



Harry E. Kalodner

Born: March 28, 1896, in Philadelphia, Pennsylvania

Died: March 15, 1977, in Philadelphia, Pennsylvania

Federal Judicial Service:

Judge, U.S. District Court for the Eastern District of Pennsylvania

Received a recess appointment from Franklin D. Roosevelt on July 6, 1938, to a seat vacated by Albert B. Maris; nominated to the same position by Franklin D. Roosevelt on January 5, 1939.

Confirmed by the Senate on March 30, 1939, and received commission on May 4, 1939.

Service terminated on September 4, 1946, due to appointment to another judicial position.

Judge, U.S. Court of Appeals for the Third Circuit

Nominated by Harry S. Truman on May 21, 1946, to a seat vacated by Charles Alvin Jones.

Confirmed by the Senate on July 25, 1946, and received commission on July 27, 1946. Served as chief judge, 1965-1966.

Assumed senior status on October 3, 1969.

Service terminated on March 15, 1977, due to death.

Education:

University of Pennsylvania Law School (now Carey Law School), LL.B., 1917

Professional Career:

U.S. Army, JAG Department, World War I

Private Practice, Philadelphia, Pennsylvania: 1917-1935

Staff Member, Philadelphia North American: 1919-1925

Financial and Political Editor, Philadelphia Record: 1928-1934

Secretary of Revenue, Commonwealth of Pennsylvania: 1935

Judge, Court of Common Pleas of Philadelphia County (Pennsylvania): 1936-1937

Member, Judicial Conference of the United States: 1966

Other Nominations/Recess Appointments:

Nominated to U.S. Court of Appeals for the Third Circuit, May 7, 1946; nomination withdrawn by President, May 21, 1946.

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Judicial Biography

*When Judge Albert B. Maris was elevated to the Third Circuit Court of Appeals, President Franklin D. Roosevelt selected Harry Ellis Kalodner to succeed Maris.

Born in Philadelphia to Jewish immigrant parents, he was selling newspapers at age thirteen on the ferries between Philadelphia and Camden. Upon being graduated from South Philadelphia High School at age sixteen, he entered the University of Pennsylvania Law School without having attended college. After graduation in 1917, he served in the Army in World War I.

In addition to engaging in private practice, Kalodner was a newspaper reporter, first with the *Philadelphia North American* and then with the *Philadelphia Record* where for a few years he was the Financial and Political Editor. Two Pulitzer Prize Honorable Mentions were awarded to him in the 1930's for stories on corruption in Philadelphia city government and on a fraudulent securities scheme. As a reporter, he was not easily deterred from ferreting out a story. On one occasion, he was eager to attend a "top-secret" meeting of the shareholders of the Philadelphia Rapid Transit Company, the corporation that owned and operated the City's buses and trolleys. Reporters, however, were barred. To circumvent this impediment, Kalodner quickly sought out a broker from whom he purchased two shares of the company's preferred stock. He was admitted to the meeting as a shareholder and then wrote his exclusive story.

When George H. Earle III ran as Democratic candidate for Governor of Pennsylvania in 1934, Kalodner acted as his campaign manager. When Earle was elected over William Schnader, Kalodner joined his cabinet as Secretary of Revenue but resigned after only a few months to become a judge of the Court of Common Pleas of Philadelphia County. After two years in that position, President Roosevelt, on the recommendation of Senator Guffey, chose him for the open seat on the District Court. Kalodner remained on the Court until 1946 when President Truman named him to the Court of Appeals.

Throughout the years, he was active in Jewish service organizations and was a trustee of Yeshiva University. In his political leanings, Kalodner was a fervent supporter of Roosevelt and the New Deal. When time permitted, he enjoyed an outing at the race track.

* The following material is excerpted from JUDGE HARVEY BARTLE, III, MORTALS WITH TREMENDOUS RESPONSIBILITIES, A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 3-12 (Saint Joseph's University Press, 2011). Reproduced with the permission of the author, Judge Harvey Bartle, III, and the publisher, Saint Joseph's University Press.

The Court, in the 1930's, had on its docket cases involving business insolvencies and bankruptcy reorganizations. Judge Kalodner presided over the reorganization of the Philadelphia and Reading Coal & Iron Company with assets having a book value of \$94,219,000.

The reach of the government during World War II seemed to penetrate into every facet of the economic life of the nation. Indeed, the government was even concerned about an adequate supply and the equitable distribution of a type of tobacco known as cigar filler type 41. It obtained an injunction from Judge Kalodner to stop violations of an order of the War Food Administrator related to this product. As part of its decision, the Court declared void certain contracts under which Lancaster County tobacco growers agreed to sell their crop to a cigar company which processed and packaged tobacco.

