Forum Juridicum: The Judge as a Person

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Eleven short years ago your speaker sat in one of the back seats in this same hall in his last semester at law school. In selecting a topic which might be of some interest to you, it occurred to me that many of you might be, as I was then, unfamiliar with the concept of the judge as a fellow human in the performance of his functions in the judicial process. My remarks of today will therefore concern the judge as a person and as a personality in relation to the law and the practice of the law.

In making these remarks, you must pardon me for assuming on your part the same naivete and lack of common sense concerning the subject which the speaker found in himself upon his own graduation from law school. Just as many if not most of you have never had the opportunity to be closely associated with or to observe from day to day a murderous psychopath or a dope peddler, so by the law of mathematical probabilities most of you have not had the opportunity for close association with one of Louisiana’s two hundred judges among its five thousand lawyers and three million people.

So I will start with a very trite and commonplace observation: like the psychopath; like the dope peddler — the judge is a human being. Perhaps a few of you may share the innocence of your speaker when he graduated from law school. I regarded the Law as something written on pages in books, as something existing independent and apart from human life; I did not realize that the case law found in the lawbooks is written by human beings serving as judges, and is written in the course of deciding controversies arising in the stream of human life.

If you had asked me at that time to describe the application of law through our judges — that is, to describe our machinery of justice — I think I would have imagined that a lawyer’s function would be to feed the law he finds, through his brief and argument, into a sort of Univac, which after matching up the facts and legal principles against the Law (comprised of the stat-
utes and the previously decided cases), would click out the correct answer. My concept of the judge was of a faceless intellect who simply matched up the opposing legal arguments and by a process of pure logic, with a few Latin maxims thrown in, enunciated the correct result.

Of course, the judicial process cannot be described so simply.

In the first place, the very fact that there is a controversy in court may indicate that no statute or previously reported judicial decision affords any definite guide to disposition of the present case. It may indicate, contrariwise, that several statutes and several prior precedents indicate several possible dispositions of the present controversy. In either event, the decision may require a creative act on the part of the judge, the resolution of a new legal principle or selection of an old one from otherwise inapplicable precedents to supply an answer to a completely new legal problem.

In the second place the judges who are the instruments of justice, far from being "faceless intellects," are neither faceless nor (in all probability) intellects. They are men who formerly served as lawyers, who are trying sincerely to render justice within the discipline of the judicial craft, but who in all probability like all other human beings have limitations of vision, knowledge, intelligence, or predisposition which sometimes influence their judicial actions, however much they conscientiously try to avoid the occasion of error.

It may well seem to you somewhat superfluous on my part to remind you that judges are mere mortals. But I am speaking to you now not in your future capacity as conservators and administrators of our judicial process, through whose efforts justice is effectuated whether the side you represent wins or loses: I am speaking to you as future advocates, charged with the high responsibility to your client (once having accepted his case) to represent his point of view to the utmost of your ability — bluntly, being charged with winning your client's case by all possible ethical means.

Continuing to speak bluntly, in discharging this duty to your clients, in close cases you not only have to take into account the statutes and prior reported cases covering the subject. You must also take into account the judge or judges before whom you must argue your case and through whom the law applicable to your case will be enunciated.
I do not say this in any derogatory or debunking sense. Almost without exception, our judges in the performance of their duties attempt to lay aside their own limitations and attempt to perform impartially their duties. In the vast and overwhelming majority of cases the same result will be reached, irrespective of the ability of the lawyer or of the personality of the judge.

But with all the willingness and sincerity in the world, different results do sometimes flow from different judges or from the varying ability of lawyers to argue their points of view. Using the statistics of my own First Circuit Court of Appeal over the past four years, our court has handled from two hundred to two hundred and forty cases a year, and in 20-25% of them the decision below was reversed by us on appeal. In approximately 5-7% of our cases, one of our three judges dissented from the ruling of the majority. Last year, the Supreme Court granted writs as to approximately 3% of our opinions, and reversed us in almost every case in which a writ was granted.

