

Two Years on the Bench

A judge
recalls his
rude awakening
after moving from
corporate law
to dispense
justice to a
dysfunctional
world.

By Mel Dickstein

*Photographed
by Kelly Rogers*

IN AUGUST OF 2002, I took the oath of office as a state trial court judge in Hennepin County and began an extraordinary period of my life.

For me, coming to the bench was a bit like Alice walking through the looking glass. I had been a litigator at Robins, Kaplan, Miller & Ciresi, a high-profile firm where I specialized in civil litigation on a national basis. I dealt with cases involving tens or even hundreds of millions of dollars, not the small personal-injury cases—not to mention the drunk-driving, domestic-abuse, robbery, theft, and assault cases—that I came to see daily.

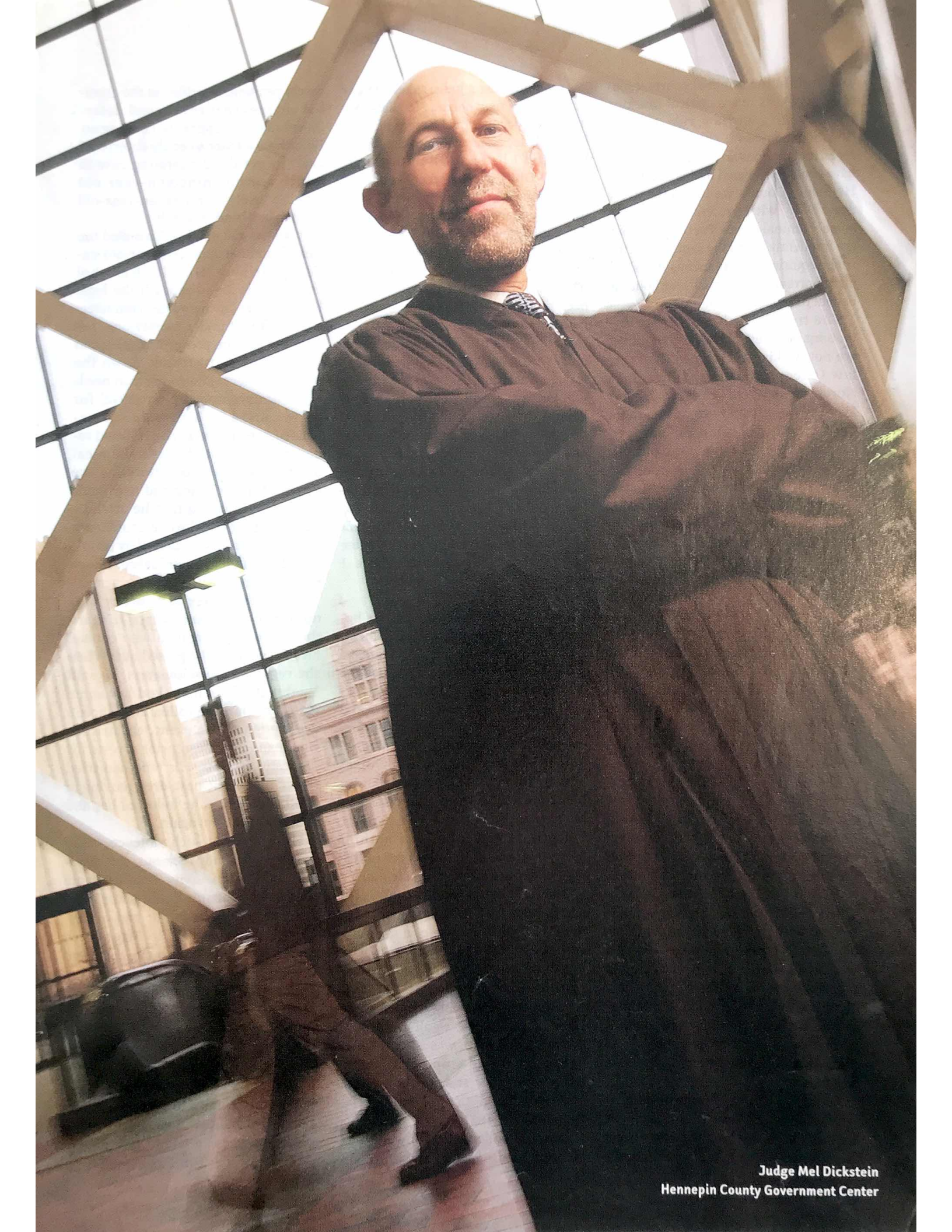
I made the change because I had the financial freedom to do so and a long-held desire to return to public service. I also had a special motivation to make the change: a young son. I gladly gave up business trips to Boston, Chicago, Philadelphia, San Francisco, and LA for evenings at home with my family.