Probably the most well-known case in legal history involving a discovery dispute under the new Rules of Civil Procedure enacted in 1938, arose out of this District. In February 1943, five seamen had drowned when the Tug *J.M. Taylor* capsized in the Delaware River near Philadelphia. The widow of one of those seamen filed a lawsuit, *Hickman v. Taylor*, against the tug's owners for damages under the Jones Act for his wrongful death. During discovery, plaintiff served interrogatories asking whether any statements had been made by members of the crew of the sunken tug. If the answer was in the affirmative, plaintiff sought "exact copies of all such statements if in writing" and "the exact provisions of any . . . oral statements or reports." The defendants through their counsel, Samuel B. Fortenbaugh, Jr. objected on the ground that the interrogatories called for "privileged matter obtained in preparation for litigation."

Fortenbaugh, as counsel for the tug owner, had interviewed and taken written signed statements from four surviving crew members shortly after the incident. He also had conducted and made memoranda of interviews of other individuals who he believed had relevant information.

Plaintiff moved to compel defendants and attorney Fortenbaugh to produce the requested information when they refused to do so voluntarily. Recognizing the precedent-setting nature of the motion, the entire District Court consisting of Judges Kirkpatrick, Welsh, Kalodner, Bard and Ganey, heard the matter. In July 1945, the Court ordered defendants and Fortenbaugh to produce the written statements and other information requested. The Court reasoned that:

The guiding principle is the broad conception of the Rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with the orderly and efficient functioning of the judicial process.

Fortenbaugh and the defendants refused to obey the order on the ground that it went beyond the scope of permissible discovery under the new Federal Rules of Civil Procedure. Accordingly, they were found guilty of contempt and sentenced to jail until they complied. Fortenbaugh immediately filed a Notice of Appeal, and the order to report to jail was held in abeyance. This distinguished member of the Bar would not be wearing prison garb, at least not until the matter was finally resolved.

The Court of Appeals, sitting en banc, reversed. It held that the “memoranda of talks with witnesses, signed statements made by witnesses, the lawyer’s recollection of talks with witnesses,” were in effect “work product of the lawyer” and protected from discovery. The Supreme Court, after first denying a petition for a writ of certiorari, reconsidered and accepted the case even though it involved the type of question not ordinarily arousing the curiosity or interest of the justices.

The Court characterized the new discovery rules as “one of the most significant innovations of the Federal Rules of Civil Procedure.” Now parties were able “to obtain the fullest possible knowledge of the issues and facts before trial” and “civil trials in the federal courts no longer need be carried on in the dark.” While the Court acknowledged that the rules needed to be accorded “a broad and liberal treatment,” there were limits. It held that the memoranda and other information sought from Samuel Fortenbaugh did not have to be handed over because no “necessity or justification” had been established under the particular circumstances as the witnesses and their testimony were equally available to the plaintiff. In affirming the Court of Appeals, the Supreme Court concluded:

When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

Many a court and trial lawyer in the Eastern District and elsewhere have cited this case during the course of discovery disputes over attorney work product and have had to wrestle with its meaning and implications.

In the mid-1960’s, one of the first successful poverty law cases decided by the Supreme Court arose out of the Eastern District. A class action challenged the constitutionality of the Pennsylvania law requiring welfare recipients to have resided in the Commonwealth for a year immediately preceding their application for benefits. A three-judge court consisting of District Judge Joseph Lord, District Judge Michael Sheridan of the Middle District of Pennsylvania, and Circuit Judge Harry Kalodner heard the matter.

The Court, over the dissent of Judge Kalodner, held that the one-year waiting period had no legitimate purpose and violated the Equal Protection Clause of the Constitution. Although noting that there is no constitutional right to receive public welfare, it decided that it was arbitrary to draw a distinction between those who had been residents in the state for at least a year and those who had lived in the state for a shorter time. The Court also concluded that the statute had the prohibited effect of inhibiting the movement of indigent persons from other states into Pennsylvania. In the Court’s opinion, Judge Lord declared, “The right to travel freely without deterrence is inherent in the notion of a unified nation, and no State may exclude citizens migrating from other States, whatever the reason for the migration.”

The Supreme Court affirmed. It agreed that the Equal Protection Clause and the fundamental right to travel voided the Pennsylvania law as well as similar laws of Connecticut and the District of Columbia.

Judge Kalodner served as a district judge from 1938 to 1946 and served on the appeals court from 1946 until his death on March 15, 1977 in Philadelphia at the age of 80.