major. I kept talking about how important, that this is the nation's history, you know, and I think in my final opinion, I quoted Napoleon. He said, he didn't really much care who wrote France's laws if he could write its history. And that's how crucial all of this stuff was. And I'm sure the White House thought I was a pain in the neck. But, in the long run, we did preserve for history an enormous amount of important information. And that leads, of course, to how we're going to grapple with that problem in the future. You know, they say that this administration is particularly tech savvy and they must be, every time I see them, somebody is on a Blackberry. So, you know, if the president serves for four years, he may, his administration may produce a billion e-mails. When they show Iraq on the TV, they go

into the tent where the commanders are; do you notice they're all on computers? What legitimate military historian would write a history of our engagement in Iraq without reviewing the e-mails of the commanders and everything else? It's inconceivable. It's the very stuff of history.

MS. BRACEY: It's also so much of it is in pictures, and the e-mail, and so like many things were discovered because pictures were e-mailed to family and friends, and Facebook, and —

JUDGE FACCIOLA: Of course, visuals. Of course, yeah. So, it was, it was very interesting and I liked it because it was pressurized; it's almost more fun to be under tremendous pressure to do something and get it done than it is to have a more leisurely pace.

MS. BRACEY: And given that your background with the technology and you had the law clerk's background with the technology, did you feel like you were sort of ahead of where the litigants were, or were they —

JUDGE FACCIOLA: I was where they were.

MS. BRACEY: They were where, okay.

JUDGE FACCIOLA: Yeah, I think we were all fortunately on the same page. It's a rare case when I'm ahead of them. I'm lucky to be on the same page. I'm a little more likely to deal directly with the experts. In the first couple of years, I had promulgated what I called, "Facciola's Law," which was:

Don't ever listen to a lawyer when he uses the word computer in a sentence. Because like many judges I had lawyers get up and say, "Oh, Judge we can do that." And of course they couldn't. Or, "Judge we can't do that." And they could. So, I, I was always, I would say, "Okay, is that your expert, Mr. Jones? Mr. Jones get up here, tell me about this." So, that was a way of jumping over that. Now as lawyers become more sophisticated, I don't have to do that. But, as I say, we're back to competence again. We never can run away from that.

MS. BRACEY: Okay.

JUDGE FACCIOLA: And we don't test for that, you know? We don't. I don't know. It's interesting, we have to be the only profession on earth that goes through education and never takes a test.

MS. BRACEY: Right, right.

JUDGE FACCIOLA: You know, so. You know, you go to a CLE program, because they're mandatory and there are three people paying attention, three people doing the crossword puzzle, and you know, and that's why Georgetown and Sedona are alternatives to that, you know. Georgetown emphasizes the academy nature of the place. Sedona, you're not here to sit on your butt and take notes, you're here to work, this is a working group, and we want to hear what you have to say. That's why I think, together they've had a real revolution in the way legal education is done.

MS. BRACEY: Have you, do you want to talk a little about your most difficult cases? You said that the electronic discovery ones are not the most difficult.

JUDGE FACCIOLA: Yeah, well, difficult in the sense that one has to spend some, all right, I mean, you know, if it's attorney-client privilege, I know what attorney-client privilege is. But, I don't know until I've learned it, how the technology of how the White House keeps its e-mails, so that's the difference. You know, it's funny, when I look back over it, the most difficult cases I've had, the most complex cases I've had, having involved large accumulations of data, and getting my hands on them. I think uniquely, Magistrate Judges find themselves at the bottom of the food chain, in the sense of, you know, we've got five thousand documents here, somebody's going to have to look at them, and it's going to be you. So, those have been most complicated because they have been involved in the necessity of managing an immense amount of data which then serves as the premise of the legal conclusions that have to be reached. And that requires the skill of organization. Where is this stuff? And so forth and so on. Going through it word by word. Now, the question is whether or not that luxury will continue to exist in a computerized future. You know, it was relatively easy when I first became a judge to say, "Okay, you say it's privileged, you say it isn't, let me see it." Now that there are 7,000 documents, yeah, how are we going to do that? So the complication has arisen in my case, not so much from the legal issues, as the

conquering of the data sets, will I understand what factually this is all about? Certainly in terms of difficulties, I had a 21-day trial with issues popping up. And I thought that was very challenging and demanding.

MS. BRACEY: What kind of case was that?

JUDGE FACCIOLA: It was a breach of contract case, basically. The interesting thing about what judges are finding, is the day never ends, because of e-mail. In other words, you're trying a case and you finish at 5:00 and you come here at 7:30 in the morning and there are five e-mails with lawyers trying to raise issues. Your Honor, we want to see you this morning, and so forth and so on. So, trials are very demanding because you find you have to work, literally it's a 12- or 16-hour day, and all weekend, because then you got to do your instructions and rule. I have a tendency to memorialize a lot of my trial rulings in writing. So, I write a lot of opinions during a trial, and I find that it's very demanding. In terms of the most challenging, two of my big electronic discovery cases have been particularly challenging because the issues kept coming on us, and we had some really grave difficulties with information that was on servers that no longer existed, and so forth. And they prove it very challenging. Challenging because it was and is so difficult to draw the line between how much more can we do, and how much money is that going to cost, and is it worth it? That's very, very difficult.

