

Oral History of Magistrate Judge John M. Facciola
Second Interview
December 28, 2009

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 December 28, 2009. This is the second interview.

MS. BRACEY: Okay, we're starting again, with the oral history of Magistrate Judge Facciola. And we're here on December 28 beginning with your appointment as a Magistrate Judge.

JUDGE FACCIOLA: Yeah, well actually the story begins a few years before then. I had applied for the position that went to Judge Robinson and then applied for a position that went to Judge Kay. So, the third time, apparently, was a charm. By the time that had happened, I had been with the U.S. Attorney's for 15 years and I had been practicing law for about 25 years, and I thought it would make sense to make application. The application process was, first of all, a written application, and then at the suggestion of Judge Richey, I made it my business to visit with each of the judges. Some of whom I knew well because I had appeared before them, and others whom I did not know as well. Some I had known from my experience at the Superior Court and they had come over here. So, I interviewed with all of them. A committee is appointed pursuant to the statute. The committee has lay members and

members who are from the profession and the practice of law. And I interviewed with them. The list was progressively narrowed as time went by. So I think they started with 150 and that got down to X and then to Y and then it was down to the last 3 or 4 people. And then I remember my interview.

MS. BRACEY: How did the positions become available?

JUDGE FACCIOLA: Well, in that case, Judge Attridge retired, announced his intention to retire. A Magistrate Judge must, under a statute, must give no less than one year's notice of whether he will take another term. So, Judge Attridge has decided he would not take another term. And his term had expired. Now, once you hit 70 you must be certified every year, by the judges, okay. But Judge Attridge announced his intention to retire and the position became open.

MS. BRACEY: And how long are the terms?

JUDGE FACCIOLA: Eight years. So, I'm in my second term.

MS. BRACEY: So, you had left off at your interview.

JUDGE FACCIOLA: So then I had the interview with the judges, and I thought that went well, and then the time went by and I kept my fingers crossed. And I got the phone call and they told me to go buy a robe. And so I did. And then there was another process, which is a process of vetting me by the FBI, and that took quite a period of time because they went

back to high school. And I filled out forms about my experience. It was strange that it took so long, because obviously I was an Assistant United States Attorney and had at least a moderate amount of security clearance. But they interviewed a lot of people about me, and they interviewed me on several occasions. And I gave them my history, and so forth. And I still remember it was, it was interesting. This was a period of time, if you remember, when there were a lot of concerns about nannies, remember that? And I remember a lot of questions about our cleaning lady, we had to explain who she was and we always paid our taxes, and I think they interviewed her. So, I thought that was kind of funny.

MS. BRACEY: They interviewed your cleaning lady?

JUDGE FACCIOLA: They interviewed my cleaning lady. We really loved her very much. She was almost a part of our family. She had a son who had some troubled times and we tried to help out there, my wife being a teacher. So, the vetting process ended and then I was told to arrive and to come. And I believe I started, something like on August 4, and then my investiture would be later in October. Now, shortly after, I think the day they announced it, the next day I got a letter from Judge Kay, welcoming me. Alan and I had not known each other before then, and we chatted, and then, I had told him how much I was looking forward to it, and that was the beginning of a friendship that's very deep, and has lasted until today. And then he and Judge Hogan were very fond

of an intern, young woman named Julie Anna Potts, and I was hiring kind of off-season, and they said, "Well you've really got to interview this young woman." And I'm funny when it comes to personnel questions, I'm very instinctual. And I met Julie Anna, and we went and got a cup of coffee at the old National Building Museum, I was still at the U.S. Attorney's office, and I said, "Well, you got the job." And she seemed to be stunned. But we began together at that time. She was a graduate of George Washington. And she was my first law clerk. And I learned last week, I'm delighted to say, she's now become General Counsel of the Senate Committee on Agriculture, at the ripe old age of 33. So, God bless her. So, we began, it was nice, because the first month nobody knew we were here, so we could kind of get set up and go to work, and then I began in criminal in September. Now that time was one of the most remarkable things I've ever encountered. I had only been a Magistrate Judge for a few days, and of course having been an Assistant, I knew the run-of-the-mill gun and drug cases. And I was, my chambers was on the first floor, and I was sitting there minding my own business working on something and these three guys with suits show up. Now, that probably was a Thursday, and the story about Monica Lewinsky had not broken. If you remember it broke over the weekend, and it was on all of the Sunday talk shows. So, but they brought me a search warrant to seize the semen-stained dress of Monica Lewinsky and I became one of the

