Hon. Kevin Gross
U.S. Bankruptcy Judge, District of Delaware
by Sean M. Beach and Patrick A. Jackson

Good morning, everyone! It’s wonderful to see you!” This is the typical welcome for advocates appearing before Hon. Kevin Gross, U.S. bankruptcy judge for the District of Delaware, whether for a brief status conference or several hours of knock-down, drag-out oral argument. Official hearing transcripts do not capture the exclamation points, but his warm tone and beaming smile convey them to anyone present in the courtroom—any of whom would likely agree that, if the federal judiciary handed out a “Mr. Congeniality” award, Judge Gross would be a shoo-in. At the conclusion of the hearing, Judge Gross usually thanks counsel for their efforts and praises their “wonderful” work on the case. And as he told us when we caught up with him for an interview in preparation for this article, “I mean it! I really mean it. I appreciate how hard it is to be a lawyer—I remember how hard it is to be a lawyer.”

Judge Gross began his legal career in 1978 as a clerk for Chancellor William Marvel and Vice Chancellors Grover C. Brown and Maurice A. Hartnett III in the Delaware Court of Chancery. At that time, corporate-takeover litigation, which would dominate the court’s docket through much of the 1980s, was just beginning. Following his clerkship, Judge Gross joined the Delaware firm Morris & Rosenthal, with an “interesting practice” consisting of about half general practice work (e.g., real estate, business incorporation, personal injury) and half securities and corporate litigation.

“It was a hard mix,” Judge Gross said. He would toggle, for example, between real estate settlements for individuals and court appearances for sophisticated corporate entities. “It never felt quite right to me,” he said. “But looking back, the mix really made me what I became, because the general practice side was very personal, dealing often with issues of a personal nature. So, I think more than anything, that human side of the practice warmed me as a lawyer.” Judge Gross remained with the firm, which over time was renamed Rosenthal, Monhait, Gross & Goddess, until he took the bench in 2006.

Judge Gross’ entrée into bankruptcy practice was abrupt and unexpected. He was working in the office one Saturday in 1991, when he received a phone call from a lawyer at Sidley Austin in New York, for whom he had served as Delaware counsel on minor matters. The lawyer had been trying to track down court documents pertaining to Columbia Gas System Inc., which had just filed for chapter 11 bankruptcy relief in Delaware. He needed the documents to prepare a pitch to represent the official committee of unsecured creditors in the case, but he had not been able to reach any of his usual bankruptcy contacts in Wilmington. “Here’s how much I knew about bankruptcy at the time,” Judge Gross recalled: “They called and said, ‘Is there an order of reference?’ I didn’t even know what they were talking about.” He made an educated guess, “Sure there is!” He tracked down the documents from the federal district court and sent them to his colleague. The pitch was successful, and Sidley Austin was selected as counsel to the committee. They hired Judge Gross as their local counsel; the rest is history. “On my end, I was doing everything basically by myself,” he said. “On one occasion somebody called me from Sidley Austin and said, ‘Hello, I’m with the Columbia Gas team.’” Judge Gross responded, “Well,
you’re talking to the Columbia Gas team at this office!” That’s how it was.” As it turned out, Columbia Gas was one of the largest and most complex chapter 11 cases in Delaware history, so Judge Gross received a lot of on-the-job training and court time, which later resulted in more chapter 11 work. He began working on other big bankruptcy cases and served as counsel for other creditors’ committees. These bankruptcy cases included HQ Global, Smith Technologies, Teleglobe, American Classic Voyages (to name just a few), and several health care cases. And all the while, Judge Gross was still doing general-practice work and, to a lesser degree, securities- and corporate-litigation work.

In 1997, Judge Gross had another abrupt and unexpected run-in with Delaware bankruptcy practice when he received a call from then-Chief Judge Joseph J. Farnan Jr. of the U.S. District Court for the District of Delaware, who advised him that the court was considering withdrawing the reference order that he had so fortuitously happened upon six years earlier. The district court did ultimately withdraw the standing order of reference of bankruptcy matters to the bankruptcy court, citing the “significant increase in the number of bankruptcy cases … necessita[ting] that judges of the district court participate in the handling of such cases.” At the time, Judge Gross was serving as the district court’s ombudsman, an official bench-bar liaison responsible for addressing administrative issues in the ordinary course of the district court’s operations. He also served as chair of the District Court Rules Committee. His work resulted in his earning the first district court distinctive service award.