MS. BRACEY: And do you have to deal with this, sort of the one-email syndrome?
Where can we find this one e-mail . . . ?

JUDGE FACCIOLA: Yeah, well I think the better. The smoking-gun syndrome. You know, it's like the old joke about the, you know, the kid. There's the story is told the family has an optimist and a pessimist kid and they take the pessimist kid and they put him in a room full of toys and they come back in half an hour and he's broken all of them, and he's sitting there crying. And they go in the room with the optimist and they filled it with horse manure and he's in there with a shovel saying, "Santa Claus left me a pony and I know it's in here somewhere." All right, so the problem is lawyers are trained to find everything that is important and everything that is relevant. And the problem with doing that is, it may simply be impossible to do because the data set is so big. One of the great frustrations is, you can really kill yourselves and get all of this stuff and find out that it's monumentally insignificant. And that's another gigantic problem. It's hard for me to say, what were the most difficult ones because difficult would suggest, I think in all, the legal issues have been interesting. That fact that I'm going to write is a clear indication that it's not settled and I've got some work to do. But I don't remember any one where I felt, you know, I'll never get out of here. Some are longer than others. I had a very challenging situation involving a lawyer, gosh it was difficult. He, poor guy, his life collapsed around him, and during the middle of the case he got

indicted and he was representing some very poor people in Texas and involved in that was just an absolute nightmare. It was very, very complicated, and very, very difficult. And because of that, it just made it hopelessly complicated. But I can't think of any of them where I said, where I ever said, this is impossible. I always kind of think, there's a way out. And there usually is.

MS. BRACEY: And that means in sort of a settlement kind of case? Or in a —

JUDGE FACCIOLA: No, in terms of intellectually. You know, I'll get through this. And some are difficult simply because they take so long; been around for so long, require work for so long. There is an exhaustion level that sets in. And that's something a judge has to fight. The solution there is to go for a walk, a good long walk. Don't let it get you down. This too shall pass. That's difficult. Because you so desperately want it to get done, but it may be a very good idea to put it aside over the weekend, not come in and hit it fresh on Monday morning. Then you say, "Oh yeah, that's what I meant, sure, yeah, yeah, I see." That's a fine line a judge always draws.

MS. BRACEY: And do you have any in particularly sort of memorable cases?

JUDGE FACCIOLA: Yeah, gosh. Well, the White House backup tapes was very exciting, the arrival of the new president and all of that. I can't think one that I didn't enjoy. I mean, I really had a lot of fun. And in each one of them, there was something that really engaged my intellectual interest.

So, I can't think of any that sort of stand out and say, "Oh my God, why did I get this one?" Obviously, patent cases are tougher, they're arcane and you have a lot to learn very quickly, but you got to do it. And we're generalists. That's the great thing about the job. I have never heard a good argument for a specialized judiciary. I think that's, you know, how judges have handled this kind of thing, in a special court for this, and a special court for that. I suppose so, but if you do just one thing all of your life, you never get the cross-fertilization of learning from other things.

MS. BRACEY: This could apply to —

JUDGE FACCIOLA: Well think about it. For example, it was only thanks to the problems that arose from electronic discovery that caused anybody, particularly Judge Grimm, to look at attorney-client waiver, which gave, which was the genesis of Rule 502. So, if we had Judges who did only one thing, that process would never occur, that kind of cross-fertilization. And you see that every day sitting there. Wait a minute, you know, this relates to this. That's important. And I'm not so sure if you have this homing in on one thing you get that.

MS. BRACEY: Can we talk a little bit about — you said you also had an interest in the attorney-client privilege; you just touched upon that with the e-discovery.

JUDGE FACCIOLA: Well, yeah. What happened was the lawyers were saying to us, in the early days of e-discovery, we're getting killed here. Because we're going to have to go through each piece of paper, or each e-mail to see if there's anything privileged and this is costing us a fortune. And Judge Grimm leaped on that in a case called *Hopson*. And he said, Well, wait a minute, a compelled disclosure is not a waiver. If the parties make an agreement then merely seeing something that would be privileged is not in itself a waiver. Then that may be, and I blessed that as a judge that would bind them. But then the question is how do we bind the whole world? But Paul's opinion led to consideration of it and it became Rule 502 which now defines the circumstances under which there is a waiver and says that it's limited and limits it. And that was a direct product of that thinking. So, there was a situation where an issue that arose in electronic discovery cross-fertilized the evidence rules. In other words, what I'm saying – and I've got an article about this coming out pretty soon – in a sense, is that we're kind of blowing up the law school curriculum in the sense of its segregation. You know you study conflicts here, and then you study jurisdiction here, the problem is all of this stuff cuts across that you maybe going to have to revise that curriculum. You know, someone says, well, why don't you teach a two-credit course in electronic discovery? And the answer is: I don't want to teach a two-credit course in electronic discovery because that suggests it's some sort of

arcane thing like a two-credit course in international arbitration. No, no, no. That lets you off the hook. The real question is how are you going to modify your course in civil procedure to live in a world where all discovery is going to be electronic? Or, you know, how are you going to look at evidentiary issues in this world where fundamental information is produced electronically? You see what I'm saying?

MS. BRACEY: Right.

JUDGE FACCIOLA: So that, we keep blowing up the curriculum. And, it's a very fertile time and we're going to have to put it back together again.