As these statistics may indicate to you, different judges reach varying results in disposing of the same set of facts by the same legal principles in an appreciable (although far from preponderant) number of instances. Again, let me reiterate, this circumstance casts no reflection upon the sincerity or learning of any of the judges involved. It simply indicates that, especially in appeals (which have a greater tendency than do unappealed cases to involve frontiers of new and undecided questions of our law or borderline factual situations), several judges may with equal sincerity and equal reason reach different results. Under our system of law, however, regardless of the theoretical correctness of any other point of view, that reached by the highest appellate court involved is, for practical purposes, the correct disposition of that particular case.

Now, my friends, sooner or later most of you will go forth into the practice of law. You will soon become immediately concerned on a day-to-day basis with your local district judge or judges and will be involved on occasion with your courts of appeal and supreme court judges.

In arguing a contested case before your trial judge, you will undoubtedly as you get to know him better take into account his personal attributes. You will know, for instance, whether the field of law in which your litigation arises is one with which he is thoroughly familiar or is one, upon the other hand, in which
you should enlighten him even as to fundamentals. You will know whether he is a judge who prefers a factual argument as to the equity of the merits to aid him in the decision of the case, or whether he is a judge who prefers the citation of authority; and if the latter, whether he prefers quotations from a multitudinous number of cases, or just citation of a few closely similar prior decisions.

In thus appealing to your judge's preferences in order to aid your client to receive a favorable decision, you are doing nothing improper. These preferences of his do not make your judge any less or any more fair a jurist. They simply indicate that, as a human factor, different men accomplish the processes of decision by different means, although they might well reach the same result in applying the same principle of law to the same set of facts. In furnishing your judge the type of argument which he best appreciates, which most efficiently aids his reasoning in the painful process of giving birth to a decision, you are simply fulfilling your function of assisting the court to arrive at what both of you hope will be a correct solution of the legal issues involved.

Thus, to continue speaking of fundamentals which everyone knows but which a surprising number of lawyers ignore, in writing a brief it is well not only for the lawyer to find the correct law for his own satisfaction, it is well also to present it for the most ready use of the judge to whom the brief is presented. It is not only a nice thing to have read and to cite all the cases surrounding the point and to have further checked to see that the effect of the holding has not been changed by subsequent jurisprudence; it is well, in citing these cases, to inform the court of this research and to cite them correctly. (It is surprising the number of times a case is cited at the wrong volume of the Southern Reporter, or that only the Louisiana or the Southern citation is given, often causing further labor to the judge to find the decision upon which the lawyer relies.)

If the lawyer intends to rely on a case, it is well for him to spend the effort to summarize briefly the facts, to show that under the facts the cited case is applicable to the present situation, rather than glibly to refer to a factually inapposite case on the basis of favorable dicta to be discovered only after burrowing laboriously through many irrelevant pages. If the lawyer quotes from the cited decision itself, it is of course a lot easier
for him to have his secretary copy several pages; but it will aid
the judge a lot more and assist him in appreciating why the case
is cited if only the relevant sentences are quoted in their context,
if quotation at all is necessary rather than a summary of the
holding under the facts.

These obvious suggestions spring from the circumstance that
in modern times, with the telephone and our ever more crowded
population, the modern practitioner finds himself more and more
pressed for time. Often in such a situation, the practitioner has
a tendency to leave it to the judge to weed out the irrelevant
and unnecessary rather than to take his own time and effort
to do so.

However, the judge, as a fellow-worker in the legal vineyard,
is also in this day of overcrowded dockets often very much him-
self pressed for time. In justice to him and in justice to the
client, any of the judge's effort or time that the lawyer can save
will enable the judge to understand more expeditiously and effi-
ciently the lawyer's point of view and that of his client.

Equally applicable to appellate judges are these foregoing re-
marks concerning persuasion of a trial judge to decide a case
favorably or at least more efficiently. But, in the normal course
of events, after you enter practice you will not be as familiar on
a day to day basis with the appellate judges as human beings and
will not, so to speak, as readily know what makes them tick.
However, in your mail each week there is a means by which you
can realize how each of your appellate judges in this state ex-
presses himself as to the legal questions decided by his court —
and by this I mean the weekly advance sheets of the Southern
Reporter.

