

Interview Of New Mexico Supreme Court Justice Barbara J. Vigil

By Caren I. Friedman and Larry J. Montaña

Please tell us about your childhood and how it led to your career in the law and to your position as a New Mexico Supreme Court Justice.

The loss of my mother at age 12 instilled in me a need to be self-reliant and independent. After her death, I shared care-taking responsibilities with my sisters in caring for them and my father. That taught me to be self-sufficient and instilled in me a deep desire to care for and serve others. Academics also influenced my self-sufficiency. One day while attending boarding school, one of my classmates, whom I had come to admire, shared with me her desire to someday become a lawyer. That sparked an interest in me. Because I come from a family of farmers and ranchers, I had never been exposed to the law as a possible profession.

Justice Vigil, how long did you sit as a district court judge before you came to the Supreme Court?

I served as a district court judge for twelve and a half years. I was appointed and elected in 2000, and I served until my transition to the Supreme Court in December of 2012.

Initially, was your position in the district court in children's court?

Yes.

How long were you in the children's court?

For ten years. When I served on the district court, I was committed to serving as the Children's Court judge for a long time. Historically, the docket was assigned to the newest judge and then rotated amongst the judges every two years or so. I did not agree with this process because I considered cases involving children to be a priority. Rather, I thought that because these cases involve our most vulnerable citizens that the assigned Children's Court judge should preside over both the dependency and delinquency docket for much longer than just two years in order to provide stability and consistency to the processing of these cases. I cherished my time as Children's Court judge because I was able to work closely with Children's Court attorneys and other court participants in developing an efficient docket so that community services were provided to children sooner rather

than later. I was also able to participate in local and statewide efforts to access resources to sustain services to serve children in their community. I thoroughly enjoyed this work but eventually it became important for me to consider presiding over another docket.

Is that because of the nature of those kinds of cases?

Partly, yes. As a Children's Court judge one cannot help but become aware of the critical needs of our children and families. The day to day exposure to the harm facing children can take its toll. Personally, I found it impossible not to advocate for new ways to improve our system in order to better serve our children. Of course, others such as Chief Justice Petra Jimenez Maes had paved the way for this line of work and it continues with the unflinching commitment of many Children's Court judges around New Mexico. I maintain that as judges we must continually examine and address the systemic barriers within our court system that have adverse impacts, or which can be improved, so that we can better serve our children. While my commitment to this work continues, after ten years I realized that it was time for me to focus on other types of cases and on other needs within the judiciary.

How have you found the transition from district court to the Supreme Court?

I thoroughly enjoy both roles, but for different reasons. Obviously, both roles are quite distinct. As a Supreme Court Justice I am able to use the skills that I developed as a district court judge but in a very different way. The relative importance of the written word and the spoken word is quite distinct in each court. At the Supreme Court the spoken word is used primarily in private discussions to convince one's colleagues to view the case as you do. There is a fair amount of dialogue that takes place amongst the justices that is obviously not necessary in district court except to address administrative matters. In district court the spoken word is important to explain one's decision to the litigants and lawyers. In the Supreme Court, the written word is critical. As the author of a decision or opinion, one must learn to write for a majority of the justices. This takes time and in some instances, compromise. Obviously, in the Supreme Court



because one's written work has broader implications it must always be more contemplative. Given the role of the district court judge, there is a greater need to focus upon the contemporaneous communication between the court and the litigants.

Do you miss that interaction with the lawyers and their clients?

While the two roles are really quite distinct, I have experienced a great deal of professional satisfaction in both settings. At district court, one experiences perhaps more directly, the impact of one's decisions upon the litigants. At the Supreme Court, my professional gratification occurs in appreciating the broader impact that my contribution has on the development of the law.

Do you feel like your experience as a district court judge has been helpful to you in terms of how you approach cases at the Supreme Court?

Yes. My experience as a district court judge enables me to have a comprehensive understanding of the day to day challenges facing our district court judges. For instance, the need to move an ever increasing caseload expeditiously through the system together with the need to give due diligence to all pending matters, along

with having very limited resources to do so, is an ongoing challenge. This was one reason I chose to assume the civil docket, and that experience has given me a better understanding of ways we can improve our system. The bottom line is that by virtue of each of the Justices having various backgrounds and experiences, the Supreme Court gets the benefit of such diversity, which makes for better decision-making on so many levels.

Do you notice a difference in the level of preparedness of attorneys that are arguing in district court versus arguing in Supreme Court?

Lawyers demonstrate their preparedness and skill at each level. Well-prepared lawyers do well in both forums. Good preparation and skills translate easily from district court to the appellate courts.

Has it affected you to know that you're one of five Justices in the Supreme Court and that what you say is, typically, the end of the discussion, at least at present, barring unusual circumstances?