MS. BRACEY: And make it —

JUDGE FACCIOLA: Well, yeah and make it principled.

MS. BRACEY: Make it useful.

JUDGE FACCIOLA: Yeah.

MS. BRACEY: Do you think, and this sort of opens up a different topic of, do you think there are other ways it should be changed, given what you have seen?

JUDGE FACCIOLA: Yeah, I, in my life, I think it probably was either the first or second class at Georgetown that actually had electives. For many years lawyers were told what to take. And they were told what to take because they had to meet certain requirements to take the bar, or ABA requirements for certification. That all exploded and the traditional

mandatory curriculum went out the window. And was replaced by a pure elective system. I mean, I assume people keep taking the same things. But my concern there is I don't think you should become a Johnny One Note in your first year of law school. I think the breadth of your education is important. I remember a young woman, really brilliant young woman, and she decided at the end of college that the only thing she was interested in was international human rights. And had no interest in taking corporations, or taxation, or anything else. And I told her dad, who is a physician, that your daughter has seen a toenail and she decided she wants to be a podiatrist. And she ought to allow herself to see these things; how this all somehow comes together. And I can't tell you how many people at Georgetown when I started who thought they were going to be patent lawyers and were not patent lawyers, or whatever. So, I think there is a genuine interest, or should be a genuine interest in the law schools in giving people the breadth of experience, and resisting any temptation on the student's part to become a Johnny One Note. And if that means you are required to take certain courses, so be it. I don't know.

MS. BRACEY: How do you balance that with the people who say, but I need a job. And it's nice if I'm more marketable if I'm a, you know, a patent lawyer.

JUDGE FACCIOLA: Yeah, I guess so. Oh yeah, I'm not saying that. I think that it's perfectly legitimate to specialize at some point. But not at the cost of

not doing anything else. I mean, when I taught trial advocacy, students said “I’d like to take trial advocacy” and they hadn’t yet taken evidence or civil procedure. I said, “What am I going to teach you?” I mean, you know, look at square one. So, I don’t know how law schools resolve that. But in terms of electronic discovery, certainly one could make the argument that the curriculum could be revised in a lot of different ways. And I use the word curriculum broadly to include post-graduate and CLE programs. For example, we might just want to take a topic like creation of information, and look at it from a lot of different perspectives. We’d look at it from a constitutional perspective. We’d look at it from the perspective of intellectual property and copyright. We’d look at it from the perspective of defamation. We’d look at it from the perspectives of privacy protection. That’s the kind of thing I’m talking about.

MS. BRACEY: And you put some e-discovery in there too.

JUDGE FACCIOLA: Of course. Yeah, you see what I’m saying, yeah.

MS. BRACEY: Right. Who is going to come look at it? And your work with Sedona and the attorney-client privilege is sort of —

JUDGE FACCIOLA: Well, yeah, we’ve looked particularly there. The piece I wrote I think was called, *Sailing on Rough Seas*, or something. It was just before 502 came out, and I talked about the problem of the expenditure funds in doing that. And then when 502 came out we had a special session

in complex litigation on 502 and it's so intimately related to electronic discovery, that continues; I don't know if they're going to address it this year, but there's still a lot of work on that as well.

MS. BRACEY: Do you ever have any, or can you speak about sort of instances of personal conflict between, you know, the rule of law and your personal philosophy?

JUDGE FACCIOLA: Yeah, I think so. My first problem is, I'm not as convinced as I was many years ago that the adversary system is the future. I think there are a lot of problems. For example, ethically lawyers view the adversary system as an absolute, and therefore has absolute requirements upon them. I simply think it is one way of resolving disputes. It may be no better or no worse than other ways, but there's nothing sacred about it. And I think there is a tension in, always in my mind between a lawyer's zealous advocacy and my perception that this is a fight over nothing. And this client should not be paying for this. This is just not right. I find that to be a deepening concern on my part where there is a conflict. In terms of other aspects of that, I mean, I have never found any conflict between what I personally feel and in my criminal obligations. Blessedly, I don't have any kind of final responsibility in capital punishment cases, which would be, as a matter of my faith, very difficult for me to handle. But at the same token, I do find that my, in sentencing that my personal views do enter in. I am becoming more convinced that the lock 'em up mentality isn't going to

work anymore. We've got a small window of opportunity to where people get out of jail to begin the process of the transformation. And I love being involved in that process. And I'm sure the U.S. Attorney's office would describe it as being too patient. But my own personal views intrude there to require that patience, particularly when the violation is not outer-directed but inner-directed. In a recent opinion, I said of one of my defendants, when Mr. Jones looks in the mirror he sees his own worst enemy. Every time I try to get him a drug program, he lasts 30 days, and then flunks out of it. He's got mental problems. I put him in therapy and he flunks out. You can see why the U.S. Attorney says, "Come on for crying out loud, throw the guy in jail." Well, as long as he's not hurting anybody, I'm going to go that extra mile. So that's a point where I don't see there's a conflict but there is, there's a tension between lock 'em up, lock 'em up, and what I personally believe.

MS. BRACEY: And you make the recommendations on sentencing to —

JUDGE FACCIOLA: I make the, when the guy has violated supervised release. I'll make those recommendations.

MS. BRACEY: And then mostly followed?

JUDGE FACCIOLA: Very rarely is there any different view.

