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WHEN TRIAL JUDGES INTRUDE ON TRIALS BY CALLING AND QUESTIONING WITNESSES

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October 17th, 2022

INTRODUCTION

In our adversary system of criminal justice, prosecutors and defense attorneys are expected to advocate zealously for their desired outcomes and trial judges should preside over the proceedings as neutral and detached determiners of the substantive, procedural and evidentiary issues in the case.

When everyone stays in their designated lanes, cases can be properly decided on the law and the facts and the public can have confidence that the system is working as it is supposed to, whatever the outcome.

It is axiomatic, then, as stated in *People v Martinez* (201 AD3d 658 [2nd Dept 2022]) that every defendant (and the People} "has a right to a fair and impartial trial before an unbiased court."

To say that a judge should be neutral and "detached" is not to suggest that he/she should be disengaged. As the Court of Appeals observed in *People v Mendes* (3 NY2d 120 [1957]), a judge may (indeed should) take an active part in the proceedings to "clarify issues that need clarifying and facilitate the orderly and expeditious progress of the trial," but it must REFRAIN from conducting itself in a manner (e.g. expressing opinions about the case or counsel's performance, appearing to take a side) that could unfairly influence the jury's determination.

And, as noted in *People v Moulton* (43 NY2d 944 [1978]), "the role of the trial judge is not merely that of an observer or …even a referee enforcing the rules of the game. In fulfillment of its broader obligation to ensure the defendant a fair trial, a court is not without power, TO BE EXCERCISED WITH JUDICIOUS RESTRAINT, to KEEP THE PROCEEDINGS WITHIN THE REASONABLE CONFINES OF THE ISSUES, AND TO ENCOURAGE CLARITY RATHER THAN OBSCURITY IN THE DEVELOPMENT OF THE PROOF (citing *People v DeJesus*, 42 NY2d 519 [1977]), *People v Knapper*, 230 AD 457 [1930])(emphasis supplied).

THEY GOT THE POWER

To be sure, judges wield tremendous power (i.e. discretion) over every aspect of the trial process from motions in limine (e.g., whether to admit evidence of prior convictions), to jury selection (setting time limits on counsel's voir dire), to evidentiary rulings, to motions for a trial order of dismissal, submission of lesser included offenses to the substance of the jury instructions. They may admit evidence conditionally (i.e., subject to connection) or shuffle the usual order of evidence presentation to accommodate practical realities. The only limitation is that they should not abuse their broad discretion.

While judges may vary in their level of engagement and participation in a trial, lawyers may wonder whether judges can ask questions of witnesses or even call a witness whom both sides declined (or neglected) to put on the stand. The short answer is that under limited circumstances, THEY CAN DO BOTH. This can be problematic when the judge harbors an agenda other than helping ensure a fair and just outcome based on the evidence.

THE VERDICT

A not-so-subtle example of biased judicial intrusion into (if not outright usurpation) of counsel's role can be seen in the 1982 classic film, The Verdict, in which Paul Newman, a boozed-up, down-and-out lawyer, is handed a medical malpractice case against two prominent doctors and a diocesan hospital after a young mother-to-be suffered irreversible brain damage during childbirth from protracted deprivation of oxygen. (The issue was whether the doctors administered anesthesia too soon after her last meal thus causing her to suffocate on her vomit).

When the plaintiff's expert testified that the plaintiff's brain damage and cardiac arrest were caused by at least nine minutes of oxygen deprivation (contrary to the doctor's claim that it was only three minutes) the judge butted in and pointedly asked,' are you saying that the failure to restore the heart within nine minutes, in and of itself, constituted bad medical practice?

Plaintiff's counsel asked that he be allowed to question his witness in his own way, but the judge insisted that he was just trying to get to the point and chided counsel for wasting the jury's time. He then got the witness to admit that the nine-minute time lapse, in and of itself, did not constitute negligence. Satisfied, the judge punctuated the response by declaring, "SO THE DOCTORS WERE NOT NEGLIGENT."

Counsel approached the bench and exclaimed, "YOUR HONOR, WITH ALL DUE RESPECT, IF YOU'RE GONNA TRY MY CASE, I WISH YOU WOULDN'T LOSE IT."

While most judges refrain from such heavy-handed interruptions and play it straight, it is worthy remembering that many of them are former prosecutors who have not fully shed those stripes. Not unexpectedly, their sensibilities tend to favor law enforcement and victims, and knowledge of a defendant's criminal past or of damning evidence that may have been suppressed might inform their perception of what constitutes justice in each case.

SO HOW FAR CAN THEY GO WITH WITNESSES?

New York Advisory Evidence Rule 1.09(2) states that a trial judge may, IN LIMITED CIRCUMSTANCES, examine witnesses, WHEN NECESSARY, for example, to clarify unclear answers from a witness with language difficulty, or to ensure that a proper foundation is made for the admission of evidence, or WITHOUT ASSUMING THE ROLE OF AN ADVOCATE to ELICIT SIGNIFICANT FACTS, CLARIFY OR ENLIGHTEN AN ISSUE OR FAILITATE THE ORDERLY AND EXPEDITIOUS PROGRESS OF THE TRIAL.

