



The Judicial Role

Lawsuits are complex because they involve human beings. If only the practice of law were like a computer in which you could feed the data in one end and have a fair and reasoned result come objectively spilling out the other. But the law has a distinctly human dimension, and nowhere is this more evident than in the area of the primary arbiter of legal proceedings—the judge.

In the language of the business world, it is the lawyer's task to *sell* the importance of his client's cause to the court. This job is made difficult by the fact that there are many other competitors out there who are also earnestly striving for the court's attention. In the end, the court faces an overwhelming caseload, and therefore will invariably spend less time on your case than you would like.

Our legal system, unfortunately, is not always a smoothly operating machine. It often produces only a rough approximation of justice. But you must also recall that the judge has a formidable task ahead—to achieve justice, and to do so in a prompt, economical, and accessible way.

The Ideal Judge

The judge begins with case law, statutory language, constitutional principles, and procedural rules as signposts. Following these guides, he must be willing to accept whatever destination lies at the end of the road. The primary job of the court is to ensure that the rules are followed and that the process is a genuine search for truth. If a judge becomes too passionate about a particular result, it impairs his ability to serve as a faithful guardian of the legal process.

Most judges pick up a new case not knowing how it will ultimately be resolved. They alternatively lean one way and then the other as they consider the arguments being presented. By the end of the process, the judge has read the briefs and key precedents, considered the difficult issues, and wrestled with how the case at hand fits into the matrix of applicable legal principles.

The ideal judge is one who decides each case with impartiality according to established legal principles and who, when necessary to fill in the gaps, applies reason and appropriate public policies. At the core of the system is the belief that justice should be objective and evenhanded above all else. Litigants who appear before the bench should be confident that their cases will be evaluated fairly on their legal merits.

The Realities

Of course, no judge lives in a vacuum. An individual cannot easily relinquish a lifetime of values and experiences simply because he is elevated to the bench. But a good judge is aware of his predominant biases, and he deliberately seeks to remove his personal ideology from his decision making.

Over the years, caseloads have increased dramatically; unfortunately, court resources have not kept up, which has led to even greater backlogs. A few courts have attempted to increase productivity through the use of computer technology and modern management techniques. But the fact remains that the judicial process is almost by its nature cumbersome. The entire proceeding,

especially trial by jury, was intended to promote justice rather than efficiency.

Yet justice must not become so slow as to be unavailable. To enable the courts to perform their various functions expeditiously, a number of alternative forms of dispute resolution have become available. This trend has been embraced wholeheartedly by some judges and resisted vehemently by others.

Relating to the Jury

A big part of a judge's role is dealing with the jury, which plays a vital part in the justice system. Involving the public in the resolution of disputes is valuable in a number of ways, not the least of which is that litigants are confident in a process that provides ordinary citizens with the power to right a wrong. Perhaps best of all, jurors are reminded that they, the people, are the true source of justice.

But a bureaucratic mindset is not always attuned to these values. From that point of view, trials are contests to be run at the convenience of those in charge. When that happens, the emphasis turns to efficiency, and the goal becomes processing numbers rather than ensuring that each case is fairly disposed of. Most judges are mindful of this bureaucratic tendency and actively strive to serve the cause of fairness and justice instead.

Moving Toward Settlement

The importance of the judge's role in bringing about settlement of a case is generally underrated. Some judges, of course, are more assertive than others. But it is not typically necessary for a judge to use coercive techniques. By simply bringing up the subject, by soliciting a demand and a counteroffer, and by encouraging the lawyers to talk, the judge overcomes the largest obstacle to settlement—lack of communication.

If the judge provides the parties the benefit of his objective appraisal of their claims and defenses and suggests a reasonable

compromise, his contribution to the process is even more significant. Large numbers of cases settle regardless, but judicial effort may have caused them to do so earlier. And many cases that go to trial would have settled had the judge been willing to abandon a more passive role.

A Common Source of Contention

Differences between the interests of the judge and those of the litigants are often a source of tension. Lawyers frequently feel they are best qualified to determine how fast their case should move. The judge, on the other hand, may become preoccupied with settling or otherwise moving cases off the docket. Most judges permit the adversarial system to operate, but they do so within a framework of rules and procedures that deter excesses and promote settlement.

The goal in all this should be an atmosphere in which the judge and the lawyers work as a team toward the just, prompt, and economical resolution of the controversy. Seeing the judge's perspective will allow attorneys and their clients to proceed with far less strife.

Cooperation Between Judge and Counsel

A judge can obviously never know as much about the case as the lawyers do. Thus, the judge must necessarily look to the attorneys to develop a plan for bringing the litigation to a fair and orderly conclusion.

In fact, fostering an atmosphere of trust and cooperation may well be the judge's most important role in reaching a resolution. The judge must have confidence in the professionalism and competency of the lawyers who appear before him. But the judge should expect cooperation from counsel without asking that counsel forgo proper advantages which representation of their clients demands.

To be sure, there will be occasional lapses, misunderstandings, personality conflicts, and other communication problems along the way. But in the end, the lawyers must find ways to resolve such issues.

The Well-Organized Argument

A judge will immediately recognize a well-organized argument. Issues in such an argument are logically set forth, and each is neatly resolved before the next one is discussed. The court is given just the right amount of analysis to quickly and confidently come to the advocate's conclusion.

Likewise, legal contentions are discussed in the order of their logical importance, not necessarily in chronological sequence. The judge is always aware of how the argument fits together. This organizational structure springs from sound architecture—a wisely chosen building plan that the proponent has carefully considered.

In general, the most effective sequence is to first present the issues on which you are most likely to win. Within those issues, you should present your strongest points first. And within those points you should correspondingly cite your best authority first. The overall goal should be to focus the judge's thoughts on the most appealing theory.

An effective legal argument is not just a collection of stray thoughts, so you cannot afford to let the judge lose sight of how your propositions are related to one another. You must enable the judge to clearly see your train of thought.



"The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mostly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind."

—Oliver Wendell Holmes, "The Path of the Law"

