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# Forum Juridicum

## The Influence of Environment on the Litigation Process

*Leon Green\**

Let us assume that the function of the litigation process is to settle important matters that cannot be settled by agreement of the parties outside the courthouse.

We know that this process requires considerable manpower—clerks, police officials, lawyers, witnesses, jurors, and judges.

We also know that it requires a system of procedures—pleadings, service of process, motions, taking of testimony, instructions, arguments, findings, orders, judgment, and finally execution, with many ancillary processes throughout.

Of equal importance we know that any litigation may involve much of what we call substantive law—constitutions, codes, statutes, interpretations, theories, principles, doctrines, rules, and formulas.

We further know that for the litigation process to be successful the inner workings of this massive organization of manpower, procedures, and law must be subject to the control of lawyers and judges who shape the litigation in the particular case.

All of this is the common knowledge of the legal practitioner. To the law student the process looks forbidding, but after a few years of practice he will not be able to remember when he didn't know all about it.

These are not the things that consume a lawyer's nights, Sundays, and holidays, that give him ulcers, and eventually make his hair turn gray. These indicia of maturity have another source—the processing of the particular case—how to give form and substance to the case in hand so that his client may have a favorable judgment—and perhaps also, the lawyer a good fee.

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At this stage in the process the lawyer is like any other artist. He may have all the raw materials anyone could use but it is his responsibility to create out of them a cause of action that will command the favor of those who have the power of judgment.

### *Local Environment*

Let us consider some of the immediate things that the lawyer must consider. It might be said in a word that his overall concern is the environment of his case, or the environment he can create for it. Environment is a complex concept and must itself be critically examined.

Let us assume that the lawyer has investigated the factual data available by document, scientific, and lay testimony and is satisfied he has a basis for his claim or defense. But having them and using them are two different things. How shall he present them to his best advantage? Documents and witnesses do not fall into a fighting front of themselves. Strategy and tactics here are as important as on the battlefield. Even if he has an "A" bomb (which is seldom the case) the problem when and where and how he shall drop it is not without difficulty.

What is the local environment: the lay of the land; the moral, business and social terrain; the pill-boxes and fortifications of the opposition? Who is the opposing client, his lawyer, and witnesses? How are they regarded in the community? Who is his own client and how does he stand in the community? Who are the jurors and who is the judge, and what are their attitudes with respect to the matters involved?

No lawyer who knows his business will trust to luck at this point. He will carefully weigh all such matters; take advantage of those that are favorable, and hedge against those that are unfavorable. As good soldiers can be routed, and their arms and equipment go for nought by the bungling of a bad general, so the effects of good witnesses and even documents can be destroyed by the bungling of an incompetent lawyer or by the superior skill of a more competent one on the other side. Strategy and tactics in time come to be a lawyer's second nature. He reacts to the cards he holds, assesses their strength and fends against their weakness as any other professional does in an adversary conflict. Local environment may present the most

troublesome phase of a litigation and not infrequently turn the tide of the litigation process. If you are in doubt try suing a bank, or well-known doctor, or the general store in a rural parish; more vividly perhaps would be the prosecution of a racial "civil rights" case before a local jury.

### *The General Environment*

However great the pull of the local environment and whatever the judgment in a trial court, if the case is an important one it will probably be reviewed by an appellate court and the judgment may be upset by the pull of the larger environment. This pull is frequently described as public policy, public welfare, social justice, or simply as law. I prefer to call it the interests of "we the people." The further a case is removed from the local environment the less its influence and the greater the influence of the general environment. This larger environment is made up of many factors.

In the first place the personnel and the procedures of the appellate court are different. Here we have the high priests of the judicial process pondering a record and briefs. The parties, witnesses, jurors and trial judges tend to disappear or become mere names. The search ostensibly is for errors, and the issues revolve more largely around law than around fact. The lawyers and judges are in complete command and control. Argument rather than testimony predominates. The issues are cast in a new and sometimes larger mold. Their resolution may depend upon how other issues somewhat similar have been resolved in cases which have already been decided. If the issues are new their resolution must be consistent with the basic notions of justice and not create too many and too difficult problems in cases yet to come. The area of judgment broadens greatly. The dispute of the parties must be settled but in its settlement larger interests than those of the parties may control. It is thus that the interests of "we the people" as the third party to every litigation play such a large part in the shaping and growth of the law.