first people in the U.S. to learn of this and I'm afraid I wasn't very judicious. I was used to cops saying they wanted to break-in an apartment to find cocaine, and I got to about, to page 3, of all this lurid detail, and I said, "Holy shit, he did what? Where?" So, ever since then, you know, I have always told people I should keep the pen, and you know I don't think the Clinton library would be very interested in it, but, so that was amazing. It became my introduction to what the most wonderful thing about this job is; you never know what in the world is going to come in the door. You know, every expectation you have is critically defeated by reality and that was it. So then I began doing my work.

MS. BRACEY: So, did you sign the warrant?

JUDGE FACCIOLA: Of course. And I think she got it cleaned and they never did get it. I don't know. Jake Stein and Plato Cacheris would ultimately represent her and they're both good friends, and I don't know, I never asked them what happened to it. But it was, it was very interesting. We had that summer, we called it Monica Beach. It was a warm summer, as they all are, but this was particularly hot, and I guessed in the first week in the investigation, one of them got criticized, one of the reporters, or photographers, that somebody got into the building, one of her friends, and nobody took a picture of it. So every day there would be three guys across the road and we called it Monica Beach, because they would come with beach chairs, and one guy would

obviously have to go get the coffee and one guy would go get the donuts, and the other guys would get the newspaper. And they'd just shoot a picture of everybody coming in and out of the courthouse. So I was taking my laundry over to the drycleaners here and I had shirts and they took my picture. And Judge Robertson came in, and he was teasing me, and he said, "That's probably your dirty laundry." It's interesting sometimes when I show people around, they are all faded now, but for a couple of years, you actually could walk over there and you could see, it said CBS, CNN, they had their designated spots on that, on the sidewalk out there.

MS. BRACEY: It was all very scientific.

JUDGE FACCIOLA: Yeah, it was. But it was, as usual it was an exciting and interesting time to be around in the Court.

MS. BRACEY: Did you have any sort of training or was that your training?

JUDGE FACCIOLA: No, not really. There was very little training. Now, the training before I arrived was nothing, but then it gets very intense very quickly. And you go to what's called baby judge school. And you're off the premises and we went to San Antonio, and there's an intense, at least week-long training. And then I did that. I think we went twice. And the first aspect of it was an introduction to criminal and civil and then we followed it up with additional trainings, particularly on civil and negotiations, so that really was where my training took place. And

that was, that's done by the Federal Judicial Center. Ironically, I am now a member of the board of directors of the Federal Judicial Center, so —

MS. BRACEY: So, you know how to help shape those trainings?

JUDGE FACCIOLA: I hope so.

MS. BRACEY: And what did you learn about, sort of unofficially, how the court operated?

JUDGE FACCIOLA: Well, I learned fairly rapidly that the system of assignment was idiosyncratic. In other words, there wasn't the same sort of wheel for which I was used to. You filed your paper, and, you know, instead, the judges would assign Magistrate Judges to particular matters. So I realized that my life would be a function of having criminal every third month, but then of having whatever came to me from the other 14 judges, in no systematic way.

MS. BRACEY: And did you develop a particular relationship with any of the judges that effected —

JUDGE FACCIOLA: Well I knew almost all of them. So that was, that was, but I knew some better than others. I didn't know Judge Friedman as well as I would get to know him, or Judge Sullivan, but I became very close to them as years went by. So it was, it was, I don't remember a point of

time, where no one knew me, everybody just about knew me, but they knew me at various levels.

MS. BRACEY: And is that the way the assignments work now?

JUDGE FACCIOLA: Yeah, they still work that way. Yep.

MS. BRACEY: Okay. And so then how would you get an assignment, does it show up in your —

JUDGE FACCIOLA: Well, we have what's called the 295 Forms. So, it can happen a lot of different ways. A judge can say I want Facciola to handle this discovery dispute. Does a 295 issue as an order? Sometimes the phone would ring, and it would say, "John, I've got these people they're ready to kill each other, can you spend some time with them, and I'm going to assign this to you." And then, more systematically matters would be assigned to me for settlement. And then they would come in and we would get the case and immediately set a date for the people to come in and begin the settlement process.

