When Judges Want to Get in the Game: Lessons from Another Court

by Martin J. Siegel

On May 27, 2008, somewhere around 9:00 p.m., I was where I can usually be found in the evening that time of year: camped out blissfully in front of the television, sunk deep into the overstuffed couch, savoring my first true love: hoops. NBA playoff basketball, in this case, but not just any game. The tested, veteran, savvy champs—the San Antonio Spurs—versus the flashy, upstart, "showtime" comers, the Los Angeles Lakers. Western Conference finals. Game four. Lakers up two games to one and looking to take an unassailable series lead. Put down that dreary deposition transcript already and pay attention.

Now cut to the last play of the game, Lakers up by two, two seconds on the clock, Spurs' ball at half court. The Spurs inbound the ball and, as time expires, sharp-shooter Brent Barrry heaves up a prayer. But wait—Barry's head fake entraps the Laker defender, who crashes into Barry as the ball is released. For a second or two, as the errant shot bounces away and the realization dawns that calling a foul will likely swing the game to San Antonio, things freeze while everyone looks to the ref. Involuntarily, I get that feeling in the pit of my stomach lawyers get while we wait for the judge to speak and either toss us out on our ears or make us look like geniuses.

But the whistle does not blow. As this dawns on Barry, he flails his arms melodramatically at mid-court, as if beseeching the packed arena and the gods besides, "where's the call, what gives, *where's the justice?*" The non-call ignites a debate in the blogoshere and sports pages about whether referees should apply different rules at different times, or whether a foul is a foul is a foul. Many, like Charles Barkley (a.k.a., the "round mound of rebounds"), approve of the non-call on the ground that the ref should never decide the game, while others ask, "if it is a foul in the first quarter, why isn't it a foul in the final second?" David DuPree, "Playoff Musings: No-Call Was Fitting Conclusion to Spurs-Lakers Game," Sl.com, May 28, 2008. The next day, the NBA startlingly announces that, "with the benefit of instant replay, it appears a foul call should have been made," but ascribes the non-intervention to a previously unspoken "explanation in the rule book" that "there are times during games when the degree of certainty necessary to determine a foul involving physical contact is higher. That comes during impact time when the intensity has risen, especially at the end of a game. In other words, if you're going to call something then, be certain." *Id.*

Judges are sometimes compared to referees. Chief Justice Roberts drew the likeness most famously during his confirmation hearings. "Judges are like umpires," he said in his opening statement to the Senate Judiciary Committee. "Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to the ballgame to see the umpire... I will remember that it's my role to call balls and strikes and not to pitch or bat."

While the Chief Justice likened judges to umpires in order to contrast the judicial and legislative functions, the comparison is also made in another context, when analyzing the role of the judge at trial. There, the analogy thins. At trial, judges are supposed to be something more than referees. As the Second Circuit observed: "Our court has never embraced the so-called sporting theory of the common law. This extreme theory viewed litigation as a game of skill and placed the trial judge in the position of an umpire, there simply to see that the rules of the game were obeyed." *U.S. v. Filani,* 74 F.3d 378, 384-85 (2d Cir. 1996). This harkened hack to Learned Hand's remark half a century before that the "judge is more than a moderator; he is charged to see that the law is properly

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administered, and it is a duty which he cannot discharge by remaining inert." *U.S. v. Marzano,* 149 F.2d 923, 925 (2d Cir. 1945). In other words, in the courthouse if not on the court, last second fouls should be called—not ignored in the interests of letting the players decide the contest.

Every now and then, though, judges seem to want to get in the game. Seemingly intent on steering the proceedings in one direction or another, they too closely come to resemble the players and get into trouble. They do this in various ways, including questioning witnesses, interrupting and clashing with lawyers in front of the jury, and commenting on the evidence during trial and in the instructions. When this sort of thing gets excessive, parallels with that other court—the one with rims and nets where the referees shrink from deciding close games—may provide some guidance.

Under Fed. R. Evid. 614, judges may call and question witnesses, or question those called by the parties. Such questioning can be useful, or at least innocuous. The court can examine witnesses in order to clarify ambiguities in the testimony or record, correct a misstatement unintentionally made by the witness, obtain information needed to make a ruling, call the jury's attention to important evidence, or simply to

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elicit the truth as the judge sees it. That this intervention may hurt one side or another is usually of no consequence. In the famous capital espionage trial of Julius and Ethel Rosenberg, where the judge's frequent questioning of witnesses seemed usually to bolster the prosecution and was therefore one of the Rosenbergs' grounds of appeal, the Second Circuit rejected the claim of unfairness, commenting that if the questioning "gave witnesses who had contradicted themselves a chance to resolve that conflict, and took away defendants' temporary advantage with the jury, it was an unavoidable incident of [the trial court's] unchallenged power to bring out the facts of the case." *U.S. v. Rosenberg*, 195 F.2d 583, 593 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

Still, questioning from the court can go too far. One sign of possible trouble is quantitative. When the judge comes to dominate the transcript, something is probably amiss. In one reversal, the court of appeals observed that the district judge challenged the defendant's credibility on no fewer than 16 of 60 pages. In another, the court observed that there were few pages out of nearly 200 of transcript free of some questioning by the judge. In a third, the trial court's comments and interjections numbered well into the hundreds. After a while, repeated questions from the court begin to seem suspicious themselves, whatever the bent of the questioning.