Let us consider in some detail *our* more important interests in the case in litigation. It is important to us that the law be consistent — that it rest upon something more stable than the individual judgments of one or more judges. As a profession we desire that it be somewhat predictable in its operations on

our clients; if not certainty, at least that it have stability. This is one of the purposes the doctrines of precedent and principle are supposed to have; why previous decisions are appealed to and why at common law it is sought to make them binding on a court. That both precedent and principle have great influence in directing judgment cannot be doubted.

Equally important is the attitude of judges themselves. They want to feel that they are administering law to the ends of justice—something they can rely upon, point to, and not be charged with subjecting the rights of litigants to their own notions of justice. They do not like to be charged with making new law or engaging in what is sometimes called “judicial” legislation. It is highly important to judges that they keep their decisions consistent with one another and with underlying principle. To do so saves time, labor and worry, and personal responsibility when they can say to the lawyers in a case “the law is settled.” It is a position hard to meet however erroneous a lawyer thinks a decision may be. He cannot openly, at least, accuse the judges of being a “bunch of dodos,” though the temptation at times is very great.

Also precedent and principle serve as “tranquilizers” for judges and lawyers, as well as laymen. We often hear it said “this is a government of laws and not of men,” and the cliché makes us feel good. It also makes it easy, when some case comes up from the trial court that cannot be squared with the cases which have gone before, to send the newcomer back for re-trial with the observation that if change in the law is to be made it must be made by the legislature. This is called “passing the judicial buck,” and this can be very irritating when the matter happens to lie primarily in the court’s domain.

In this appeal to principle and precedent argument frequently waxes hot and cannot be easily put down. Even assuming that opposing counsel and the court are rather strictly confined by the record, this does not preclude them from reading and evaluating the record differently. Emphasis at one point, tip-toeing at another, stroking conflicting data and the trial court’s errors with light and heavy tints here and there, may make totally different pictures. Nor does it matter that one lawyer or one judge is a better painter than the one who paints a different picture. They need not be the most highly rated of the profession. They may be daubers, but it is their’s to daub and to

insist on the genuineness of their creation. What determines which image shall seize the majority of the judges and hold them to judgment for one party or the other? No one can tell. But this much is true: the lawyer for each party sees in the record the facts that support and justify his client's cause. Likewise, while the judge has no client, he is never without a cause. His cause may be the consistency of the law, some principle, some interpretation, some decision in another case, his own evaluation of the facts, or conviction that new law is required to meet the demands of justice. Whatever his cause, he too is likely to see in the record the image that supports his cause. But once an image of the record is set, the judge who holds it becomes an advocate for his position much as does the lawyer, the only difference being that the lawyer's cause is that of his client while the judge's cause is some interest of "we the people."

If the record permits different images, consider how much greater the possibilities are for the many variations in choice of applicable law! The lawyers will normally have committed themselves to a choice of law that supports their client's cause. They may differ in choice of theory, principle, interpretation of code or statute, former decision, appropriate rule or formula. The court is not required to choose between them — which is right or wrong. No court will accept the law as contended for by a lawyer unless it accords with its own judgment. The court takes the law as its own province, and while the parties' dispute is important it must be decided consistently with the interests of "we the people." Our interests demand consistency and stability of law as already discussed, but they also demand justice between the parties, if not at too high a cost to consistency and stability. Even more importantly *our* interests may demand a shift in the law — modification, broadening, even rejection of what has been and a new declaration of principle. Lawyers hesitate to go so far as to ask a court to disturb its scheme of adjudication. They prefer to stretch some well-accepted principle or doctrine or code provision to cover the case, and they try to clear the way — run interference for the court's acceptance by distinguishing former decisions or interpretations that lie athwart its path. But there are cases in which this cannot be done without the lawyer's contentions appearing ridiculous in the eyes of the court. Then comes the time when the lawyer must make bold to ask the modification or rejection of some old principle and the recognition of a new principle even though it

may require a confession of error on the part of the court in former cases.