Yes. I have come to appreciate the collaborative nature of the Supreme Court's work which enables us to make better decisions. Generally speaking, as a district court judge, you don't have the benefit of considering the points of view from other judges about the issues. The Supreme Court's ultimate determinations reflect considerable thought and collaboration. Collaboration is vital to the work of the Court and I have come to appreciate the value of such a process.

How much of your time is spent reading motions, cert petitions, and briefs?

Approximately 40 percent of my time is spent writing opinions or decisions. Twenty-five percent of my time is spent preparing for oral arguments and briefs only conferences. This includes studying briefs, reading legal memorandums and conducting research. Approximately 20 percent of my time in this position is spent reading petitions for certiorari, various motions or requests for emergency writs and in studying proposed rule changes. A fair amount of time is also spent on administrative matters such as serving as the Court's liaison on several committees and in attending functions for or on behalf of the judiciary.

How is that time allocation different relative to when you were a district court judge?

In district court, approximately 80 percent of my time was spent in court, sitting on the bench conducting

hearings. The actual amount of time spent in court on any given day also depended upon the number of cases and types of hearings scheduled for that day.

In devoting so much time to reading briefs, have you developed your sense of good writing style, not so good writing style?

Absolutely. I have come to consider it an art. Good legal writing should tell a story. It should be clear and to the point. Getting it right is hard but once you do, it is beautiful work. Also, it is important to teach the Justices about your case because you know it so much better than they do.

Many judges say that they want to be told a story. What is it about being told a story that's compelling to you?

Virtually every case involves the real people and the circumstances affecting their lives. So, every case is a story. Telling their story in a compelling manner makes it interesting to the reader. It provides the context. Making it interesting so that the reader can connect to the lives being affected can make all the difference. While it is always important not to sacrifice accuracy for context, it is a valuable skill in our profession to be able to present the facts in such a way that piques the reader's interest. Remember that your brief may be picked up to be read by the Justice after having read hundreds of pages that day. So, making it as clear, interesting, accurate and compelling as possible only helps. Doing that well is an art.

The role of facts seems to change as a case moves from district court to the court of appeals to the Supreme Court. Facts are developed in the district court and in the Supreme Court there's much more of a distance. You presided over many bench trials where you were the finder of fact. How does that influence what you do now, as a Justice?

Facts are important at every level. The difference is that the trial judge plays a key role in how the facts are developed at trial by making evidentiary decisions, observing first hand the witnesses testify and by making credibility determinations. So, the role of the trial judge is central to the development of the facts. The Supreme Court, on the other hand, later examines the facts through a different lens. The significance of particular facts may sometimes change as the case weaves itself through the appellate process.

It sounds, Justice Vigil, like appellate practitioners' responsibility is to breathe life into those facts in their briefs because you're not there like you were as a district court judge, observing the story first-hand.

Breathing life into those facts is important. Doing so in such a way that makes sense, is accurate and highlights the public importance of the issue is what matters on appeal.

There's a certain amount of letting go, too, that you have to do as an appellate advocate or presumably as an appellate judge, in relation to the facts.

You have a distinct relationship to the facts as an appellate judge that is different than as a trial judge for the reasons I previously stated. A simple reminder to lawyers about the facts is that it is always best to address the deficiencies in your case head on in your papers rather than leaving it to your opponent to do so.

Can you talk a little bit more about the need for brevity?

In your briefing, say what you need to say in as few words as possible, without compromising accuracy. Your goal should be to get to the point sooner rather than later. It is not necessary to write 15 pages of argument if you can make your point in five. This also holds true for oral argument. At oral argument, be prepared to have a lively dialogue with the Justices about the issues but get to the point. One of my colleagues recently commented to an attorney who had completed his oral argument before his time had run and appeared nervous for having done so, that, "Just because there is time left on the clock, doesn't mean you have to take it." I must say that I agree with my colleague.

If you are new to appellate practice, it is a good idea to moot your argument beforehand. Being able to argue your opponent's position will help prepare you for the Justices' questions.

Are district judges confronted with the task of forging new legal ground more often than Supreme Court Justices? Or is it the other way around?

By and large, a district court judge's decisions are bound by existing law. However, existing law may not always be clear, which may result in the district court "forging new legal ground," and when a district court does so, that presents an opportunity for appellate review. The Supreme Court, is obligated to examine existing law and decide whether the law should be

expanded or limited given the facts in the particular case. In doing so, the Court always considers the broad implications that its opinion will have on the development of the law and impact its decision will have on future cases.

Has that sense of different responsibility been difficult for you? As a district court judge you only have to be concerned about the case that's in front of you. But as a Justice you have broader responsibilities. You may be confronted with very compelling facts but your rule of law must make sense not just with respect to those facts but in other cases that will be subject to that rule.

