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NINE SECRETS FOR LIVING WITH JUDGES

Can you find yourself in this article?

J.P. Vero ¹

The legendary Australian barrister Addison Steele recently regaled visiting American lawyers on the vagaries of judges from the Land Down Under. Addison described the secrets employed by the Australian bar in its dealings with the bench. He named names. His lecture displayed rare candor and deserves repeating in America:

1. Enlighten Judge Dimness

Marlowe Dimness descends from a prominent family long renowned in the political life of New South Wales. Unfortunately, before ascending the bench, Judge Dimness never entertained a passion for the practice of law. He neither knows the law nor has a quick grasp of it. However, he possesses other attributes of high quality—scrupulous honesty and unflinching courtesy. Jurors love him, and lawyers wish him well.

But Judge Dimness exasperates Carl Cocky, a lawyer who deeply admires his own brilliance. Cocky throws his attaché case on the counsel table in disgust, raises his eyes in exasperation at the dumbness of Dimness. Cocky doesn't submit briefs on difficult points, thinking them beyond Dimness's capacity. Cocky attacks Dimness whenever he can. Jurors, who don't know Dimness is dim, resent Cocky, and appellate courts don't appreciate Cocky. That's how not to do it.

Lawyer Kate Kean submits briefs on all major points. With modesty, she discusses issues with the judge's legal assistant. She knows Dimness often looks to his legal assistant, who nods yes or no for rulings. She never lets on she knows Dimness is dim. Subtly, sincerely, she tries to educate him. She never shows him up. When Dimness errs, she fully but politely protects the record. She never attacks him. She fortifies him. She even praises him: "With the greatest respect, no, I mean it, I do respect your desire to reach the right result." She doesn't belittle him. She tries to enlighten Judge Dimness and more often than not brings out the best in him. She tries to help him. That's how to do it.

¹J.P. Vero is the pen name of a New York lawyer who occasionally finds himself at the mercy of judges. This article first appeared in 17 Litigation 18 (Summer 1991) and is reprinted here with permission.

However, Marlowe Dimness has a cousin, the Honorable Malcolm Dimness, who descends from a prominent family long renowned in the political life of Victoria. Malcolm is as dim as Marlowe but not nearly as sweet. Malcolm is arrogant. Unfortunately, ignorance and arrogance often keep company. Judge Malcolm covers up by bullying. He yells at lawyers: "Stand up!" "Sit down!" "Stay at the lectern!" "Don't talk!" He constantly tells the jury of his great burden in dealing with unprepared and unintelligent lawyers.

Kate treats Malcolm the same as Marlowe, only more so. She exudes even more respect. She smiles with even more deference as she submits basic briefs on basic points. She also looks in the mirror every day of the trial and prays: "Lord, give me the patience to smile at Malcolm Dimness! Give me the courage to endure the human comedy!"

2. Anticipate Judge Swift

Judge Swift is fast, very fast. He makes his mind up quickly. Paul Ponderous speaks slowly, comes laboriously to the point, and does very poorly before Judge Swift. As Ponderous warms up, Swift decides.

While Ponderous stumbles, Sidney Smart sprints. For Judge Swift, he takes extra pains to prepare. He anticipates all issues by having ready two or three sentences, succinct sentences, to answer Swift's specific questions. As quickly as Swift asks, Smart replies.

He knows that appearing before Swift can make him a better lawyer by forcing him to get right down to business.

Sometimes Swift tries to hurry even the fast-moving Smart. Smart resists the steamroller: "Your Honor, I appreciate the concession, but it is essential that you hear my expert's qualifications."

Other times Swift is so fast he makes his mind up before the case begins. Smart appeals to the very intelligent but too confident Swift, "I ask for the gift of an open mind, Your Honor, you haven't heard it all." Swift may listen; he doesn't like to be wrong.

3. Stiffen Judge Lax

Judge Wadsworth Lax enjoys the affection of the bar in Hobart, capital of the island state of Tasmania. He smiles even in the face of provocation. He seeks a fair resolution of all disputes. He has a scholar's knowledge. He has one drawback: He never restrains counsel. He doesn't like to offend anyone. Pandemonium replaces decorum in his courtroom. Lawyers fight like Tasmanian devils in his presence.

Quincy Quarrelsome loves to appear before Judge Lax. Nasty by nature, he loves to fight with his opponent. He objects with long improper speeches. Adversaries appealing to Judge Lax for help receive bromides like "Now, counsel, you both know better."

Alfred Swagman takes no guff from anyone, least of all Quincy. First, he appeals to Judge Lax's pride without embarrassing him. He knows the refusal to discipline counsel flows from the judge's insecurity. He diplomatically points out the loss of respect for the judicial process that chaos in the courtroom produces: "Judge Lax, what must the jurors think of this constant fighting? It detracts from your dignity. Your Honor, please restrict counsel, both of us, to objections without arguments. Forbid personal insult and cross talk between counsel. Insist we address the court only in argument. I ask you to reprimand whoever violates your directions." Inwardly, Judge Lax knows Swagman is right. Sometimes one can stiffen Judge Lax.

