

Address by Honorable Frank M. Coffin, U. S. Circuit Judge,  
U. S. Court of Appeals for the First Circuit,  
at the First Annual Convocation for Experienced Trial Judges,  
Copley Plaza Hotel, Boston, Massachusetts, January 30, 1984

### **Is There an "Art of Judging"**

I cannot picture any more flagrant invitation to fatuousness than to ask a federal appellate judge to address state trial judges on "the art of judging". The title is forbidding enough, without importing a speaker who has never impanelled a jury or sentenced a defendant. But just because of this threshold inappropriateness, there has been no danger that I would take this assignment lightly. I have persuaded myself that this can be a useful exercise for all of us if we have no illusions that there are secret ways to mix paint, to size canvasses, and to use varnish that can change hack work to masterpieces. I suggest that we go at this as searchers together for the ineffable in our common calling, that we try to raise our consciousness of those pinnacles of excellence that, with application and good fortune, we can occasionally reach. Not possessing any precise formula, I propose to try to suggest several basic attitudes and activities which together, over time, may increase our chances of knowing something about the art of judging.

The first prerequisite for one who would apprentice in the art of judging is a reverence for the position of judge. One does not seek the office of judge for material reward; all good judges at whatever level can make more money practicing law. One also gives up certain freedoms -- to associate in business, to fraternize, to support causes -- when he or she becomes a judge. Why does one seek or joyfully accept the office? The simple answer is that we perceive, distinctly or dimly, the uniqueness and sacredness in a democracy of the calling of individuals who are designated and set aside to pronounce judgment, to decide in disputed cases who shall inherit property, shall have custody of children, shall be paid damages, whether individuals shall prevail against the state, and even whether actions of the executive and legislative branches can survive constitutional scrutiny.

This function of decision, affecting liberty, property, privilege, duty, power and right, is sacred and knows no degrees of value. This function is no less important in the court of first instance. Indeed, since those decisions are often final because not appealed, the competence, dedication, and integrity of that long thin line of nisi prius judges is perhaps the most critical organ of the judicial anatomy. We should make no distinction between trial and appellate judges as to value and prestige. Nor between state and federal judges, nor between judges of courts of general jurisdiction and judges of specialized courts. The application of a unitary concept of judging involves both respecting the sacredness of the function and insisting on excellence in performance of the function.

A second essential for the art of judging is a thorough going and dogged respect for the craft of judging. This was Hand's emphasis when he called us The Society of Jobbists and wrote "In all chosen jobs the craftsman must be at work, and the craftsman . . . gets his hire as he goes". This is a more modest and realizable objective than the art of judging. Yet it should not be denigrated. I would rather have a bench decently populated by craftsmen than one boasting a few lonely artists and a multitude of journeymen.

Craftsmanship includes many skills and sensitivities:

-- A basic ability, salted with intuition, to find facts, to distinguish the truth from falsity, the relevant from the irrelevant; to sense the strengths and weaknesses of a

complaint, a defense, a justification; to be a senser of character;

-- An equally basic ability, constantly honed, to look for and find the appropriate cases, statutes, or regulations that apply most closely to the facts at hand; to use logic, analogy and other modes of reasoning appropriately and with awareness of their limitations

-- All of this means the development of skills in patient listening, close reading, and keen looking. These are the skills of inflow.

-- Then the skills of outflow -- speaking and writing simply and clearly, and, not least, body language, for example, a smile to make a witness, litigant or juror feel both dignified and comfortable.

-- An ability to keep in mind and deal sensitively with all the publics of a court: the litigants, witnesses, and jurors; the court employees and law enforcement officers; the lawyers; the media; schools and civic groups; and officials of the legislative and executive branches;

-- A capacity to manage, to use systems, people, and equipment in an efficient manner, without being overwhelmed or dominated by technology. One judge gave me his view that the most important factor in the art of judging was not to fall behind. Well, this is vital for confidence, optimism, and serenity, but it belongs with the craft, not the art, of judging. Yet without this one lacks the peace of mind to reach the heights.

-- A sixth sense of the needs of the appellate courts, the concern of a mother hen over the record of a case. Perhaps the single most important thing that can be done is to give reasons for rulings so that reviewing judges won't have to scan vast pages of transcript and guess at what was in the trial judge's mind.

-- And an evolving sureness of how to handle each kind of situation. But this doesn't mean a fixed formula. One great appellate judge I know was not all that good at inducing settlements when he was a trial judge. His invariable approach was to ask plaintiff the least he would take, the defendant the most it would pay, and then ask both to split the difference. It was not long before every lawyer who came before the judge knew of this proclivity. From then on everyone was manipulating everyone else.

Perhaps our goal is to find the gold collar of the legendary Irish judge Morann which would expand when the judgment was just and, when it was not, would contract and choke him.

