

Judges Are People, Too: Getting To Know Your Judge By Doing A Judge Study

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Introduction

A few years ago, an attorney for whom I had prepared a judge study sent me a T-shirt that read, "A Good Lawyer Knows The Law, A Great Lawyer Knows The Judge." While the T-shirt was surely tongue-in-cheek and was meant to suggest something underhanded on the part of the "great lawyer," judge studies are actually nothing more than a systematic data-based attempt to get to know your judge as you prepare to step into the well of the courtroom. Judge studies are useful in advance of any sort of oral or written argument that will be considered by a judge, including bench or jury trials, *Daubert* hearings, class certifications, summary judgment arguments and Markman hearings.

Trial strategy consultants have long studied jurors in preparation for trial. Surveys, focus groups and mock trials have become standard parts of trial preparation in many cases. And, although attorneys surely think about their judges as they prepare their cases for trial, these thoughts may be based more on casual observation or courtroom watercooler chats than on systematic study.

Particularly in the post-Internet age, getting access to information about your judge is quite easy. Judge's decisions have long been available. They are now supplemented by media coverage of

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judges' speeches or other public activities. Those with training in psychology can interpret this information in ways that can be useful to you during your opening and closing arguments, when you examine witnesses, and when you prepare demonstrative exhibits. Furthermore, experienced trial strategy consultants have many more opportunities to observe judges in action since they tend to be on trial most of the time.

Psychology is the study of human behavior, and while each one of us is unique, it is still the case that there are certain commonalities to human experience. All of us tend to gravitate to those areas of thought where we feel most competent and most comfortable. Judges are people, too. For judges with little background in technology who are asked to try complex technology cases, added attention to the fundamentals and to the vocabulary of that technology will be

important. A judge with a strong technology background will not need this sort of extra help. Knowing in advance whether or not your judge is schooled in a certain area or is conversant with particular concepts can help to streamline and make strategic your trial preparation.

Not only do judges know (or not know) certain things, but judges also evince different decisional styles that can be useful to know in advance and addressed at trial. Some judges pay great attention to both sides of an issue even when writing their decisions (when their minds are made up). Other judges seem to begin and end on one side of an issue. For some judges, the deliberative process, the weighing of one idea against another in order to reach a resolution, is inherent to their decision making. For other judges, a single-minded focus is revealed in how they reach their rulings. Some judges' decisions are so apparently even-handed that it is hard to know, until the very end, how they have ruled. Other judges' decisions are so solidly one-sided that they read as if they were one party's briefs.

The purpose of a judge study, then, is to gain a better, more specific understanding of a judge's background, nature and proclivities and thereby to improve the likelihood that the judge will be persuaded by your arguments. Judge studies review the data gathered from observations, decisions and the media, and feature recommendations for trial strategy. While some may feel that it is unseemly to study your judge and that justice is and ought to be blind, effective lawyering is, in large measure, good teaching. Just as a teacher would not walk into a classroom without knowing the grade level and background preparation of his or her students, lawyers' preparation should rightly include attention to the background of the judge.

Please email the author at jblackman@doar.com with questions about this article.

A Sample Judge Study

Here is a sample excerpt from one of our judge studies, prepared in a patent matter. I have changed the judge's name and some key facts so that confidential information is not revealed:

Judge Kingsford appears to be a man of real emotional depth who reacts to issues in a very specific way. He is not a "blanket" decider, where once he has leaned in one direction, it is as if the rest of his opinions are pre-ordained. Instead, he rules issue by issue and, to some extent, person by person. This decision-making style bespeaks a high level of cognitive flexibility and intelligence. Only when he believes that lawyers or witnesses are running self-serving strategies that lack merit and credibility does he appear to harden against the ideas they put forward.

He is also a "no-nonsense" sort of judge. He follows the rules closely and expects others to do so as well. His opinions are highly efficient; he rules on those issues that require decisions and declines to opine on those he does not deem necessary.