Another "Danger Will Robinson" moment comes when the court's questions start to sound like those of someone sitting at counsel's table. Thus, in a criminal case where a former federal employee collecting disability benefits was indicted for failing to report income he earned at the same time through a business, the Court questioned the defendant about his claim that a government employee had told him not to bother reporting business-related earnings less than $300 a month:

> Court: You did not put [the exculpatory conversation] on any form, did you?
>
> Defendant: Did I put it on a form? No sir; this was a telephone conversation.
>
> Court: Did this Julio Mendez [the government employee with whom the defendant testified he spoke] put it on a form?
>
> Defendant: I don't know, sir.
>
> Court: We just have to take your word for it?
>
> Defense counsel: Objection, Your Honor.
>
> Court: Overruled. Is that right?
>
> Defendant: I'm sworn to tell the truth, sir.
>
> Court: I know, but we have to take your word for it; is that right?
>
> Defendant: I don't know if he has any record of it or not.

U.S. v. Tilghman, 134 F. 3d 414, 417 (D.C. Cir. 1998).

Later, the court bore in on the defendant's understanding of the relevant form:

> Court: You were an employee of Tilghman Enterprises [the defendant's business]?
> Defendant: That is correct, sir.
> Court: Doesn't that fit in the paragraph Employment other than Self-Employment? Under this heading, you must report all employment.
> Defendant: For which you receive wages.
> Counsel: Objection, Your Honor.
> Court: It goes on to say if you perform work for which you were not paid, you must show a rate of pay of what it would have cost. You didn't put that in any of them?
> Defendant: I felt that was not applicable, sir, because there was no way to compute those figures.
> Defense Counsel: Your Honor, if I may just renew my objection.
> Court: The objection is overruled.
> Prosecutor: In other words, Mr. Tilghman, it is your belief that the Department of Labor had to specifically ask you, Okay, Mr. Tilghman, asterisks, we want to know about your corporation?
> Defendant: No. It was my belief that I had to answer carefully, accurately, and honestly; and I did so.

Id. at 418.

Other questions from the court included whether "any sane bank would give somebody a loan on figures that are totally made up," and "You were perfectly content to lose money on these contracts. . . . You were a philanthropist; you wanted to help these people?" The court of appeals concluded that the

questioning suggested partiality by the court and reversed the conviction.

A similar pattern appears in a case where the defendants were charged with defrauding investors persuaded to contribute to a dummy oil company. When the defendant protested that the company had real projects in the works, the court asked, "Name them. What are they? What are these projects you were working on for ten years waiting to come through?" *U.S. v. Godwin,* 272 F.3d 659, 674 (4th Cir. 2001), *cert. denied,* 535 U.S. 1069 (2002). Probing the defendants' guarantee of certain returns to the investors, the judge wondered how one defendant could "justify in [her] mind guaranteeing returns within six months when back in 1990 [one investor] gave you his money, and still so many years later you still owed [him]? How could you put 'guaranteed in six months' when nothing was coming through?" "And you did that in 1990," the court continued, "and nothing has come through for six, seven years. How could you still be doing that six, seven years later?" The judge also referred to the defendants' victims—who the defense claimed were bona fide investors—as "the *quote* investors," and asked why the defendant failed to tell them how their money was being invested. (emphasis in original). The court of appeals found this questioning improper, though it upheld the conviction based on the overwhelming evidence of guilt.

Judges also risk donning the players' uniform when they target counsel. No doubt sitting on the bench day after day watching lawyers of all different abilities, styles and levels of preparation tempts even the most temperate now and then. And almost all lawyers have been on the business end of one or another judge's barbs at some point, something we try with varying success to slough off on our trudge home from the courthouse. But as with questioning witnesses, degree and even-handedness matters. In one insurance coverage dispute, the trial judge interrupted the plaintiff's opening statement six times. *See Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805 (6th Cir. 1999). In two of these interruptions, the judge cut the plaintiff's counsel short, telling him that it was not necessary to go into so much detail. When the plaintiff's counsel noted that two adjusters would be testifying, the judge summoned counsel to the bench and admonished him for daring to call the adjusters in his case in chief. Three more times, he interjected with questions for counsel, including one implying the plaintiff's expert had tampered with evidence. All in all, probably not the opening statement the plaintiff's lawyer had in mind.