Now, instead of business disputes, I deal with a world of dysfunction. Daily, people appear before me who don't have a job and haven't worked in years. I see so many people who consider carrying a gun on a daily basis

normal, who abuse alcohol and drugs, and who lack a permanent home. I see so many people who have been abused and are abusing others, and people who have mental illnesses and need help, but aren't receiving it.

There is a virtual chasm between the niceties of my old practice and the new world in which I operate. At my old law firm, I had the opportunity to plan my cases—to investigate, research, confer, and strategize. Finding the right cases and analyzing them carefully to support my client's position was an essential element of doing my job. I also had immediate access to hard-working associates and knowledgeable and skilled partners. Now I rarely have time to give matters careful thought.

I learned during my first year that some people have an image of a Hennepin County judge as a person who has substantial resources—and the time to consider carefully drafted legal memoranda and write lengthy, well-reasoned opinions. In fact, I had just that when I ruled on the constitutionality of the Minnesota Fair Campaign Practices Act. But for the most part, a Hennepin County judge lacks the time



Judge Mel Dickstein
Hennepin County Government Center

to reflect. In the criminal courts, especially, lawyers make critical motions without citing any law, rule, or case. And for good reason: There are so many cases, and motions are often repetitive. I have become resigned to this because in Hennepin County we have effectively done away with pretrial hearings in some criminal cases. Pretrial motions are frequently heard the same day as the trial, requiring instantaneous decisions on important issues, usually without the benefit of any legal memoranda.

The trouble with not supporting motions with legal briefs is that judges are not walking encyclopedias of case law (except, perhaps, Judge Jack Nordby, who wrote the encyclopedia). We rely on attorneys to advocate for their clients—and bring the most pertinent cases to our attention, but that doesn't always happen. In one case, for example, a lawyer moved to exclude a defendant's statement made in her home before she was arrested for domestic violence. He argued that she was in custody tantamount to arrest when she was questioned and hadn't been advised of her right to remain silent. When I asked if he had a case upon which he intended to rely, he said he had none. Neither did the prosecutor. But, in fact, there was a year-old Minnesota Supreme Court case that neatly laid out the factors to consider, which I found in the several minutes between learning of the motion and the actual hearing.

The lawyers in this case did not perform poorly. They both have good reputations. They operated well within the expectations of the state criminal justice system. The system just does not always permit the time and attention required for lawyers to do more.

As I quickly learned, every new judge is faced with problems never confronted before. Experienced judges can be a wonderful source of information—but not while you're on the bench. A law clerk can only do so much in minutes. Lawyers can provide much-needed information. But it is impossible not to make mistakes; it is one of the ways a judge learns.

As a lawyer in private practice, I would frequently awaken in the night with an idea about how to frame a legal issue or develop a line of cross-exami-

nation. But being a judge takes the experience to a new height. Sleeplessness may be an occupational hazard of making quick decisions that impact people's lives. Did I listen to all of the arguments? Did I give correct weight to each witness's testimony? Did I adequately understand the law? Did I ask the right questions? Did I make the right decision? I have pondered these and many other questions at three o'clock in the morning. There have been times when nothing but sheer exhaustion enabled me to sleep through the night. It's no wonder that some judges are consumed by the stress, anxiety, and tension that come with the job. Yet lawyers seek the position and believe they can handle the pressure, do good work, make the right decision, and improve our justice system.