MS. BRACEY: And how did you, did you sort of earn a reputation as being someone who could facilitate the settlement process?

JUDGE FACCIOLA: Yeah, don't ask me how. I came here, unlike Alan, the difference in Alan's and my career are striking in the sense that Alan actually made a living as an arbitrator and mediator for a period of time, before he became a judge. That was not true of me.

MS. BRACEY: And who is Alan?

JUDGE FACCIOLA: Alan Kay. So, when I came here, while I unquestionably participated in settlements, I had no experience as a mediator, and I learned an enormous amount from Judge Kay about how to approach it. And as I explained, Magistrate Judges go to training. But it was primarily on-the-job training. Something I had to learn how to do. And try to grasp what was going on. And in retrospect I think one of the advantages I had is I came to it utterly ignorant of a preconceived way of how to do it. And I had to respond to what was occurring before me and in front of me. And that was good.

MS. BRACEY: And so how did you access Judge Kay's knowledge?

JUDGE FACCIOLA: Just when I talked to him. We became very close, very quickly. I still remember the first day I was supposed to take the bench, and I couldn't get the zipper on my robe up, and he helped me. And the two of us were laughing so hard, that he could hardly do it. So, and that became a relationship that has been, we're notorious, it is said of the two of us, one guy in frustration said, "You know it's not, it's bad enough that you have a similar sense of humor," he says, "the problem is you have the same sense of humor." He said, "I think you use it on Mondays and Wednesdays and Fridays and he uses it on Tuesdays and Thursdays." So we have been known as two people who never take themselves very seriously. We have this ridiculous love of old comics

who do what is called the Yiddish shtick. And bad jokes, Henny Youngman, and all of this stuff. We're the only two guys on earth left, on earth, who remember any of this. But tomorrow night they will, the Kennedy Center Honors will honor Mel Brooks who is out of that generation of Mel Brooks, Woody Allen, Carl Reiner, those guys, and that's our kind of humor, you know. A guy goes into the doctor, he says, "Doctor I can't do this." The doctor says, "Don't do that." So that's the kind of thing Kay and I do all of the time.

MS. BRACEY: Do you use it in court?

JUDGE FACCIOLA: All too frequently. And, but I just can't resist the temptation. It's really a lot of fun and one of the great joys of being a judge is that the lawyers take themselves very seriously. And being able to stick the pin in is a lot of fun. The one story I love about Judge Urbina, did you ever hear this one?

MS. BRACEY: I don't think so.

JUDGE FACCIOLA: He's got a room full of these lawyers in this big pharmaceutical case, and they're all in black suits, and they're all stiff as boards, and he turns to one of them and he says, "This drug is used to lower anxiety?" He says, "Yes." He says, "And it makes one feel better in times of depression or great stress?" He says, "Yes." And then he said, "Did you bring any?" So that kind of stuff is one of the things I really enjoy. And, you know, last week a lawyer said, I was trying to press

him to agree to do a deposition by video conference. And I said, “What’s the difference between watching the Cardinals play the Cubs in Wrigley Field, and being in Wrigley Field? It’s the same thing, isn’t it?” He said, “No, your Honor. I want to smell the peanuts and the popcorn.” And I said, “I’ll buy your crackerjacks and sing God Bless America at the 7th inning stretch if you’ll go along with this.” So I enjoy doing that.

MS. BRACEY: Did that work?

JUDGE FACCIOLA: Nope. But I got a laugh.

MS. BRACEY: Right. So, in terms of your mediation style, what have you learned that’s helped you conduct the mediations?

JUDGE FACCIOLA: It’s funny. There came a point after I’ve been doing this for a couple of years, when I thought, you know it might be valuable to teach a course in this and learn what I can. So I wrote to the, you know, usual suspects that publish law books. And I said I’m thinking about teaching this course. And you know within days they come charging in here, and I had a whole pile of them. And I was going through them and I said, “You know it’s a good thing I never read these because I break every rule that, and I’ve learned first of all, it is very much an individualized process and that attempts to rigorously say what’s right and what’s wrong ultimately fail. That’s because you’re dealing with human beings”. And the first thing I learned about this, is you have to

