
INSIDE THE MIND OF A BOARD JUDGE

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How does a board of contract appeals judge think? Insights into a judge's thinking may be of interest to board practitioners, and I see no reason not to be open with my general thought processes. Of course, I only can speak for myself, and the views here expressed may or may not be subject to generalization to other judges. I suspect though, based on my discussions with other board judges, that many of the insights I share may be common.

I have been told that when I was a trial attorney, my reputation was that of an aggressive advocate who argued every alternative theory. I thought I could force the judge's hand with strongly-worded advocacy of facts and legal analysis that I hoped would leave no alternative but to rule in my favor. I also did not mind overtly criticizing my opposing party or even opposing counsel, where I thought it would convey some advantage. Over six years on the bench has changed my perspective.

Looking back on my own former thought process from my current perspective as a judge, I would have been better served to have tempered my approach. Had I known then what I know now, I would not have argued every theory, because that approach, in practice, diminished the stronger theories I presented and distracted from my overall advocacy. Now, when I see lawyers straining to present weak alternative arguments (which often is far more obvious than the practitioner may believe), I wonder whether their strong arguments are similarly strained. As for advocacy that leaves no alternative for the judge, that was legally immature thinking on my part – there always (or at least usually) is an alternative. Regarding criticizing your opponent or counsel, it is far better to let the strength of your own argument and your substantive reply to your opposing counsel's arguments serve as your persuasive mechanisms. These days, when I read briefs containing overt criticism of a party or opposing counsel, as opposed to addressing counsel's arguments, I cringe.

At a recent judicial training course I attended, the instructor asked the judges (mostly general jurisdiction state court judges) the following question: if you were forced to choose between deciding a case based on the law, or based on your personal sense of justice, which would you choose? I was very surprised to see a



two-thirds preference for personal sense of justice (I was in the minority). The confluence of resolving cases based solely on legal analysis, and reasoning cases based on fairness or “the equities,” often is overlooked in board advocacy because government contracts law is so dependent on established legal doctrine. I wish to commend considering the equities as a subtle though important consideration for the practitioner to bear in mind. I see no reason not to share with the bar the extent to which the overall equities may affect my decision-making.

Judicial fact-finding involves the exercise of my judgment to decide among sometimes conflicting evidence. Those fact-finding judgments are based on my perceptions of witnesses, and on numerous other factors, such as plausibility, consistency, corroboration, and the like. The facts I find then drive my legal analysis to the ultimate result. While I certainly consider myself bound to follow directly where that leads, apparently more so than the judicial classmates I mentioned earlier, I freely admit that I also tend to consider what is fair as I see it, as integral to my decision-making.

I think (some colleagues gently chide me as obsessing) about fairness, and equally as importantly, the appearance and perception of fairness, in every action I take in Board litigation – not just in ultimate decision-making, but throughout case management. Acting as a neutral arbiter, of course, is a fundamental obligation for any judge. Assuring that I am *perceived* as neutral, though, can be more nuanced, and is particularly important for a board judge who came up as a government lawyer as many of us have – and it cuts both ways.

I constantly strive to improve my judicial performance to maximize perceptions of me as fair and neutral. I scrutinize even seemingly trivial impressions I may be giving. When I start a telephone conference for example, my routine is to welcome both attorneys by name, and then say “thank you both for joining me.” I used to say just “thank you for joining me” but became concerned that the first lawyer whose name I called might think I was thanking only the last-named lawyer. It gets down to that level of detail for me. During hearings, I explain my rulings on evidentiary objections more often than some other board judges. I worry that simply overruling an objection without explanation might be thought of as unfair by the objecting attorney. I try to explain hearing procedures in detail, particularly where the contractor is self-represented. I believe that maintaining this type of atmosphere helps support litigants’ feelings that they have been treated fairly. In another judicial training course, I was taught that based on surveys of litigants, more of those polled believed that their perceptions of having been treated fairly were more important than whether they won their cases. Hard to believe, and I will not generalize that sentiment to counsel, but I try to keep that surprising finding in mind.



When writing decisions or even orders, I think about how my words may be perceived by a variety of audiences. After drafting, I perform separate reviews and edits, while mentally putting myself in the place of each audience, and trying to gauge possible reactions for unintended messages. Who are those audiences? For orders, the audience is comprised mainly of the lawyers on each side, and to a lesser extent, the parties. In decisions though, there are many more audiences to consider. I try to think how my words will be perceived by the other judges on the panel who will need to decide the case. I consider how future lawyers looking at the decision as precedent, as well as future boards and courts may construe my words. I think about the appellate court and academic commentators. I also recognize that my words can have a powerful impact, and I worry about avoiding unintended consequences.

