

Judicial Profile

KIMBERLY SAYERS-FAY AND ERIC RITIGSTEIN

Hon. Susan P. Graber U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit

NINTH CIRCUIT JUDGE Susan Graber has innumerable reasons to be proud. She graduated from high school at the age of 15, from Wellesley College at 19, and had her law degree from Yale University's School of Law by the time she was 22. She was not yet 40 when she was appointed to fill a vacant seat on the Oregon Court of Appeals. Later, Judge Graber set a new kind of precedent by

giving birth to her daughter while serving as an associate justice on the Oregon Supreme Court. More recently, in 1998, Graber became a circuit judge for the U.S. Court of Appeals for the Ninth Circuit. Perhaps what is most impressive about Judge Susan Graber, however, is the modesty she exudes in light of her talents and meteoric career trajectory. As fellow Ninth Circuit Judge Barry Silverman explains, Graber is "brilliant — but she doesn't wear it on her sleeve. As bright as she is, she does not put on airs or use her amazing intellect to try to dominate."

Judge Graber spent most of her childhood in Oklahoma City. Her family, however, had far-flung, cosmopolitan roots. Her father, Julius Graber, was a Brooklyn native who dedicated his life to social work and administration of Jewish charities. Her mother, Bertha, emigrated to the United States from Czechoslovakia as a child. Judge Graber now proudly displays her mother's naturalization certificate on the wall of her Portland, Ore., chambers.

Judge Graber admits that, at times, it was difficult to be part of a Jewish family in Oklahoma City, where even today Jews constitute less than 1 percent of the population. Judge Graber's parents, however, were a bedrock of support. They instilled in both of their daughters a conviction that they could be whatever they wanted to be. Both sisters took that lesson to heart. Defying gender stereotypes, Susan became a lawyer and her sister, Valerie, became a college professor.

When asked how she decided to pursue a law career, Judge Graber is quick to credit a guidance counselor in her middle school. During a visit to this counselor's office, Graber discovered a brochure about



being an attorney, and she "liked the job description." Soon after reading the brochure, Graber watched the movie "Twelve Angry Men," after which there was no turning back. With her law degree in hand at the age of 22, Judge Graber began her career.

Her first legal job was in Oregon, a state she admits she "just picked off the map." Between her first and second years at Yale, Graber served as a law clerk to U.S. Attorney Sid Lezak in Portland. Judge Graber was both the first woman law clerk and the first Yale law clerk to serve in the Oregon U.S. attorney's office. Thirty-five years later, Lezak still recalls Judge Graber's exceptional legal ability. "I have never personally known or been associated in practice with anyone who could see legal issues as quickly, or write as succinctly and clearly as Judge Graber. ... She was a natural right from her first year of law school." In addition, Lezak was impressed with Graber's research skills and foresight. "Even at a young age, Judge Graber had good peripheral vision on the social effects of

the legal issues.”

Following law school, Judge Graber embarked on another adventure by moving to New Mexico, where she joined the attorney general’s office for the state’s Bureau of Revenue. Judge Graber had been working in New Mexico for less than three years when she learned devastating news about her father. On Oct. 16, 1974, Julius Graber was murdered in Cincinnati, Ohio, by two teens who had stolen his car. Both killers are now serving prison sentences in Ohio.

After her father’s murder, Judge Graber moved to Cincinnati. For three years, she practiced with Taft Stettinius & Hollister, where she gained a familiarity with labor and employment law. Then, in 1978, with Sid Lezak’s encouragement, Judge Graber returned to Oregon, which has been her home ever since.

In Portland, Judge Graber worked for Stoel, Rives, Boley, Jones & Grey (now known as Stoel Rives), a well-known law firm in the Northwest. Judge Graber downplays the obstacles that she had to overcome as a female attorney during that time. However, Stoel Rives partner Barnes Ellis recalls that some clients were forthright about their desire to have male attorneys working for them. Ellis remembers one major investment banking client who, unbeknownst to Judge Graber, initially protested when she was assigned to handle his arbitration because she was a woman. Ellis persuaded the client to give Judge Graber a chance, and soon the client admitted that he was very satisfied. Ellis explains that this episode was indicative “of the obstacles Susan and her women colleagues entering the profession then encountered, often without anything being said. She was part of a remarkable group of young women who entered the profession then, and by their competence simply blew away the barriers that existed.”

“Blew away” is certainly an apt phrase. Judge Graber’s career trajectory has been astounding. She became a partner with Stoel Rives in 1981. Seven years later, she was appointed to fill a vacancy on the Oregon Court of Appeals, where she served for just two years before becoming an associate justice of the Oregon Supreme Court. She had been an associate Supreme Court justice for just nine months when she gave birth to her daughter Rachel. “I could be wrong,” says Edwin Peterson, former chief justice of the Oregon Supreme Court, “but I think I’m correct that Susan is the first [Oregon] Supreme Court judge, male or female, to have a child while serving on the court. She certainly is the first woman Supreme Court justice to give birth to a child during her tenure on the court.” Judge Graber speaks fondly of her “wonderful colleagues” on the Oregon Supreme Court, reminiscing — as Chief Justice Peterson once put it — that it felt like “the Court was going to have a baby.”

In July 1997, President Bill Clinton nominated Judge Graber to serve on the U.S. Court of Appeals for the Ninth Circuit. In March 1998, the U.S. Senate confirmed Judge Graber’s nomination by a vote of 98–0.