A friend who became a judge in California gave me this advice when he learned that I'd been appointed to the bench in Minnesota: "Make a decision and move on—don't think about it after you've made it." It was good advice. I just have not been able to follow it.

I USED TO REFLECT on matters because of how they impacted my client. I did not just make legal decisions; I made business decisions. I evaluated a strategy based on its potential for success as well as its cost in dollars and cents. Now, I reflect on matters because of the human toll they involve. Sometimes the human toll involves acts of incredible horror—a point blank gunshot through the head or a beating of unconscionable cruelty. Sometimes it results from nothing more than the thoughtless act of driving under the influence of alcohol.

The legal blood alcohol limit is .10, and in August of 2005, it will decrease to .08. I heard the case of a man who rolled his car while driving with a blood-alcohol content of .33. That was followed by the case of a mother whose preliminary breath test registered .39, with two small children in the car. Then there was a white-collar executive found slumped over the wheel of his car at a traffic light because his blood-alcohol content was an incredible .483.

Many defendants have lower blood-alcohol readings, and most are sin-

cerely penitent, mortified at the criminal charges that result, and determined never to appear in court again. But others are not so easily deterred. I can't forget the devastating case in which a drunk nineteen-year-old killed a lovely thirty-seven-year-old woman in a head-on crash.

It was on my mind as I handled the case of another nineteen-year-old underage drinker. His blood-alcohol content was .067—beneath the legal limit, but the law mandates zero tolerance for those under twenty-one. His attorney and the prosecutor agreed to a \$300 fine. But I turned down the plea agreement. The young man needed to understand the potential for harm caused by his conduct, I explained. I gave him work detail and required that he undergo a chemical health assessment to determine the extent of his drinking and marijuana use. I also required that he attend a victim-impact panel so he could learn first-hand the misery caused by people who drive under the influence. I hope we won't see him in court ever again.

Domestic abuse is another omnipresent courtroom horror. I heard the case of a young man who choked his fiancée until she passed out. When she regained consciousness, he said "Lights out," then choked her some more. In court, he called his fiancée's description of the event "theatrical." One man had eleven prior arrests for domestic assaults. His wife had tried to flee him in the past, even moving to another state, but he followed her and beat her again and again.

Hearing about such violence, every day, week in and week out, can deaden a judge's sensitivity. I almost came to consider pushing and slapping a wife and children minor bad behavior, because I dealt so often with closed-fist punches to the face and head, with choking so intense that visible strangulation marks were present long afterward. I hope I never fall into the trap of accepting violence in the home—or anywhere else. But I also know it is an ever-present danger in criminal court because judges and lawyers are enticed to see cases in relation to one another. Imagine, for example, the anger you would feel if some-

continued on page 282

TWO YEARS ON THE BENCH
continued from page 84

one punched your spouse in the face and bloodied him or her. Now imagine being a judge or lawyer and observing that case and fifty others involving knifings, rapes, gunshot wounds, or beatings so severe the victim is left permanently disabled. A degree of insensitivity to certain acts of violence may be inevitable. There's no easy way to avoid it. A judge, like lawyers involved in the system daily, must try to remember there is a larger community of which we are all a part where violence at any level is unacceptable.

AS A LAWYER, and as a member of our community, I was always interested in issues of poverty and race. My concerns were genuine, but they were a step removed from the real life problems I now deal with daily. Misdemeanor court is replete with those charged with poor people's "crimes," such as driving after license suspen-

sion. These cases often arise after someone cannot afford to pay a fine; if stopped a second time, he or she may be cited for a criminal offense. Ironically, prosecutors in some jurisdictions try to settle such cases by insisting the person pay an even larger fine. It can be a Kafkaesque world.

