

Saint Louis LAWYER



“I think Bench and Bar is the best organized bar activity! The 2010 Bench and Bar ranks as one of the best events ever! Quality CLE, outstanding social events, a great facility and fantastic attendance allowed great networking! I encourage everyone to attend next year’s event in Branson!”

- Judge Kintz



president's message

Thomas G. Glick

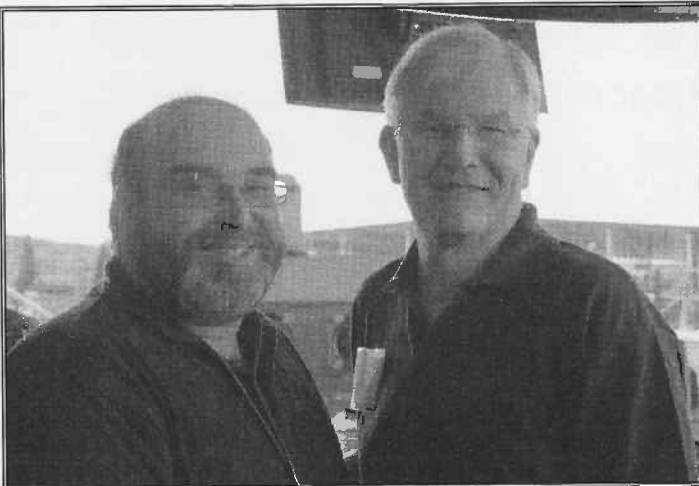
Diversity and Elena Kagan



At Danna McKittrick, when discussions turn to topics of firm administration, a member of the firm's executive committee, Ruth Binger, often points out that a strong overall firm requires diversity amongst its lawyers. "Diversity" has come to be a buzzword about inclusion based on race, religion, gender, national origin, age and other protected or pseudo-protected classes. When Ruth talks about diversity she doesn't just mean adhering to the law (which coincidentally is one of her practice areas). She means having diversity of many other sorts, such as a diversity of backgrounds, approaches and practice areas. This broader definition of diversity is the lens through which I propose to examine the newest nominee to the United States Supreme Court, Elena Kagan.

Over the course of the last 94 years the Court's composition has slowly, but methodically gained diversity in the sense of race, religion, gender, and national origin. As a result, Elena Kagan won't be the first, or even the only, person with any of her immutable characteristics to sit on the highest court. She will, however, add to the Court's diversity in the broader sense. For starters, her employment path differs substantially from that of the current Justices. Early commentators, focusing on her lack of judicial experience, opined that she was ill prepared to be a Justice. Unlike those commentators, I have the privilege of writing to an audience of lawyers who know that the appellate practice of a United States Solicitor General is excellent preparation for service on the United States

Supreme Court. In many ways, being Solicitor General provides just as valuable an experience as being a Federal District Court judge; probably even more valuable



President Tom Glick and Honorable Duane Benton, Eighth Circuit enjoying Bench and Bar at Camden at the Lake of the Ozarks

in terms of appellate experience. For this reason, the office of Solicitor General was for many years the "on deck circle" for the Supreme Court. Now that the tradition of appointing the Solicitor General to the Court has faded, the appointment of one will certainly bring a measure of diversity to the current Court.

On first blush, Kagan's experience at the Harvard School of Law does not seem to immediately bring anything new to the Roberts Court. A large number of legal academics have served on the high court. But, only three of the current members of the current court have legal academic experience (not coincidentally, all three were appointed by Presidents with experience in academia) and none of them as extensive as Kagan's. Certainly there are no other former deans. So, in this way, Kagan also brings a slightly different perspective to the

Court.

One item that jumps out from Elena Kagan's job as Law School Dean was her refusal to allow military recruitment on the law school's campus. She didn't really cut any bold new ground with this action. She merely revived a policy that had been a touch point for controversy since the adoption of the "Don't Ask, Don't Tell" policy nearly ten years earlier; a policy that had been litigated and legislated multiple times in the intervening ten years. However, I would suggested that in today's world where "advise and consent of the Senate" has come to mean "a media frenzy comparable to a political election," the fact that she has taken a political stand on any issue, much less a relatively unpopular stand, brings another note of diversity to the Court.