MS. BRACEY: So you are, sort of the, you mentioned you weren't sort of the final decision maker in death penalty cases, but —

JUDGE FACCIOLA: Yeah, thank God.

MS. BRACEY: Just because there aren't that many? Or is it —

JUDGE FACCIOLA: It just works out that way. I don't try the case. And I don't sentence the defendant. Somebody else does.

MS. BRACEY: So let's move a little bit into the jury system.

JUDGE FACCIOLA: Yeah, God bless them. I'm a great believer in the jury system and I have said on more than one occasion to anybody who will hear me, I would not live in a country without the jury system. It's as simple as that. You know, if history teaches anything, it is that governments are always looking for more power. And the resistance to that assertion of power has to come from the people themselves and it does in jury trials. And I have loved juries; I get along with them famously. And I say it, you know, people look at me like I'm crazy, and I say it again, I will not live in a country without a jury system.

MS. BRACEY: And how many jury trials do you see a year?

JUDGE FACCIOLA: Unfortunately, not as many as I would like. Maybe one or two. Which is a general trend, you know. We're seeing an America, we try very few cases and that's just the way the dynamics of that have been studied by a lot of different people. But the net effect of it is there's just not much, there's just not many cases to try.

MS. BRACEY: And what do you do, criminal jury trials?

JUDGE FACCIOLA: No.

MS. BRACEY: Okay. You do civil jury trials.

JUDGE FACCIOLA: I can pick a jury to try a criminal case, but I can't try it.

MS. BRACEY: And what is it about jurors that you like?

JUDGE FACCIOLA: Their common sense. Their extraordinary dedication and willingness to put down what they're doing and get involved in the process. The fact that they quickly can be comfortable, get comfortable with people they've never seen before and become close to them. The fact that they, they truly try to do their jobs. I mean, people who bitch about the jury system ought to remember that in the *Kevin Gray* case there were 180 counts in the indictment and the indictment was God knows how many 100 pages long, the jury found 3 typographical errors. Showing how careful they were. How demanding. So, as I say, is there a better way to do it? Yeah, show me. I'll be glad to listen. But I can't think of one. You know, the British whom I admire deeply, have eliminated jury trials in civil cases. Yeah, so be it. But I'm not one of them.

MS. BRACEY: Do you sort of have any thoughts on the state of the judiciary now in terms of a lot of the vacancies and getting things done?

JUDGE FACCIOLA: Yeah, we desperately need some help. You know, I just don't know where this is going. I mean, we've got four vacancies now and it's

starting to hurt. It's pretty obvious. That's true generally all over the country. Yeah, we've got to get cracking. I just don't know what the answer is, but you know. And now there are rumors flying around town that Stevens is going to retire. Well, if Stevens retires, the Judiciary Committee will focus on his successor to the exclusion of everything else.

MS. BRACEY: Right. It happened with Sotomayor.

MS. BRACEY: Yeah, it happened with Sotomayor. So, that could mean that our vacancies, even if Congresswoman Norton gets them out, let's say by the end of January, we still may be looking at early fall at the earliest. And it takes months and months and months to do this. I was always stunned that how long it took the FBI to vet me after I was appointed. I was Assistant United States Attorney for 15 years.

MS. BRACEY: Right, you've been vet.

JUDGE FACCIOLA: Yeah, I mean, yeah, but I am concerned about it. And as bad as it is here, in the border states, it's horrible. Magistrate Judges are just overwhelmed in those states.

MS. BRACEY: And how does it effect, does it mean that things get done more slowly, does it mean —

JUDGE FACCIOLA: And this court is particularly burdened with the Guantanamo cases which thankfully, we don't, the Magistrate Judges don't touch. But

it's really a perfect storm with everything coming together. The other thing rescuing us is that the U.S. Attorney doesn't seem to be bringing as many criminal cases to us as they used to.

MS. BRACEY: So at least there's some relief.

JUDGE FACCIOLA: There's some relief. Although the cases they are bringing are the big monster, 11-week conspiracy trials for, you know, Columbian drug pushers.

MS. BRACEY: None too complicated, I mean very complicated.

JUDGE FACCIOLA: Very complicated. And large number of defendants, and security concerns, and wiretapping concerns, and all of this stuff, so it's tough.

MS. BRACEY: And when they bring a case, they bring a case.

JUDGE FACCIOLA: That's it.

MS. BRACEY: The Feds, yeah. Have you seen any, I mean, when you came to the Court, were there that many vacancies, or were, there wasn't more?

JUDGE FACCIOLA: Yeah.

MS. BRACEY: Okay.

JUDGE FACCIOLA: Yeah, well look what's happening now is, and it's happening universally all over the country, the baby boomers, the Clinton appointees, are now hitting 65. Just a process of time. So they're ready to go. And their vacancies have to be filled.

MS. BRACEY: Do you think that judges have a broader sort of societal role, or —

JUDGE FACCIOLA: Yeah, I think so. I think, one of the, I learned, I think it was Judge Wald. I didn't hear it from her directly, but from another source, she always warned about the dangers of isolation. You know sitting by a word processor thinking you run the world. And I've done everything in my power not to get isolated. Which explains why I keep getting, I try getting involved in the community, through Catholic Charities, and in bar activities, CLE programs and all of that. They are crucial to me to live the life I want to live, and not in isolation.

