

4 Lessons Judge Richard Posner Left for In-house Lawyers

Career Development



Banner artwork by Consuelo de Luna / *Shutterstock.com*

On Nov. 10, Judge Richard Posner died. Every lawyer knows who he was, what impact he left. You can read the *New York Times*' obituary if you need a refresher. Or if you want a deeper dive, William Domnarski's 2016 biography traces Posner's life from preschool prodigy to Yale English major to Seventh Circuit judge, with lots of enjoyable anecdotes along the way.



Judge Richard Posner at Harvard University in 2009

Any bio, however short, talks about the judge's prolific output. Posner wrote dozens of books, published hundreds of articles and essays, issued thousands of opinions. He boasts more citations — by a country mile — than any other legal writer.

That volume is matched by its variety. Besides Posner's well-known work on law and economics, the judge wrote incisively on democracy, sex, old age, plagiarism, nuclear war — you name it.

But despite his wide-ranging writerly interests, Posner never wrote about in-house lawyering. (As far as I can tell; one can't be sure given his massive oeuvre.) His lack of engagement with the subject isn't too surprising. Posner held many legal roles: Supreme Court clerk, federal government attorney, academic, and of course judge. But counseling WidgetCorp on its day-to-day problems wasn't one of them.

Even so, Posner would've found himself right at home at WidgetCorp. So many themes that Posner touched on in his writings can't help but resonate with in-house lawyers.

Here, see what I mean.

1. Be pragmatic

Posner wrote frequently on jurisprudence and judging. Throughout these writings he advocated a "pragmatic" judicial approach: judges should consider the consequences of their decisions, not just deduce answers from theories, statutes, and case law.

Posner opposed pragmatism to legalism, the idea that "the law" consists of "a set of propositions written down in a book," and lawyering "simply of learning how to find the correct place in the book." A sensible legal interpretation has sensible results.

In-house lawyers understand that implicitly. Sure, we'll look to statutes and case law as needed. But ultimately our business clients want legal guidance that lands them in the right place. A well-researched, doctrinally sound analysis of a contract claim won't answer the question, "should we sue?" In figuring that out, in-house counsel have to look beyond the law alone and weigh the action's consequences — how much a lawsuit will cost, how long it will take, whether suing will hurt our reputation, etc.

"The world of theory," Posner wrote in his 2001 book *Public Intellectuals*, "operates without friction." In-house lawyers don't live in that frictionless world. They must, in short, be pragmatists.

2. Write like you speak

Posner, an English major in college, peppered his books and opinions with literary references. And not surprisingly, writing itself — particularly writing in judicial opinions — remained a regular focus of his works.

Posner decried the stodgy, jargon-laden language often employed by judges, with its "lofty, formal, imperious, impersonal, 'refined'" tone. Instead he championed a "direct, forthright… colloquial, informal" style. In his 2016 book Divergent Paths: The Academy and the Judiciary, for instance, he exhorted judges to "[e]mphasize the essential simplicity of law, concealed by lawyers' delight in jargon and doctrinal complexity."

Amen to that. Internal clients don't want lawyer lingo, Latinisms, herewiths or heretofores. Their inboxes overflow with hundreds of emails a day; good luck getting them to read your memo on the parol evidence rule. And while you may not sit on the bench, you can still follow Posner's advice: give your readers guidance in succinct, easy-to-understand language.

3. Grapple with facts

Any discussion of Posner's legal contributions will mention his work on law and economics. Posner applied economic thinking and analyses to legal subjects that didn't exactly scream economics — drugs, divorce, terrorism, adoption. It sometimes made for, um, a tough read.

His economic work reflected a general empirical bent, a willingness to engage with technical fields that most lawyers shy away from. Both inside and outside of his decisions, Posner preferred to grapple with real-world facts, not abstract concepts. Judges who failed to do so, he carped in his 2013 *Reflections on Judging*, may be able to "puzzle out a legal doctrine"; but "without understanding the activity to which the doctrine is to be applied [they] can't produce reliable reality-based decisions."

Within a company, reality-based decisions are the only decisions that leaders want to make. And so in-house counsel must deeply understand their company's business, even the parts that lawyers don't naturally cotton to. The stale quip — "I became a lawyer because I didn't like math" — may evoke a forced chuckle inside your department. But what businessperson wants a big-ticket deal handled by someone averse to basic arithmetic?

In *Mitchell v. JCG Indus., Inc.* (7th Cir. 2014) — a case where workers' time spent changing in and out of protective gear was at issue — Judge Posner had his law clerks don and doff the gear. He wanted to see firsthand how long the wardrobe switch took. In-house counsel needn't swap their outfit to advise clients. But they should similarly strive for a hands-on sense of their business.

4. Embrace technology

According to William Domnarski's 2016 biography of the judge, Posner taught himself to type at age twelve. The middle-schooler had realized it would be more efficient than writing school papers in longhand.

It was a sign of things to come. Throughout his career Posner continued to embrace technology in his work. Along with the late economist Gary Becker, he was an early contributor to the legal blogosphere. In *Rowe v. Gibson* (7th Cir. 2015) he drew on his own web research for background information relevant to the case. He advocated for televising and recording oral arguments.

And all that before AI! Today's in-house lawyers enjoy more opportunities than ever to integrate tech into their practice. See the recent ACC Corporate Counsel Now article "5 Ways In-house Legal Departments Are Using AI" if you need some ideas.

"The dominant methodology of law," Posner wrote in *Reflections on Judging*, "has changed little since A.D. 534, when the Code of Justinian was completed. No profession has changed less in the last 1,478 years than the law, unless it's the clerical profession."

In-house counsel today can help bring the trade to the modern age.

A guide worth keeping

Throughout his long career Posner also faced his share of critics — for coldly applying market theory to sensitive subjects like adoption, for conducting his own internet research for his opinions, for lambasting sitting Supreme Court justices. The words "iconoclast" and "controversial" often dogged him.

Whether those criticisms are fair or not, Posner's impact on the law was indisputable. And while he never worked in-house himself, his works offer an inexhaustible source of guidance for in-house counsel everywhere.

Join ACC for more insights!

Disclaimer: The information in any resource in this website should not be construed as legal advice or as a legal opinion on specific facts, and should not be considered representing the views of its authors, its authors' employers, its sponsors, and/or ACC. These resources are not intended as a definitive statement on the subject addressed. Rather, they are intended to serve as a tool providing practical guidance and references for the busy in-house practitioner and other readers.

Christopher Wlach



Senior Director, Legal

Acxiom

Chris Wlach is the senior director, legal of Acxiom. Before moving in-house he focused on complex commercial litigation at Arnold & Porter. He is a certified information privacy professional (CIPP/US) through the International Association of Privacy Professionals. He also chairs the board of HEART, a humane education nonprofit.