Nothing else so serious and so likely to be received with ill grace can be asked of a court. There is no foretelling how far the introduction of some new principle or the setting of some new course will extend and what labors and difficulties will be created for the courts throughout the judicial system. But not infrequently courts do make departures from a former course: sometimes unknowingly, sometimes ever so slightly, frequently with premeditated silence, and now and then boldly. Whence the impulse that gives direction to their departures from some well-charted course? Why do courts ever extend the law's protection? The answers do not lie far afield and they are usually found on the broad horizons of the general environment.

It may be difficult to realize but any important change in the social environment or any significant scientific invention or discovery makes it necessary to discard or modify old law and frequently create new law. The last century has witnessed hundreds of such instances. War, economic depression, communism, the motor vehicle and paved highways, industrial mass production, the modern newspaper, radio, television, photography, advertising, oil and gas industry, installment credit, chain stores, processing and marketing of foods and chemicals, the various public utilities, and the airplane, are a few of the numerous examples that could be given. While much change in law is brought about through legislation, perhaps most of it is developed in litigation between private individuals. No one can read the cases of the last twenty years involving the liability of doctors and charitable hospitals for injuries inflicted on their patients without realizing how the development of medical science and wonder drugs, the complexity of treatment, the increase in financial stability of charities, and the availability of liability insurance, have revolutionized the law in this area. The same can be said of numerous other areas.

We note without too much excitement how rapidly the things we use and the way we do things become obsolete and are replaced by the new. In the course of ten years nearly every machine, tool, structure or process of any kind that we know undergoes modification and improvement. But we are incredulous when we are told that our legal principles, theories, doctrines,

and rules suffer a similar obsolescence and modification, renewal, and replacement. If you are doubtful, examine the Century, Decennial and the current West digests, or the casebooks, texts, or treatises or thirty or forty years ago in any field. You will be struck by what was important then and what is important now: the issues lawyers and courts spent their time about; how they talked about their cases; their procedures; and their remedies. Some of the more important current subjects will not be found at all. You will find many of the same terms still used; but if you will examine them closely, you will be surprised by the changes in meaning given them. I do not know of a single important legal concept that has not suffered expansion or inflation on the one hand or contraction or atrophy on the other. There may not be much difference between the ox-wagon, the tin lizzie and the 1958 Cadillac. Each provided transportation for its day. But there are enough differences so that if you were preparing to be a mechanic, or a manufacturer of 1960 vehicles you would not spend much time on the ox-wagon and the tin lizzie. You would choose to store them away as museum pieces so that your children may see how crudely their forebears got about and what progress has since been made.

We have thousands of museum pieces in our law libraries and all too often we see lawyers and courts parading them as though they had all the vitality of law suited to modern life. They somehow ignore the fact that obsolescence in law is as great as in other areas of our society. They are shocked out of their boots by the suggestions that principles and doctrines grow and die and take new forms as other creations of this world. They may put heavy store by the words of Mr. Jefferson or Justice Holmes for example, but seldom refer to Jefferson's suggestion that all statutes should expire automatically if not re-enacted within a given period, or that of Justice Holmes that it would be a good thing if all law books more than twenty years old were burned. Their thought, of course, was that periodically we should have to rethink our laws and get rid of the vested interests that enshackle the law and its language.

I need not press the point. We have chosen a slower and more tedious process to reach the same ends. We fill our old terms with new meaning and continue to use them. If we but let our intelligence have its head we know that life oozes out of most of what is written very soon and perhaps out of all that

is written in a shorter time than we are willing to believe. Immortal writings are about as scarce as immortal men — and the truth is that each is immortal only because we, the living, from time to time give them immortality — stuff them full of new life by the process of spiritual or intellectual transfusion. We have a way of convincing ourselves that they still live and breathe when it is our life that we breathe into them. Please do not misunderstand me. I do not discount or discredit this marvelous process of transfusion. Even though it is the reverse of what we profess to believe and teach, I value it all the more because it teaches that *life* is immortal — if man and what he writes are not — and life thereby attains greater heights and is capable of successfully meeting and measuring up to much greater demands of an ever-developing society.

