



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
 Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Prolific Pragmatist: Judge Richard Posner

By **Gavin Broady**



Law360, New York (March 25, 2014, 3:02 PM ET) -- For attorneys in the Seventh Circuit, arguing before Judge Richard Posner can be the very definition of a trial by fire.

Widely regarded as one of the most prolific and influential legal thinkers of the past half-century, the 75-year-old Posner is also notorious for a prickly bench demeanor and a tendency to make underprepared attorneys look like wide-eyed welterweights who accidentally wandered into the ring with Ali.

"His tales of reaming out lawyers are legendary," says Marc Kadish, who has had extensive experience with Posner in his role as Mayer Brown LLP's pro bono director. "He wants answers to his questions, and if you don't give him those answers, he will get, shall we say, more and more animated and brusque."

Hinshaw & Culbertson LLP partner and former Illinois Solicitor General Joel Bertocchi adds that while Judge Posner has a dry wit and likable demeanor off the bench, he brings so much intellectual firepower to bear in oral arguments that attorneys going up against him are often simply "worried about getting out alive."



Judge Richard Posner

"People ask me, 'How do I prepare for an argument with Judge Posner?'" Bertocchi says. "I tell them, 'Get a good night's sleep.'"

A Real-World Approach to Law

By Judge Posner's own account, when temperatures rise in his courtroom it most often stems from a disconnect between his fundamental view of the law — which is rooted in real-world economic analysis — and the programmatic department of the typical practicing lawyer.

"It's as if lawyers think judges are engaged in a semantic enterprise, where you have language in a statute or the Constitution or a prior opinion and you try to fit the present case into the categories created by that language," Judge Posner says. "Rather than hit us over the head with the language, lawyers need to make sure judges understand the big picture and why it makes sense to rule in favor of their clients."

Although the New York native studied at Yale College and Harvard Law School, many who know Judge Posner say his legal outlook has been most profoundly influenced by the so-

"He's not interested in abstract notions of right or wrong. What he cares about is consequence."

called Chicago school of economics.

The neoclassical approach, championed in the mid-20th century by scholars at the University of Chicago, where Judge Posner is a senior lecturer, emphasizes the contextualization of history through economic metrics, and it significantly informs Posner's seminal work on the topic, *Economic Analysis of Law*.

"His pragmatic approach is a type of economic analysis," says former clerk Jonathan Masur, now a professor at the University of Chicago. "He's not interested in abstract notions of right or wrong. What he cares about is consequence — what will the world look like if we rule one way or the other? That type of analysis is fundamentally economic."

Judge Posner rejects as misguided the popular conservative analogy that judges ought to function as "umpires," restricted to what's written in the rule book and blind to the practical ramifications.

"The umpire doesn't care who wins or loses, while the outcome of a judicial decision is not a matter of indifference," he says. "That doesn't mean judges should go to the other extreme and think of themselves as politicians, but they have to be concerned about the consequences of their decisions."

Bertocchi suggests that Judge Posner's background in academia and relative lack of experience as a legal practitioner is at least in part responsible for the occasional heat in his courtroom.

"Judge Posner takes a big perspective and thinks a lot more about what law ought to be than what the law is, which is undoubtedly colored by his academic background," Bertocchi says. "But I think he underestimates the effect his different perspective has on those before him. I don't think he recognizes as much as he should that lawyers are advocates rather than scientists."

The Real Judge Posner

Whatever criticism Judge Posner may receive for his cantankerous mien in the courtroom, those who know him well insist his sparring with attorneys is never less than collegial.

"He can act really irritated, he can be aggressive with questioning and call lawyers to account, but it would never become personal," says Masur. "He would excoriate lawyers who would appear before him and afterward say, 'Thank you, I really appreciate the argument.'"

Masur says Judge Posner is also fond of engaging in fierce — but friendly — lunchtime debates with his clerks on upcoming cases, noting that the judge's unusual practice of writing all of his own opinions means his main expectation for his clerks is that they research and learn the cases well in order to serve as a sounding board.

Those who spend most of their time on the receiving end of his courtroom excoriations might be surprised to learn that there is a softer side to Judge Posner, who enthusiastically self-identifies as a cat person and speaks with obvious affection of Pixie, the "lovable, sweet, affectionate and very intelligent" cat he shares with his wife, Charlene.

Masur also notes that the typically phlegmatic Judge Posner would become uncommonly enthusiastic about movies, though his tastes are "not exactly French New Wave cinema."

