Dealing With Difficult Judges: What They Don't Teach You In Law School

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Trial judges who exceed the bounds of discretion, ignore positive law or disregard their jurisdictional limits during trial, a/k/a "difficult judges", challenge any lawyer, regardless of experience. These are the type of errors that all lawyers in the court room, regardless of whom they represent, will find surprising and shocking.

Most of the problems, and therefore reported case law, arise in the context of jury trials, presumably because of the concern that such conduct can taint the jury's perspective.

When confronting this type of error, counsel should keep in mind the extent to which the record reflects the severity of the conduct. In these types of situations, preserving the record is likely the best course. Depending on the situation, counsel should also consider whether the facts will support mandamus and/or recusal options. The following discussion primarily relies on federal law.

I. OPTIONS AND STANDARDS

A. Recusal/Disqualification

1. Under 28 U.S.C. §455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

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2. 28 U.S.C. §455(b) mandates that a judge "shall also disqualify himself in the following circumstances:

   (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

   (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

   (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

   (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

   (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

      (i) Is a party to the proceeding, or an officer, director, or trustee of a party;

      (ii) Is acting as a lawyer in the proceeding;

      (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

      (iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

3. A party may file an affidavit alleging that a judge has a bias against him or in favor of another party. The judge in question must then take no further action in the matter, and another judge will be assigned to hear the proceeding. 28 U.S.C. § 144.

B. Mandamus

1. A party can seek a writ of mandamus in the appropriate appellate court under Federal Rule of Appellate Procedure 21. The appellate court has authority to grant writs
of mandamus pursuant to 28 U.S.C. § 1651. However, a court will not issue a writ of mandamus without "a strong showing of necessity for [its] use." Steward v. West, 449 F.2d 324 (5th Cir. 1971).

2. The party seeking the writ must submit a petition to the appellate court with proof of service on all parties in the trial court and provide a copy to the trial court judge. Fed. R. App. P. 21. "The petition must be titled 'In re [name of petitioner]'" and include a copy of any order or parts of the record essential to understanding the petition. Id. Further, "[t]he petition must state:

   (i) the relief sought;
   (ii) the issues presented;
   (iii) the facts necessary to understand the issue presented by the petition; and
   (iv) the reasons why the writ should issue." Id.

3. All parties to the matter in the district court are respondents in the petition. The court of appeal may order respondents to answer the petition or it may deny the petition without receiving an answer. Id. The court may order the district judge to respond to the petition, or the judge may request permission to respond, but the district judge may not respond to the petition without an order or invitation from the court of appeals. Id. Either way, the court of appeals must notify the district judge of the disposition. Id.

C. Reversal on Appeal

1. To appeal from a final judgment in federal court, a party must file a notice of appeal within 30 days of after the entry of the judgment. See Fed. R. app. P. 3-4.

2. In order to appeal from an interlocutory order in federal court, the judge must state in that order that "such order involves a controlling question of law as to which there
is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The party must then apply to the court of appeal within ten days of the entry of the order. The application for an appeal from an interlocutory order will not stay proceedings in the district court unless the district judge or court of appeals so orders. *Id.*

II. **PRACTICE TIPS IN THE HEAT OF BATTLE:**

A. **Seek a curative instruction**

1. **After objecting to a judge's negative comments, request a curative instruction in the presence of the jury.**

2. **A curative instruction may be poorly given, in which case you have successfully preserved the record and your objection has not been cured.** The Fifth Circuit in *U.S. v. Musgrave*, 444 F.2d 755 (5th Cir. 1971) found that certain jury instructions given by the trial judge placed the defendant in a bad light and created the appearance that the judge was advocating for the prosecution. In reversing and remanding, the court noted that "the prejudicial effect of the District Judge's comments reached the jury without the benefit of an instruction that a jury is not bound by the judge's questions or comments."

3. **Be careful what you ask for: a curative instruction may remedy the problem. But if you don't ask for it, you may not preserve the objection for appeal.** In *McMillan v. Castro*, 405 F.3d 405, 410 (6th Cir. 2005), the court denied relief, finding that the judge's curative instruction helped to remedy the "troubling" situation created by his repeated interrogation of the plaintiff and aggressive tone.