No doubt most lawyers realize that language is necessarily subjective — subjective to the user and to the receiver. This is true of words and phrases, and even truer of sentences and paragraphs. They seldom carry identical thought to different persons — and once the environment is changed they never carry that of the writer. Poetry is our best example. We love poetry as we do music because we can fill it full, each to his own capacity. The score can be rendered differently by numberless performers. Stradavarius could never use his wonderful fiddle as Fritz Kreisler or Heifetz. But what is true of music and poetry is equally true of great prose — Lincoln's Gettysburg Address, the Apology of Socrates, Emerson's Self Reliance and Compensation, The Declaration of Independence, The Lord's Prayer, or any other you may choose. The reason is that language takes on the coloring of a specific environment which can never be created again. We may use the same language in another environment, and do so very effectively, but when we do we give the language a new meaning relevant to the new environment. We give it new life — our life — a rapturous experience perhaps — and this may be done over and over again until it becomes so tattered and torn that its meaning becomes diffused or even lost in solemn mockery. Who is so credulous as to believe that a modern rendition of one of Shakespeare's plays on stage or screen conveys the meaning of its creator? What meaning does it convey on the high school stage? But who would deny that its rendition by great artists is not even more gripping than that Shakespeare himself could have con-

ceived? And who would question the values added by the artists?

I doubt that any one can read and use to the best advantage the opinion in any significant case without bringing more to it than the judge who wrote it, for the chances are that he has said more than he has done or has done more than he has said. Neither is it likely that what he has said or done corresponds exactly with what he thought at the time, or what we think when we read his opinion. And it is very unlikely that any two or more of us will agree completely on what he said or did. Language is just that subjective and unstable. But that does not mean that we cannot use the opinion to advantage, for we give it our own meaning and press it on our courts, our fellow lawyers, our fellow judges, and innocent students as the *true* exposition. Thus the law is being re-written and re-expounded from day to day. And thus it is also that no one can become a good lawyer until the law's language becomes as much a part of him as is his blood, for as one feeds his body the other feeds his intellect or spirit.

These observations find support in all the law books where judges and writers generally employ the words of other judges and writers as attesting to the wisdom or folly, as the case may be, of those who make use of them. If the words of an able jurist are brought to bear witness for a strong position it makes the position stronger in all our minds even though they were spoken in a different context. But if the same words are attributed to an unknown, they may add nothing. Thus it is not the words that give strength, but the image we have created of the jurist who spoke them. Quite frequently it is not the authoritative value of thought we seek but the weight of personalities which were developed in one environment and which we now transplant by the use of their words to bear witness in another and different environment. This is one of the finest powers of the lawyer and adds tremendously to his creative art. We daily make use of the great courts, judges, and writers of the past to support our position in the litigation process and frequently do so, no doubt, far beyond anything they would stand for if they were permitted to enter a protest. What we do is to call upon their names and fill their words with our own meanings for our own purposes, and gain shelter and protection for our client's cause that we could not otherwise obtain. We

make oracles or saints, as it were, of the great names of our profession and call upon them to speak our wisdom for the nurture and growth of new law.

This process is not unlike nature's process that we find in plant life. How often have you observed how new plant life springs from the wet rot of the plant life of former seasons, even if it must be plowed up, re-spread or produced synthetically, and how the new plant life thrives from the soil so provided. Is this the old life reborn or new life utilizing the old to serve its growth and living purpose? Whatever answer you may give, this much is certain, no stalk is so quickly displaced as by its own seeds, and no seeds germinate so quickly and grow so vigorously as those that fall in the rich environment made by the decay of life that has gone before. The old displaces the new so gradually, so imperceptibly, so naturally, yet so inexorably that though it take place before our eyes, we scarcely notice the transmutation and never get excited about what takes place. But we should get greatly excited if it did not take place.

