Litigation in Practice

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by
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For Louis H. Pollak
1922–2012
United States District Court Judge

My mentor, my friend

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About the Author

Curtis E. A. Karnow is a Judge of the San Francisco Superior Court, assigned to the complex litigation department. He is an author of *Rutter's Civil Procedure Before Trial* (West/Thomson Reuters). He has taught at the University of California Hastings College of Law and lectured at the business schools at the University of Michigan and the University of California, as well as the law schools at the University of San Francisco, Stanford, New York University, and Yale; and he teaches civil litigation to new and experienced California judges. Judge Karnow graduated from Harvard College and the University of Pennsylvania Law School where he was an editor of the law review. He served as Assistant United States Attorney and clerked for Louis H. Pollak (E.D.Pa.). While in private practice, Judge Karnow specialized in antitrust, intellectual property, computer and internet law. His books and articles address the legal process and civil procedure, legal education, game theory, settlement, implicit bias, bail, artificial intelligence and robotics. He was raised in Hong Kong, France and North Africa, and holds private and instrument pilot ratings.

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"Sargon and the Science of Reliable Experts," 22 *ABTL Report* 1 (Spring 2013).

"Similarity in Legal Analysis & the Post-Literate Blitz," 15 *Green Bag 2d* 243 (Spring 2012).

"Rhetoric of Academe," 41 *U.S.F. L. Rev.* 135 (2006).

Introduction

I know I am not the only one who, as a young lawyer, would seek out empty courtrooms and sit down, breathing in the musty air, imagining the lives come and gone. In these moments, silence would banish the commotion of the live courtroom, and quiet memory would allow me to immerse myself in the romance and majesty of the room. The small municipal courtroom, perhaps no more than a converted school room, would nevertheless share something with the cathedrals of green-marbled federal courtrooms: a flag, perhaps; perhaps a raised dais for the judge, but in any event a certain arrangement: the tables side by side for counsel facing the single chair of the judge, set off from the tables used by clerks and the like. Off to one side, chairs for the jury, with a fine view of the witness box. The stage set. The quiet before the storm. I remember thinking, *this is where we make law.*

Trial lawyers know that, for all the work of the appellate and supreme courts where major conflicts in the law are resolved and errors corrected, everything truly depends on what happens at trial. Few cases get reversed on appeal (perhaps ten percent[1]), and that does not account for the many cases which are never appealed. Supreme courts take (practically speaking) no cases at all — perhaps 100 a year (true for both the U.S. and California Supreme Courts[2]), out of millions filed.[3] For an overwhelming majority of cases, trial courts are the beginning, and the end, of the affair. Years of argument, litigation, discovery disputes, threat and counter threat, posturing on the impact of precedent or witness testimony, sometimes the life and death of a person or company, all come to a head at trial. The result is not always "just," and the facts found by the judge or jury may not always match the truth as known by an omniscient being, but by

1. Cases decided by written opinion had about a ten percent reversal rate. The average is lower when criminal cases alone are considered. http://www.courts.ca.gov/documents/2011CourtStatisticsReportIntroduction.pdf

2. http://www.courts.ca.gov/documents/2011CourtStatisticsReportIntroduction.pdf (California Supreme Court).

3. Counting all cases, including small claims and infractions, about ten million. If we cut out over six million infractions, we still have literally millions of cases. http://www.courts.ca.gov/documents/2011CourtStatisticsReportIntroduction.pdf

and large the result is reasonable — and, importantly, it is a result. The impossible, intractable conflict is solved one way or the other. It is done in these rooms, with these people, writing and speaking nothing but words (perhaps with a little body English).

The mystery of how this comes about is not apparent to the new lawyer; I will say it was not apparent to me. In law school we were taught the law, and the development of the law, in binary fashion: the law either was what it was, something one might look up like reading the temperature; or it was the transmutations of an earthquake. So we spent our time studying the earthquakes: *Brown v. Board of Education* via *Plessy v. Ferguson; Lochner;* the advent of administrative law, *Miranda*, the death of the doctrine of ancient lights; and all the other moments that marked visible shifts in the legal landscape. We did not study the law in its quotidian manner. We looked at great principles, and assumed their implementation in the quiet times between earthquakes was routine, almost a syllogism, with the result following inevitably from the application of the law to the facts.

But this is wrong.

Law is what happens in the courtroom. The core law school curriculum does not teach the practice of law; it teaches the academics of the law. So be it. Literacy in legal principles is a necessary but not sufficient education for the trial lawyer, for — as we now know — the result in court is not the function of a syllogism.

If Holmes is right in defining law as that which in fact judges do,[4] then we would be interested in the question of predicting what judges will in fact do, given precedent. Assuming an honest judge, we desire to predict his decision applying extant law to new facts. We believe we can do this, and we say, for example, that law must be stable and assured so that persons know how to arrange their affairs; that law must in this way be predictable; that if it is not so, something is wrong. Yet if this were all true, every judge's decision would be predictable, and after a short while we would cease litigation as a waste of time. We do not, however, cease litigation. We wonder at judges' decisions; we do not know how it will turn out. How is it possible that we believe both that the law is stable and that it is unpredictable?