My distinguished predecessor on the court of appeal, the late
and beloved Judge Hugo Doré, told me as a young lawyer fresh
out of law school, that I should regard the advance sheets as my
bible. He told me that when he had been in active practice, each
week when the Southern Reporter came in he retired into his pri-
ivate office and told his secretary that he could see no clients
until he had finished reading that week's advance sheets. While
perhaps many may feel that such practice is not possible in their
own situation, it may be well to heed the advice to not let a week
go by without having read or at least scanned your Southern Re-
porter, even if you take it home with you. The law, as you know,
is not a static set of rules but a constantly developing area of human experience in which principles perhaps age-old in origin are daily applied to the ever-changing problems of human existence. The law itself by imperceptible steps grows more complex and changes as human life, the milieu from which the law takes meaning, itself grows more complex and changes.

But we are not at the moment speaking of the value of reading the advance sheets in the fulfillment of the vocation you have chosen by entering and completing your course at this school, that you will not only be a practitioner of but be also a lifelong student of the Law. We are now speaking of the value of reading the advance sheets to know better the minds and attitudes of the appellate judges before whom a case is to be argued.

Now, as an appellate judge, I am sometimes surprised (although I should not be, realizing how busy most practitioners are), to find an advocate getting up before us and blindly arguing contrary to several of our recently reported cases, with an apparent ignorance of the courts' recent expressions relating to his own legal point or to related or peripheral legal problems. If an appellate judge has expressed himself strongly and emphatically upon a certain subject, whether it be in a majority opinion or in a dissent, it is often better, as a simple matter of human relations, to avoid hitting him over the head, if possible, with a different view. On the other hand, if the judge's position is necessarily incorrect for an advocate's own view to prevail, this circumstance cannot be avoided, and it is preferable to bring it into the open at the outset frankly, although diplomatically.

In an oral argument before an appellate body, having prepared his brief comprehensively and helpfully for the appellate court as he did for the trial court with a full consideration of the current views of the appellate tribunal, a lawyer's function is not simply to read what is in his brief. His brief and the cases cited therein will be read by the court or by that member of the court to which the case is assigned. The advocate's further function is to stimulate the judges before whom the case is argued to a proper appreciation of the issues involved, to enlighten the court by the highlights (and preferably only the highlights) concerning the legal considerations which should be applicable to the decision of the question, and, perhaps, above all to satisfy the judge's intellectual quest that the advocate's is the fair solution of the problem. An oral argument, then, as I see it, attempts to
stimulate the court to an appreciation of the issues before it, to leave an impression as to the fair solution of the problem, and to answer any doubts that the court may have against your position. The final decision will be reached of course only after detailed study of the authorities cited in the briefs and, perhaps, after additional independent research.

It must be remembered that the judges sitting on that appellate court are human beings charged with the duty to administer justice. They are not charged with the duty of writing decisions that will satisfy the law reviews and law professors, however synonymous the scholarly views of these excellent independent sources of legal thinking often are with a just solution of the controversy. The judges are not charged with evaluating, irrespective of the merits of the case, the forensic ability of the respective counsel; nor are they charged with determining what a fair solution of the controversy might have been in 1820 or 1830 or 1920 or 1930 under the then existing facts and circumstances. The judges are simply charged with a duty to find, under the existing jurisprudence and existing set of facts and within the discipline of the judicial craft, the fair solution of the legal question presented to them.

Having this in mind, questions from the bench should not be regarded as interruptions of a skillfully prepared legal argument. They should be regarded rather as an opportunity to enter into the mind of the questioning judge, to understand what is concerning him, and to enlighten him as to the merits of the cause in the phase presented by the question from the bench.

In connection with appellate argument, the commentary of a veteran Attorney General of the State of Wisconsin found in an article entitled, "Confidential Chat on the Craft of Briefing," in Volume 57 of the Wisconsin Law Review, states, rather perceptively in my opinion, as follows:

"The most persuasive arguments are factual rather than legal. Possibly that is because Law has borrowed infinitely more from Equity than Law has the courage to admit. If facts can be clarified to the degree that the barber, the grocer, and the shoemaker would consider that a certain result should follow as a matter of common sense; the probabilities are that the judge will arrive at the same conclusion. There is this difference, however; the judge, because of his
specialized training, can express the rationale of the decision in profound language that fits into the juristic scheme. An unfair analogy would be the witch doctor who may produce cures without knowing why, and the highly skilled medical expert who cures, but can also give a scientific explanation—or, at least, something that sounds like one. A plausible theory is that every human being considers himself an amateur judge; when a judge turns professional, his judgments acquire sanctions, but his thinking habits fortunately remain those of the amateur. . . .” (Emphasis added).¹

But however much the appellate judge desires to render common sense justice under the facts, certain restrictions—the discipline of his craft—inhibit him from administering justice solely on his own idea of what is fair.