The regenerative process in law is not less than that taking place on every hand. This leads me to say that the chief growth of law is not found alone in the change of social, physical, or scientific environment, as great as that may be, but is found primarily in the growth of new lawyers and the fresh ideas they develop as they face the ever re-creating environment. Law is always in the making, and it cannot be otherwise, for its creators have come endlessly throughout the life of society and must continue to come as long as there is a society. And that is why law schools are of such great importance. They are the nurseries of the law. We no longer risk the ways of the forest. We nurture lawyers by design.

The evolution which has taken place in law schools during the last half century is hardly conceivable. They have come as it were out of the stillness of the night with little ferment in the social order. If you are in doubt, take any law school you will and study its development during the last fifty years in physical facilities, libraries, administration, faculty, students, curriculum, and methods of instruction. And the man doesn't live who can foretell what the next fifty years will bring. The great Harvard Law School forty years ago was thought to have reached a level never to be surpassed, but now, even some of those who have

come along since that time have been pushed out by a group of youngsters to whom they and their teachings are all but strangers. It may well be that the social scene moves so rapidly that people become too ignorant to be of much value long before their life span has run its course. One California law school refuses to accept this idea and has found that it pays to utilize the talents of law teachers thrown in the discard by schools in which they have spent their lives. Other schools are gingerly experimenting with this practice. It need not be added that wherever tried the turnover in personnel is rapid, and that no doubt has it advantages.

This idea of personnel obsolescence is not foreign to the legal profession. Some practitioners reach the end of their business because they have outlived their clients, or new managements of their corporate clients have sought younger and more contemporary lawyers to do the company's business. Other practitioners not so very old in years have found their practice dying because new institutions and new problems calling for new law have superseded the institutions they have represented and the law they have practiced. Some practitioners are inclined to point a finger of blame at law schools for departing from the "fundamentals" and for substituting what is sometimes derisively called "new fangled" subjects. But if they were back in school they would soon realize that the "fundamentals" have taken on new forms and designs and the "new fangled" subjects are already fundamentals without which no young lawyer would enter practice.

The regenerative process in law as it is reflected in litigation, as well as in law office and school, is relentless as you yourselves will too soon realize. The manna you gather today will have worms in it tomorrow, and you will be forced to gather new manna day by day to sustain your professional competence as long as you practice your profession. And there is no bayou-locked parish which offers you a safe retreat. Many lawyers, and some quite successfully, have fended against a ruthless fate by establishing firms into which from time to time they feed young lawyers. The ages of the members of the firms are a sort of stairstep arrangement. Young life is nicely balanced with the old and the affection of the young for the old may preserve the elders for a life time of usefulness and happiness. It is not a bad arrangement but is one that calls for hearts of loyalty and

gratitude — qualities of character too often smothered by ambition and aggressiveness.

Do I have to say more than that with a continuing procession of new students, new teachers, new lawyers, new judges, better trained and equipped than their predecessors for the new environment and new problem — the litigation process their laboratory — the regenerative process in law cannot be stopped. And may I ask, with all its implications of courage and opportunities to expand your own lives to their uttermost, would you have it otherwise?

### A Brief (?) Opinion on Brief Opinions

*George W. Hardy, Jr.\**

As this article is written I have before me an opinion of the highest court of another state, which occupies almost *eighteen pages* of the Reporter volume in which it is printed and bound. By the side of this exhaustive pronouncement there lies a single sheet of legal size paper upon which is mimeographed a suggested redraft of the printed opinion, which would occupy much *less than one printed page*. Careful examination discloses that all the substantial pronouncements of both fact and law necessary to a resolution of the case have been adequately set forth in the redraft.

This illustration serves as substantial justification of the increasingly frequent criticism of the unnecessary length and complexity of judicial opinions. It is quite understandable that members of the Bar are often irritated by the loss of both time and patience in the necessity of wading through innumerable details of irrelevant and immaterial matter which encumber many of our judicial pronouncements. In view of this conclusion, it appears to be high time for appellate judges to engage in a critical examination of the style, manner, and form of writing opinions, with the hope that they may be enabled to reduce the length thereof without sacrificing either necessary or desirable reasons and conclusions.

In the course of this examination it will be helpful to establish

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\*Judge, Second Circuit, Louisiana Court of Appeal.