In another case, the judge could not resist discussing the lawyers' respective ages and backgrounds in front of the jury. "You must remember that you have tried criminal cases for years and years," the Court told defense counsel, "is that right? And both of us have some experience in trying cases for many years, and we are much older than this young boy who is trying this case." *U.S. v. Guglielmini,* 384 F.2d 602, 604 (2d Cir. 1967). "But he is a very competent young boy who may be better than a decrepit old man. . . He's tried many civil eases and has been here many years," the defense lawyer parried. "I said, for the first criminal case he is trying we can't be too critical, but when it comes to some of the jargon, he may not be as adept as those with more experience." Such repartee improperly disadvantaged the defense, "as it cast the prosecutor in the role of a young neophyte David contesting against a practiced Goliath."

Yet another form of excess can arise when judges decide it necessary to comment on the evidence. Federal judges have always had this power, a common law prerogative inherited from their English forbearers. In Sir Matthew Hale's formulation, the judge "is able, in matters of law emerging upon the evidence, to direct [the jury]; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact; which is a great advantage and light to laymen." *Quercia v. U.S.,* 289 U.S. 466, 469 (1933) (quoting Hale, *History of the Common Law,* 291, 292). Therefore, the judge can point the jury to particular parts of the evidence, describe witness testimony, and opine about any aspect of the facts as long as she also instructs jurors that their recollection controls.

As with questioning witnesses, however, the power can be misused. In *Quercia,* the trial judge told the jury, "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying.

Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie." That the judge hastily added that this was only his opinion, and that the jury should acquit the defendant if it disagreed, hardly cured the error.

Long before *Quercia*, a trial judge presiding in a murder case committed a similar mistake by expounding at length about how concealment of the crime and subsequent flight signified guilt:

There is a little bit of history illustrative of the conduct of men:

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> "And Cain talked with Abel, his brother; and it came to pass, when they were in the field, that Cain rose up against Abel, his brother, and slew him.
>
> "And the Lord said unto Cain, where is Abel, they brother? And he said, I know not. Am I my brother's keeper?
>
> "And He said, what hast thou done? The voice of thy brother's blood crieth unto Me from the ground.
>
> "Am I my brother's keeper?" From that day to the time when Professor Webster murdered his associate and concealed his remains, this concealment of the evidence of crime has been regarded by the law as a proper fact to be taken into consideration as evidence of guilt, as going to show guilt, as going to show that he who does an act is consciously guilty, has conscious knowledge that he is doing wrong, and he therefore undertakes to cover up his crime.

Hickory v. U.S., 160 U.S. 408, 415 (1896).

The court later added:

> [T]he law recognizes another proposition as true, and it is that "the wicked flee when no man pursueth, but the innocent are as bold as a lion." That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom, and apply it in this case. Therefore the law says that if, after a man kills another, he undertakes to fly, if he becomes a fugitive from justice, either by hiding in the jurisdiction, watching out to keep out of the way of the officers, or of going into the Osage country, out of the jurisdiction, that you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act.

Id.