While either side may object to the court's questioning (especially when it is unhelpful or harmful), counsel may find him/herself in the awkward and unenviable position of calling out (and ticking off) the judge in front of the jury. Nevertheless, if the judge's questions go too far, counsel should first ask to be heard OUTSIDE the jury's presence and MAKE A RECORD which spells out the basis for the objection. If the judge persists, counsel must stand his/her ground and continue to object.

In *People v Yut Wai Tom* (53 NY2d 44 [1981], defense counsel found himself up against a trial judge who not only bolstered the People's witnesses with questions that filled in gaps in the proof in this murder trial (where identity was the issue), but repeatedly interrupted the cross examination with questions that would arguably have been proper on redirect examination by the prosecution.

For example, the court: gratuitously elicited testimony of a prior identification of the defendant, had the witness explain prior inconsistencies in testimony, brought out an eyewitness' familiarity with and ability to recognize Asian people, elicited consistent details from multiple prosecution witness and diffused counsel's cross examination with numerous interrupting questions.

When defense counsel, not unlike plaintiff's counsel in The Verdict, accused the judge of taking on the role of a de facto prosecutor, the judge overruled the objection and kept on going. When counsel requested a side bar conference, the court held him in contempt and directed that any objections he made be in front of the jury.

The Court of Appeals concluded that the judge deprived the defendant of a fair trial by taking over the proceedings as a second prosecutor rather than presiding in a fair and impartial manner (citing, inter alia, *People v Mees*, 47 NY2d 99 [1979]).

Noting that a trial judge must strike a balance between safeguarding the rights of the accused and the public's interest in the administration of justice, the court observed that while the court may properly intervene and ask clarifying questions, it cannot cross the line of neutrality and appear to be trying the case for one side or the other.

As the Court observed, "a trial judge's examination of witnesses carries…SO MANY RISKS OF UNFAIRNESS THAT IT SHOULD BE A RARE INSTANCE when the court (rather than counsel) examines a witness (citing, inter alia, *People v Moulton*, 43 NY2d 944 [1978], People v DeJesus, 42 NY2d519 [1977])(emphasis supplied).

Those risks include the jury's attaching too much weight to the court's questions, counsel's reluctance to object, and the judge conveying an opinion about the case by the content, tone, and tenor of his/her questions. All of which may confer an unfair advantage to one side over the other.

As the Court noted, "the risk of unfairness…is so great that the judge should RARELY IF EVER INDULGE IN EXTENDED QUESTIONING of witnesses for either side" (*Yut Wai Tom*, at 58)(emphasis supplied). The bottom line, in the Court's view, is that a trial judge should PROTECT THE RECORD, NOT MAKE IT. In this case, the judge's questioning was deemed to be so qualitatively and quantitatively (1300 questions in total) unfair as to deprive the defendant of any hope of a fair trial.

In contrast, see *People v Jamison* (47 NY2d 882 [1979]), where the Court held the trial court's questioning of witnesses were infrequent, even handed and clearly intended to help the jury understand the legal and factual issues presented. Neither side was singled out for special treatment nor did the court reveal any hostility toward the defendant.

KEEP YOUR OPINIONS TO YOURSELF

While judges may ask questions of witnesses, they should refrain from expressing disbelief, whether expressly or by conduct, of the testimony. Such was the case in *People v Mendes* (3 NY2d 120 [1957]) where the judge's rhetorical questions of witnesses clearly revealed his incredulity, thus undermining

the defendant's case and depriving him of a fair trial. In the Court's view, there was just too great a risk that the jury adopted the court's position as its own (citing *People v Knapper*, 230 AD 487 [1st Dept 1930]).

The dissenting judge (Hon. Charles S. Desmond) argued that while the trial judge asked probing questions of the witnesses, they did not go so far as to deprive the defendant of a fair trial.

TRIAL COURT TAKES ON DEFENSE EXPERT

In *People v Martinez* (201 AD3d 658 [2nd Dept 2022]), the defendant asserted the affirmative defense of Extreme Emotional Disturbance (EED) to a Murder 2nd degree charge for shooting a man who had assaulted the defendant's wife. While he recounted certain details of the events (argument between the wife and the victim's girlfriend) leading up to the shooting in an apartment hallway, the defendant claimed that he blacked out and did not recall the shooting.

The defendant called an expert in support of EED, but the court interrupted with questions that challenged the witness' credentials and methodology (e.g., failure to interview others besides the defendant, highlighting inconsistencies between the defendant's prior statements and posing hypothetical questions implying that the defendant was a "cold-blooded killer.")

While the Second Department condemned the court's confrontational questions, it determined that any error was harmless in view of the overwhelming evidence of guilt and what it perceived to be flimsy evidence of EED.

The dissenting justice took the position that the trial court's repeated interruptions of the defense's direct exam with impeaching questions and inflammatory inferences, seriously undermined the defendant's case and deprived him of a fair trial. In the dissenter's view, that right is too fundamental to be subject to harmless error analysis (citing *People v Nelson*, [27 NY3d 361 [2016]).

