



Some Resolutions of a New Judge

By Judge Robert K. Hilder

I write this article reluctantly. One of my former partners warned me last year that if I had the effrontery to write a "view from the bench," before I could reasonably claim to develop a legitimate view, any remaining respect for me would evaporate. Nine months of judicial service will probably fail to satisfy him, but perhaps it is not too soon to make some commitments to the bar, the public, my colleagues on the bench, and perhaps most important, myself, about how I plan to conduct myself as a judge.

My first nine months have been spent primarily as a circuit court judge with an overwhelmingly criminal calendar. In that time I have probably handled eight to ten thousand matters in court – enough to remind me that the business of law is people. As Robert T. Noonan, Jr. stated: "No person itself, the law lives in persons." Many of these people are in a courtroom for the first time. Their view of the law, and of courts, if any, is shaped by television, movies, and the media. They want "justice," but they are not at all sure the courts are designed to dispense justice, at least not to them. They are, for the most part, the less affluent, the less educated, the less influential, and they are conscious of

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their condition.

These people, in their hearts, might agree with Thucydides: "You know as well as we do that right, as the world goes, is only in question for equals in power; the strong do what they can, and the weak do what they must." I believe and am pledged to the notion that this is not the reality in our Utah courts, but the cynicism, or at least skepticism, about equality under the law prevails. Many believe that equality under the law goes only as far as Anatole France suggested: "The law, in its majestic equality, forbids the rich as well as the poor to sleep

under bridges."

Clarence Darrow is supposed to have said that: "in reality there is no such thing as justice either in or out of court. In fact, the word cannot be defined." Conceding the difficulty of definition, and even conceding that many decisions a judge is bound to make fall short of anyone's ideal definition of justice (e.g. what would happen in Utopia so often invoked by my contracts' professor, Dean Walter Oberer), I resolve to advance the cause of justice as far as it is in my power to do so. I will approach the matter, I hope, more like Judge Learned Hand, who rather than defining the word, made the following practical observation:

Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily on the judge.

Brown v. Walter, 62 F.2d 798, 800 (2nd Cir. 1933).

The following resolutions, therefore, concern some of the things I can do in the courtroom. The list is not complete, and further experience will no doubt suggest certain revisions, but this is where I stand from the lofty perspective of nine month's

experience. (Note: One study suggests that the socialization of a judge takes at least fifteen years.² Without disputing the study's findings, I can't help but wonder what happens to the unfortunate litigants during this prolonged process.)

1. Be conscious of the courtroom atmosphere.

The courtroom is my workplace. For the typical lawyer, it is a familiar environment, but for litigants, witnesses, and jurors, the courtroom can be a strange and forbidding place. A lesson in how not to put a witness at ease was provided by the King (acting as judge) in Lewis Carroll's *Alice's Adventures in Wonderland*: "Give me your evidence," said the King (to the Hatter), "and don't be nervous, or I'll have you executed on the spot."

The importance of a courteous and patient reception was recognized as long as 5,500 years ago. Ptah Hotep, an official of ancient Egypt, reportedly gave the following instruction:

If thou be a leader, be gracious when thou hearkenest unto the speech of a suppliant. Let him not hesitate to deliver himself that which he hath thought to tell thee but be desirous of removing his injury. Let him speak freely that the thing for which he hath come may be done.³

Unfortunately, judges cannot remove, or even redress, every injury, but Ptah Hotep notes also the merit contained in the hearing itself: "Listen attentively to the petitioner, for a good hearing is a soothing to the soul."⁴ I will, therefore, strive to provide the "good hearing," even though the outcome may not be all the petitioner desires.

2. Hear patiently and avoid hasty judgment.

John Bunyon recorded the following exchange:

Judge: Thou runagate, heretic and traitor, hast thou heard what these honest gentlemen have witnessed against thee?

Faithful: May I speak a few words in my own defense?

Judge: Sirrah, sirrah, thou deservest to live no longer, but to be slain immediately upon the place; yet that all men may see our gentleness to thee let us hear what thou, vile runagate, hast to say.⁵

No judge wants to act with such haste,

but the temptation does arise. After only a few weeks on the bench, I recall starting to state my decision after a preliminary hearing, when defense counsel said something like: "Your Honor, I apologize for interrupting, but would it be too much trouble if I made my argument before you finish your decision?" I was embarrassed and, I hope, instructed.

3. Communicate clearly.

The aim of every judge and lawyer should be to communicate effectively. It is harder than it seems. I thought I was doing fairly well, particularly when speaking directly to criminal defendants, but on a recent visit to the county jail I learned otherwise. I was at the jail participating in a rehabilitation class I often order. Coincidentally, four of the twelve inmates had been sentenced by me. They received me with courtesy and good humor, but as I left, one young man, who was sentenced three weeks earlier, approached me: "Judge, I don't want to be rude, and I am sure you were fair, but could you please explain what my sentence is; I really didn't understand you."

