The Better Part of Discretion: Judicial General Practice of Law

by Judge Norman A. Thomas
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When I was a youngster, my pediatrician did it all. If I was ill, my mother took me to his office and he would examine me, decide what the matter was, and treat me, which usually meant that I got a “shot” from him (or his nurse, whose visage I learned to greatly fear!). When I fell on the playground and split my lip, or wrecked my bike and broke my collarbone, it was he who met us at the emergency room and did any and all needed work. The same was true of the dentist; until I had children of my own, I’d never met a “pediatric” dentist. The same fellow who molded and fitted my father’s dentures and looked after my mother’s dental needs also attended to my brother and me. He got the job done well enough; however, he did not possess a particularly warm personality and his office most certainly lacked any semblance of a kid-friendly atmosphere. Such was the general practice of pediatric medicine and family dentistry during my youth. Those practitioners could make referrals to specialists, no doubt, but except in the most extreme or unique circumstances, they took care of their own patients’ needs. They knew enough about many things to competently practice their professions.

Many attorneys in the past similarly engaged in the general practice of law. The same attorney that would assist you in estate planning, real estate matters, small business administration or contractual relationships might also meet you in court to represent you in civil matters, traffic court or—when it came to that certain family member who always was in trouble—criminal proceedings. Of course, some attorneys—particularly those in more rural or suburban settings—still successfully engage in a widely varied general practice. But during my nearly thirty years of experience in the legal profession, their numbers have greatly declined. Our profession relies more on specialization, and few would argue against the societal value of that increasing trend.

Writing here as a circuit judge and, in a larger sense, as a trial court judge, I submit that we are general legal practitioners in the truest sense of our modern profession. We take an oath to steadfastly seek to make correct decisions in cases of every legal topic, and sometimes we do so without clear precedential authority to guide us. Moreover, due process depends not only on our achieving correct results from a substantive perspective, but also properly, according to Virginia’s labyrinth of civil and criminal procedural and evidentiary rules.

Without question, we trial judges receive much helpful guidance and have access to many resources that assist us. We may review reports of decided cases from every level of Virginia’s courts, our colleagues willingly discuss legal issues with us, many jurisdictions employ law clerks to assist us with research and legal writing, the Judicial Conference of Virginia annually provides us with continuing legal education, and many of us periodically attend courses at the National Judicial College. Still, on many occasions we must adjudicate issues of subject matters that we never practiced as attorneys, and in which we simply have no experience. The General Assembly does not fill our ranks only with general practitioners.

Thus trial judges have a responsibility to be ever-active students of the law and to stay abreast of its evolution through decided cases, legislative action, and regulatory and rule-making authorities. We must engage in research and the process of judicial reflection. You may rest assured—based on my observations as a practitioner and a jurist—Virginia’s judges, taken as a whole, genuinely work hard to perform such tasks. I believe our judiciary, top to bottom and from every evaluative perspective, ranks among the best in the nation.

Notwithstanding the quality of our personnel, our resources, and the consistency of our strivings, the judicial general practice of law places a premium upon at least three additional qualities: attorney preparation, effective efforts at settlement and other forms of alternative dispute resolution, and the discretion afforded to trial judges.

The cold truth is that attorney preparation counts for much in ensuring correct judicial decisions. In this age of legal specialization, the presiding judge may not be familiar with the controlling legal principles of your case. Even if the judge possesses a background in them, her or his daily occupation now spans a broad range of topics. With good case preparation, counsel can serve as a reliable guide and a much-appreciated resource to the court in its decision-making role.

Normally, the involved attorneys know the strengths and weaknesses of their clients’ respective positions. The best counsel representation will seek first a negotiated or other nonlitigated result to ensure a positive outcome and avoid the risk of a disappointing or perhaps
even catastrophic result. Isn’t it better to diligently pursue a result to which your client voluntarily submits, as opposed to a result litigated and imposed by a judge or jury that lacks expertise in the subject matter? An attorney well schooled in the subject matter can best shepherd a client to such a conclusion. Knowledge is power, and that advantage often can best be wielded by seeking a litigation end through nonadversarial means.

Finally, there is that wonderful safe harbor known as “judicial discretion.” Courts utilize it to ensure due process and a maximization of correct outcomes. The judicial process is not designed or expected to produce outcomes with mathematical precision. The application of the law to varied fact patterns may, from judge to judge, yield somewhat results that properly may withstand appellate review. The legal profession is not science. As a circuit judge, one must not rely upon the appellate process to cover over legal or other errors in the name of an exercise of discretion. However, the credibility and vitality of Virginia’s judicial system — staffed as it is with jurists of all legal backgrounds and former practice specialties and applying their individual professional acumen — greatly benefits from the flexibility afforded by proper application of judicial discretion.

The growing complexity of the law requires an increasing reliance on attorney specialization. Clients receive truly expert advice and guidance, and our society gains from it. Our trial judges now and in the future will ascend the bench from law practices limited to a subset of legal subject matters. When they do, they commence a new career within the profession: that of a judicial general practitioner. Recognition of this fact by the judicial branch and attorneys alike will help achieve the desired standard of due process for all. ☉

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Editor’s Note: This is one of a series of columns by judges and lawyers of the Virginia State Bar.