“I kind of got panicky,” Judge Gross recalled. “I said, ‘Well, you can’t just do that.’ [Judge Farnan] said, ‘We’ve got to do it.’” Judge Gross was tasked with putting together a small committee of lawyers who worked with Judge Farnan and the other district court judges to make the new protocol work. And it did work. From Feb. 3, 1997, when the withdrawal of the reference order became effective, to Sept. 6, 2001, when the standing reference order was reinstated, the District of Delaware became the only jurisdiction in the country where bankruptcy cases were being handled in the first instance by the district court, rather than the bankruptcy court.

When Judge Helen S. Balick retired from the bankruptcy court in 1998, Judge Gross served as chairman of the merit selection committee responsible for recommending candidates to the Third Circuit Court of Appeals to succeed her. Later, when Congress created four new judgeships in Delaware as part of its bankruptcy reform legislation in 2005, Judge Gross applied.

He did not have a lot to say about the application and interview process, other than his FBI background check. “On the application for the judgeship it asks if you’re a member of any organization that discriminates on the basis of race, religion, or gender,” he explained. “And since I belong to two synagogues, I thought I had better put that down because, you know, you have to be Jewish to belong to a synagogue.” Sure enough, the FBI agents interviewed the two rabbis from the two synagogues, and then asked him for the names of his neighbors. “I gave them a couple of names,” he said, smiling, “[but] they went around my entire block to all the houses and talked to everybody.” Now we know how thorough FBI background checks are.

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“I had an uneventful childhood,” Judge Gross recalled. “Good parents, good sister. We lived in Green Acres [a neighborhood in North Wilmington, Del.]. It was full of kids so we were always busy with them, and there was a neighborhood swimming pool that kept us busy in the summer.” Growing up, he was also close with his extended family: “Grandparents, cousins, aunts, and uncles—every weekend we were with one side of the family or the other.”

Judge Gross’ grandfather, Benjamin, who was originally from Novohrad-Volynskyi, in northern Ukraine, traveled to Canada by boat, and then to the United States by foot. “In fact,” Judge Gross explained, “his real name was Marder, but he had a sister who was married to a fellow named Gross, so when he came to the country he showed up at her front door she said, ‘What are you doin’ here? You can’t just walk into the country!’ So he adopted her name, Gross, and that’s how we got the name Gross.” Judge Gross’ grandfather was a cooper (i.e., a barrel maker). Even though he did not write English and barely even spoke it, he managed to build up a large business in Philadelphia. When he finally retired and moved to Norma, N.J., he learned that he had lost all of his savings in the Great Depression. “I think he lost hope at that point,” Judge Gross said. Even when World War II was calling for craftsmen, his grandfather did not have the heart to continue. He later became a citizen.

Judge Gross’ father, Harry, grew up on an egg farm in Norma, which was an all-Jewish community at the time. “It was created by the Baron de Hirsch,” Judge Gross explained, “who believed that the cities were ruining the Jewish people, [and] that they belonged to a synagogue.” Sure enough, the FBI agents interviewed the two rabbis from the two synagogues, and then asked him for the names of his neighbors. “I gave them a couple of names,” he said, smiling, “[but] they went around my entire block to all the houses and talked to everybody.” Now we know how thorough FBI background checks are.

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way they’d lived in Europe in rural areas. So he bought up all this land, and founded several communities, including Norma.36

Judge Gross’ mother, Gloria, grew up in “a beautiful home” in Minquadale, Del., which was at the time very rural. “Her father didn’t like the city,” Judge Gross explained. “He grew up in the country in Russia, and he came over here when he was 15, slept under a fruit stand in New York until he made enough money to bring over his older brother, and then the two of them worked together to bring over the rest of the family.”

Gloria went to Wilmington High School. At age 19, she was introduced to Harry Gross, who had just come back to Wilmington. Harry had served in the Army Air Corps, but was injured before he had the chance to fly. Instead, he went into the weather service, which he greatly enjoyed. After the war, he attended pharmacy school at Philadelphia College of Pharmacy and Science (now the University of the Sciences). He was working in a pharmacy when he met Gloria. They dated for about three months, got engaged, and were married about two months later—a whirlwind courtship not unlike that of Judge Gross and his wife, Lawren (known as “Lolly”), as discussed below.