These were cases where I found I could make a small difference in people's already difficult lives. In one case, a woman worked for Wal-Mart, earning \$7.30 an hour while attempting to bring up two children alone. Trying to make ends meet, she failed—and bounced a check to cover her auto insurance. In another, a woman worked as a maid at a hotel earning \$6.70 an hour. She had two children, her husband was temporarily out of work, and she couldn't afford car insurance. She decided not to drive her car—but one horribly cold day, she couldn't resist. A police officer stopped her because she hadn't adequately cleaned the ice off her windshield. Prosecutors in the respective

suburbs asked both women to plead guilty to a criminal offense and pay a fine or perform manual labor for the county. In both cases, I did not impose a sentence—on condition that the women have no similar offenses in the next year, when, according to state statute, the charges would be automatically dismissed and vacated.

Certainly, people need to obtain insurance. We all pay for those who don't. Chronic offenders should have to answer for their acts. However, these two women were doing their best to comply with the law. It makes no sense to fine someone who is poor, or to force a mother already struggling to keep her family together to work for the county picking up trash when she should be with her children.

Many in poverty find themselves in a vicious cycle from which they no longer even try to extricate themselves: fine, court, fine, court, and, perhaps eventually, jail. Each appearance by one of these defendants requires a prosecutor, public defender, court



clerk, deputy, court reporter, and judge. This isn't a good use of our community's limited resources.

As the months passed, I learned how bewildering the criminal justice system is for many people, especially those not conversant in English. A young Latino man came before me. With the assistance of a translator, he pled guilty to using a false identity in aid of a theft. He admitted that he used a false identity card to cash a check. The defense attorney and the prosecutor both assured me he had admitted to the facts that constituted the offense—but I conducted my own questioning. When asked to whom the check was written, he said it was made out to him—for a car-washing job he had done. He even gave me the business card of the person who had written the check. I then called both attorneys to the bench and suggested they might want to call the check-writer, because if the young man's statement was true (and I had no reason to disbelieve him), he was not guilty. He may have used a false identi-

ty card—but the check he cashed appeared to be a legitimate paycheck for work he performed.

The attorneys involved were experienced criminal lawyers. They are people who care about doing the right thing. They had not ignored the facts. Faced with the huge volume of cases and the difficulties of communicating through an interpreter, they had missed an essential fact. A judge helps assure that everyone enjoys the same rights. It means that a judge must listen carefully to each case on a long calendar, and hundreds of such cases in a week's time. It's harder to do than it may sound.

On too many occasions, I have also observed evidence of the hard reality that race matters. One day in misdemeanor court, I looked up to find that all the people in front of the bar (which separates court personnel and lawyers from defendants and observers) were white, and everyone behind the bar was black. It was a stark reminder of the role of race in our society.

It was certainly not the only sign that people of color may be treated differently in the criminal justice system. A Latino man was stopped for going over the speed limit on Hiawatha. He said he was frisked, handcuffed, detained in the back of a squad car, then ticketed. Anyone who has ever received a ticket would ask the same question he asked through an interpreter—"Why was I treated this way?" Then there was a black woman who said a white officer harassed her when he stopped her at night in a northern suburb. Crying, she related the events. She did not want to be in court complaining; she wanted to be at her job but felt it was her obligation to explain how she was treated.

There is certainly room for improvement in matters related to race—in our policing function and in our society. Yet it is also true that law enforcement personnel frequently work hard and well and under the most difficult circumstances. I am often impressed with their work and apprecia-

TWO YEARS ON THE BENCH

tive of it. It is, after all, law enforcement officers who have to deal daily with the frightening proliferation of weapons on our streets.

The search for illegally possessed weapons is an important police function, but our system imposes limits on police action. One of a judge's challenges is ruling whether a weapons search is legal.

It is 12:15 a.m. on Minneapolis's Near North Side. Two police officers observe a van that appears similar to one reported stolen that evening. They notice that the van's license plate and color are different from those of the one reported stolen. Still, they follow the van and stop it (they will testify that the driver made a right-hand turn without signaling). One officer approaches the driver; the other, gun drawn but at his side, carefully approaches the van after observing movement from within. He carefully comes up close and observes a long-nosed revolver under a seat. "Gun!" he yells, as he orders the two passengers out. His partner quickly secures the driver and eventually finds a small-caliber revolver stuffed down the driver's pants. The officers recover three guns. The driver is a convicted felon. He will face a mandatory five-year sentence.