Perhaps an example may help me explain. I presided over a case that turned on the contents of a telephone conversation between a government official and a contractor. They testified in a diametrically opposed way that could not be reconciled, and there were no other witnesses to the conversation. I also believed that both had testified truthfully, yet only one version could have been accurate. Based on a variety of factors – contemporaneous corroboration, plausibility and who was more likely to have remembered accurately – I reached a conclusion as to which version of the conversation I believed to be more likely to have been occurred. However, when writing my resulting analysis in the decision, I agonized over avoiding any appearance that I believed that the witness whose version I rejected was being untruthful. I did not want that witness to suffer adverse career consequences were I unintentionally to leave such an impression. If I had believed that the witness had been deceptive, I would not have been as concerned, although I see no reason to point out such things where I do not need to do so. My words have power – I understand and honor the responsibility that comes with that power.

Maintaining both the reality and appearance of fairness is particularly important for cases involving self-represented litigants. Those cases also are much more difficult for me than cases in which both parties are represented by skilled counsel. I constantly consider my obligation to explain the process to the self-represented litigant so that he or she can effectively represent him or herself and not be intimidated by unfamiliar litigation procedures. However, I also struggle to watch the line over which I should not cross of providing so much guidance that it delves into legal advice. That would appear unfair to the other side – in board practice, the government side. So, I try to explain this line to both parties.

During the course of a case, I do not believe in avoiding sharing what I think is important, though I strive to temper that with allowing the advocates to argue the case as they see fit. So, for example, I often (although not always) explain to



counsel at the end of a hearing some of the issues or concerns that occurred to me, and ask that counsel include analysis of those matters in their post-hearing briefs. However, I emphasize that counsel should argue the case as they wish (which I try to remember always to say). I see no reason not to share what may be important to me, and therefore to obtain the advocates' wisdom on the subject – which I think makes for better decision-making. I recognize that I also need to be careful not to give the impression that the issues I raise are dispositive or even necessarily central to the decision, just that they were matters that occurred to me which might not have been apparent to the parties. I will make better decisions if I hear the parties' views on these issues than if I address them on my own. Beyond that, during case administration, or after the hearing, I do not believe that it would be appropriate to offer more of my thinking to the parties about how I think the case may turn out. After all, in the end, I am only one judge in a panel of three.

That raises another matter worthy of mention. If a close trial objection is offered (perhaps, a hearsay matter), I am more likely than a single-judge adjudicator to overrule the objection. Even where I may have been inclined to sustain an objection, the other two board panelists might disagree. As judge fact-finders, we can always disregard resulting testimony if we ultimately decide it should not have been admitted on evidentiary grounds. Sustaining an objection eliminates the testimony from the record and could deprive my board panel colleagues of their voices. I try to remember to explain this at some point during the trial, again so that counsel and parties feel that I am treating them fairly. On the other hand, I think that I am somewhat more likely than some board judges to sustain evidentiary objections. After all, many of the rules of evidence are designed to prevent unreliable information from tainting the record. My advice is that board trial lawyers *should* interject objections during hearings, but should do so only where appropriate, and only for a perceived advantage. If it does not matter, leave it alone. As the judge, I will move things along myself if a hearing becomes unduly delayed by examination that does not matter.

Another example of my evolving thinking as a board judge involves the scope of my decision-making. I strive to resolve only the precise issue presented to me, in the narrowest way needed to reach the decision. I avoid setting tests, and try to keep in mind the need to remain flexible for the future. If an issue is not squarely presented, I try to tailor the decision precisely to the issue that was presented, and save other matters for a future case. I find great value in the board format in which my board colleagues help to narrow my decisions in this regard. While I am sure that single-judge decision-makers use some type of peer review when they can, I take comfort that the robust peer review and concurrence process at the boards makes for better, or at least more consistent decision-making.



When speaking with practitioners at bar association events, I often advise counsel to guard their reputations for integrity as their most valuable asset. I decide matters on the evidentiary record, but the reputation of counsel earned by past behavior, does matter when I consider representations of counsel, or in how my case management proceeds. I will try to illustrate with two examples.

In a recent non-board case,¹ a principal was panicking when her hearing was ready to begin but her advocate was nowhere to be found. The advocate was well-known to me and had earned a reputation for reliability. I will not pre-judge what I would have done with an advocate of a less stellar reputation, but in this instance, I adjourned the hearing and simply waited. The very apologetic advocate appeared perhaps an hour later (quite out of breath), explaining that he had been detained by a power failure which stopped the train he was on, in an area that did not allow for cell phone service. We began the hearing without further incident (after I allowed the representative some time to gather himself).