Judge Gross attended public schools, graduating from Mount Pleasant High School in 1970. “Those were very fine schools,” he said, “and I got a good education at those schools.” He went on to the University of Delaware, where he graduated with a degree in psychology in 1974. At the time, the country was embroiled in the Vietnam War. “Nobody knew what was going to happen with the draft,” Judge Gross recalled, “although I did get a high draft number so I was pretty safe from the draft. But I thought, ‘Why don’t I go to law school?’ And I did it, kind of on my own because I didn’t really have any family members or friends who were lawyers.” He applied and was accepted to a few law schools, and chose to go to American University in Washington, D.C.

“I really loved law school. I hate to say that,” he laughed. “The professors were wonderful. It was challenging. I made good friends. It was just a good experience for me.” Judge Gross worked on law review during school, graduating in 1977. After law school, he began his clerkship at the Delaware Court of Chancery. He eventually grew so close with Chancellor Marvel that he would dog-sit when the chancellor and his wife were on vacation. “I would always know he was getting ready to go away because he would invite me to dinner,” Judge Gross remembered.

“Then the great thing happened,” Judge Gross said as his eyes lit up. “I met my wife that spring!”

Lolly, from Tyler, Texas, was working for Nieman Marcus at the time and had helped to open the Washington, D.C., store. She was in Wilmington for a weekend visiting her sister and brother-in-law, who was a DuPonter.

“There was a breakfast at our synagogue,” Judge Gross recalled. His parents forced him to go. Her sister forced her to go. “A fellow introduced us and when he did so he said, ‘May you live a long and happy life together.’ For me it was love at first sight. For Lolly, I think it took a little longer. But we met in April, were engaged in August, and married in November.”

Judge Gross and Lolly have two grown and “wonderful kids,” Alison and Sam, and had a miniature schnauzer, Jilly, who until her recent passing was a fixture (along with Judge Gross) at the local dog park. Both Judge Gross and Lolly are active in their community. Lolly is very involved at their synagogue, and Judge Gross served on the board there. He also served on the board at the Jewish Community Center and Planned Parenthood. They enjoy gardening, going to the movies, and watching the Philadelphia Phillies. They have been happily married for 38 years.

Judge Gross summed up his background quaintly: “I came from a very simple family. I went to law school. I became a lawyer. I think my parents were proud of me.” (His mother passed away in 2005; his father passed away in 2014, right around the start of the allocation trial in the Nortel Networks case (discussed below).)

His judicial philosophy is similarly “simple.” He describes his colleagues on the Delaware bankruptcy bench, whom he admires greatly, as “sophisticated.” In contrast, he said, “I’m not. I have a very simple view of things. I think maybe parties settle because of that—I get a lot of settlements.”

But Judge Gross is surely selling himself short. The fact is that he, like his colleagues, presides over one of the country’s busiest business bankruptcy dockets and is no stranger to “sophisticated” cases. Take, for example, the cross-border chapter 11 case (with parallel proceedings in Canada and the United Kingdom) of international telecommunications giant Nortel Networks Inc. The bankruptcy resulted in a series of asset sales yielding more than $7 billion of proceeds, the ownership of which was disputed between the various groups of companies (and related creditor and other stakeholder factions) within the enterprise. Litigation regarding the allocation of the sale proceeds culminated in a 21-day joint trial with a Canadian bankruptcy court, which required Judge Gross’ courtroom to be literally torn apart and reconstructed to accommodate additional counsel tables (there were eight parties actively involved in the trial), videoconferencing with the Canadian court, and a simulcast of the proceedings to a spillover courtroom in Delaware to accommodate the dozen-or-so other interested parties, and their several dozen lawyers, who were also in attendance at the trial.7 After nearly a year of post-trial briefing and deliberation, Judge Gross issued his ruling in a lengthy opinion, In re Nortel Networks Inc.,8 which is currently being appealed by several parties in interest. “See those red, green, and blue binders?” Judge Gross pointed to several shelves that were filled to capacity, “Those are just the briefs. Not even all the exhibits or supplemental materials. The record is enormous.”

