

Practical Thoughts on Judicial Discretion, Procedural
Fairness and Decision Making
“What would you do?” Video Presentation

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What is Judicial Discretion?

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to the demand the act as a matter of right.” *Black’s Law Dictionary* (8th ed. 2004)

How Does Judicial Discretion Arise?

“Judicial discretion is identified by two reasons which cause it to exist. First, the trial judge is the only objective person who is on the scene and who is able to see, hear and evaluate the situation from first hand knowledge. Second, no strict rule can be made applicable for every conceivable situation in the many areas of law.” Justice Ben Overton of the Florida Supreme Court, *The Meaning of Judicial Discretion*, Judicial Discretion, 1991, National Judicial College Publication.

Tension in Exercising Discretion = Flexibility vs Certainty and Consistency

How Do I Exercise Discretion?

1. Determine “range” of discretion (What are the applicable statutes, regulations, rules, precedent?)
2. Ascertain the facts.
3. Make the decision.
4. Articulate the legitimate reasons for the decision.
5. Allow the parties to support or object on the record.
6. Include the ruling and discussion in your findings, conclusions and ruling.

Taken from NJC presentation by Honorable Susan L Formaker, Special Problems in Judicial Decision Making: Exercising Discretion (July 2011)

What is “Procedural Fairness” and how do I insure it in my courtroom? *Procedural Fairness*, Judge Burke and Judge Leben

Americans are highly sensitive to the processes of procedural fairness. It is no surprise, then, that the perception of unfair or unequal treatment “is the single most important source of popular dissatisfaction with the American legal system.”

Most people care more about procedural fairness – the kind of treatment they receive in court than they do about “distributive justice,” i.e., winning or losing the particular case. This discovery has been called counterintuitive...But researcher after researcher has demonstrated that this phenomenon exists.

Procedural Fairness Independently Enhances Litigant Satisfaction

1. How just and impartial were the procedures?
2. Did the Judge appear to have sufficient information to support the decision?
3. Did the Judge take the evidence into account?
4. Did the Judge listen to your side of the story?
5. Did the Judge take enough time to consider the case carefully?
6. Was the Judge apparently unbiased?

Research on Procedural Fairness shows:

1. Unlike the public, judges focus on the fairness of case outcomes instead of the process.
2. Case volume of courts is a management challenge for judges, not an excuse for deemphasizing procedural fairness.
3. Perceptions of procedural fairness differ dramatically between minority and majority populations.
4. Litigants have a powerful need to express themselves vocally during the hearing.
5. Body language influences how litigants perceive the judge and the judge’s decision.
6. Procedural fairness is the critical element in public perception and satisfaction with the court system.

Humility can be, and frequently is, your biggest asset as a Judge!

Consider one Judge's "prayer" for himself that he has sitting on his bench:

I PRAY THAT TODAY I WILL HAVE THE KNOWLEDGE TO DISCOVER, AND THE WISDOM TO CLARIFY, THE LEGAL ISSUES;

THE ABILITY TO SEE, AND THE UNBIASED MIND TO RECOGNIZE, THE TRUE FACTS;

THE HEART TO KNOW, AND THE GENTLENESS TO UNDERSTAND, THE HUMAN PROBLEMS;

AND THE PATIENCE AND LOGIC TO REACH, AND THE COURAGE TO DECLARE, THE JUST DECISION.

ALL THESE THINGS LORD, I ASK AT THE CLOSE OF THIS DAY MY CONSCIENCE MAY TRULY SAY, "TODAY YOU WERE WORTHY TO BE CALLED 'JUDGE'"

Consider another Judge's "Rules" for humility and procedural fairness...

TEN COMMANDMENTS (by Honorable Edward J. Devitt)

- I. Be Kind
- II. Be Patient.
- III. Be Dignified.
- IV. Don't take yourself too seriously.
- V. A Lazy Judge is a Poor Judge
- VI. Don't Fear Reversal.

- VII. There Are No Unimportant Cases.
- VIII. Be Prompt.
- IX. Common Sense
- X. Pray For Divine Guidance

And another Judge's prayer...

SO FAR TODAY

"So far today, God, I've done alright. I haven't gossiped. I haven't lost my temper, haven't been grumpy, nasty or selfish. I'm really thankful for that. But in a few minutes, I'm going to get out of bed. And from then on, I'm probably going to need a lot of help."

Procedural Fairness discussion taken from
Honorable Jim Morrow's presentation on *Decision Making*, NJC
Conference, July 2011

All comments above recreated with deep appreciation to
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