But sometimes one cannot. If all else fails, Swagman must answer Quarrelsome, relying on experience and praying for wit. If Swagman acts like the "good guy," a long trial, especially, will usually expose Quarrelsome as the "bad guy" who—jurors may sense—disrespects the judge, the system, the world, and, indeed, everyone in it.

4. Excite Judge Listless

Robert William Listless never wanted to be a judge. He adores rugby. He knows the name of every player in the rugby league in Sydney and Brisbane. He waxes eloquent over the intricacies of a scrummage. Sometimes he leaves court early to watch his favorite team practice. During his rather lengthy luncheons and midday recesses, Listless shows an excitement in discussing rugby rarely displayed when he talks law. Secretly, he never enjoyed the law. His father and wife wouldn't hear of his desire to make a career of coaching a rugby team. Law is more respectable, they argued. Listless became a judge, but he

doesn't like it. He never takes work home. He can hardly wait to leave the courthouse.

John Oak has an important cause with many witnesses and scheduling problems, a cause teeming with complicated legal issues, a cause in need of prompt resolution. John has been assigned for trial to Judge Listless.

What can John do? Somehow he must excite Judge Listless. But how? First, appeal to his sense of justice: "Might we work a bit beyond four o'clock today, Your Honor? Professor Geldbeutel must return to Vienna tonight." Or, "Could we take a shorter lunch break this week, Judge, to help complete the trial, since my client will be fired if she misses work next week?" Or, "Your Honor, would you conclude this hearing on custody before your vacation, since I fear for the child's safety?"

Or try appealing to his vanity: "Your Honor, no one has been able to settle this dispute. I believe you can do it." Do it humbly: "I need your help, Your Honor. Here is the problem."

Keep trying. Don't give up. If all else fails, you can always plead, beg, or kneel. You might even try crying. The secret of Judge Listless is that beneath his indifference are remnants of decency. Pierce that shell to break through to his dormant better self. Lazy people have often never known the joy of deep involvement and hard work.

Listless protects himself by trying not to get involved. Overcome his indifference. Show him the picture of the horribly maimed little girl. Ignite those embers not yet entirely extinguished even in a Judge Listless.

5. Challenge Judge Slant

With a squint of his eyes, the Honorable Richard Hawke Slant furtively recognizes friends in the courtroom. After many years in many dubhouses, the politically aware Slant enjoys many friends, and they enjoy him. Slant stares down lawyers who are strangers, particularly when they are young and easily intimidated. It surprises Slant in a vaguely unpleasant way that women now appear before him. Although Slant favors friends, he presides carefully, ever mindful of the record.

Nettie Wickersham, a young advocate, starts by giving Judge Slant the benefit of the doubt. She has no chip on her shoulder that might invite a knock. In the privacy of his chambers, she gently suggests, "Your Honor, I know it was unintended, but you frowned when I asked the last question."

If Slant persists, Nettie does not shrink. She protects the record: "Your Honor, I respectfully object to the tone of your voice when you disallowed my objection and to your smiling at my opponent when he addresses you."

Nettie asserts herself, hoping the jurors will sense the bias—which may boomerang against the malevolent Slant.

Jurors generally favor judges. However, once on your side, the jury will support a lawyer all the way against a prejudiced judge. Some lawyers go so far as to encourage the bias of a Slant to make it even more obvious.

Nettie, mannerly but fearlessly vocal when she needs to be, has already earned the respect of bench and bar. She presumes the fairness of all judges but rises to challenge when Judge Slant leans.

6. Love Judge Grumpseat

Judge Edward Fitzhugh Grumpseat looks coldly at all humanity. Some disappointment, inflicted on him while young, haunts his every gesture and unsmiling face. Sometimes he smiles, as when he boasts, "I eat young lawyers for breakfast." Dyspeptic and disagreeable, he growls at everyone equally, irrespective of race, gender, or creed.

When appearing before Grumpseat, alert the jurors during their selection that you may not always agree with the judge. "I certainly intend no disrespect, but it will be my duty to speak up on behalf of my client." You must prepare the jurors. Grumpseat awaits you.

You may have to make a record. Appellate judges know the Grumpseats of this world. You cannot be a wimp with Judge Grumpseat.

But why not begin by trying to pacify him? Search for the young boy in him who always smiled long before life turned him into a modern Scrooge. Love Judge Grumpseat. He knows everybody hates him. If nothing

else, love will at least surprise and perhaps disconcert him. Kill him with kindness. At least, the jury will be amazed at your patience on your client's behalf. Edge right up to unctuousness: "Your Honor, I am truly sorry I asked the question awkwardly. Give me a chance to reword it." Grumpseat may say, "I'm sick and tired of your apologies." This may get a smile of approval for you from the jury. Or, Grumpseat may, despite himself, feel a stirring of his long buried humanity. Why not? Try loving Grumpseat. Understand him. To understand is to forgive. Rescue Grumpseat from himself. This might even make you a better person.