In recent history, Judge Gross has also presided over the complex, often contentious bankruptcy cases of the Los Angeles Dodgers (commenced in response to Major
League Baseball Commissioner Bud Selig's takeover of the team in 2011, and resulting in a court-supervised sale of the franchise for more than $2 billion) and Trump Entertainment Resorts Inc. (concerning the Trump Plaza and Trump Taj Mahal in Atlantic City). And he has served as court-appointed mediator in some of his colleagues' cases, including notably (1) In re Tribune Co. (Hon. Kevin J. Carey), where he facilitated a multiparty, global settlement of claims relating to the debtors' pre-bankruptcy leveraged buyout that paved the way for negotiation of a chapter 11 plan; and (2) In re Catholic Diocese of Wilmington Inc. (Hon. Christopher S.ont-chi), where he facilitated a multiparty, global settlement of clergy sexual abuse claims against the Diocese of Wilmington, its affiliated parishes, and certain Catholic religious orders, as well as a settlement between the diocese and its lay employees regarding funding of the lay employee pension plan.

“Before I took the bench I did a lot of mediation work,” he explained. “I just always liked it. But it sometimes frustrates me. I get the parties somewhat close, then they come to mediation and completely back away from the position they had just taken. I don’t understand that.” Despite his ordinarily sunny disposition, Judge Gross has a reputation for being a tough mediator, willing to work nights and weekends (and into the wee hours of the morning) if necessary to get the parties to a deal. In the Tribune case, for example, he called for mediation on a Sunday morning. “I like to do that,” he explained, because, “first of all, I don’t have time during the week to do it; and second of all, it seems to me that if parties want to mediate in the evenings or on the weekends, it shows they’re serious.”

Judge Gross takes a more hands-off approach to his cases. “My basic philosophy,” he explained, “is ‘do no harm.’ We are really blessed with good lawyers. Ninety-eight percent of everything gets worked out. And if it doesn’t work out, I know it’s tough.” And while he has been known to express his frustration in opinions from time to time, he said, “I try really hard not to express anger in court at a lawyer.” He then added, “When I do get mad, I don’t stay mad. I don’t know if lawyers realize that.”

In his approach to deciding cases, Judge Gross typically relies on the parties, through their counsel, to frame the issues and record for him. “I think that a judge should not necessarily go beyond the record, the arguments that counsel are making,” he explained. “We have to do that because, as Chief Justice Daniel Herrmann ([Delaware Supreme Court, 1973-1985]) used to say, ‘A trial judge’s job is to decide the case—it’s up to the appeals court to get it right.’ And I understand what he meant by that. Sometimes you just have to issue a ruling and worry about the appeal later.” To keep cases moving along, Judge Gross tries to rule from the bench whenever possible; as a result, he tends to issue written opinions less frequently than his colleagues. (The fact that he writes “two thirds, maybe more” of his opinions longhand—including his recent opus in Nortel—also might have something to do with that.)

For practitioners, the upshot of Judge Gross’ approach to deciding cases based on the particular arguments and record before him is that he is open to reconsideration of his rulings in a given case if there was something he missed, and to reconsideration of prior rulings in light of new arguments not previously considered. He is more concerned with doing equity, and making the best decision he can in each case, than with constructing and maintaining a body of jurisprudence. For this reason, he does not get too exercised about being reversed on appeal: “I just think to myself, ‘Thank goodness they didn’t say anything insulting about me’—that I didn’t do my job, etc. It hasn’t been like that at all, I haven’t had any of those.” He speculated that he had been reversed “probably a third of the time,” and added, with a smile, “I guess that’s not too bad—batting .666”

We checked, and as of the writing of this article, Judge Gross is actually batting closer to .800 before the Third Circuit Court of Appeals. Of his two reversals on the merits, one was a matter of first impression at the circuit level, which he certified for direct appeal for that very reason. And the Court of Appeals recently agreed with him in another matter of first impression that he certified for direct appeal. So, to carry the baseball analogy further, he’s batting a respectable .500 in cases presenting novel legal issues.

We asked Judge Gross if there was any advice he wishes he’d had when he first took the bench in 2006. “First of all,” he said, “I don’t think a judge should make his decision based on the moral high ground—the truth is somewhere less.” Judge Gross’ colleague, Judge Brendan Linehan Shannon, has compared being a judge to being at a party where every half-hour someone turns the light on for one minute. For that minute, you see what’s going on; the rest of the time, you’re in the dark. “He’s right,” Judge Gross said. “And sometimes at the beginning I would wonder about that—what’s really going on? Now I know it’s better to just call it like I see it, based on the record before me.”