4. **Curative instructions may not always be granted, or even if granted, may not cure the problem.** If a curative instruction is requested and not granted, the
failure to provide a curative instruction can provide an additional ground for appeal. In *Whitenight v. International Patrol and Detective Agency, Inc.*, 483 So. 2d 473 (Fla. 3rd Dist. Ct. App. 1986), the appellate court reversed a jury's decision and remanded for new trial where the trial judge's comments, including calling the plaintiff's evidence ridiculous, compounded with an ineffective and confusing curative instruction prejudiced the plaintiff's case, warranting reversal.

**B. Managing Objections**

1. **In some cases, it may be that the judge's conduct is so egregious that the verdict may be reversed on appeal even in the absence of an express objection.** The District of Columbia Circuit found in *U.S. v. Wyatt*, 442 F.2d 858 (D.C. Cir. 1971) that a judge's extensive questioning of a criminal defendant created the impression that the judge doubted the defendant's veracity. While the government argued that defense counsel failed to object to the interrogation, the court held that "[t]he absence of an express objection does not remove the error which we find occurred in these proceedings."

2. **Always note your objection. If the judge will not let you make a record, say, "At a break, I would like to make an objection."** If the Judge will not allow a side-bar, state that you need to make a record at some other time. The Superior Court of New Jersey, Appellate Division, held that a judge's total ban on side bars in a jury trial "went over the line" and ordered recusal of the judge and a new trial. *Mercer v. Weyerhaeuser Co.*, 735 A. 2d 576, 591 (N.J. Super. Ct. App. Div. 1999).

3. **How do you preserve tone for the record?** Appellate courts do consider the tone of interruptions when considering whether the trial judge has overstepped his bounds and committed reversible error. *McMillan v. Castro*, 405 F.3d 405, 410 (6th Cir. 2005). While the Sixth Circuit called the court's tone and interrogation of the plaintiff "troubling," it did not
find grounds for reversal in *McMillan v. Castro*. The trial court's conduct in question included cutting the plaintiff's answers to his questions short, stating that he was asking "a simple question," questioning whether he and plaintiff were "speaking the same language," ending a line of questioning by saying "[t]hat's it? That's your case?," and suggesting that the plaintiff's attorney had keyed her in on an answer. *Id.* at 409.

4. **In some cases, tone may be clear from the transcript and from the effects it has on parties, counsel or jurors.** In *U.S. v. Rowe*, 106 F.3d 1226 (5th Cir. 1997), the defendant's conviction was reversed where the trial court's statements to the jury venire "cut off the vital flow of information from venire to court." After ordering one panel member who expressed possible bias to return for jury duty each month to "see if you can figure out how to put aside your personal opinions and do your duty to your country as a citizen," the judge asked whether anyone would be biased by a relationship with a law enforcement officer. The following exchange occurred between the panel member and the judge:

[The panel member] explained to the court: "I knew I was going to get myself into trouble when I said that, but, and I don't really know what I should say here, but I feel that ... if the law enforcement agency has done [enough work] on somebody to get them here in court, they know what they're talking about." Without calling the member of the venire to sidebar and in the presence of the entire panel, the court responded:

It is appalling, actually, that you would come into a court, and presume that people were guilty because they were standing here charged with a crime. That's not our system. And apparently you will not, or you cannot follow the instructions of the court, so you're excused. Put her back on the jury panel for February, March and April, and perhaps you can take [sic] some remedial constitutional inquiries in the meantime. Does anyone else feel that these people are guilty, without hearing anything further? Now, I don't want to scare you into not responding. You will not be taken into custody. It is just hard, it's actually hard for me to believe somebody who stands up and says that they believe that because someone's sitting here that they're guilty already.
Id. at 1228-29. The judge asked twice more if any panel members felt they were biased such that they could not obey instructions and there were no responses.