"He loves action movies and thrillers, and his favorite movie when I was clerking for him was

"The Matrix," Masur says. "And he was obsessed with the Garfield movie. Really, any movie involving cats."

A "Compulsive" Writer

Several years ago, Judge Posner was the guest of honor at a University of Chicago after-dinner lecture, where he was introduced by a faculty member who raved that no one man could ever hope to write as much as the insanely prolific judge and that therefore there must actually be many Richard Posners.

"Good evening everyone," the judge deadpanned as he stepped to the podium. "I am the Richard Posner who does after-dinner lectures."

With a miles-long oeuvre that includes more than three dozen published books on topics ranging from antitrust law to the nexus of sex and human rationality, Judge Posner is the Joyce Carol Oates of legal writing: intellectually profuse, multifaceted and seemingly capable of functioning without sleep.

What's most striking is that this level of production has come atop a steady output of judicial opinions. Not only is he known for writing those opinions himself, he is notorious for the speed at which he is able to produce them, often sending his clerks first drafts of a decision within hours of oral arguments.

The prolix Judge Posner was destined for academia from the start, and as an English major at Yale he toyed with the idea of going to graduate school for literature before ultimately following in his father's footsteps — though he admits he thought of law as "kind of a default career choice."

The judge says there is no real secret behind his extraordinary production, attributing it instead to personal compulsiveness, decades of practice meeting the tremendous writing demands of being a judge, and a tendency not to take vacations or weekends off.

"I work 365 days a year, day and night, because I enjoy it," he says. "I don't have any hobbies. I get a lot of exercise. Occasionally I'll watch a movie."

Masur, however, suggests the judge also has a little help from a wonder drug relied on by workaholics since time immemorial.

"He consumes an unbelievable quantity of caffeine every day," Masur says. "He's a very calm and mild-mannered person, but every day he drinks mugs of espresso, literally 8 shots of espresso at once. Most people would be having spasms after that amount of coffee."

Where Pragmatism Meets Politics

Both the volume and the quality of Judge Posner's contribution to the field of law tend to inspire ebullient praise, and the main debate over his importance tends to be whether he is among the most influential legal scholars of the past 50 years, or of the entire 20th century.

"I think history will look back on him as one of most influential judges never to sit on the Supreme Court, in a class with Henry Friendly and Learned Hand," Bertocchi says. "He has the brainpower, but it just didn't happen."

Judge Posner has maintained that he has no desire to join the high court at this point in his career,

"Judges are appointed from complex political processes, and appointing authorities are concerned with quality, but that doesn't mean they appoint the smartest people."

and he has been unusually frank in his criticism of the political realities of the court and the processes by which justices are selected.

"I think it could be better managed, and it should hear more cases, but I don't think the problem is structure," he says. "The problem is the personnel, which in turn is a reflection of appointing authorities — the president or the Senate."

Judge Posner suggests the political considerations behind the appointment of judges may also bear on the overall effectiveness of the nation's judiciary.

"Judges are appointed from complex political processes, and appointing authorities are concerned with quality, but that doesn't mean they appoint the smartest people," Judge Posner says. "They have other interests to consider."

He notes that law clerks, on the other hand, are generally hired on the basis of intelligence and as a result "are often, dare I say, smarter than a lot of the judges."

Bertocchi says that Judge Posner, meanwhile, is thought of by many as the archetype of an apolitical judge.

"Even among his critics, it's been a long time since I've heard anyone who knows what they're talking about consider him as a Reagan appointee," Bertocchi says. "Why he goes where he goes is something you could debate, but I don't think anyone could say it's because he was appointed by a Republican."

Judge Posner appears content to finish out his career on the Seventh Circuit, and while he's done a careful economic analysis of his own prospects and determined that while he would be financially better off if he took senior status or retired, he says he enjoys his work too much to slow down.

"I'm paying to work, which is fine, because I wouldn't do it if I didn't enjoy the work," he says. "I would hope I would notice if I were starting to lose my marbles, or my wife would point it out, and then I'd quit."

"It's a danger for all of us, staying past our sell-by date," he adds. "But I don't think I'm there yet."

In Chambers is a weekly feature presenting in-depth profiles of the nation's leading state, federal and appellate judges.

--Editing by Kat Laskowski.

All Content © 2003-2015, Portfolio Media, Inc.