MS. BRACEY: And do you have to go places, where people don't know you're a judge? Like is it helpful to go to sort of be —

JUDGE FACCIOLA: It follows me around, you know. No. Most people ask you what you do for a living, so it's kind of hard to avoid —

MS. BRACEY: Right.

JUDGE FACCIOLA: One of my Catholic Charities work, the kids all call me judge, they get a kick out of it.

MS. BRACEY: But they, I guess they don't sort of see that they're going to practice before you, you know what I mean? Like if you're in CLEs there may be people who feel like they'll be before you someday, or they —

JUDGE FACCIOLA: Yeah, most of them are. The ones when I do the D.C. Bar. It's a room full of friends, you know, hey, you know, give me a hard time. But it doesn't really seem to be a problem.

MS. BRACEY: And it's not difficult to maintain your friendships?

JUDGE FACCIOLA: Oh, no. I've done everything in my power to make sure I do. The Sedona Group, for example, we call ourselves, Sedona in Exile, because it's in Arizona. We have lunch once a month, just to stay in touch, how you doing? And last month, Judges Robertson and Kollar-Kotelly joined us. So that's a good way of putting people together. And I'm a great believer in the Inns of Court. I'm a great believer in all of that. I think judges who get isolated are just crazy, you know. It just isn't, it's not what we're doing, we've got to be reflective of the community in which we serve.

MS. BRACEY: And do you think that requires effort? Because it seems like it would be an isolating problem.

JUDGE FACCIOLA: Oh yeah, sure. Yeah, it is. And then it brings all new demands upon you, because you're a member of things, but that just comes with the territory.

MS. BRACEY: And how do you think sort of society views judges – separate from how you want to be viewed, how do you think —

JUDGE FACCIOLA: I think there's a fundamental misunderstanding of what we do. And there's a fundamental, unfortunately a misunderstanding of the operative documents under which we operate. I was looking at the, there's one effort to do that, Justice O'Connor and Justice Souter have done a series of programs for high school kids about what the courts are like. There's a good program that I work on, the Marshall-Brennan Constitutional Literacy course at A.U., introducing it to young people. But I think there is a fundamental misunderstanding of what we do, what powers we have, and that is troubling to me. Maybe we're our own worst enemies. One of the reasons I write so much is because I want, the people who pay me, the taxpayers should know what I'm doing and why I'm doing it. And I think most judges feel that way. But they get a little distressed that there's no understanding. I always remember a woman who went to the oral argument in the Nixon subpoenas case and she was sitting there, and she said, she came out and I asked her what she thought, and she said, "Well I was amazed." She said, "I understood every word. I thought they would be talking in Latin." Well, we don't talk in Latin. We talk in English, and we talk about things that everybody should understand and in a sense lawyers like to think this is very arcane thing we do and you've got to pay us a lot of money. Well, yeah, that may be true in one sense but it's not true in the sense of understanding what judges do. And I think that there is concern on my part, that there's a fundamental

misunderstanding of how our powers relate to legislative power, how we are supposed to be limited, how we are supposed to be deferential. *Here, The People Rule* is one of my favorite books and understanding what judicial review is and so forth. There are also is I think in the criminal law a failure to understand that if man's rights have been violated, his rights have been violated and there has to be some consequence of that, even if that consequence is letting him go. And I think there is a perception encouraged by some people in our society that, for example, juries go crazy and they give away mountains of money. I can't tell you how many *voir dire*s I've had in which people have not pointed to the McDonald's case where the lady spilled the coffee. The insurance industry apparently did a wonderful job of having everybody see that's how things go. My daily experience is the precise opposite of that. So, I'm worried about that and to work against it, I bring kids here to do a moot court before me in May and talk to them a little bit about the history of this court, and getting themselves involved in the system. And they love it. And a marshal comes by and talks about what he does, and court reporters, and court clerks, everybody does it. And I think that process is never-ending. But certainly we, I don't know about, if you would agree with me, but the tone of civil discourse in this country is going terribly wrong. Most things you listen to sound like people who really hate other people. And that's not the way it goes. The language used about some

judges' decisions by some of these bloggers is just scary. And it's troubled me.

MS. BRACEY: It has led to some violence. I mean it has led to some —

JUDGE FACCIOLA: Yeah, you should see some of the things that were said about me after the White House backup cases. There were references to my ethnic heritage. And all this wonderful stuff about what a dumb wop I was. And this kind of stuff is scary. I mean, just yesterday there was Judge Hogan's decision on one of the Guantanamo cases. This blogger who said, who is this fool named Hogan? He's going to unleash these dangerous people. Does he give a damn? And we've had the judge who's presiding over one of the cases involving the claim that the president was not born in the United States. There's been some great nastiness out there and putting on the internet his vehicle so you can see the license plate, or his home where the apartments where his law clerks live. A subtle, not a very subtle kind of intimidation of him. And after Judge Sullivan ruled in a gun case in a particular way, his face was on the internet in the middle of a target. So, Justice O'Connor has spoken about this at great eloquence. And I think, I'm not afraid, and never will be afraid. But, what I am afraid of us is about a society that has forgotten how to talk to each other. That's not what we're about. It's just getting very, very bad, and very scary.

