

# Judicial Discretion

## “What to do, what to do....”

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# Judicial Discretion

- What is it?
  - The power of the **judiciary** to make some legal decisions according to their **discretion**.
  - Under the doctrine of the separation of powers, the ability of judges to exercise **discretion** is an aspect of **judicial** independence.



# Judicial Discretion

- What is it?
  - The act of making a choice in the absence of a fixed rule (i.e statute, case, regulation).
  - The choice between two or more legally valid solutions; (a choice not made arbitrarily or capriciously).
  - A choice made with regard to what is fair and equitable under the circumstances and the law.



# Judicial Discretion

- What it is *not*...
  - A choice made arbitrarily or capriciously;
  - A license for a judge to merely act as he or she chooses.



# Purpose

- Judicial discretion is necessary to the proper discharge of our Constitutional obligations as a separate – and independent – branch of government.
- Legislatures simply cannot write laws to address all situations which find their way into court
- A judge must have some discretion to apply the law to the facts and procedure of the pending dispute.



# Evolution

## Judicial discretion as a concept has evolved

- 1680

*“The discretion of a judge is said to be the law of tyrants, it is always unknown; it is different in different men; it is casual and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable.”*

*Lord Camden*



- 1800 American jurisprudence

*“Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”*

*Chief Justice John Marshall*



# Opportunity for Individuality

- No two judges will think alike, “reasonable minds can differ”
  - Discretion is not exercised in a vacuum.
  - What may impact a judge’s “choice” or decision?





# Appellate Review

## “Abuse of discretion”

- Most deferential standard of review on appeal
- Appellate Court will ask:
  - Did the trial judge misunderstand or misapply the law?
  - Is the decision clearly unreasonable, arbitrary or irrational?
  - Is the decision based on an erroneous finding or conclusion of law?
  - Is the decision clearly untenable and did it unfairly deprive a litigant of a substantial right and just result?
  - Does the reviewing court have a firm and definite conviction from the record that the trial court erred?





# Ten Guidelines for making discretionary decisions



# 1. Establish the record

- *Are the relevant and necessary facts on the record?*
- *Are my findings based only on the evidence presented?*
- *Am I properly weighing the credibility and demeanor of witnesses and evidence?*
  - List the facts and law supporting your reasoning and logic



## 2. Apply the correct law

- *Is the law clear or is it unsettled?*
- *Are there alternative rulings that could be made under the law?*
- *Do I know that I have all of the (appropriate) law in front of me?*
  - Ask counsel to brief the issues.



### 3. Consider different ways to exercise your discretion

Act quickly and decisively

**OR**

Take all of the evidence and law  
under advisement

- Every case is different



## 4. Consider doing nothing

- There are times that careful consideration of the issues leads one to conclude that the best course of action is no action.

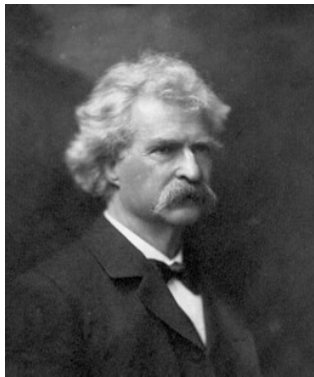
*“Not to decide is to decide”*

*Dr. Harvey Cox*



## 5. Consider the equities of the situation

- *Is it fair?*
- *Is it the right thing to do?*
  - Let your fairness show on the record –
  - Give each side an opportunity to present their position.



*“Always do right. You will confuse some people and astonish the rest.”*

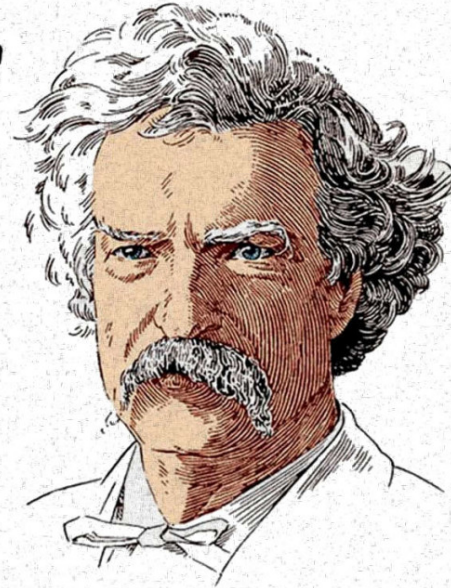
*Mark Twain*



## 5. Consider the equities of the situation

Never argue with stupid people,  
because they will drag you down  
to their level and then beat you  
with experience.

~ Mark Twain



Truth Inside Of You



## 6. Consider the results of your decision

- *Will this decision foster justice being done?*
- *Could this lead to irreparable harm which could have been avoided by choosing another course or action?*

*“For every action there is an equal and opposite reaction.”*

*Sir Isaac Newton*



## 7. Take time to think over any decision

- The case cannot proceed without you.
  - Take time to step off the bench to ponder a decision or discuss it with a clerk or colleague.
- Be wary of decisions you are asked to make late in the day or on short notice.
- Most decisions can wait until the next day.

### Funny Work Quotes

Thinking is the hardest work anyone can do, which is probably the reason why we have so few thinkers.

Thomas Monson



## 8. Clearly and logically explain your decision

- Explanation can be written or oral.
- Make sure the rationale and terms of the decision are understandable for anyone who reads it.
- Helps make enforcement of the decision easier.



## 9. Do not unnecessarily look back

- It is natural to agonize over a decision while considering it.
- Reflect on past decisions – but...
- After you make a decision, move on... focus on the next decision you will have to make.



# 10. Do not make a decision just because you can

- See Tips 1 – 9
- The power of the robe should not be taken lightly or used arbitrarily



# Final Thoughts

## Pros

- The judicious use of judicial discretion can increase fairness and help promote an equitable process.
- Not a one size fits all solution.
- Situational considerations must be applied.



# Final Thoughts

## Cons

- Situational considerations subjective.
- Misuse can adversely impact court's authority and reputation.
- When exceeded may lead to gross injustice and loss of faith in court system.



# Final Thoughts

If you think a higher court would say this about your decision:

“When it is clear to the appellate court that what was perceived by the trial court as common experience is really no more than the operation of a common prejudice, not borne out in reason, the trial court has abused its discretion.” *Montgomery v. State*, 810 S.W.2d 272, 291 (Tex. Crim. App. 1990) (op’n on rehearing).

Reconsider!