Well, even attempting to profile the craft of judging is an immense job. Think of all the disciplines involved -- of legal knowledge and analysis; of fact finding ability; of oral and written communication; of relations with the bar and with lay people; of relations with the public, the media, the schools and civic groups; of management; of building an informative record. All this is more than enough to think about, learn about, and practice.

But, if we are serious, this is not the end. For there is a third step. Beyond reverence for the position of judge and respect for the craftsmanship demanded, we must be seized by an aspiration for the art.

Just what is "art" when we come to discuss judging? We don't mean "art" in the classic sense. There is no problem, or perhaps a different problem, in identifying who is an artist in painting, sculpture, dance, music, poetry, drama, the novel. All these occupations claim a fee simple in the domain of art; by definition any full time occupier of such an occupation, whether gifted, disciplined, diligent or not, is an "artist". Not so with occupations beyond the pale -- the trades, the crafts, the professions. There, the word "artist" is reserved for "the master". One can be a middling painter and yet be an artist; but one must excel as a cabinet maker to be called an

artist. In this sense of mastery, "art" is a vastly expansive word. The wonderful octogenarian sculptor in found scraps of wood, Louise Nevelson, recently said, "I always wanted to show the world that art is everywhere, except it has to pass through creative minds". So, for our purposes, let us define "art", as in "the art of judging", as the state of rare excellence achieved by a top performer in any complex discipline functioning at his best. This is the key -- the desire to know what this is, to experience it, to look back and say "I have done it . . . and will do it again".

What are embodiments of artistry in judging? I can think of a thousand different actions. A judicial opinion that has the elegance of Einsteins' equation -- something at once comprehensively illuminating and yet economically expressed. A horrendously complex antitrust suit whose issues become narrowed, the relevant discovery sharply defined and limited in time, the stages of argument and decision making fixed long in advance -- in short, a litigation which could sprawl and meander for years coming under firm, knowledgeable, fair, and determined control. A trial so managed that it proceeds without the jurors feeling that their time had been wasted and without the lawyers feeling that they had been unfairly curtailed in their examinations. A sentence imposed on a pathetically mixed up defendant, found guilty of a serious crime, that somehow assuages society's sense of injury yet instills a flicker of aspiration in an almost lost individual to justify the faith reposed in him by the sentencing judge. A successful settlement conference saving both sides the embarrassment of introducing the subject but affording each the chance to put his best foot forward and see how his case looked to the first disinterested person who understood the entire fracas. All of these accomplishments are works of art.

This is all well and good. We can aspire to be artists in this sense. But wishing doesn't make it so. So a fourth step in our slow approach is to ask whether such an evanescent quality can be taught. I recently spent some time with a widely respected judge who had also taught in law school for more than three decades. He was telling me about his teaching a course in negotiating. I asked, "Can this be taught?" His answer was the question, "Can it be learned? If it can be learned it can be taught." Then he quickly added, "Of course not everything can be taught. The basic skills and attitudes and sensitivities can be passed on. There is always something more to it. But this is better than trying to do all of it on the job. Anything that is learned wholly on the job can be improved."

He added, "Few great performers really know what they do. A fine teacher is not usually a great performer. But he can communicate what the performer did and why it was just right." What can be communicated are principles (like perspective and colors), standards or sensitivity (like composition and harmony), and passion and commitment.

With these prefaces, we take our fifth step -- to set forth what kinds of attitudes and exploration should be pursued to lead us beyond craftsmanship to art. These are the foothills. Climbing them does not guarantee that one will attain the summit. But if one does not climb them, it is certain that he will never reach the higher uplands.

The first such foothill is humility. While we need to cherish an exalted idea of our office, we need equally to view ourselves in a humbler vein. A trial judge is a front line judge. He is alone on the firing line. This aloneness all too often begets a fearful antidote to lack of confidence, of assurance from peers, and of feedback from litigants -- the antidote of arrogance. How tempting it is -- with court employees ready to jump at the slightest eyebrow raising, with litigants whose life, liberty, prosperity, and happiness are in your hands, and with lawyers who know what side their bread is buttered on -- to revel and exult in running one's own show. Any review comes much later, if at all. But arrogance spells the death of craft, not to mention art.

A second foothill on the way to excellence or art is a sense of perspective, the capacity to withdraw from all the immediacies of work, to break out of routine for a time, to invest time and energy in self enrichment wholly unrelated to vocation. This becomes harder to do as one becomes more successful. But it is essential both to avoid becoming a burnt out case and to have a chance of tasting artistic achievement. On the one hand this means attention to stress management; on the other, a deliberate effort to broaden horizons and to deepen one's familiarity with the humanities and the civilized tradition of which we are the latest legions.