The most popular way to compare any United States Supreme Court nominee to the sitting Justices is to examine the nominee's perceived political bent. I say, "perceived" because of the recurring examples of a President that falls on one side of the political spectrum appointing a Justice whose later decisions fall on the other side of the political spectrum. The most relevant example here is Justice John Paul Stevens, whose seat Kagan is nominated to fill. Stevens was appointed by Republican President Gerald Ford but there is substantial agreement in the many retrospectives, which have recently marked his retirement that he has served as a liberal vote on the Court. As a result I preface any discussion

of any individual's beliefs with the caveat that the politics of an individual are a subjective label applied by someone else to them. In this instance that someone else is her appointer, President Barack Obama. I'll let other commentators dissect the exact political beliefs of each member of the Supreme Court and where Elena Kagan might fit in with them. It's a certainty that the President's belief is that her views are similar to his or at least to those he aspires to and that those views are left of center (exactly how far left of center is another matter I'll leave to those smarter than me; although everyone that seems to take on the task in the popular media does not strike me as particularly bright). Certainly there is no shortage of critics of the President's politics who will argue that Kagan will not represent their political or judicial philosophy. Of course she won't. The United States Supreme Court is not a representative part of the democracy. And the politics of the last nominee, this nominee and any other nominee between now and January 2013 will not be based on the views of the citizenry at the time of the appointment. Instead they are based on

what the views of the citizenry were in November 2008 when we elected our President. As lawyers we can debate endlessly the meaning of "advice and consent". But, it's hard to come away from any reading of Article II, section 2, clause 2 of the Constitution with a belief that anybody but the President gets to take the driver's seat in the appointment of a Supreme Court Justice. In accordance with the Constitution, we elected a liberal president and his choices will likely reflect his politics. So, while leaving aside the full analysis of Kagan's politics, in the broader sense, there is little doubt that her politics diverge from several the politics of other members of the court.

I would like to examine whether her views of the law represents any measure of diversity. But, I can't because we don't know much about her views. Moreover, we won't know them even after the Senate questions her. In fact, we won't know them until she has been appointed and written several opinions. The reason for this great secret is because the appointment process has become so political and media driven. Ronald Reagan introduced the concept of a

political capital. Thus, I have little to no ability to actually determine the way Kagan thinks about the law.

Instead, I am forced to conclude my observations on the ways Elena Kagan might impact the court with an examination of her own views of diversity. First, we know that despite her declared liberalism, she intentionally set about recruiting conservative faculty members for the Harvard Law faculty. She contends that while her politics differed from them she felt that the best education resulted from exposure of the students to a broad diversity of perspectives. This is of course precisely the sentiment applied to legal education that Ruth applies to our law firm and society frequently applies to issues relating to protected classes.

It is also the philosophy that I have about BAMSL. BAMSL has long striven to overcome a shameful, though now distant, history of exclusivity based on race, religion, gender and other immutable characteristics. But, if we are to initiate and achieve the sustained growth of membership I hope, BAMSL must also maintain a broader sort of diversity. One where we pay attention to even more about our members and strive to balance our ranks based on other attributes, like the size of the group with which they practice, the area of law they practice, whether they are in private practice, and whether they practice in an urban, suburban or exurban setting. This I think is the way to build a strong Supreme Court, Law firm or Bar association.

To comment on this article, please use the discussion's tab on the Bar Association of Metropolitan St. Louis Group on Facebook or email them to tglick@dmfirm.com. To access Facebook, please click on the Facebook Icon at the bottom of the page at bamsl.org. Watch for the July St. Louis Lawyer with a tutorial on using Facebook and other social media.

litmus test for Supreme Court Justices, which was a bit of a surprise and Presidents since have refined that test. As a result, candidates not only have to have certain views but their track record must be totally bereft of any evidence of those views in order to assure maximum potential for appointment without unnecessary expenditure of the President's

The Women in the Legal Profession Section (WILP) would like to thank the law firms who matched its "tips" at the Bench & Bar Hospitality Suite on Thursday, June 3, 2010, which benefited Legal Services of Eastern Missouri:
O'Brien Law Firm, P.C. & Hepler Broom, LLC

MEDIATION SERVICES

**PROMPT, EXPERIENCED, AND
REASONABLY PRICED
ASSISTANCE FOR THE SUCCESSFUL
RESOLUTION OF ALL
YOUR DISPUTES.**

BRUCE S. FELDACKER

Attorney/Mediator
laborlaw@anet-stl.com
314-862-3333, Ext. 15

**SERVICE AS MEDIATOR
THROUGHOUT MISSOURI AND
ILLINOIS TO RESOLVE LABOR &
EMPLOYMENT LAW, INDUSTRIAL, AND
GENERAL CIVIL MATTER DISPUTES IN THE
PUBLIC AND PRIVATE SECTORS.**

ACR Advanced Practitioner in Workplace Mediation; Co-chair, ABA Committee on ADR in Labor & Employment Law; President, Association of Missouri Mediators.

Please visit my website, www.mediate.com/feldacker, for complete biographical information and articles I have written on the successful use of the mediation process.