There are a few answers. First, we believe this in the sense that utterly predictable decisions are not tested in court. Rather, we bring cases at the ever expanding edge of the law (sometimes we are stupid, or ignorant, too, and bring cases that never should have been necessary). By definition, then, cases making their way through the courts usually have some quality of uncertainty. Even when we have all the facts and all the precedent, we cannot quite predict outcomes. There

4. Oliver Wendell Holmes, Jr., "The Path of the Law," 10 Harvard Law Review 457 (1897).

are differences of opinions as to which cases might qualify as precedent, and the rules used to choose precedent themselves may not be easily ascertainable from the body of cases or statutes before us. Often scores, or hundreds, of cases may qualify as binding precedent (i.e., authored by courts above a given judge in the hierarchy, such as the Ninth Circuit vis-à-vis the North District of California) or persuasive authority (such as the Ninth and other Circuits for state Superior Court judges on e.g., Fourth Amendment issues). There are often many paths to choose from. Depending on which seem more "similar" to the case under scrutiny, different precedent will be selected by the trial judge. In this way, trial judges seeking authority must *already* have a sense of what counts as relevant precedent ("similar" to the present case) before acceding to its authority. This sense of what *counts as relevant* is judgment, based on years of experience. It is tantamount to a general theory of the law in a given area, but often is a function of experience in many areas of the law. The general theory is built up from the variety of individual cases, which then in turn influences the result and reasoning of the next case. So it is that a judge, faced with a new issue, will react to some arguments with incredulity. *That doesn't make sense,* she may think. This reaction is a shorthand application of the general theory — a practical judgment.

When deciding the application of law to a new circumstance (i.e., most cases), this sort of practical judgment can be a driving force in the selection of which appellate opinion does, and does not, *count* as precedent.[5] Every time this happens, law evolves: General theory influences the specific case, and specific cases influence the development of general theory. Not that we pay much attention at the trial court level, but when cases reach the appellate courts and opinions are published, those courts' selection of precedent will modify the law even as they appear to follow it. Only in retrospect is prediction infallible, and the law certain.

Second, and closely related to the point made just above, for those cases which we agree are not determinable from what we choose to call precedent, we must conclude that something other than precedent shapes the case and its result. That other "thing" is, of course, the impact of the people involved in the case. If a case is a river, then its two great tributaries are the law as we find it, and the practical reasoning of the trial's participants. The courtroom is where these streams meet: the stream of case law and statute, and that of the participants' common sense and real world experience. The latter (which I will call the practical) controls many matters: determinations of credibility, for one. The entire law of negligence is built on it, for we allow the jury to decide what a "reasonable"

5. To be sure, when the appellate opinion obviously applies, the trial judge does as he is told; but presumably everyone reads the same opinion, and the matter is not seriously litigated, or at least not at length, or at least not by rational counsel.

person ought to have done, a practical judgment at heart. A thousand and one matters are committed to the judge's discretion, albeit within limits; not all are decisive, but some of them may be, such as the weighing under Evidence Code 352 of the probative value of evidence against its prejudicial effect, and whether an expert shall testify. But the true scope of the practical is far, far broader. Practical skills may be decisive in settlement (and over eighty percent of cases will settle), in the size of jury verdicts, and — in close cases—in the verdict itself.

We (especially judges) like to think that cases are decided on the merits, and every effort is made towards that end, but as suggested in the first section of this book, lawyers with no practical experience, or with a disdain as to its purpose, may make this impossible. These lawyers, advertently or not, throw up a screen of bad behavior and foolish argument through which no judge with limited time may pass.

Often the fault, such as it is, is not conscious. It is just an absence of training.

Where to get that training, and how to develop practical judgment? A difficult matter. Clients will not pay law firms to train first and second year associates, and often insist they not be assigned to a matter. It is difficult for offices of district attorneys and public defenders to entrust cases to new lawyers: the stakes of liberty are high, and no one wants to be anyone's first client. As noted in the last section of this book, law schools traditionally demean practical training, including legal writing courses. Is there a tenured Professor of Legal Writing? I have not found him. Focusing on the earthquake cases, law schools usually ignore the intervals; they simply do not see the other tributary of practical skill.

Perhaps things are changing. Legislators and judges are evaluating, and indeed implementing, evidence-based processes — as, for instance, in sentencing. The sentences are founded on research, and suggest to the judge empirically based conditions actually likely to reduce recidivism,[6] as opposed to traditional sentences based on a judge's idiosyncratic view of what is appropriate. Recently, the state bar of California announced consideration of a requirement of practical work, including through law school courses, before one may pass the bar. There is not a judge — or client — who would not welcome the change.

Experience itself is of course directly useful, but not quite enough, because we humans tend to do the same thing over and over again, attributing success to our brilliance and failures to external causes beyond our control. We can train ourselves, although only with great concentration. But if we truly believe that practical issues are essential to the practice of law, there will be more time for the merits. I hope this volume will help in the practice of law.

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6. Roger K. Warren, "Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism," 82 Ind. L.J. 1307 (2007).