

# The Ideal and the Real in the Realm of Judicial Procedure

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No system defining proper human behavior is ideal or perfect, and humans can not be required to live up to ideal expectations. This is as true for the legal and judicial system as for any other system. Rules of proper procedure in litigation can be defined to such a detailed level that no real event can be conducted that meets them all. It is just a fact: rules of procedure defined in extreme detail may be “correct” in the ideal sense but virtually impossible to satisfy in real life. To demand this ideal level of conformity is to end up paralyzing the system.

At one extreme, infractions of general rules of procedure should never be tolerated. But at the other extreme, insisting that the ideal – every designated and potentially implied requirement – be met that can be extrapolated from the general goals of procedure is unrealistic and ultimately makes the situation so complicated that reaching the overall goals in real judicial events are put in jeopardy. It is entirely possible to “win” in legal contests at the theoretical or ideal level [usually on appeal] over what constitutes legitimate legal procedure while ignoring the fact that the realistic general goals of procedure have been adequately met in all respects. In short, the excessive pursuit of the procedural ideal risks having the effect of obstructing justice.

It is not a perfect world – in any sense, including the judicial sphere. We can strive for a reasonable approximation of the ideal, but always with the recognition that we can never expect to achieve it. “Close” is about as good as it gets in every human endeavor. The real questions to be asked in assessing any legal proceeding are: 1) “Has a good faith effort been made by all participants to abide by a commitment to procedure that is fair to all parties?” Or, 2) “Have serious procedural mistakes been made by one party and/or another that really have the potential to make a significant difference in the outcome?” Or, 3) “Are minute procedural challenges being repeatedly made or claimed [ie. technicalities] that make it impossible either to make reasonable progress in a legal proceeding or to uphold what is otherwise a reasonable judicial determination?” Loophole hunting is as problematic in challenging judicial procedure as it is in seeking to avoid the intent and spirit of the law by considering only the letter of the law.

There are many ways for humans to go wrong. Most of the time failure is the result of pursuing excessive personal, corporate, or national “self” interest. But, it is also possible to fail by expecting or requiring perfection at any scale.