The second piece of advice Judge Gross wishes he had was this: “You’ve got to put that opinion away for a few days and re-read it. It might say something that is going to be misinterpreted.” The decision in In re Fisker Automotive Holdings Inc. is a prime example of an opinion that was misinterpreted. There, Judge Gross held that a creditor who had purchased the Department of Energy’s $168 million secured claim against the debtor for $25 million would not be allowed to credit bid more than $25 million for the purchase of the debtor’s assets, based on the circumstances of the case. One such circumstance was the “express and unrebutted evidence” that if the court did not limit the credit bid, no other bidders would be willing to participate in the auction. Because of this reference to the chilling effect of credit bids, the Fisker decision was initially not well-received (or, we would say, well-understood) by the bar, and
ignited a flurry of trade journal articles and CLE presentations questioning the viability of credit bidding in Delaware—Fisker. At one such conference, a panelist even referred to Judge Gross as a “maverick.”

“I never pictured myself as a maverick,” Judge Gross assured us with a smile. “And I was surprised there was this much blowback from the decision, and I’ll tell you the reason. I issued a verbal ruling, then somebody took an appeal. I came in on a Monday morning and I said, ‘I’ve got to get an opinion out by the end of the day.’ They were moving for a stay [pending appeal, from the district court] and I had to explain the reason for my ruling.” So he drafted his opinion that day. With the benefit of hindsight, Judge Gross said he would not have emphasized that a credit bid would chill other bidding in that case. “It always does—it chills all the bids—other than that, I’m comfortable with it. But that statement became the focus of the opinion.”

We asked whether he had considered hiring a career clerk with some practice experience under his or her belt, as some of his colleagues have done, to help ease his busy workload. But he said no, he hires exclusively term clerks. “I feel very strongly about that,” he said, “and it has worked well for the most part.” Even though the term clerks’ relative inexperience may make a little more work for him, he thinks it is worth it for the opportunity to train a future member of the bankruptcy bar, as well as to benefit from their fresh perspectives. “I think they benefit from it,” he explained, “and I benefit from their experience and their knowledge.”

At the conclusion of our interview—and in his typical fashion—Judge Gross thanked us for our time and effort in speaking with him, and told us not to expend too much effort on the article. “You have more important things to do than to talk about Kevin Gross,” he said with his characteristic smile. “I know you do.”

Endnotes
1He guessed right. In fact, there is a standing order of reference in every federal district, as a result of the Supreme Court’s landmark ruling in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), holding it was unconstitutional for an Article I bankruptcy court to exercise Article III judicial power. In response to the Marathon decision, Congress adopted a legislative fix in 1984 permitting federal district courts to “refer” matters to bankruptcy courts for adjudication, subject to ultimate review by the Article III courts.
2Order, In re Referral of Title 11 Proceedings to the United States Bankruptcy Judges for this District (D. Del. Jan. 23, 1997). At the time, Delaware had only two bankruptcy judges (Hon. Helen S. Balick and Hon. Peter J. Walsh) but had been inundated with large, complex chapter 11 filings and related litigation.
3During that time, the district court would refer matters to the bankruptcy court on an ad hoc basis.
5Baron Maurice de Hirsch (1831-1896) was a German-Jewish philanthropist whose charitable funds helped persecuted Jews establish agricultural colonies in the Americas.
7As noted above, Judge Gross’ father passed away at the beginning of this trial. “It was tough,” he said. “But you get it done somehow.”
10E.g., In re Midway Games Inc., 428 B.R. 303, 327 (Bankr. D. Del. 2010) (“Judges are not infallible and it is clear that this judge erred and the result would be manifest injustice if left uncorrected. Accordingly, reconsideration is appropriate.”).
11There was one reversal based on an intervening agency interpretation of the statute at issue, In re Amtral Holdings Inc., 532 Fed. Appx. 316 (3d Cir. 2013), which we did not include in calculating Judge Gross’ “batting average.”
12In re Majestic Star Casino LLC, 716 F.3d 736 (3d Cir. 2013) (regarding whether a debtor’s federal tax status as a qualified “S” corporation subsidiary was in the nature of a property interest, such that IRS’ revocation of the tax status violated the automatic stay in bankruptcy).
13In re Trump Ent’mnt Resorts, 810 F.3d 161 (3d Cir. 2016) (regarding whether a debtor can reject a collective bargaining agreement that expired pre-bankruptcy).
15Id. at 60.