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I resolve, therefore, to do better, and particularly to ask questions of unrepresented parties to measure understanding. I will also strive for brevity, a hallmark of effective communication, but I doubt I will do as well as Justice Harold H. Burton, during a sentencing for murder:

Defendant: "As God is my judge, I didn't do it. I'm not guilty."

Justice Burton: "He isn't, I am, You did. You are."⁶

4. Act with integrity.

I have learned quickly that judges are not insulated from external pressures. Indeed, it is to be expected that citizen groups, the media, political entities, and even erstwhile friends, will seek to influence decisions. While it is the expected role of these groups and individuals to advance their causes however they legitimately can, it is the essence of the judge's role, and the measure of his or

her integrity, to decide on the evidence. The task is complicated, however, by the realization that Lord MacMillan's comment, "in almost every case except the very plainest, it would be possible to decide the issue either way with reasonable justification,"⁷ has more than a kernel of truth.

I resolve, therefore, to follow the evidence and the law to the indicated conclusion, rather than to seek to shape the law to justify a desired conclusion. By so doing, I hope to avoid the cruelty of which Sir Francis Bacon spoke:

Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws.⁸

In the criminal law particularly, judges must understand their role if they are to fulfill their responsibilities with integrity and courage. As we are taught by our peers:

Judges must remember why they are on the bench. They are not part of the police department, the prosecutor's or the public defender's office. They are there to do justice according to settled principles, not according to what is popular at the moment.⁹

5. Respect, as far as possible, the dignity and privacy of the individual.

Speaking of his wartime work as a writer of documentaries, John Mortimer (author of the Rumpole series) says: "I had the pretext, which the law has also given me, for talking to an endless variety of people and asking them impertinent questions."¹⁰ That license can be abused. Not every impertinent question needs to be asked, and I resolve not to ask questions merely to satisfy my curiosity, or to allow lawyers to inquire unnecessarily.

When the questions must be asked, where possible I will limit the negative effect. For example, I have learned that "disorderly conduct" covers a wide range of human behavior, some merely foolish, some quite humiliating to confess. Now, when I take a guilty plea to disorderly conduct, I always have the defendant approach the bench to give those details I must have to fairly sentence.

6. Remember, I was once a lawyer.

Judges were lawyers once. Both lawyers and judges can forget this. The roles are different, and a judge cannot be effective if he or she identifies too closely with the advocate's role, but my lawyer origins should provide empathy for the difficulties

of the lawyer's role.

Accordingly, I resolve to remember that the courtroom is not my exclusive domain. The courtroom is also the lawyer's arena, and she belongs there at least as much as I do. I will also remember the crushing workload of most litigators. As a general rule, whatever preparation or additional work I may do outside the courtroom pales into insignificance when compared to the lawyer's task in preparation, as well as juggling numerous other matters while trying to attend to the matter in my court.

I will also remember the ever-present pressure of pleasing the client. Except in cases of egregious incompetence, I will seek to never embarrass a lawyer. To the

contrary, I will try to follow the counsel of Sir Francis Bacon:

There is due to the advocate come commendation and gracing, where causes are well handled and fair pleaded; especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel . . .¹¹

CONCLUSION

These resolutions are probably both premature and idealistic. It is certainly foolhardy to share them with so many lawyers who will gladly point out to me (or, more likely, to others) each occasion where I violate my own canons. When this does occur, I only ask that you be kind.

¹Robert T. Noonan, Jr., *Persons and Masks of the Law* (New York: Farrar, Straus and Giroux, 1976), p. 4.

²Alpert, Atkins and Ziller, "Becoming a Judge: The Transition From Advocate to Arbitrator," 62 *Judicature* 325 (Feb. 1979)

³Ptah Hotep (quoted in *The Judge's Book*, National Conference of State Trial Court Judges and The National Judicial College, Second Edition, 1994), p. 41.

⁴*Ibid.*, p. 42.

⁵John Bunyon, quoted in Ephraim London, ed., *The Law in Literature* (New York: Simon and Schuster, 1970).

⁶Peter Hay, *The Book of Legal Anecdotes* (New York: Barnes and Noble, 1970), p. 205.

⁷London, *op. cit.*

⁸Francis Bacon, "Of Judicature," (quoted in *Law: A Treasury of Art and Literature*, Beaux Arts Edition, 1990), p. 105.

⁹*The Judge's Book*, p. 43.

¹⁰John Mortimer, *Clinging to the Wreckage: A Part of Life* (New York: Penguin Books, 1982) p. 71.

¹¹*Law: A Treasury of Art and Literature*, 10.

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