In reading Judge Kingsford's decisions and the transcripts of a hearing in the instant case, we have been struck by what appear to be two very different tones in his decisions. Most of the time, his tone is moderate and even-handed. He does not take moral positions on the parties' business behaviors; even when he discussed willful infringement in one case, his tone was notably lacking in moral rebuke.

In other decisions, though, Judge Kingsford sometimes came across as harsh. He expressed irritation when parties made arguments based on alternative claim constructions after he had already construed the claims. He described in scathing terms an expert report that did not include an appropriate validity analysis.

The distinction between the mild-mannered Judge Kingsford and the angry, harsh Judge Kingsford appears to follow from his view of the difference between the competitive business environment and the hallowed courtroom. Business is business, and he seems to accept this, until the world of business is viewed under the bright lights of the courtroom. Strategic lawyering or testimony designed to advance business interests over a respect for the law is anathema to

this judge. Simply put, Judge Kingsford has very strong feelings about the rightness or – especially – the wrongness of how parties act before the court. If they do not do their homework, if they do not respect his rulings, if they waste his time, or if they are less than honest with him, he gets angry, and he lets the parties know it.

Below are our more detailed observations on Judge Kingsford's thinking and decision-making styles, along with our recommendations for working in his courtroom:

Detailed Observations And Recommendations

1. Judge Kingsford is a very systematic thinker and writer. He states his opinions up front and then methodically explains the reasoning behind them. His writing is efficient; there is no redundancy.

Recommendation: In all written materials to him, make your writing tight and focused. Tell him up front what you are asking for, and then explain why. Try to parallel his style – well organized and efficient. He is not likely to value creativity; just be as straightforward and systematic as you can. Do not make arguments that he may perceive as unnecessary. He is likely to value quality of arguments over quantity.

2. He appears to be flexibly non-partisan in his thinking; he does not generally see "good guys" and "bad guys." Instead, he evaluates each question before him on its merits, and rules on each individually. His decisions are often split, favoring one party on some issues and the second on others. He is also able to see the merits of both sides of the case. Often in pre-trial hearings he ruled for both parties – neither party prevailed all the time.

Recommendation: Be prepared to convince him of your position on each and every one of your arguments. Appeals to the moral superiority of your case are not likely to sway him; he will look more for strong legal bases for your positions.

3. He is smart and able to grasp complex technological concepts. His high intelligence and comprehension are matched by a great appreciation for logic and common sense. He uses analogies and colloquial language effectively in his decisions.

Recommendation: Appeal to Judge Kingsford's belief that things that make sense are right. Show not just the legal correctness of your positions, but also their inherent logic and good sense. If you can come up with good analogies that show the logic of your positions, use them. Also, he likes colloquial phrases, like "go for the gold," or "time's a wastin'." Phrases like these may be useful in gaining Judge Kingsford's attention and approval.

4. He tends to rule on the narrowest possible questions, and he only does so when it is absolutely required. When presented with multiple questions, he will work hard to identify the one or two that he perceives as dispositive, and is likely not to decide the others. On pretrial issues, he will demur rather than decide issues that he thinks can be resolved by the parties in "meet-and-confer" conversations.

Recommendation: Match your style to his. Identify for him what questions require his initial focus. Make them as narrow as you can without compromising your position. Resolve as much as you can without his involvement, and let him know you have done this.

5. He does not pull his punches. Even when he does not appear to be angry, he calls things as he sees them. In one hearing, he suggested that he would hire a neutral technical expert to help him decide whether or not two technologies were similar. Then, he said that whoever was shown to be wrong and therefore *unreasonable* would pay for the expert and the other side's time to deal with this question.

Recommendation: Be as judicious as possible about the battles you pick. Stand your ground when you must, and allow disputes to be easily resolved when you can. Reasonableness is a particularly strong indicator of credibility for this judge.

Conclusion

Studies like these can enhance attorneys' preparation for any sort of hearing or trial over which a judge presides. Applying the results of judge studies enables attorneys to create a more personalized intellectual context for the development of persuasive themes and related strategic arguments. Trial consultants with training in psychology can help you to carry out and to implement a systematic study of your judge.