Legislative enactments, for instance, may not be disregarded simply because the judge feels they produce an unfair result in the instant case. Long-established precedents may not lightly be disregarded. Nor may the stringent public policy of this state expressed by statute and countless decisions be ignored in order to avoid inequitable results in an individual case, such as that policy (to take a single instance) requiring title to immovables to be proved by writings and only by writings.

For our legal system requires not only that equity be reached wherever possible in individual cases; it also requires some consistency and predictability of result based upon past decisions, so that lawyers and their clients may expect certain legal consequences to attach to their acts should litigation ever result therefrom. A litigated case reported on appeal serves not only to record the decision in the instant case, but to provide a guide by which other people may regulate their conduct insofar as legal consequences ensue, and it further provides a guide for the disposition of scores and perhaps hundreds of unlitigated cases and unappealed decisions which would otherwise require a fresh determination by our highest court in each instance.

A further example of the discipline to which our craft in its appellate manifestation is subject is the doctrine that in civil cases an appellate tribunal may not disregard a trial court’s factual determination unless the latter is manifestly erroneous, since (unlike the appellate court which merely reads the record)

¹. Levitan, Confidential Chat on the Craft of Briefing, 57 Wis. L. Rev. 59, 67-68 (1957).
the trial judge sees and hears the witnesses and is better able to evaluate their credibility. Because of this restriction, for instance, I have on several occasions had to write or to sign opinions affirming judgments, although I had strong personal reservations as to the correctness of the factual findings of the trial court.

Thus, an advocate in appealing to the sense of fairness of the reviewing bench cannot simply argue that his own recommended solution is the fairest. The advocate must additionally take into account such restrictions upon the power of appellate review and he must, if he for example desires the decision below to be changed, argue not only that it should be changed but that it can, by a self-respecting court exercising the self restraint called for by the tradition of our judiciary.

But, in glibly stating that the effort of a practitioner on appellate argument is to persuade the appellate tribunal, within the discipline of the judicial craft, to see that his solution is the fair one to the legal controversy, I have glossed over a really central problem.

In a very rare percentage of cases resulting from very close litigation, the individual views of the judges as to what is fair become decisive, due for example to the absence or conflict of prior precedents. There, in these very rare cases, the court is creatively free to apply the conflicting principles of law advanced, in such manner as to produce the result the court itself thinks is most fair.

But with all the learning, scholarship, ability, vision, integrity, and lack of predisposition in the world, two judges of equal perception may with equal sincerity believe in opposing solutions as the fairest disposition of the case before them.

Such differences involve a matter of philosophy, the entire set of views and entire history of the judges before whom such a case is argued. The proper role of the advocate in such matters, as I perceive it, is to attempt to understand the policy motivations involved and to frame his argument with frank reference thereto, with as well of course the citation of appropriate legal authority, in order to persuade or reconcile as many of the judges in the tribunal as possible to the advocate's point of view as more consistent than his opponent's with the past expressed
opinions and policy motivations of the appellate judges or justices concerned.

This vague advice may not be of much help to you. To the contrary, it will be a tremendous hindrance if you rely on public policy in routine cases to the exclusion of precedent or other legal argument.

Looking at you in your fresh enthusiasm for the profession to which you have chosen to dedicate your lives, it has not been my intention to lessen your respect for the impersonal majesty of the law by pointing out that it is produced and administered by men who naturally are subject to the intellectual frailties of all other human beings. The simple purpose of this talk has been to point out the practical and obvious application of such an observation.

But the realization that the law is produced and administered by equally fallible beings, rather than decreasing our respect for the judicial process, should inspire admiration for the human achievement in formulating from myriad efforts our great system of law. We may well be struck by the wonder and miracle of human intelligence and human integrity which, despite the imperfections of the human agents who are the constituent parts of our judicial process, produce in the majesty of the law a legal system whose breadth and compassion and fairness and intellect distills from these imperfect human contributions a substance finer and fairer than could be imagined by any of the mortals who contributed their best thought and most selfless service to this end.