Because of her father’s murder, some commentators assumed that Judge Graber would have a strong “law and order” bent. In the more than seven years that she has been on the federal bench, however, Graber’s jurisprudence has been hard to pigeonhole in this way.

When asked to describe her style of judging, Judge Graber says that she considers herself to be old-fashioned and idealistic in the way she approaches her job. She believes that judges should “come to the job with your life experiences, but keep them at a distance.” According to her fellow Ninth Circuit judge, Hon. William A. Fletcher, Judge Graber does that well. “Judge Graber is a superb judge. ... She calls them as she sees them, but as a matter of law, not personal preference.” Two of Judge Graber’s former law clerks echo that sentiment. Ben Souede reports that Judge Graber’s opinions, like her questions at oral argument, are

designed to answer the particular questions of the case at bar. ... Judge Graber’s opinions fulfill what she sees as her basic judicial obligation: to answer the questions of law that are properly before the court. ... They reach an issue only if it is required to resolve the case. ... This approach is driven by [Judge Graber’s] deep respect for the legislative process and her belief that, if a statute is bad, the proper remedy is to change its meaning legislatively, rather than resorting to strained judicial interpretation.

Mindy LeMoine, a former clerk who is now a litigator at Mungler Tolles & Olson LLP, concurs, noting that one of the first and most enduring lessons she learned from Judge Graber is that “it is not about me. It is not about [Judge Graber]. It’s first of all about the people who come to the court to solve their problem, and secondly about the lawyers who may one day look to that opinion for guidance.”

Writing clear opinions is a priority for Judge Graber, who believes that “muddled writing is a sign of muddled thinking.” She strives to draft her opinions in a manner that makes them understandable to the litigants and to future readers, without the need for translation by a lawyer. For example, Judge Graber believes that, when drafting an opinion on search and seizure issues, the court should make the opinion understandable to police officers — the individuals who will actually have to adhere to the ruling. According to fellow Ninth Circuit Judge Barry G. Silverman, Judge Graber’s “opinions are noteworthy for their unusual clarity. Agree with them or not, there is no mistaking what the court has held or why, or what is supposed to happen on remand, when she is the authoring judge.”

Judge Graber’s straightforward writing style may help explain why she has authored a remarkable seven en banc opinions in as many years on the court. Another possible explanation is that Judge Graber is a



Judge Graber with her family.

respected moderate in a polarized circuit. That does not mean, however, that Judge Graber will shy away from writing controversial opinions or opinions that do not square with others' image of her. To cite but one example, in December 2005, Judge Graber wrote *United States v. Menyweather*, 431 F.3d 692 (9th Cir. 2005), which thrilled the federal defense bar. Professor Douglas Berman termed *Menyweather* "a potential *Booker* blockbuster,"¹²² while Steve Kalar, a federal public defender, described the decision as "too full of *bon mots* to fully summarize."²²

When asked about the type of opinions she most likes to write, Judge Graber volunteers that she enjoys cases involving statutory construction. In one such case — *Silvers v. Sony Pictures Entertainment Inc.*, 402 F.3d 881 (9th Cir. 2005) — Judge Graber, writing for the en banc majority, wrote that § 501(b) of the Copyright Act bars copyright owners from assigning their bare litigation claims to third parties. To some, this topic might seem dry. However to Judge Graber,

who is an admitted Scrabble, Boggle, and crossword puzzle enthusiast, many statutory construction cases have a puzzlelike quality that intrigues her regardless of the substance of the statute.

When Judge Graber is not on the bench or besting her opponents at word games,³ she most enjoys spending time with her family. She and her husband, Bill June, along with their 15-year-old daughter, Rachel, enjoy taking trips to the beach and caring for their pets — three dogs and a thoroughbred show horse. It is not uncommon to find the family — including four-legged family members Poppy, Lido, and Prince — spending an afternoon along the beautiful Oregon coast. Judge Graber also enjoys baking bread with her daughter and reading mystery novels.

As for the future, Judge Graber seems quite satisfied doing exactly what she is doing and where she is doing it. In the eyes of Chief Justice Peterson, however, Judge Graber has still more potential. "Judge Graber is unfailingly fair and objective. ... She would be an excellent Supreme Court justice." **TFL**

Kimberly Sayers-Fay is an attorney with Stevens & O'Connell LLP in Sacramento, Calif., and a former law clerk to Hon. William A. Fletcher and Hon. Thomas G. Nelson, both of the U.S. Court of Appeals for the Ninth Circuit. Eric Ritigstein is a law clerk at Stevens & O'Connell LLP; he expects to graduate from McGeorge Pacific School of Law in May 2006.

Endnotes

¹Douglas A. Berman, *Sentencing Law and Policy Blog: Big Sentencing Doings in the Ninth Circuit* (Dec. 18, 2005); available at sentencing.typepad.com/sentencing-law-and-policy/2005/12/big-sentencing.html.

²Steven Kalar, *Ninth Circuit Blog: Case o' the Week: Menyweather & Booker Sentencing* (Dec. 19, 2005); available at circuit9.blogspot.com/2005/12/case-o-week-menyweather-booker.html.

³According to former Boggle opponent (and former chief justice of the Oregon Supreme Court) Edwin Peterson, "I pride myself on being a pretty good Boggle player. But [Judge Graber] beats me every time."