5. Preserving tone can be especially challenging where a judge engages in behavior that seems harmless or even positive but, in reality, burdens your presentation of the case. In *Parodi v. Washoe Medical Center*, 892 P. 2d 588 (Nev. 1995), the Supreme Court of Nevada found that despite plaintiffs' counsel's failure to adequately object, a jury verdict against plaintiffs had to be reversed and the case remanded where the trial judge's levity during wrongful death trial so undermined the solemnity of the proceedings that is was plain error.

6. Similarly, it is important to preserve for the record actions of the court to which you object. You may need to say, "Respectfully, I would like the record to reflect that the Judge just raised his voice and left the courtroom, slamming the door." In *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801 (6th Cir. 1999), the Sixth Circuit found that a judge's "constant interruption of the direct examination of the plaintiffs' witnesses and the intemperate tone and content of the court's often argumentative questions" tainted the proceedings such that the jury's verdict had to be vacated and the case remanded for new trial. The court noted that the judge often solicited objections from the defense or pointed to defense counsel in order to prompt an objection. "While the pointing obviously is not in the record, plaintiffs' counsel's statement describing the judge's conduct is. At one point counsel said, 'Your Honor, I haven't even finished my question, and you're pointing to the defense counsel to object to my question.'" Id. at 808.

C. When you are the beneficiary of a judge's apparent bias
1. In addition to preserving objections to erroneous unfavorable rulings, counsel should also seek to ensure the record will support on appeal rulings in favor of their client.

2. What do you do when you are the beneficiary of a judge's apparent bias? The Nationwide court noted that many times when the judge asked if defendants' counsel wanted to object, counsel declined to make the objection. *Id.* This raises interesting questions about how to handle a situation in which you are benefitting from a judge's apparent bias or mistakes.

3. Be prepared to amend your pleadings in the event the judge suggests additional claims or raises additional defenses. In *Eirline Co. S.A. v. Johnson*, 440 F.3d 648 (4th Cir. 2006), the Fourth Circuit held that the district court improperly raised a statute of limitations defense *sua sponte*. If this were to happen in your favor, immediately amend your pleadings to raise the defense.

4. Be mindful of the effect favorable erroneous rulings may have on the record on appeal. Even with favorable rulings, counsel should work to avoid reversal and further unnecessary litigation. If you are the beneficiary of an incorrect evidentiary ruling, consider withdrawing your objection or request or otherwise blunting its impact.

D. Deciding when to seek recusal/mandamus

1. Consider recusal in the case of extreme facts, such as when a judge is part of the accusatory process in a criminal case or where the judge has "interjected" himself into the proceedings and taken on the role of an adversary. *U.S. v. Izaguirre*, 11-867, 2012 WL 948962, at *2 (N.D. Ca. Mar. 20, 2012). Recusal may also be granted when "extrajudicial sources" demonstrate a "deep seated favoritism or antagonism that would make
fair judgment impossible." *Id.* Where a judge has allowed anger, vitriol, animosity, hostility, sarcasm, frustration, impatience and irritation, "to influence the dispensation of justice." *In re Blake*, 912 So. 2d 907 (Miss. 2005). Courts look at all of the circumstances in order to determine whether the "prejudice is of such a degree that it adversely affects the client" such that recusal is necessary. *Id.*

2. **If you make a motion to recuse and the trial is not stayed, make a record that you are objecting to the continuation of the trial.**

3. **Where the judge has a personal bias against counsel, recusal may be the only option.** The Supreme Court of Mississippi ordered a trial judge's recusal for seven pending cases in which counsel was enrolled because of apparent bias in *In re Blake*, 912 So. 2d 907, 917 (Miss. 2005). The court found that "the record before us clearly demonstrates that [the judge] entertained a high degree of hostility toward Robinson and that her conduct during the exchange regarding [one witness'] availability to testify was not an isolated loss of temper." *Id.* Finding nothing justifying the judge's conduct, the court held that the judge's hostility toward counsel denied his clients a fair hearing in court and recused her from currently pending cases, though not future cases.