A board colleague likes to share a story from when he was a trial lawyer. He was accused by opposing counsel of misconduct involving hiding documents during discovery. When presented with a motion, the board judge in that case ruled that even if responsive documents had not been produced, he had no doubt that counsel was not to blame. Based on prior experience, the board judge was confident that this attorney simply would not have participated in improper conduct. That is the reputation practitioners need to strive for in their conduct before the boards. Such things matter to a board judge.

When I was appointed, I sought the advice of a district court judge friend of mine. He offered two suggestions for good judicial decision-making – always hear both sides before deciding anything, and be patient. In judicial training, we are advised to try to slow down our decision-making which, studies show, results in better decisions. My thinking as a board judge honors these concepts, which I try to keep in mind. If I were to give advice to a new judge, I would add a third suggestion: take nothing personally. Judges are human though, and I sometimes need to remind myself that an emotional reaction from me about how I have been perceived has no legitimate place in my decision-making. With me, at least, practitioners need not hesitate to point out where they think I have been wrong. I will not take it personally.

A similar concern, and another area that I strive to keep constantly in mind, is that (with unusual exceptions like judicial or official notice) I am obligated to consider only the facts in the record and reasonable implications based on those facts. It is not unheard of for my board while deliberating on a case (yes, believe it or not, we generally deliberate as a panel) to speculate among ourselves about



“what really happened.” That remains only idle speculation though, and I will not base a decision on anything outside the record. This can be a challenge, but I consider it a core responsibility.

Being clear and open as a judge does not always mean being a nice guy, though. Occasionally, I need to be blunt with or strongly direct a lawyer or a party to ensure fairness. Calling him or her out, but only where absolutely necessary, demonstrates to the *other* party that I recognize behavior that is improper, will deal with it appropriately, and will protect the fairness of the process.

I also want to express my views of the time it takes to issue board decisions. I am sensitive to a common criticism of the boards that decisions take too long to issue. For the most part, I agree, although a significant part of the delay often can be traced to the parties themselves. Nonetheless, quicker decisions certainly would be better, although I consider it far more important for the decision to be right than to be issued faster. Where those interests conflict, I will err on the side of being correct. I ask counsel to bear in mind that, at least at my board, the review process takes longer than the decision drafting process, sometimes considerably so. Practice no doubt differs at the larger boards, but at my board, every board judge (not just the panel members) reviews every decision. Every board judge reviews the entire record, edits substantially, and ultimately concurs or dissents internally, before the case file moves onto the next judge. This can take a while, but results in a better, and more consistent product. I think this type of consistency is a great virtue of the board structure.

Before I close this discussion of my judicial thought processes, I want to address approaches board judges take to being involved in settlement. I have noticed that board judges differ greatly in that approach – some will not mention settlement at all – others push hard for settlement and become actively involved in the settlement process. There are many approaches that can be effective, and it pays for you to learn the style of the judge before whom you are appearing. For me, as I often say to practitioners and at bar association events, I view my job as helping to resolve disputes. That may be accomplished through a hearing and full decision, by helping the parties with settlement efforts directly or indirectly, by suggesting mediation where appropriate to the case, or by any other reasonable method of dispute resolution. It really does not matter to me whether I write a decision or the case settles so long as the dispute is resolved. Based on my experience, it appears that I am somewhat more hands-off when it comes to settlement than many other board judges.

The only approach that I think is not appropriate in this regard is one I encountered early in my career in a case in a different court. In a pre-hearing



conference, the judge bluntly said that the case was not worth his time to decide, that he would not hear the case, and that we must settle. While I understand the pressures of heavy dockets, to me, that attitude abdicated the judge's responsibility. Another lesson emphasized in judicial training classes is that the most routine case to the judge is not routine and is the most important case to the parties. I try to treat every case as the most important case.

In the end, my goal is for both sides to feel that they were given a fair shake, that I both listened and heard them, and that I did what I believed was right in consideration of the law's application to the facts all as influenced by my sense of fairness. If a losing party or lawyer believes that I got it wrong, that they should have won but that at least I considered his or her views reasonably and was fair throughout, I will be satisfied. I hope the practitioner will be as well.

* Administrative Judge Gary E. Shapiro is the Vice-Chairman of the Postal Services Board of Contract Appeals and 2014 President of the Boards of Contract Appeals Bar Association. Judge Shapiro's views should be considered his personal views, and not those of the PSBCA, or any other board or judge.

ENDNOTES

1. My office, the Postal Service's Judicial Officer Department, is responsible for fourteen types of administrative adjudication other than the PSBCA.