MS. BRACEY: Right. And the internet sort of makes it easy to —

JUDGE FACCIOLA: Yeah, because you can hide. You can be the blogger from Portland. You don't have to say your name or whatever. But with that said, judges are as eligible for fair criticism as everyone else. And if you can't take it, go home. People sit at this table during settlements and I say, "My only desire today is that when you leave, you both hate me equally." Because then I've done my job. I've got you to do what you don't want to do. But I would love to see that, the level of that discourse get back to where I hope it was, where someone says Judge Facciola said that. I think he's wrong for the following five reasons. Not Judge Facciola is a dumb wop. That doesn't advance the discourse.

MS. BRACEY: No. And do you think that there are any sort of influences the court has or that you've personally had on any public policy, or should have any on public policy?

JUDGE FACCIOLA: I think so. I mean I think the 502 was a judiciary at its very best. We saw a problem. We realized that we had a unique perspective. And we marshalled our resources and we did the job. And Judge Rosenthal deserves an immense amount of credit. Not only because of the genius but because of a shrewd, political maneuvering, and she got it done. So, yeah. And we've done other good things like that as well. And I think more things are coming in that way. You look at Judge Walton's work on rapes, on his work as Chair of that Commission on Rapes. You look at Judge Friedman's work on the 100-to-1 crack differential

and what that has done. You look at the attention it's brought to those kinds of things. I mean, in a million different ways judges have an obligation to try to formulate policy at least in advice to the legislative body because we see things that they don't. How likely would a federal judge like Reggie, how likely would it be that he would become an expert on prison rape, and yet he did, because he brought with it the unique gifts of a judge.

MS. BRACEY: And it's fortunate that you have those opportunities. You know, you've learned, and that if you see a problem and you can act on it.

JUDGE FACCIOLA: Of course, yeah.

MS. BRACEY: What about the impact of, we've talked a little bit about the impact of political events, like the Monica Lewinsky on your life, but what about sort of social or economic events?

JUDGE FACCIOLA: It's interesting, in the old days when they actually had Law Reviews in libraries, I used to take them out from random eras, because they almost perfectly reflected what was going on in the minds of law students. It's interesting if you, that '39 through '45, it was the power of the federal government to deal with the Depression, and the war, and the Second World War and the dangers. Then it was the Cold War and national security. In my era of the '60s it was the law and the urban poor. You know, that was, you know, how the law should be more concerned about people that were disenfranchised from the

political process. So, I think the law cannot escape the social and economic context in which it lives. And they always have a very dramatic impact on it. You know, I just, I found this wonderful Law Review article it seemed arcane, it was about a contract case in the '40s involving the steel companies and the resistance to it by the federal government was based on the perception that in the war we were going to have to swallow some of the antitrust laws to get the war won. And the major concern was that these big steel companies would then take advantage of that. And that was the heart and soul of this contract case. And what looks like a silly little contract case, is really a very dramatic inculcation of public policy. That's why it's so fascinating. And that's, you know, I loaned Judge Huvelle a book called, *Wolf Hall* about Thomas More, and Henry the VIII, and all of that, and you know, think about that, and lawyers involvement in that, and the oath, and all that. I think that's the most exciting thing about being a lawyer or a judge. We are engaged. We're right where it's happening.

MS. BRACEY: And do you have any sort of feelings toward the terms, or reactions to the terms judicial activism, or judicial legislation?

JUDGE FACCIOLA: No. I think there is a legitimate and sophisticated academic criticism that suggests that judges should be more deferential to the exercise of powers by the other branches. Judicial activism is a blogger's word. No, but I think that's a legitimate concern. I was reading just

yesterday, there's now academic criticism of how over the past twenty years, is the court's engagement class actions looking towards institutional reform may not have been the best way to go about that. So, I think it is perfectly legitimate to talk about what judges should be doing and what judges shouldn't be doing. And that's fine. And if you want to call it judicial activism, that's interesting. I mean, in those controversies which would now, for example – today in San Francisco the attack on Proposition 8 is a perfect example of the people having spoken but have they spoken in a way that violates the Constitution? What is the judge's role on all of that? I think that's a fascinating and exciting discussion to have. We never stop having it, which is good.

MS. BRACEY: And do you see any evolution in your philosophies since you've become —

JUDGE FACCIOLA: No. I'm still, I still find myself most comfortable with Brandeis' decision in *Ashwander*. I, you know, as I say, here the people rule, and I rule through their elective representatives. So, I always am looking in the first instances, where is my jurisdiction? You know, I always try to keep in mind, as someone said, I should have a sign on my desk that says, remember, stupid, in the last election, nobody voted for you, which is true. And nobody did vote for me in the last election, or in any of the previous ones either. So, I think that's a legitimate concern. That courts have limited jurisdiction. That's what it's all about. And here the people rule. That's why I think this Proposition 8

case is going to be so fascinating. And I suppose you could look at the White House backup tapes as my being a judicial activist. But I stepped into a vacuum. And what choice did I have? And the best of all possible worlds, I wish Congress would create a system that would explain what would have to be kept and what would not. But until it does, here we are. Now in terms of institutional reform, I don't agree with those. I think in the long run, the work of the federal courts in trying to forge institutional reform has been most beneficial. Can I point to five kids who are better educated now than they were 20 years ago? No, I can't. But my sense of it is that they have held the municipal feet to the fire and brought about social change on behalf of disenfranchised people who otherwise would be ignored. I think it's no answer to say well, you know mayors, whether in Philadelphia, New York, or San Francisco, who are insensitive to these needs will be thrown out of office. I suppose so. But Bloomberg is not going to go out of office because of people's concern of how he handles the mentally ill. Or Fenty is not going to be thrown out of office. So the political process there is not going to yield the same motivation that a court would, can or must. But by the same token I can understand why mayors feel that kind of intrusion is illegitimate and can hamper the kind of progress they are trying to make.