have the patience of a saint. You cannot rush this process. You know, it's one part seduction, its one part therapy. It has a time, it has a place, and it has its own dimension like any other human activity. And you just have to play that out because you are, after all, getting people to do, act against what is the normal way they would approach a problem. That is, let's fight. And propose to them a way that's not fighting, even though up to this point in the case, all they've been doing is fighting. It's a different mindset. So, the first thing I've learned is patience. The second thing I've learned is that people wonder why judges, Magistrate Judges, in particular, seem to do this better. And I think I've figured that out. I've got a robe. And what I mean by that is, that these poor people have been battered from pillar to post. Depositions and interrogatories, it's all been very artificial. I'm probably the first judicial officer who can say, "What happened?" And they can let it all come out. So I've learned the ability to listen. It's very, very crucial. And the third aspect that I think it is, always be faithful to the rules of the game. And I use the word game not pejoratively but as a compliment. It is a game, and is a game worth playing. Litigation is a game, as well. It's a little more highfalutin, but it's because people have to act in a certain way. But in any good negotiation it has a discipline to it, and that discipline has to be respected. The greatest most important thing is respecting the autonomy of the parties. This is your lawsuit. It doesn't belong to me.

It doesn't belong to anybody but you and how it begins and how it ends, finally is entirely up to you. And that autonomy can be liberating or it can be terrifying. You know?

MS. BRACEY: For the litigants?

JUDGE FACCIOLA: Yeah. It's like your kid going off to school. There's one part of him that can't wait to get out of the house and go to college. There's another part of him that says, "What's going to happen when I walk out the door, who's going to take care of me?" You know? And it's the same thing. So there is a tendency in that I think for most people to respect their autonomy but need counseling and guidance. And that counseling and guidance can come from the lawyer but can also come from me if they want it, and they almost always want it. So people who look at our styles, which is an interesting exploration, would say of my style as being slightly more evaluative than Alan's. So I may say, "You really want to consider this aspect of this," while Alan will say, will not do that. And he'll approach it in a different question. So that's the first difference in style. But again, that's very much a function of our personalities.

MS. BRACEY: And so you're, and you're saying you ought to consider this, in terms of the weaknesses —

JUDGE FACCIOLA: This is going to go on for a long time. You're relatively close to retirement. I think I can hammer out a deal with them, okay? They

will be willing to pay you more if you retire. That's a big, big decision. I don't want you to make it today, but I want you to think about it. That kind of a thing. That could be liberating in one sense, it also can be terrifying. And people react very differently to it. But most of them deeply appreciate the guidance. Now, in that sense, a judge can do this somewhat differently than a private mediator. A judge can reasonably be expected to be a little more evaluative. While a private mediator that might be considered intrusive by counsel. So it's a fine line.

MS. BRACEY: And when you mentioned that you got this stack full of how to conduct a mediation books. What rules do you remember, thinking that you —

JUDGE FACCIOLA: Oh, you should fight about who goes to whose office. That was a big deal in one of the books. I stopped reading as soon as I read that. Because I knew that this was the kind of nonsensical stuff that I never could take seriously. Now this is not to say that an enormous amount of social scientific research should be done in this process. It is curiously understudied from my point of view.

MS. BRACEY: So that conclusion was not research-based? It was just —

JUDGE FACCIOLA: No. No. But the question we don't have, for example, Judge Shaffer in Denver has been doing something that I should have done 12 years ago. When his settlement is unsuccessful, he makes sure he keeps a

record of the last number that was rejected. And then he watches what happens at trial. And he's beginning to collect that data. And to see where it takes us. Nobody has really been doing that in a socially scientific way, at least that judges have quick access to. And so the process really is well worthy of a greater understanding and differentiation between what is successful and what's not successful. And that remains to be done. But stuff about who goes to whose office is not what we need.

MS. BRACEY: Have you started doing, keeping those sorts of records?

JUDGE FACCIOLA: No, I haven't. I can tell you in every case I've ever had, I have my notes of the last settlement conference. Sometimes, but you have to remember, though, even if I have been "unsuccessful," it may nevertheless settle. Sometimes my job is to get the ball rolling. And then the dynamic is different. Then the dynamic gets to what I would call, the closing price. All right? Even if they leave me and they are \$20K apart, that will probably narrow as time goes by. So, it's interesting how few cases I can track, because even if I don't settle them, they somehow wind up being settled. But I've had cases that have gone both ways. I've had cases in which plaintiffs turned down a lot of money and got nothing. I've had cases where plaintiffs turned down a lot of money and got even more. That's the point. That's what we should study.