A third way station is learning to appreciate that while craftsmanship requires the learning and application of time-tested ways of doing things, art demands the further sense of knowing when and why and how rules and ways and general principles should be bent, broken, or ignored. Just as the Speaker in Ecclesiastes said, "For everything its season, and for every activity under heaven its time:

a time to be born and a time to die;  
a time to plant and a time to uproot;

...

a time to scatter stones and a time to gather them;  
a time to embrace and a time refrain from embracing;

...

a time for silence and a time for speech . . . .",

so a trial judge might echo the wisdom and the cadence:

a time for quick decision and a time for slow percolation;  
a time to seize on procedural niceties and a time to look only at the big picture;  
a time to let adversaries fight and a time to intervene;  
a time for clarity and precision and a time for ambiguity;  
and, repeating the words of the Speaker,  
a time for silence and a time for speech.

Akin to developing this subtle sense of timing and varying appropriateness of rule and work ways is a constant instinct for trying new ways. I do not mean that every nostrum, system, procedure, piece of hardware or collection of software that someone suggests is worth the investment of your time and energy. But the artist in judicial management should be looking for the truly elegant way of getting necessary things done. This requires a delicate balance of skepticism and willingness to innovate.

A fourth and critical foothill to climb in the long ascent is that of self knowledge. Not only knowledge by each of us of ourselves but self analysis by others who could help us. Here we come to the essence of learning how to become artists in our vocation: seeing what the masters do. You all know that even today as in centuries past art students troop to the Louvre, the Prado, the Tate to study the works of the masters. They observe and copy the masterworks minutely -- not merely to make a copy but to appreciate how the great artists conveyed light and shade and shadow; nearness and distance; flesh and water and sky; doubt, despair, joy and faith. Similarly, this is how medical students have pursued excellence in their vocation for centuries. Only when they left their treatises for the operating room theater did medical education reach a high plateau of excellence.

This what we judges should be doing -- learning from our peers what they do and why they do it when their performance of a judicial function rises to such a level of elegance and excellence that it can truly be called a work of art. This observance of grand masters at work should focus on all the many facets of the judicial art. But we have a problem. Let me tell you of

an exchange of conversation I witnessed just this past week. I was with two judges. One was the teacher judge I mentioned who taught negotiating. The other was a highly reputed veteran trial judge in a metropolitan center. He began talking about his negotiating activity -- rather, about bringing to pass settlement negotiations in pretrial conferences. He would hold as many as twenty of these a day at fifteen minute intervals. He was so successful at this that his colleagues would refer their cases to him. When we asked him what he did, he replied that he handled no two cases in the same way. But he would, after a few well chosen inquiries, soon find what he called "the soft underbelly" of the case, the area that could provide the basis for a fair settlement. The teacher-judge then asked him what his basic technique or strategy . . . or, if you will, his art was. He confessed that he was utterly unable to give us any intelligent account. Whereupon the teacher-judge came up with the brilliant suggestion that the other judge ask his law clerks, after they had been on the job six months, to undertake not only to observe him conducting these pretrials but to make detailed notes of the course of inquiry and response . . . to replicate the operating room and the close examination of a masterwork of art.

This is what we need on all fronts, accounts by master judges of what they do in their various roles, how they approach and prepare for various cases; how they deal with various kinds of litigants, lawyers, and witnesses; how they keep cases moving; how they use law clerks; how they give jury instructions. At present we lack a literature of judicial reporting based on reflective self examination and close observation by others. To me the prospect of breathing life and reality into the concept of the art of judging depends for its realization on accumulating such studies of the masters all around us. The increasing presence of television and the availability of videotape recorders make possible an abundance of recorded masterworks. What remains to be done is to develop the arts of introspection and self analysis on the part of the doer and close observation by the learner. I hazard the prediction that if we but use these resources we shall make impressive progress in this subtle search for the art of judging.

Finally, after one has made all efforts to perfect his mastery of the disciplines that comprise the craft of judging, and after marching over all the foothills of humility, perspective, appreciation of the flexibility of work ways, and the revelation of examination by and of the masters, one comes finally to the single source of all art.

It has never been better expressed for me than by a working judge of the Philadelphia Court of Common Pleas, Curtis Bok, in his memorable book "The Backbone of the Herring". Bok was describing the evolving conviction of his central character, Judge Ulen, that "Justice has to do with the play of an enlightened personality within the boundaries of a system". The question for him, as for us, was of course how to become such a person. And this was the answer:

"The source was actually no farther away than the implacable stillness within himself. The quiet pool into which he could drop, if he would, such prejudice and fear as he had and draw out unruffled and competent answers to the problems of his cases."

Perhaps everything we have been saying about the art of judging comes down to this: the deeper the quiet pool within us, the greater likelihood that we may reach the heights.