Indeed, I appreciate the significant differences between the two roles. They are quite distinct. The future implications of our decision is always an important consideration. However, the issues in the case under consideration are paramount.

When you're deciding cases and announcing a new rule of law, do you individually and do you collectively with the other Justices, talk about other potential fact patterns or other cases that could fall under that rule? And do you shape your rule to address those potential situations?

It obviously depends upon the issue at hand. As I said, we always consider the future implications of every decision we render. We review the specific issue pending before us carefully and pragmatically and strive to avoid any unintended consequences that our decisions may have on future cases. That presents a unique challenge because it is impossible to predict the myriad of potential fact patterns that may present themselves in the future. We simply strive to create well-reasoned and principled rules of law based upon stare decisis and the facts before us, which can then be applied to similar scenarios in the future. We also recognize, however, that new fact patterns may continually test these principles.

Do procedural issues occupy more of your time as an appellate judge?

Yes, but for different reasons than they would occupy a district court judge's time. The rules of procedure guide the day to day functions of the district court, whereas, the Supreme Court is tasked with creating and maintaining those procedural rules. The Supreme Court spends a significant amount of time carefully examining and considering proposed changes to the rules governing all the courts in New Mexico. With respect to procedure in individual cases, the review of procedural issues by the Supreme Court is much broader by virtue of the fact

that you are presented procedural issues arising from all types of disputes.

Do you approach preservation issues more or less strictly having sat on the trial court bench?

I doubt that by my having served on the district court bench that I would be more or less strict in applying the rules on preservation. I approach issues on preservation by examining what the lawyer or litigant did or did not do at trial to preserve the error. Did the litigant do what is needed in order to preserve the error for review on appeal?

Can you tell us about the Supreme Court's plans with respect to hearing oral argument in locales other than your courtroom?

In October, we conducted oral argument at Santa Fe High School, and earlier this year we conducted an oral argument at the Court of Appeals in Albuquerque. Our goal was to give the high school and law students an opportunity to observe and learn about what we do. The Court of Appeals has been conducting oral arguments around New Mexico for a number of years with much success. Given the time and logistical commitment required, I foresee the Supreme Court continuing to do so in the future but on a very limited basis.

How do you approach formal opinion writing?

It's an exhaustive and intensive process involving a thorough examination of the record below, the briefs and of course a careful parceling of the existing law. The process from beginning to end takes a significant amount of time. Each Justice is afforded an opportunity to make suggestions to the author. It can be challenging to write for a majority, which sometimes takes a fair amount of compromise. I strive to master the process.

Are there particular areas of the law that you've enjoyed working in as a Justice that, as a district court judge, you did not have an opportunity to get into?

It is remarkable how many different areas of law one is called upon to address as a Justice on the Supreme Court, and I thoroughly enjoy the education involved in considering various issues before me.

Has your role as a researcher of the law changed? Do you do more independent legal research now?

One must always verify each and every legal authority relied upon by the parties and confirm that the case indeed stands for the proposition they cite it for. The

importance of the work of the Supreme Court mandates that our legal research be exhaustive.

What are the qualities that you value in a judicial law clerk?

In addition to having good research skills I require that my law clerks have excellent writing and analytical skills.

From your perspective as a Supreme Court Justice, is there anything that you would have done differently as a trial judge – not for purposes of regret but for purposes of advising district court judges?

My prior courtroom experience both as a lawyer and as a judge has been very valuable to me in my role on the Supreme Court. But our profession is so much more than what just takes place in the courtroom. Obviously there are always choices that are made, but I believe that so long as you are ethical, tenacious, hardworking and professional in all settings – you will avoid having any regrets.

Can practitioners do anything during briefing or oral argument to either avoid or encourage the quashing of cert?

Only one other thing comes to mind, in addition to what I have previously mentioned – which applies to any and all submissions made to the Court – and that is – never mislead the Court in any way. Always be forthright and honest in your presentation to the Court.

As for Petitions for Cert in particular, my advice is to again, be clear, short and interesting. Tell a story and illuminate why it is important (or not) for the Court to review the case.

Judges often say that lawyers should not repeat their briefs in oral argument. What should they do, and do you have any tips for practitioners when they appear for oral argument before the Supreme Court?

As I mentioned, be prepared to have a lively discussion about your case with the Justices. Be prepared to be interrupted with questions from the bench throughout your argument. Listen carefully to the questions asked because questions may be asked by a Justice for your benefit or to draw attention to a particular point that they consider to be important. If you don't know the answer, say so.