MS. BRACEY: So that people have some, everyone knows what the result could be.

JUDGE FACCIOLA: Yeah. I mean, the point is. There's a wonderful book, I just finished it this weekend, called *The Good Lawyer*, by David Luban who's at Georgetown. And when you come right down to it, that we have an adversary system is very much a product like everything else of our history. And you know the notion of the law of combat, of having a crusader on all of your side, they are very much ingrained in the common law that we inherited. But the real question is, of all the ways to settle this controversy, what is the best way? And that's what we have to study. But we are so engrained in doing it that way. It's very hard to jump out of our own skins and examine our self, you know? You know, one thing I learned in that classical education, was, you know, Socrates always said, "the unexamined life is not worth living." And that's the problem. We're so enmeshed in the process, we don't step back and say, "Well, why do we do it that way?"

MS. BRACEY: And that's because there's too many stick holders who don't necessarily want you to get it done.

JUDGE FACCIOLA: Yeah, that's right. Yeah. That's right. Now in terms of other things I've learned, certainly from employment cases, I have had confirmed for me the wisdom of the statistical base, shows that when you ask people what's important in their jobs, money comes in a poor fourth. Particularly, at this time when so many people are out of jobs. And

maybe this is why the Europeans are so critical of us. But we Americans take our jobs very, very seriously. They really are wrapped up in our self-worth and I knew that kind of abstractly, but only by doing settlements do I appreciate that, because we'll be talking about something, money or whatever, and then I'll turn to the plaintiff, and say, "What happened?" And it all comes pouring out. "Yeah, they all went to lunch. Do you think they ever took me to lunch? Do you think they ever would do that? And training, they all went to training. Did I ever get to go to training?" It all comes out, all of this stuff. And you realize you could of given this guy all the money in the world, and you would not have —

MS. BRACEY: He wanted to be at lunch?

JUDGE FACCIOLA: Yeah, he wanted to be at lunch. And he would still feel as if he had been cheated out of something to which he was due. And now as we see in our economy that people are losing work. I mean, you know, mature guys, men and women in their 50s or 60s, they can't talk about this without almost immediately beginning to cry. And as I say, the Europeans who might say, "Those American are crazy, you know? There have got to be other things in one's life." Try to understand people as you search for alternatives. Consider how they are important. I mean, it may sound stupid. But maybe a retirement lunch, is what this case needs. And the most magnificent example I ever saw of that was, the toughest case I ever had was, a couple of

years ago two off-duty police officers were both in line at some restaurant or bar, and a fight broke out, and both of them went to break up the fight. It got out of hand, and both of them drew their guns. Each was unaware that the other was a police officer. Neither of them were wearing their badges. One killed the other. Both of them, this is astonishing, were the sons of police officers. So, we tried to settle that case. And one officer's mother was the principal of a school. And she, I had, when I was in the U.S. Attorney's office, I was a part of a group of assistants who adopted that school, and I went over there, and so I knew her, and my wife's a teacher, and we just got chatting about our children and her husband was a police officer, her daughter was a police officer. This is a cop's family. And I noticed that she was wearing around her neck, her son's badge. And what really broke her heart was there was an investigation of what happened that night, and perhaps because of its existence her son was not given the traditional honors given to a police officer who dies in the line of duty. That really broke her heart.

MS. BRACEY: It was a District police officer?

JUDGE FACCIOLA: Yes. And one of the things we worked on was to see if she could meet with the chief of police just to talk about that and explain it. Now, you might, in the world, the way the world looks at things, you'd say, well you know, what's the money and all of that? Money had nothing to do

with it. That's what we have to do when you settle cases, where are these people hurting? And how do you alleviate that?

MS. BRACEY: And did that one settle?

JUDGE FACCIOLA: Yeah. Yeah. All the money in the world is not going to bring her back her son. Right? But she had to come to grips with that, and deal with it, and so did I. I mean there are terrible stories in me. We have cases, you know, people being hit by Metro buses and having to watch the video tape of the accident, and babies dying and thanks to some problem in a hospital. I mean, there's a lot of tears. You know, we Magistrate Judges kid, that we're the only judges in America who keep Kleenex in our chambers. And we have to. That this can be a very emotional process. In a way, you know, if I have two business people here, and they are fighting over a contract or something like that, I can leave them in a room, and get out. That's what they do all day. He says 10, he says 20, they reach 15. You know, they know this much better than I do. But when there is this, this emotional aspect of this, in other words, people still look to the system of justice to be a system of justice, to right a wrong and to vindicate the violation of some sacred trust. The justice system may or may not be able to meet their needs. I mean, all we have is money. But dealing with that confrontation is the heart of what we do.

