

Originally published in

New York Law Journal

December 23, 2020

Judges and Aging—Some Random Thoughts

By [Joel Cohen](#)

"We, today, by the way, and rightly so, make a big deal about "diversity" on the courts—race, ethnicity, gender. But we don't want diversity on the bench in terms of age? 70 and out?"

The current President of the United States is 74 years old. No one among his detractors—I am one—thinks his *age* is the problem. And while some wonder if President-elect Biden, age 78, is quite the same man he once was, Democrats who voted for him in the primaries simply believed that he was the best person for the job, despite his age, and voted to give him the Democrat nomination.

This, notwithstanding there being 29 major candidates, 27 of them younger than Biden. *The* most important and taxing job in the world, voted into office by the American public—a position that will have been held by back-to-back septuagenarians (and in Biden's case at the end of his term, older).

There's no question that younger judges typically, but not always, have some skill sets that older judges may not. Indeed, some of my law school students have wondered aloud about judges who openly admit in a class I teach that they often rely on their clerks for "wisdom" when it comes to the Internet world. And what exactly is wrong with reaching out to staffers for assistance and insight they may not have on their own? Don't all judges of whatever age look for assistance from their clerks?

Isn't that the whole point of the clerking protocol?

But what about the skill sets of older judges. Think about Judge Jack Weinstein of the Eastern District of New York who recently retired at 98, and not because of any mental infirmity. Judge I. Leo Glasser, also of the Eastern District, who still actively sits at age 96. Judge Jed S. Rakoff of the Southern District who remains a juggernaut at age 77 (veritable youngster), is in his chambers presiding over virtual appearances and hearings every single day despite COVID. (Try asking him for an adjournment).

And look at all the "senior judges" on the Second Circuit and District Courts—all over age 65, but many older, who can pretty much abandon or sharply reduce their caseloads (with no loss of pay whatsoever), but nonetheless maintain active status largely across the board. It kind of makes one wonder about the "ageist" thing those getting older wonder about. Yes, these judges, in particular, and so many others like them, won't be running a marathon anytime soon, if ever again. But their mental skills and toughness, alertness and added wisdom—the latter maybe enhanced precisely by age—are as intact as ever. I can't imagine the very idea of taking them off the bench because they've hit a magical wall at age 70.

Yes, maybe there should be some procedure to check, or objectively determine if a federal judge is "losing it"—if she is tuning out during argument; if he can't quite pick up the thread of what's going on in his

courtroom; if he's become unduly irascible, and his level of equanimity has changed too much for the worst over the last couple of years. There isn't currently.

But state court judges are treated differently. And, maybe, there should be a moment in time when it's time for state judges to pack it in. A mandatory time. A time when—the public can agree on—that there's basically a "presumption" that we can't leave it in the judge's own hands whether to retire from the bench. Judges of the New York Court of Appeals are flat out of business at age 70. That's the law—but does *it* make sense? Consider how much America was enhanced by what Supreme Court Justice Ginsburg, for example, brought to the table and meant to her wing of the court after reaching age 70?

And, now, New York State's Supreme Court and Appellate Division justices, who could, until now, have stayed on if certificated after age 70 (until age 76), will no longer be able to if the Chief Judge's decision remains intact. I can't argue, here, with the Chief Judge, whom I admire greatly, over her cost-saving decision. I simply don't know enough about it. I wonder, though, if the decision is penny wise and pound foolish. Are we simply giving up too much in "wisdom" and "experience" in making an economics decision that tosses these judges to the curb? My former boss, Judge John F. Keenan, age 91, sitting on the Southern District, was quoted in Sunday's New York Times saying "[W]hat is it they say—70 is the new 50?" And isn't it so!

Full disclosure, my law firm is one of the two firms representing the 70-year-old state court judges. This, though, is not about the legal arguments presented by my colleagues. It may really be about what society is saying about the elder population. We, today, by the way, *and rightly so*, make a big deal about "diversity" on the courts—race, ethnicity, gender. But we don't want diversity on the bench in terms of age? 70 and out?

Joel Cohen is senior counsel at Stroock & Stroock & Lavan. He is the author of "Blindfolds Off: Judges On How They Decide" (ABA Publishing, 2014), and teaches a course based on it at both Fordham and Cardozo Law Schools.

Reprinted with permission from the December 23, 2020 edition of the *NEW YORK LAW JOURNAL* © 2020 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com.