MS. BRACEY: Because it's also so persistent. Because usually these things are not Bloomberg's problem or Fenty's problem there like . . . 30-years-ago problem, right.

JUDGE FACCIOLA: They are institutional. Thirty years ago. I worked on a lot of institutional cases as a lawyer and I remember one involved St. Elizabeth's Hospital, and you know there are actually people who were born in St. Elizabeth's Hospital and never been anywhere else in their lives. Did you know there is actually a place where you would leave a basket at St. Elizabeth's with a baby in it that you didn't want anymore?

MS. BRACEY: I didn't know that.

JUDGE FACCIOLA: Yeah. And that's what was done to a lot of kids with Down syndrome. There used to be, there was a time in American history when mentally retarded people were institutionalized. I remember at St. Elizabeth's seeing the place where it was. Now they were severely mentally retarded, not functioning at all. But, yeah. And there's a perfect example of how institutional reform brought about some change, the treatment of those people. With that said, would I prefer that the legislative body had gone in there, and came up with a system, with checks and balances, and budgets? Of course. As I said, nobody voted for us in the last election.

MS. BRACEY: But it's also when you come in, it's too late.

JUDGE FACCIOLA: Of course.

MS. BRACEY: I mean, it's not too late, it's so late.

JUDGE FACCIOLA: It's very late. So then we're in a way, performing a legislative function of putting in place the system perhaps that should have been there in the first place. Municipalities have the capability to do this stuff. I mean, yeah. And that's what I think we'd all prefer that they do it free of this sort of intermittent judicial activism.

MS. BRACEY: And they prefer not to get sued.

JUDGE FACCIOLA: Yeah. But in many areas that have been successful. The treatment of the mentally ill, used to be, the mentally retarded I think over the past twenty-five years you would have to describe it as a remarkable success when you think where it used to be. But poor people being thrown in these barbaric facilities for all their lives, when they presented no danger to anybody.

MS. BRACEY: Right. What are the qualities of a good judge?

JUDGE FACCIOLA: Patience, patience, patience. I think so. Those are good qualities of a good magistrate judge because if you are trying to settle cases, you must have the patience of several saints. Saint Francis, Saint Anthony, every saint you can find. Because the process is a dynamic process that has its own discipline and its own logic. And it must play itself out. And you can never move faster than the process will let you.

And you learn that every day. You know, they're twenty thousand dollars apart. You've been at it all day. You're ready to tear your hair out. But now is not the time to do anything except stay there, get a glass a water, and say, "Well where are we folks?" Are you really trying this case for \$20 thousand? How about this? Here's a middle ground for you. Ten now, ten a year from now. Sigh of relief, we did it. But no one has ever settled a case by being impatient. In terms of other qualities I think a good judge has to have is dispassion and understanding that the first reading was not the right reading and that if you're really going to understand this case/guy you better read that three or four more times so it penetrates truly. And openness to new ideas and an appreciation that not every legal issue has been resolved and we get paid to resolve them. And that that is an exciting and interesting process and not an intimidating one. You can never be, you know, Dr. Martin Luther King said; he would say, "There could be paralysis by analysis." You've got to decide. That's the judge. Knowing that moment. Judge Sporkin always says it's a moment when a judge cracks a case. It's that moment when suddenly, ah, I know. He's saying this, he's saying this. The answer is right here between them. Or it may be over here to the left or to the right of them. But it's there. And having the patience to go through that process. Enthusiasm for the job is very, very important. And stamina to hang in there. When most of this is probably a six-day-a-week job.

And it's got to be that way. It's not the kind of the job where you can just walk away from. My wife will tell you, all too frequently, she'll think I'm crazy. Because I'll be sitting there watching a football game, and I'll say, "Yeah, that's it!" And she'll say, "What are you doing?" And I say, "Well I finally got it." And she'll say, "You know you're crazy." I say, "Well you knew that when you married me 40 years ago. It's too late to do anything about it now, woman."

MS. BRACEY: What are the qualities of a good lawyer?

JUDGE FACCIOLA: Qualities of a good lawyer. From a judge's perspective they are, a good sense of proportion between resources and result. Judges are very impressed by an efficient lawyer, that is a lawyer who has gotten to the point and marshaled the resources needed to get to that point without bringing more to bear than is necessary. Patience with the judge who may not be getting it on the very first bounce; compassion. An appreciation that the other side has a point, and a willingness to try to understand that point. But a zealous desire to answer that point. An appreciation of how the system is not perfect and needs the cooperation of everyone to move from A to B. Easy grace with the juries. Addressing them in a non-condescending way. The story I told to some people yesterday, one side of the case were very sophisticated, scientific people, and I told them that there's a wonderful judge in Maryland, and I don't know her name, but she's been a trial judge, an appeals judge then went back to being a trial judge. Seen everything.