MS. BRACEY: And so you mention having the mother of the slain police officer meet with the chief of police?

JUDGE FACCIOLA: Yeah.

MS. BRACEY: Do you ever, can you think of any, sort of other, sort of nontraditional, nonmonetary, I guess, that you've worked out at settlement?

JUDGE FACCIOLA: Yeah, Yeah. I had a situation where the guy, they loved this guy. And he was a very good man, and he had worked for them for years, and he fell off the wagon. And he got loaded, and they said, "Look we'd love to have him back, but he drives a truck. What are we going to do if he shows up loaded?" And I said, "Bring him here." They said, "What?" I said, "Here's the deal. If he shows up, and you think he's drunk, all right? I'll stop whatever I'm doing and we can get together and talk about it." And they all looked at me like I was crazy, and then they all agreed. I've never heard from them since. Okay? But I often will introduce the notion of coming back to me for an additional mediation if the deal they work out goes sour. And that's very important. It's one thing to tell somebody, well you have your rights under the law and they can't retaliate against you, but that's not a lawsuit. And that's more of the same. So, I'll preserve my jurisdiction, and they'll come back, and I will continue to work with them. And that I find, I think it's very important in a mediation for the people with whom you are working to understand you have a dog in the fight, that this is just

not another case and they'll leave and you'll go on to do something else, that you want to be invested in this because it is crucial and very important. And the mediator has to convey that. You've got to care. Now it's interesting because the traditional wisdom of people of whom I admire like Herb Cohen. He always says, "I care, but not too much." That's one way. You know, it is a fair criticism of what I do to say of it, what I am doing is relieving them of solving their problem. There's a responsible school of negotiation that says you never want to permit these people to think that their problem is your problem. It's their problem. And it's less their problem if you – they won't get invested in trying to solve it. Those are competing and warring ends. I don't think there's one answer. But in terms of my own personality, I have, I can't wash my hands of this. That's just not the way I do things. So it's an interesting process. It's like kids, you know, I mean if you, there's always that fine line. When do you push them out of the nest, and when do you keep them? Some judges, as I say, will say that one of the bad things about the mediation process is that we permit lawyers to be as unreasonable as possible and not to learn how to deal with each other. Because then they come to the judge and the judge yells at them. I don't know.

MS. BRACEY: Then they're deluding themselves?

JUDGE FACCIOLA: That's a risk I'm ready to run.

MS. BRACEY: Right.

JUDGE FACCIOLA: To try to accomplish other things.

MS. BRACEY: And you mention that in the truck driving case with the alcoholic truck driver. They never came back. Do other people ever come back?

JUDGE FACCIOLA: Yeah, sure. They'll come back, and it will turn out that, it will turn out that there may be other ways to look at it, there may have been a misunderstanding, or it may turn out and they're back at each others' throats again. There's nothing much I can do. One of the problems we have with the employment situation is when the people go back to work there's—

MS. BRACEY: They still don't get taken to lunch.

JUDGE FACCIOLA: Yeah, that's a problem. And now there's a new atmosphere there. But time can heal all wounds. Because people come, the people go. The people who were abrasive to each other then may be in different situations. So you always got to hope that things can be worked out. I mean, anything is better than carrying these crosses for six or seven years. I mean, it's almost torture for people to go through this. And if I can bring that to an end, you know, I'll run whatever risk I can to do it.

MS. BRACEY: How long were you at, were you on the bench before you felt like you really got it?

JUDGE FACCIOLA: I still don't. The day I figure I got it, I'll quit. No, I mean that there's always something to learn every day. I think I became fairly more comfortable with the settlement process recently after doing it for about 10 years, and with the litigation process on the criminal side, I think I'm really comfortable now. But now there's a whole new wave of things I have to learn because of electronics. And the computer revelation, and cell phones, and PDAs, and searches of computers. It is a very new world. So with that, there's always something new to learn. But I don't think you ever really get up in the morning and say, I've got this locked. There's always this wonder and what's coming at me, did I get it right? Making sure I'm looking at everything, you know, am I prejudging this? Am I really thinking it through? So, I guess you get a little more comfortable and there's no substitute for experience but there's always that sense of what's next, a sense of wonder that the process can be so complicated.

