

THE WRITE STUFF

FIVE CHARACTERISTICS OF A JUDICIAL MINDSET

1. The Fundamental Judicial Mindset:

They don't pay me to be right; they pay me to be fair.

In virtually every case, each side coming into a trial or a hearing thinks that it is right and is entitled to win. It is only human nature that the parties' respective beliefs are informed by and founded upon all manner of non-legal and non-judicial considerations.

When our first goal as judges is to be "right", we too are necessarily more likely do the same thing the parties do, that is, to focus on the end result, to apply goal-oriented measures, or a predetermined position on the law, or other preferences from outside the courtroom, and thereby wittingly or unwittingly predetermine the "right" result.

When we try simply to be fair, we have instead turned our focus to the process rather than the end result. Ironically, trying only to be fair causes us in the long run more likely truly to be right, at least in the eyes of the law, in large part because we are less likely to have closed our minds to a valid argument or otherwise prejudged a matter.

Adherence to process is at the core of the rule of law.

2. Approaching the Decision in a Given Case:

The most important person in the courtroom is the loser.

The best judges are, in a very real sense, non-judgmental.

Our first job is not to decide. Our first job is to listen. Deciding comes last. When we have listened carefully to the losing parties and show them that they have been heard, and particularly when we also direct our explanations to them, their attorneys and in the long run the parties themselves will more easily accept our decisions.

The fairness of a legal system is probably best judged by the respect that a losing party has for the judicial process and for the ultimate decision.

3. Making the Decision:

Demonstrate neutrality in posing questions of law and in weighing evidence.

Pollsters know how to phrase a question to push the responder to a desired result. Likewise, attorneys know that if they succeed in posing the key question for the court, they are much more likely to win their case.

A judge's duty is different. How do we, as judges, pose questions that do not consciously or unconsciously predetermine the outcome? Can we ask a question in the manner of a truly neutral pollster? On the other hand, when the mere choice among several possible questions does effectively determine the result, how do we select which question to ask? What is the neutral principle of choice that we can identify for the parties as explaining and justifying our choice between or among competing questions? As judges, we should take the time to explain to the parties how and why we selected a particular question and how we weighed the evidence. We can set the stage for this sort of colloquy by telling the attorneys during oral argument that when we ask a question in court, we want one of two things: either a direct answer to the question, or an explanation of why they believe our question misses the mark.

As to questions of fact, sometimes the weight of the evidence is very clear, in which case fairness is not hard to demonstrate. But when ultimate facts and matters of witness credibility are muddled, when we remain unsure, we can still make and express a

proper decision. Rules for the application of burden of proof provide a neutral standard: when the evidence either is unclear or is evenly balanced, the party having the burden of proof on that issue loses. Parties readily understand, and often come to fully accept, the neutrality and fairness of that concept.

4. Checking the Decision:

The flip test can correct for unconscious bias.

Writing and issuing our ruling is the final step. But even a fair decision may fall short in the parties' eyes if we have not demonstrated fairness in our conduct in the courtroom, including our responses to the parties and their evidence. Moreover, all of us can be affected by human factors throughout a hearing or trial: e.g., studies demonstrate that good-looking witnesses are generally deemed more credible than average-looking witnesses. When drafting our decision we must carefully consider why we believe witness A but not witness B. Have we really listened carefully to both sides?

When we believe we have reached a decision, but before we have announced it, it is helpful – particularly in a hotly contested case – to identify any emotive factor that may have unwittingly affected our view of the facts, one that relates to a key issue in the case, and then figure out a way to flip that factor. This includes such matters as the gender of respective spouses in a parenting decision, the ethnicity of alleged actor(s) and victim(s) in cases involving race, and the parties' religious affiliations in a case involving the establishment or free exercise clauses. If we would still make the same decision after flipping that factor, we are probably on solid ground. However, if our decision would change, we'd better figure out why and either modify our decision or prepare to explain why that emotive factor makes a difference on the merits.

5. The Court in a Democracy:

The spirit of liberty is the spirit which is not too sure that it is right.

We should set aside any personal preferences or initial reactions we may have to a given dispute and try to embody the philosophy of Learned Hand: “The spirit of liberty is the spirit which is not too sure that it is right.”¹

It is not enough to “know” that we have reached the “right” decision. If we are too confident of the rightness of our own ideas or decisions, we are much more likely to be dismissive of, and not to listen to, those who appear to differ from us.

When ruling on a private dispute, we must be able to explain our decisions in a way that brings the affected persons along with us. And when ruling on a dispute that raises larger public or political issues, we must take care to explain not only the substance of our decision but also the judicial process itself, why it is the court rather than the legislature or other governmental body that properly decides the issue in that case or, alternatively, why the court is not empowered to make the requested ruling because it is required to defer to a legislative, executive or administrative body's prior determination.

Genuinely exercising and expressing a degree of humility can actually enhance respect for the court's actions and rulings.

¹ Learned Hand, J., in a speech delivered on May 21, 1944, entitled *The Spirit of Liberty*, reprinted in *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Irving Dillard Ed., Alfred A. Knopf, 1953), at 144.