What I'm hearing you say is that the Justices are asking questions about concerns they have, and the only way to address those concerns is to answer their questions as opposed to just presenting what the lawyer would like to say. Is that fair?

Absolutely. Listen carefully to the Justices. Always consider addressing the questions asked of your opponent in your response or rebuttal. Another reminder is, if you were not the trial lawyer, always make sure you are extremely knowledgeable with the record and proceedings below. Never speak beyond your allotted time without asking permission to do so and as I mentioned earlier you don't feel compelled to use all of your allotted time if you have made your points.

A few years ago, Judge Fry said in an interview that her overriding judicial philosophy is to avoid being result-oriented. Do you share that view?

To be result-oriented seems to conflict with a judge's ultimate responsibility. A judge must approach every dispute free of bias and any preconceived view of the outcome.

Is it more difficult to avoid being result-oriented as a trial judge? For example, as a district court judge you are in direct contact with the child and family members whose lives you will affect; it is more immediate.

Every judge has the ultimate responsibility to apply the law to the facts in a fair and impartial manner. In carrying out this overarching responsibility, however, every trial judge is also obligated to exercise a certain level of discretion. As we know, however, that discretion is not without limits. The trial court judge's direct contact with the litigants should not undermine these overarching parameters and responsibilities.

The Tenth Circuit has had e-filing and electronic records for a long time. It appears that the job of an appellate lawyer and appellate judge is poised to change in your Court in the near future due to technological advances. What are the changes that you foresee and the impact of those changes?

We look forward to having the benefits of e-filing and the Odyssey case management system. These technological advances will fit nicely with the work of the Court. For example, several Justices may need to share the record in a case at the same time. With these systems in place we will be able to simultaneously review the record and the saving of paper will be good.

Is there a timetable for that?

I believe the plan is to implement these changes by the end of next year.

Electronic filing is working really well at the state district court level. And, of course, we do it in federal court all the time.

Yes. It also will benefit the Court and the litigants in so many ways because it will make information more accessible. That can only make the process more efficient and thereby improve the administration of justice.

What do you like to read when you're not reading briefs?

Nothing better than a good novel when you can find one. I also enjoy reading books on New Mexico history.

I recently read a book loaned to me by Justice Daniels called "Blacked Robed Justice." It is a delightful book that describes the early days of the judiciary in New Mexico. After reading it, I am of the opinion that we are all quite well behaved compared to our predecessors who served on the New Mexico Supreme Court during the territorial and early statehood days. I also read various periodicals such as *The Economist*, *The New Yorker*, and *Foreign Affairs* to keep current on world events. Secretly, I peruse *Style* magazine – a weekly insert in the *Financial Times of London*.

Justice Vigil, thank you so much. You're so gracious with your time. I know you have so many obligations, so thank you for speaking with us.

It was my pleasure. ■

Join Us at Noon on March 7 for Lunch with Chief Judge Rod Kennedy

The board of the Appellate Practice Section continues to look for ways to help section members improve the level of appellate practice in New Mexico. One such effort is the establishment of a quarterly series of informal brown bag luncheons that allows section members to meet with individual New Mexico Supreme Court Justices and Court of Appeals Judges to discuss issues relating to appellate practice. These meetings enhance section members' understanding of the concerns of those serving on New Mexico's appellate courts, and help us identify ways in which we as a section can improve the quality of appellate advocacy in New Mexico.

Justice Charles Daniels joined us for our inaugural program in December at the State Bar building in Albuquerque. Justice Daniels was initially appointed to the Supreme Court in October 2007, and served for two years as Chief Justice. Our discussion with Justice Daniels was excellent, and covered topics ranging from court funding to e-filing. Between bites of his sandwich, Justice Daniels kept it lively with personal reflections and suggestions on appellate practice.

The program continues on March 7 with Chief Judge Rod Kennedy. Chief Judge Kennedy was first elected to Albuquerque's Metropolitan Court in 1988, serving for eleven years until his merit selection and appointment to the Court of Appeals in 1999, and again in 2001. He has served as a judge at all levels in New Mexico, and was a judge pro tem for the Jicarilla Apache Nation in Dulce, NM. In his practice, Judge Kennedy tried hundreds of cases as a prosecuting attorney and trial attorney.

Please join us at noon on March 7 at the State Bar building in Albuquerque. We encourage those attending to bring their own "brown bag" lunch. If you plan to join us in March, or if you have suggestions regarding what topics we should cover at upcoming lunches, please e-mail board member Dolph Barnhouse at dbarnhouse@indiancountrylaw.com.

Jakki Kouffman's brightly colored landscape paintings are executed in acrylic on canvas. Working texturally with both palette knife and bristle brush, her paintings speak to resistance and change through the play of wind and water on sandstone. For more information, see www.jakkikouffman.com.