7. Flatter Judge Prideface

With great pride, Lord Henry Winthrop Prideface traces his ancestry back to one of the convicts who originally settled Australia. This brings great dignity to him—comparable to the dignity of American descendants of the Mayflower Pilgrims. Although he is short of stature, no one stands taller in a courtroom than Lord Prideface, a judge often rumored as a candidate for the High Court of Australia itself. When Judge Prideface speaks, all listen. He demands and receives additional personnel to staff his courtroom. He is smart, knowledgeable, articulate, and intensely desirous of favorable publicity. He always courts favor among journalists. He has no doubt as to his prowess; he would invade Russia in the winter.

Lawyers should tell Judge Prideface of his greatness; he will believe them. But be careful: Be keen of mind, for he will see through transparent fawning. Subtlety will do it; he desperately wants the flattery to be true.

Try something like "Much obliged for your analysis, Judge. It showed me the way." Or, "I appreciate your control over the courtroom, Judge Prideface. This is the way cases should be tried. Sorry to say, not everyone measures up to your standard."

Judge Prideface may not love you for these tributes because he believes them to be his absolute due. But, perhaps—and who can ask for anything more—he might not do you any harm.

Still, though, you worry. You believe lawyers should offer only truthful praise. Agreed. But in Prideface's case, just tell the truth more emphatically.

You still worry. Pridface, sharp of mind, may detect insincerity in your praise. Don't fret. Remember Dean Swift's words:

'Tis an old maxim in the schools,
That flattery's the food of fools;
Yet now and then your men of wit
Will condescend to take a bit.

8. Revere Judge Goode

Francis Goode is a great jurist. The Melbourne Bar calls him "our good mate." Courageous, honorable, scholarly, he disarms people with a kindly understanding of human frailty. He settles more cases than anyone else in his courthouse. He never takes himself seriously but lowers himself with a deprecating humor. He arises early, works late, and worries passionately over the cases assigned to him.

He does not inject himself into the trial except to prevent an injustice by helping a stumbling advocate. He tolerates no lawyer shouting colloquy or arguing objections. He runs a tight ship and is quick to discipline any mutinous barrister. But because the atmosphere is relaxed and friendly, he brings out the best in the advocates. Lawyers yearn to be assigned to him. Lawyers should thank Judge Goode. He is a gift. He is a trial lawyer's reward. Lawyers should aspire to this level. For Judge Goode, the advocate must be prepared, well prepared. Never try to fool him or any other judge.

Judge Goode comes close to perfection, and we should revere him, but perfection among humans is rare. Therefore, to be fair, we must . . .

9. Judge Judges Gently

The percentage of inadequate lawyers probably exceeds the percentage of inadequate judges. For every Judge Dimness, there are 10 Mr. Thicknesses too dense to see the issue even when they fall over it. For every Judge Slant, there are countless Percy Slitherses who have never yet had thoughts in their heads other than for calculating their fees. Judge Lax would never have a problem of discipline if it were not for the cave-dwelling Rambo Bigmouth, who thinks of weakness as an opportunity to exploit. And Judge Pridface did not first become proud upon ascending the bench. He derives from that majority of

humankind who cannot imbibe power. They can be found everywhere: as clerks in bureaus, for instance, or officials in uniform.

You don't like Judge Listless? Then meet Nellie Proforma, a lawyer who does it by the book. She hasn't exerted her imagination in an age. It's easier to use a form book. You don't like Judge Grumpseat? What about Mr. Bull? Have you seen him at a deposition? He uses his horns to spear anyone who disagrees with him. No, please. Don't moan about the foibles of judges without first cataloging the infirmities of lawyers.

Judges today must endure inadequate counsel, crowded dockets, and public cynicism, as well as the spectacle of lawyers half their age earning twice as much as they do. Why do they take it?

At the turn of the century, judges rode the circuit in the lonely spaces of the Outback. A long-forgotten judge on horseback would arrive one day a month in a remote bush town to hold court in a one-room schoolhouse with windows tightly shut to keep out the windblown dust. An admiring lawyer, visiting from Sydney, nailed to the wooden wall this tribute:

Let us remember to honor the judges, for they are dedicated to the peaceful resolution of human disputes. We should not take civility or even civilization for granted.

I have known many a jurist who, possessed of compassion as well as erudition, has labored long into the night to craft an opinion because time was essential to the litigants.

I have known many who have taken a new case late in the day to aid a beleaguered colleague.

I have known many who treat all with courtesy, who help the defeated believe they had a fair day in court, and who with wisdom avoid defeat for all by bringing about a reasonable settlement.

I have known many whose mind is always open to fair argument, whose pursuit of truth is not impeded by prejudice of any kind, whose integrity is unquestionable, whose good humor relaxes the bitterest of foes, whose goodness is contagious, and whose humility is unflinching.

Journal of the National
Association of Administrative Law Judges

I have known many, and I speak to them now:

When the sacrifices you make discourage you, remember that your commitment to justice and the respect it earns can still produce the sweetest of rewards.

At the end, we will measure our lives, not by the wealth we have garnered, but by the goodness we have done, the kindness we have bestowed, and the peace of mind we have achieved.