

# Judicial Discretion: Ten Guidelines for Its Use

Judge Thomas A. Zonay

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“Judicial discretion.” What is it and how should it be applied? For centuries courts and commentators alike have wrestled with the concept of judicial discretion. Its judicious use increases fairness and can help to promote an equitable legal process by allowing the judge to consider individual circumstances in instances when the law is insufficient or silent. Conversely, because discretion involves situational considerations, its misuse can adversely impact the court’s authority and good reputation, create a feeling of result-oriented decision making and, when abused, lead to gross injustice.

## Purpose

Judicial discretion is necessary to the proper discharge of our Constitutional obligations as a separate – and independent – branch of government.<sup>1</sup> Legislatures simply cannot write laws to address all situations which find their way into court or that develop as a case makes its way through the legal system. Judges are present during proceedings and hear the evidence firsthand. From this vantage point a judge must have some discretion to apply the law to the facts and procedure of the pending dispute.<sup>2</sup>

## Evolution

The concept of judicial discretion has evolved. In 1680, Lord Camden said:

[t]he discretion of a judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion, to which human nature is liable.<sup>3</sup>

By the 1800s, when American jurisprudence was being established, Chief Justice John Marshall viewed things differently:

Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.<sup>4</sup>

## Defined

Currently, a common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e. statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under the circumstances and

the law.

Consistent with Justice Marshall's observations, judicial discretion does not provide license for a judge to merely act as he or she chooses.

### **Individuality**

Having a choice means a judge's exercise of discretion is individual. No two judges will think alike and "reasonable minds can differ." Discretion is not exercised in a vacuum and a judge's "choice" may well be impacted by any number of factors including life experience and personal views on legal, social, and moral issues. Though the exercise of discretion involves choosing from among a number of potential "correct" alternatives, that does not mean that a judge's discretionary ruling may not be found to be in error.

### **Appellate Review**

The standard for overturning a discretionary ruling is the most deferential standard of review on appeal. The appellate court will review whether the trial judge misunderstood or misapplied the law; whether the decision is clearly unreasonable, arbitrary, irrational or fanciful; whether the decision is based upon an erroneous conclusion of law or clearly erroneous findings; whether the decision is clearly untenable and unfairly deprived a litigant of a substantial right and just result; and, whether the reviewing court has a firm and definite conviction from the whole record that the trial court erred in its ruling.<sup>5</sup>

### **Guidelines**

When does a judge know if a discretionary decision is reasonable and likely to withstand appellate scrutiny? I offer ten guidelines to aid you in making discretionary decisions.

- **First, establish the record.** Strive to ensure that the relevant and necessary facts are on the record. Make sure your findings are only on the evidence presented. Address matters of credibility and demeanor which will lend support to your conclusion. Clearly show your reasoning and the logic in your decision.
- **Second, apply the correct law.** While this may seem obvious, there are times that the law may be unclear or unsettled. When that occurs, consider making alternative rulings to support your decision regardless of which of the alternative views of the law was employed. Also, keep in mind that the best way to be sure that you are applying the correct law is to know the law. On this point, take the time to research and prepare on the law before you write a decision. Please don't assume counsels' briefs sufficiently address or cite the applicable law.
- **Third, consider different ways to exercise your discretion.** You can choose to act quickly and decisively, or you can act slowly and monitor the situation. Every case is different and a one-size-fits-all model for how to respond simply does not work.
- **Fourth, consider doing nothing.** As Dr. Harvey Cox said, "Not to decide is to decide."<sup>6</sup> This does not mean avoiding or failing to attend to a matter which needs

a determination. Rather, it means that there are times that careful consideration of the issues leads one to conclude that the best course of action is no action.

- **Fifth, consider the equities of the situation.** It was Mark Twain who said, “Always do right. You will confuse some people and astonish the rest.”<sup>7</sup> His view is no less true for judges. When making a decision consider the equities and ask yourself — is it fair? Is it the right thing to do? Let your fairness show through on the record and give each side an adequate opportunity to present their position to the court.
- **Sixth, consider the results of your decision.** This includes both the legal and practical consequences. Remember Newton’s *Third Law of Motion*: “For every action there is an equal and opposite reaction.” Ask yourself, is the reaction of what will flow from your decision one which will foster justice being done in the case, or could it lead to irreparable harm which could have been avoided by choosing another course or action.
- **Seventh, take time to think over any decision.** You are the judge and the case cannot proceed without you. Do not allow yourself to be unnecessarily rushed. There is nothing wrong with taking the time to step off the bench to ponder a decision or to discuss it with a law clerk or colleague. You can also sleep on many decisions and address them the following day. Be wary of the discretionary decisions that you are asked to make late in the day on short notice. There are not many items which cannot wait until the next day when you have had a chance to fully consider the matter.
- **Eighth, clearly and logically explain your decision.** This applies whether it will be in written or oral form. It is important that those who hear the decision, especially those who will be guided by it, are able to understand both its rationale and its terms. This maximizes the potential that it will be followed and, if necessary, also makes enforcement more effective.
- **Ninth, do not unnecessarily look back.** Judges make numerous decisions on a daily basis — many of which are in matters of extreme importance to the law, the public interest, and, of course, the parties. Given the important decisions which are being made it is natural to agonize over a decision while considering it. Reflecting on past decisions, and even changing ones later thought to be incorrect, are both appropriate and necessary in the discharge of your judicial role and in your professional development. That being said, it is important to be able to move on after rendering a decision so that you can then begin to focus on the next decision you will need to make. And lastly,...
- **Tenth, do not make a decision just because you can.** Though basic, this tip is perhaps the most important of all. The good news is that if you follow the other nine tips then you won’t have to worry about not following this one.

1. Stumpf, Fleix, *Inherent Powers of the Court*, The National Judicial College, Reno, NV (2008). Cites cases and describes authority for the exercise of judicial

discretion in both substantive, but more commonly, procedural, instances.

2. Smithburn, J. Eric, *Judicial Discretion, a Text*, The National Judicial College, Reno, NV (2006). Explores the cases and secondary authority which analyze discretion as a jurisprudential concept.
3. Charles Pratt, aka Lord Camden, L.C.J., *Case of Hindson and Kersey* (1680), 8 How. St. Tr. 57.
4. *Osborn v. Bank of the United States*, 22 U. S. 738 (1824).
5. See also, Kunsch, Kelly, *Standard of Review (State and Federal): A Primer*, 18 Seattle U.L.Rev. 11 (1994-1995)
6. Cox, Harvey, *The Secular City: Secularization and Urbanization in Theological Perspective*, Collier Books, (1965).
7. Note to the Young People's Society, Greenpoint Presbyterian Church, 1901.

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