MS. BRACEY: What about sort of the collegiality of the court?

JUDGE FACCIOLA: It's remarkable. Yeah, I mean, it's astonishing. We get along famously. We've been blessed by Chief Judges who are collegial. The thing I always say is, I always count the number of seconds before, between Judge X says, "I'm jammed up, can somebody take motions duty?" And the response, it's usually about 30 seconds. So, we've always had that here. And there are various ways to go about it. The Chief Judges we've had are very inclusive in their thinking. They

are not “tyrants from on high,” we get along very well. I think it’s crucial that we try to have lunch together every day. And that’s very important. That may seem kind of silly, but it’s a way of putting us in the same room and getting us to talk to each other. We socialize together, our families know each other. It’s just a very, it’s a very interesting atmosphere. People from outside would be quite surprised. There are other courts where, unfortunately, it doesn’t exist. But we’re also blessed geographically, we’re all in the same place. We have to

—

MS. BRACEY: In the same building?

JUDGE FACCIOLA: Same building. We have to get along.

MS. BRACEY: _____ physical building. Right, so if you are in a broader sort of—

JUDGE FACCIOLA: Yeah, Texas, I understand it, two judges are 300 miles from each other. So, yeah.

MS. BRACEY: It’s hard to get along. More difficult.

JUDGE FACCIOLA: More difficult, yeah.

MS. BRACEY: And how does that sort of, how does your relationship with the other judges influence your work?

JUDGE FACCIOLA: Well, it’s very easy to pick up the phone when you have guidance or help, or to work things out. It’s that, and also the atmosphere breeds I

think a sense of confidence. I mean, you have to remember that vis-à-vis the District Court Judges, they are my Court of Appeals. So I am never afraid to do what I got to do for fear of being criticized. I know I may get reversed, but I know it will be for a principled reason. It won't be because of some petty jealousy or anything like that. And that's a very liberating feeling.

MS. BRACEY: And you mentioned that the District Judges were your Court of Appeals. Have you ever been reversed and had a conversation about it, or —

JUDGE FACCIOLA: Yeah. I've been reversed but I never had a conversation about it. What's done is done.

MS. BRACEY: Do you take that and use it for your next —

JUDGE FACCIOLA: Yeah, it's usually so idiosyncratic. It's only occurred, I think two times in twelve years. So, it's not that common. But when it happens, you know, I appreciate it. Very interesting issue. In a settlement, I became troubled by the fact that I thought the lawyer might find himself in a difficult position of advancing simultaneously the interests of a child and the child's mother in a particular matter. And I came up with a stratagem of appointing amicus for the child and I was reversed on the grounds that I had no business of intruding on the fundamental relationship between a mother and a child. I think reasonable people could differ about that. But, so what, you know? And in those

instances, you know, I have somewhat different views. But you learn pretty early as a judge that differing views are perfectly consistent with collegiality and you can't let one interfere with the other. Because if you do then you get petty jealousies and tyranny and a lot of other very unacceptable things.

MS. BRACEY: Do you have any sort of relationship with the Court of Appeals Judges?

JUDGE FACCIOLA: Yeah. Merrick Garland and I were Assistants together. I've gotten to know many of them because they have lunch with us.

MS. BRACEY: They have lunch as well, too?

JUDGE FACCIOLA: Yeah. Not in the same number as we do. But those that do, seem to come all the time. So, they've become friends. And there's a lot of good-natured joshing about that. As you can imagine, people sticking the pin in each other. It's a lot of fun.

MS. BRACEY: So, what about your relationship with the attorneys that appear before you?

JUDGE FACCIOLA: It's been good. I mean I, I can't, I've had, you know looking back over my career, I remember two times when I got angry. And now I regret both times. I just don't, when I began my career as an Assistant District Attorney in New York, there were these old crotchety judges who just were terrible, they just yelled at people and all that, and I

guess that experience shaped me, and I just don't like to conduct myself in that way. And as I say, the two times I've lost my temper I lived to regret it and promised myself I'd never do it again. So, to tell you the truth, when I am tempted, I'll take a recess, go in the other room, take a couple of quick deep breaths, blow off some steam and then come back out.