As the dissenter observed, "it is hard to conceive a more fundamental deprivation of a defendant's right to a fair trial than a judge flagrantly and repeatedly intervening in the questioning of witnesses in a manner that conveys the appearance of SERVING AS AN ADVOCATE for the People" (citing *People v Chatman*, 14 AD3d 620 [2nd Dept 2005])(emphasis supplied).

DON'T DEMEAN DEFENSE COUNSEL

While a few attorneys have a special knack for getting under a judge's skin, judges should not (unless counsel goes overboard and invites a beat down) denigrate counsel in front of the jury lest they hold counsel's conduct against his/her client. In *People v DeJesus* (42 NY2d 519 [1977]), the trial court in this robbery case clearly could not contain its hostility toward defense counsel.

By turns, the court levelled a barrage of verbal salvos including: "you know your questions are inaccurate," "stop playing games," "you're leading to beat the band," "I don't need any help from you," "I've never seen some of the things that you do," and "I can't understand your tactics."

In the Court of Appeal's view, counsel's conduct did not warrant such disrespectful treatment which not only served as a distraction but created an undue risk of unfair prejudice (citing, inter alia, *People v Alicea*, 37 NY2d 60 [1975]). The Court stressed that a judge must be "SCRUPULOUSLY FREE FROM AND ABOVE EVEN THE APPEARANCE OF …PARTIALITY" (citing *People v Hommel*, 41 NY2d 427

[1977])(emphasis supplied). And, citing *People v Bell* (38 NY2d 116 [1975], the Court added that "care must be taken to guard against the possibility that a stated (or even suggested) opinion of a trial court might be seized upon by the jury and eventually prove decisive."

JUDGES CALLING WITNESES

Though not entirely unheard of, a court' calling of witnesses to testify is (and should be) a rare occurrence. In other words, the court's ability to assume an active role in the truth-finding process (*People v Moulton*, supra) should be tempered by the realization that interfering with the parties' decisions with respect to what evidence to present can create the impression that counsel is hiding something or that the witness called by the court must have important information to provide. Such intrusions into the advocates realm, therefore, should be few and far between.

ADVISORY EVIDENCE RULE 1.09 (1)

This rule provides that as long as the court does NOT assume the role of an advocate, it MAY, in UNUSUAL CIRCUMSTANCES WHEN IT IS COMPELLED TO DO SO, CALL AND EXAMINE WITNESSES ON ITS OWN.

Before doing so, the court MUST (1) ON THE RECORD: EXPLAIN ITS REASONS for calling the witness, (2) AFFORD THE PARTIES AN OPPORTUNITY TO BE HEARD OUTSIDE THE PRESENCE OF THE JURY, and (3) PERMIT THE PARTIES TO CROSS EXAMINE THE WITNESS.

In *People v Arnold* (98 NY2d 63 [2002]), at the close of proof, the trial court called a witness, (an emergency services officer [ESO] who cuffed the defendant at the scene in this drug and gun possession bench trial) to determine whether the ESO also searched the defendant and found heroin and a handgun on his person.

The defendant testified that the ESO did search him after cuffing him and found nothing on his person. He claimed that he first became aware of the heroin and gun when a narcotics officer who had entered his friend's apartment only after the ESU secured it, informed him in the patrol car that contraband was found in the living room.

The People called two narcotics officers neither of whom were present in the room when the ESO went in and cuffed the defendant. They testified that sometimes ESO's search their detainees and sometimes they do not. When called by the court, the ESO agreed with the officers but could not specifically recall whether he had searched the defendant.

In reversing the defendant's conviction, the Court held that the trial judge failed to explain on the record why it was calling the ESO, nor did it give either side an opportunity to be heard before doing so. Moreover, even though this additional testimony was ambiguous, it still, in the Court's estimation, tended to discredit the defendant's position on a key issue in the case because it corroborated the officers' testimony (that it was not unusual for ESO's to search detainees before turning them over to the arresting officers.

As the Court saw it, deciding what evidence to present at a trial is a matter that should be left, except in rare cases, to the attorneys and not the court.

FINAL THOUGHT

Most lawyers probably cringe when a trial judge who may be enamored by the sound of his /her own voice, butts in and takes over a trial with questions that may confuse rather than clarify matters, neutralize counsel's case, or reveal a prejudice against the defendant or his/her theory of defense. When that happens, counsel, regardless of his/her level of experience, should NOT allow him/herself to be steamrolled by an overbearing judge.

Instead, he/she must firmly but respectfully object and asked to be heard outside the jury's presence so that a proper record can be made. If the court persists, counsel should continue to push back rather than capitulate. If counsel is in the right and exhibits competence and professionalism, and the jury sees the court as unreasonable or biased, the court' tactics could backfire and inure to counsel's benefit.

As in the conclusion of the Verdict when the foreperson, before announcing the jury's verdict, asked the judge, "are we limited to the amount demanded in the compliant?"

All things considered., unless the circumstances compel judicial intervention, trial judges do well to heed the advice written on a coffee cup that former Administrative Judge, Hon. Vincent E. Doyle kept in front of him on the bench: "JUST SHUT UP."