4. **In the case of judicial elections, be aware of any possible role opposing counsel played in the election of the presiding judge.** In *Caperton v. A.T. Massey Coal Co.*, Inc., 556 U.S. 868, 887 (2009), the United States Supreme Court held that a Supreme Court of Appeals of West Virginia Justice had to be recused where counsel for one of the parties in a case "had a significant and disproportionate influence in placing the [justice] on the case by raising funds . . . when the case was pending or imminent."
In that case, a $50 million jury verdict was entered against a company shortly before the Supreme Court of Appeals of West Virginia elections. The chairman, C.E.O., and president of that company, "[k]nowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case," supported a candidate for election to the court to the tune of $3 million, a sum larger than the contributions of all other supporters, allegedly 300% greater than that spent by candidate's campaign committee, and $1 million over the total amount spent by both candidate's campaign committees combined. Id. at 873. The candidate won election. The justice in question denied a motion to recuse finding no objective evidence of bias, and the Supreme Court of Appeals of West Virginia eventually reversed the $50 million verdict.

The Supreme Court reversed, stating that while it did not doubt the justice's integrity, the justice's examination of his potential for bias "is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." Id. at 886.

5. The risk of filing a motion to recuse and losing is that the judge will remain on the case. Because you are rarely assured of recusal, you must calculate the risks of filing the motion and the possible benefits. In U.S. v. Izaguirre, 11-867, 2012 WL 948962 (N.D. Ca. Mar. 20, 2012), Judge Illston of the United States District Court for the Northern District of California denied a defendant's motion to recuse another judge of that court from a case charging the defendant with perjury. The evidence of alleged perjury came to light in an earlier case over which the judge in question had presided. During the earlier case, the judge "expressed concern at the government's decision not to prosecute the defendant for perjury. In particular, he stated that it was hard for him 'to believe that the government would let a liar and a
The judge then entered an order stating that "it is left to [the U.S. Attorney's] good judgment whether and to what extent any follow-up should be made," which he forwarded to the U.S. Attorney. *Id.* Subsequently, the government charged the defendant with perjury. In denying the motion to recuse, Judge Illston found that there was no evidence of bias or favoritism. *Id.* at *2.

### E. Strategies on appeal

1. **Consider the following factors articulated by the Sixth Circuit in *U.S. v. Hickman*, 592 F.2d 931, 933-34 (6th Cir. 1979), to which an appellate court may look in order to determine whether the trial judge has committed error entitling the aggrieved party to a new trial:**

   First, the nature of the issues at trial. In a lengthy, complex trial, intervention by the judge is often needed to clarify what is going on. Second, the conduct of counsel. If the attorneys in a case are unprepared or obstreperous, judicial intervention is often called for. Third, the conduct of witnesses. It is often impossible for counsel to deal with a difficult witness without judicial intervention. Even if these conditions present good reason to interject [the district court] into the trial, the manner in which [it] does so is crucial.


2. **If the judge has interrupted your presentation or questioning frequently and has generally allowed the other side to present their case freely, count the number of interruptions in the transcript.** In reversing defendants' drug convictions, the Fifth Circuit noted in *U.S. v. Sheldon*, 544 F.2d 213 (5th Cir. 1976), that the trial court intervened 130 times during defense testimony, while asking merely ten questions of the prosecution's witnesses.
III. **FINAL THOUGHTS**

In spite of having to deal with, on occasion, improper conduct from the bench, respect for the Rule of Law should remain foremost in all trial work. Trying any matter is stressful in and of itself but these stresses are magnified when trying a case in front of a difficult judge. Keeping centered and on message will be a greater challenge than usual. Remember that a respectful tone is required of counsel as well as the bench--and, in many respects, is even more important.

Make your record and use all the available tools, both legal and practical, to zealously defend your client before the difficult judge, but nevertheless maintain decorum and respect for the bench and our institution of justice. In the overwhelming majority of situations, the bench's "issues" are likely not personal to counsel but may simply reflect a strongly held perspective, directly contrary from counsel's, as to the legal issues or the parties--or both.

Having the assistance of another "set of ears" is valuable. Co-counsel can help to insure that the record is being protected, serves as a sounding board and can defuse emotions.

Good luck!