



MINNESOTA JUDICIAL TRAINING UPDATE



A JUDGE'S SOLILOQUY ON JUDGING

Several of our newest judges requested an update on the amorphous art of judging in general. In 2002 retired Judge Bernard Boland wrote an excellent article for "Bench & Bar" on judicial aspirations for new judges. It has helped shape many judicial practices over the years. Enjoy.

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A Judge's Soliloquy on Judging

By Hon. Bernard Boland

(Now in my 20th year as a judge, I was recently asked, along with many others, to jot down some of the things I would like to tell newly appointed judges. It occurs to me that most of my musings also apply to the practice of law and to practicing lawyers, who, to paraphrase our 16th President, could also find useful the free advice that is too often a judge's stock in trade.)

Everyday, on the bench I learn something new and, probably, forget something I already know, but here is a list of some of the things I haven't forgotten as of today. Some may sound sanctimonious, because judges, and admonitions, very often are. And most apply not just to judging, but also to other jobs and to other things in life, and like the Golden Rule and the Ten Commandments, just knowing them doesn't mean you can keep them -- they are aspirations more than they are rules and commandments. And they are in the order in which they came to mind, not of their importance. You may rank them if you can, but it's probably not necessary. Here they are:

1. The case is not about you. The case you are hearing is about a dispute between the parties that is presented to you by their lawyers because they couldn't resolve it themselves. It is not an opportunity to demonstrate that you're tough on crime, or the champion of the underdog, or anything else that you would like people to think about you. Do not make rulings because you want to be regarded in a certain way. When a judge wants to be known for ruling in a certain way, he or she is likely to rule that way whether or not the case warrants it. That can be a disservice to the parties and in the long run won't do you any good either. Be careful of the reputation you wish for.

2. Rule. Rule. Rule. It is to judging what location is to real estate. Remember that old saw about "perfect being the enemy of good." The parties want a decision; they don't care if your citations conform to the Blue Book, or even if you have them. Get it out, give reasons for it, and don't complain or explain.

3. The parties should be given a reason for your decision. (Number two to the contrary notwithstanding!) The parties have a right to know why you decided the case the way you did. If, in a few sentences, you can't explain why you're ruling the way you are, then maybe you ought to reconsider your ruling.

4. Don't compete with the lawyers. There's an old story about a lawyer who, after the judge had questioned a witness, pleaded with the judge that if he (the judge) was going to try his case for him, not to lose it. The lawyers can see that you have a black robe and they don't. There's no need to demonstrate that you're smarter, or that you can try their case better. You aren't and you can't, and you're likely to make a fool of yourself if you try.

5. Don't be a deal breaker (inseparable from number four above). The last thing anyone needs or wants is for you to screw up the deal the lawyers have made for their clients. You do not know either their cases or their clients better than they do. Refusing plea agreements and stipulations is arrogant. Tread very lightly here. You need not abandon your responsibility, but remember when reviewing plea agreements and stipulations that your responsibility is to the law and to the standards of the community; it is not about your likes, dislikes, politics or preferences. (Also, see number one)

6. Never forget you're a lawyer and always remember you're not a lawyer. This is to say, though not simply, that you will always be a lawyer, even though you are no longer an advocate, and that you can no longer be "one of the guys" or "one of the girls." There is a boundary here that isn't precisely defined. You have the same education, experience, friends and identity. Lawyers expect you to understand where they come from and to help them out when you can do so without doing harm to the other side. Your livelihood and theirs are interdependent -- you can't be reelected without them; they can't make a living without you. On the other hand, you are not one of them, can never be one of them again, and shouldn't try. If you are unable to draw that boundary, at best, you will not be respected and at worst the Board of Judicial Standards will be in touch with you.

7. Don't be afraid to cut lawyers some slack -- they're in a tough business. You get a check every two weeks; they may or may not get paid. Every day, they have to be two or more places at once; you have the luxury of one courtroom, one case at a time. They have the toughest job in the courtroom; you have the easiest. You get six weeks of paid vacation every year; they're lucky to get two weeks, they pay double for it, and still have to worry about a judge scheduling a case in the middle of it. When the case is over, more often than not they face a client or a partner who is unhappy about something. You get to go home.

8. Never reach into a lawyer's pocket. Do not handle contested cases where lawyers who practice in front of you are a party, and don't handle their divorces even if they're stipulated. Every day you rule against their clients, and they recognize (usually) that it's not about them. If you get involved in their personal business, especially their fees and livelihood, expect never to be forgiven if you injure them. Never make a disparaging remark in front of a client about the manner in which a lawyer has handled a case; never handle a suit for fees, even in conciliation court; and except in the most egregious circumstances, stay away from awarding costs against them or fining them.

9. This isn't a popularity contest. You've heard this before, but it bears repeating. Don't expect to be liked and don't expect to be thanked for doing your job. When your mother told you that you don't get thanked for doing what you're supposed to do, you should have remembered it, and you can apply it to being a judge. You're not responsible for the facts or for anyone winning or losing a case. No matter how hard you try to "temper the wind to the shorn lamb," nobody likes losing. The parties and their lawyers will often blame you -- get used to it. If they thought they were wrong, they wouldn't have sued or taken the case. Nor is it valid to make a tough call based on what you think an appellate court might do. As tempting as it may be to guess about the Court of Appeals, your obligation is to make the fairest ruling you can on the law and facts before you. The worst thing you can do is "throw people bones," or try to make every case come out exactly even. If you do that, lawyers with good cases will avoid you and lawyers with bad cases will seek you out. The former because they know their good case will be cut in half, and the latter because they know they'll be rewarded no matter how bad their case. Either way, they won't respect you or your office.

10. Remember, what you don't do someone else must. Think of your colleagues when you're tempted to recuse yourself from that gut-wrenching family case, or a case brought by a pain in the neck lawyer, or the case involving your cousin's babysitter's brother. Try to remember that you're not well-paid because you have more wisdom than the tens of thousands of lawyers who aren't judges. You're well-paid because your job is often uncomfortable -- not because it's complex and nobody else can do it. Also, think of your colleagues when you're tempted to rip on a lawyer and cause that lawyer to remove you. Most excuses are really choices, and someone else will eventually have to handle that case. Neither the lawyer nor the case will go away. This is one of the few jobs where being a jerk is richly rewarded. If you're angry and churlish, lawyers will duck you and remove you. You will hear the easy cases and draw the inexperienced lawyers; you will have more time to hunt, fish, and play golf. You won't be the first to figure this out; legions have gone before you; that's one of the reasons why an independent judiciary is always in grave danger. You will reap what you sow. So will your colleagues. So will the public. So will the judicial branch of government.

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