I upheld the search. Under the law, the minor traffic violation justified the stop. The officers were doing their job. They acted on a hunch. They took three weapons, and three people who could use them, off the street. They risked their lives. They did good work.

But what if the police hunch was wrong and the people they had approached with guns drawn were decent, law-abiding, and hard-working? Why should people on the Near North Side be afraid that because of where they live they will be stopped this way? I have no good answer. People I know who live in Kenwood, Edina, or Minnetonka would also protest if their families were treated like this.

Abuse of power rarely comes with a shingle announcing its presence. Each case must be reviewed on its individual merits. In some cases, reasonable people will differ on the appropriate outcome.

THE WORLD OF A JUDGE is not all dysfunction and systemic stress. I also have the pleasure of working with many excellent civil and criminal lawyers whose experience, good judgment, hard work, and skilled advocacy make the system work well—and make my job a pleasure. Now I have the opportunity to evaluate a lawyer's skills from an entirely different perspective; not as an adversary, or advocate, but as a judge.

When lawyers perform well, they earn credibility with the court. One small case stands out. It was a creditor's proceeding in which a woman's car was repossessed; the creditor also wanted to attach \$900 of her bank funds to help satisfy her debt. The monies were, in fact, her son's, from social security payments she received for him. The woman had no source of income other than welfare and child-care payments. The creditor's attorney did a fine job of explaining to me my options under the applicable law. He seemed to say that he could not agree to disregard the monies on behalf of his client, but that I could order them protected. The woman did not have counsel; the lawyer easily could have tried to take advantage of the situation—but he did not. I protected the monies and then made a point of telling the woman how decently the lawyer had just acted. He conducted himself as an officer of the court in the truest and finest sense of the phrase.

Many criminal lawyers who practice daily in Hennepin County courts also perform excellently under the most trying of circumstances. The volume of the cases they handle is staggering; their dedication to the work is heroic; the skills they bring to their profession are impressive. I have observed lawyers on both sides of the table act with consideration and kindness—to one another and to defendants. The best lawyers keep their sense of perspective.

Not all lawyers present themselves in such a laudatory manner, however. On one occasion, a lawyer called me on the telephone to request that I remove a juror from the case, something no judge would ever countenance: One of the basic rules is that a lawyer does not communicate with a judge concerning a case without opposing counsel also

present. I put a stop to the call.

The resolution of many other cases is clear-cut. After my first felony jury trial, I sentenced a defendant to almost ten years in prison. He deserved it. When he was angry, he hurt people. In this case, he had hurt someone seriously with a baseball bat. In a first-degree murder case, I gave the defendant the mandatory sentence of life in prison—his act was cold and calculated. I sentenced a man who was convicted of his thirteenth felony to the maximum term possible as a career offender.

But unless you are inclined to see the world in contrasts of good and evil, most cases are not susceptible to easy answers. The question is not merely, What can we do to someone? but, What is a person's capacity for personal redemption? Except in the most extraordinary cases, there is usually hope, but no easy way to see who will be successful and who will repeat an offense.

IT'S HARD to believe that more than two years have passed since I took the bench. The journey from lawyer to judge has been an extraordinary one. There's a lot to learn—law, procedure, even the culture of the court—and no one set of experiences upon which to rely. A judge must have an arsenal of resources at the ready, because each day brings a new issue, a new problem, a new decision that may have a profound impact on someone's life.

I've now begun a rotation in family court, an assignment that requires me to deal with intense, complex emotions regarding families and finances played out on a public stage. I thought I had heard it all in criminal court, but there are some matters in family court where the truth is simply stranger than fiction.

Judging can be hard work, but it is also satisfying. It is always serious, but there is humor too. I sometimes smile at my law clerk as we are about to go into the courtroom. "Come on," I say. "Let's go do justice!" ▲

Mel Dickstein is a Hennepin County trial judge who currently is assigned to family court. He wrote this memoir in 2004, at the conclusion of his rotation on the criminal bench.