MS. BRACEY: A self-imposed timeout?

JUDGE FACCIOLA: A self-imposed timeout. Exactly.

MS. BRACEY: Do you ever impose timeouts on other people?

JUDGE FACCIOLA: Yes, I do. I would say, "Counsel I think we better take a break here, and you better be a little more careful with what you're saying. Don't call other people a liar in open court. Don't do that. You'll live to regret that. Take it from me. Let's do that." Cooling-off periods are very important.

MS. BRACEY: Do you care to discuss any of the outstanding, good —

JUDGE FACCIOLA: I think that, well, I don't know. The quality of the bar has been, in my opinion, is very good. I can't single out any one of them. But there are some, you know, one thing that amazes me is how ferociously devoted they are to their clients. I may disagree with the contentions the lawyers are making, but very few of them ever leave it in the locker room. There is a ferocious dedication to the client's interest.

And I think that's very good. This is a good strong bar, I think as bars go. The one concern I have is that it's a relatively small trial bar, and it never seems to be getting much bigger. And I think the way things are going it's not going to get any much bigger.

MS. BRACEY: And you mean criminal and civil?

JUDGE FACCIOLA: No, more on the civil side. The criminal bar still is going to be the Assistants, and the Federal Public Defenders and this good cadre of people under the Criminal Justice Act that we appoint, and that's a good strong bar that knows what they're doing. On the civil side, what we have is, the old are getting older and the young are not coming around. A lot of reasons for that. In the old days, you could cut your, you know cut your eyeteeth on a slip and fall case. Insurance companies don't pay for that anymore. You know, they give a guy 5,000 bucks and say, either settle it, or try it for that money and don't come back here. So, the problem is, and since we settle so many cases, I don't know where the young lawyers get their training in civil matters. They are taking endless number of depositions but that's one thing, but trying a case is quite a different thing. And it's a major concern I have about the future. Now in terms of the quality of the bar, one of the things my law clerks always say, and I think it's quite true, one of the problems we have is, the good are very good, and the bad are awful. There are some —

MS. BRACEY: The range is —

JUDGE FACCIOLA: Yeah, the range. I mean, it's interesting and there are some who I'm deeply troubled by. Whether they are, really know what they're doing.

MS. BRACEY: And that's the civil and the criminal?

JUDGE FACCIOLA: No, not in the criminal side. The criminal side will stop it because it's not an effective assistance of counsel. But on the civil side, there is some work that has to be done there in improving that. In other words, there's just not a bar we can turn to and say, you know, these young people can do this. There's no substitute for the experience. I mean, when I was an Assistant, for example, the Assistants would try misdemeanor cases before juries. Well, that was considered ultimately a waste of time because all you had to do was limit the exposure to six months and it could be tried by judges. So what was gained in efficiency was lost in terms of, I mean, in getting that experience, you know. I mean, you don't want that your first case be a rape or a robbery, you know? Shoplifting at the Target will do.

MS. BRACEY: Right. And on the civil side are you concerned about the plaintiffs' bar or the defense bar, or both sides?

JUDGE FACCIOLA: Both. Yeah, both sides. The problem is you don't see a new group of people coming up and you say, oh this one's really good and you know, you'll see them once and never see them again. The exception to that is the employment bar which I think has a tendency to get a lot

of repeat business. But other than there, on the civil side, I just don't see this accumulation of young people that are going to do this and do it for the rest of their careers. It's just not going to happen in this market. Which is unfortunate.

MS. BRACEY: And the market is not getting any better, I guess?

JUDGE FACCIOLA: Not from what I can tell, yeah.

MS. BRACEY: Is there anything you can do about that?

JUDGE FACCIOLA: No. I mean, it's the same old story. That's the way the society is going. If no one wants to pay that amount of money to pay those lawyers to do that thing, there's nothing anybody can do about it now. I'm not among the group of people who say well, you should use pro bono work to do things. I mean, I think you should do pro bono work because it's worth doing. Whether it's going to give you valuable experience or not, it's important. That's the true important thing. By the same token, certainly you can encourage young lawyers to do that kind of stuff but to do it for the right reason. It just may not yield the kind of experience they hope.