She said the most impressive expert witness she ever had before her, she saw him at a social occasion, and she said, “Of all the things you’ve done in your life, what is the one thing you did best?” And he said, “Teach seventh grade.” And she said, “That’s it.” That’s why he was so damn good. And I said, and that’s not demeaning. And as I told these people yesterday, if you can’t explain it to a seventh grader, you don’t understand it. And that’s what lawyers do. And I used to; I actually did that exercise when I taught trial advocacy. I would give my students a concept *res judicata*; explain it to a twelve-year-old. Explain it to a twelve-year-old. And that’s to me the heart and soul of being a lawyer. We live in a horribly complicated society. And what we’re looking for is generalists who can understand that.

MS. BRACEY: You mentioned that in the middle of football games, you think about cases. So, considering your workload, describe the quality of your family life.

JUDGE FACCIOLA: It’s excellent. I have the good fortune to be married to a woman who is devoted to her work as I am to mine, and we’ve had an understanding from you know, the day we got married, that this is what we are. This is, we’re public servants and we take it very seriously. When the kids were younger, we had a fierce devotion to them and to their activities in sports and education and we were able to balance the two. And it’s never really been a problem for us, because we give each other the space we need. You know. In a typical

evening when she at least was a classroom teacher, you know, I'd be looking at a brief and she would be doing a lesson plan with one eye on the television. So, then we got used to it. And so, we never did get that chalet in Gstaad but we've had wonderful careers. And it's hardly a secret, it's hardly a surprise that both of our sons are in public service. But public service is demanding. It's not, you know. But that's what it's all about.

MS. BRACEY: What's the hardest part of your job?

JUDGE FACCIOLA: Trying to find the proper balance, just like a lawyer, of resources and result. Am I spending too much time on this? Why can't I get this done? Dammit, I want to get this done. But I've got to do it right, finding that balance. It's like sailing. There's a point where you have put up the right amount of sail, and the boat goes properly. Too little sail, it doesn't. And ironically, too much sail and it doesn't. Finding that. Same thing is true of the tiller, you know. An inch is too much. And that's it. So, it's that proportion. You know, the judges I always envy who have always been my idols, once had that magnificent ability to get to the heart of the issue. Like Gerhard Gesell. You know, some people say, you know, that judge is very sharp, he catches it on the first bounce. Hell, Gesell used to catch it before they threw the ball. No one could be that good. The guy is 29 years old; he was general counsel of the SEC, for crying out loud. I mean, those guys come along once in a lifetime. But those are the one judges I most

love. Who crack the case instantaneously. And that's the toughest part of being the judge.

MS. BRACEY: Where in a lawyer's career do you think a judgeship should begin?
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JUDGE FACCIOLA: Towards the end. Yeah. I think there's a big experience factor if you do it too young, and so forth. I think maturity is, it's a big part of it.

MS. BRACEY: And what does sort of rises out or at least in private practice you see some people who are judges for a while, and then leave —

JUDGE FACCIOLA: Yeah, I've meant some of them. Yeah.

MS. BRACEY: The Ken Starrs, and you know the Abner Mikvas and people like that who —

JUDGE FACCIOLA: Yeah. There's one I worked with on electronic discovery issues who was a district court judge in Delaware and is now at Covington in a patent practice. And that's a new trend. It's interesting. I just wonder if their subsequent careers give them as much satisfaction as their previous careers.

MS. BRACEY: There's now nothing to look forward to.

JUDGE FACCIOLA: Well, you know, there might be. Who knows? I would like to see judges be compensated so that wouldn't be a common career path. But that's the way it is. I don't think I would have been as good a

judge at 42 as I was at 52, I just don't think I was. I still had a lot to learn.

MS. BRACEY: What has been your greatest accomplishment as a judge?

JUDGE FACCIOLA: The same thing I hope you would say if you asked Bruce Springsteen that question. He would say, "You may not like my music." But as Jonathan Stewart said at the Kennedy Center Honors when they honored Springsteen, "He didn't leave any of it in the tank." So, my best accomplishment I think was that I can't think of a single instance where I left any of it in the tank, or I did anything less than what I thought I was required to do. And that is what, when I look back on it, that's what I can say. I didn't leave any of it in the tank. I didn't leave any of it in the locker room. I went out and gave it my best. Like a Springsteen concert.

MS. BRACEY: And what advice would you give to a new magistrate judge?

JUDGE FACCIOLA: The same advice Pat Attridge gave me. Give yourself time to learn the job. He said a year. He was wrong. I'd say three.

MS. BRACEY: You say three?

JUDGE FACCIOLA: Yeah. You have to understand how nuanced the position is, how many different skills it requires. And give it time. And give yourself time to adjust to its demands. And I think that's it, one aspect of it. Second

aspect is, begin with the premise of your own ignorance. And you, the learning curve is steep but manageable. Three, try to have patience with everyone including yourself, most importantly, yourself. And give yourself the time to learn the job and to be open to it. And the fourth thing is to treat the people before you, the way you would want to be treated if you were there. I began my career in New York in front of judges who were tyrants, and yelled and all of that. I never understood what the purpose of that was. And I think how we conduct ourselves says volumes about our society and how it will be viewed by the people who pay our salaries. And when people leave here and they thank me for listening to them. That's the highest compliment I can be paid.

MS. BRACEY: Well, thank you very much Judge Facciola.

JUDGE FACCIOLA: My pleasure. That was really, really fun. I really enjoyed it.