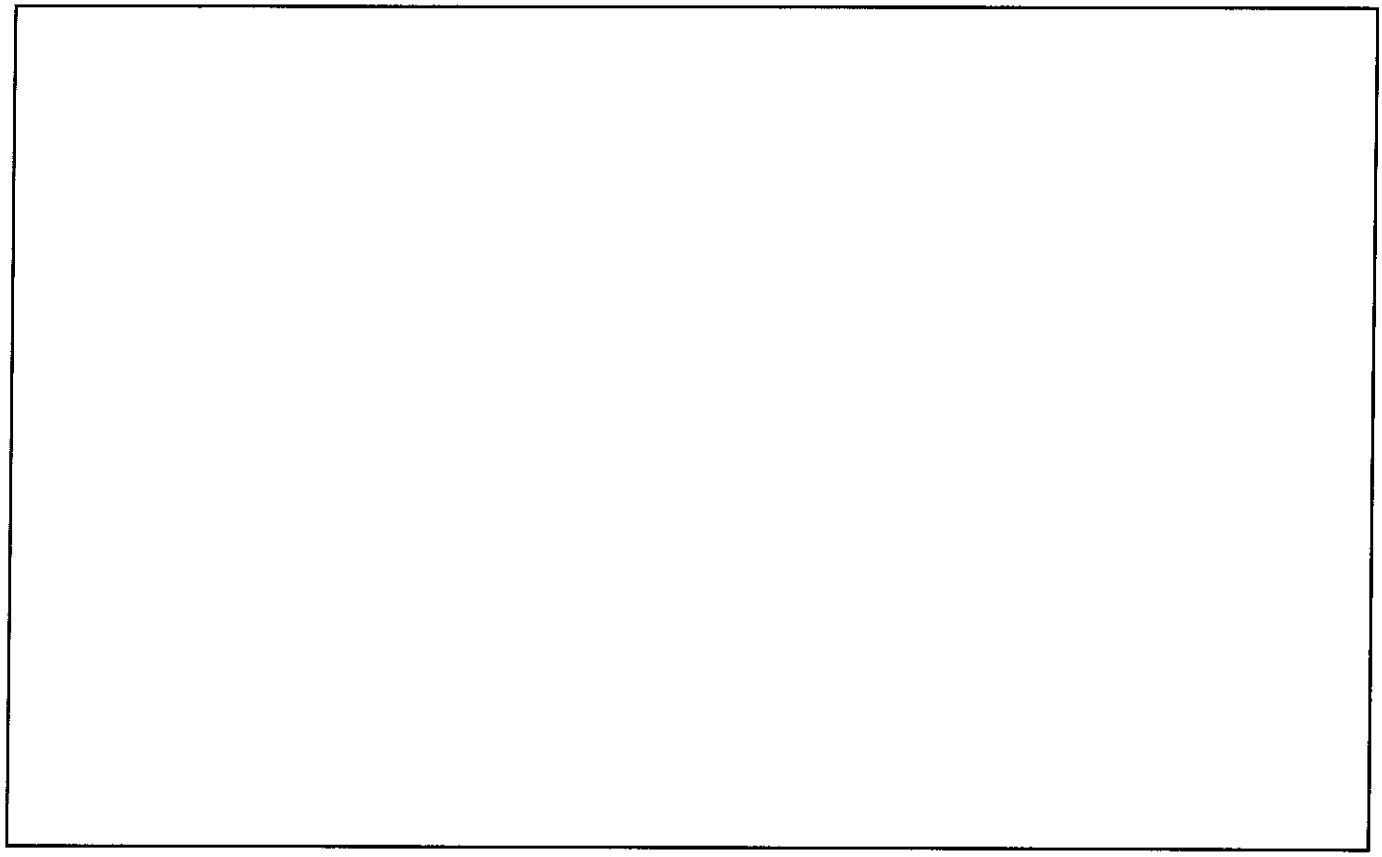
Reversing the conviction, the Supreme Court held that the commentary was tantamount to an instruction to convict.

Judges sometimes also comment on the evidence or the case before the instructions to the jury at the end of trial. In an employment discrimination case where the plaintiff presented statistical evidence regarding the defendant's terminations of multiple employees, the Court pointedly questioned the plaintiff's statistical expert and, while excusing him from the stand, offered: "Thank You, Dr. Feinberg. *You know what you did and why you did it.*" *Rocha v. Great Am. Ins. Co.*, 850 F.2d 1095, 1100 (6th Cir. 1988) (emphasis in original). The court of appeals found the remark to be prejudicial and more appropriate for a cross examiner than a neutral arbiter.

Similarly, in an employment discrimination case against the Environmental Protection Agency, the court overruled an EPA objection during the plaintiff's crossexamination and stated: "As far as I am concerned, in these discrimination cases coming out of federal agencies, the agencies have all the powerful people in there, from the director or chairman or administrator on down; they have all the records; they have all the files; they make up the rules; and they can go on and on, and the person who is complaining about them is usually alone, with just one lawyer and maybe a couple of people who also claim they are discriminated against. When they come to court, which is the first time that they come to a place where justice is done—where people don't protect each other, where people don't agree with each other from the lowest to the highest—here they get a fair shake and here they get a chance to talk, and they are going to get a chance to talk as long as I am here, whether you object to it or not." *Barbour v. Browner*, 181 F.3d 1342, 1356 (D.C. Cir. 1999) (Tatel, J., concurring in part and dissenting in part). At another point, the court remarked of an EPA employee's testimony: "No wonder the public and the Congress are upset about agencies in Washington."

What possesses judges to climb down from the bench, metaphorically anyway, and take an overactive role in the trial? One district judge speculated that part of the problem was his colleagues' inability to completely shed adversarial habits built up over years of practicing law, which are then "rechanneled, at least in some measure, into a combative yearning for the truth. With perhaps a touch of the convert's zeal, they may suffer righteously when the truth is being blocked or mutilated, turn against former comrades in the arena, feel (and sometimes yield to) the urge to spring into the contest with brilliant questions that light the way." Marvin F. Frankel, "The Search For Truth: An Umperial View," 123 *U. Pa. L. Rev.* 1031, 1034 (1975). Another reason may go deeper, to the ego inside the robe. Commenting on the Supreme Court's observation in *Quercia* that "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct," Judge Frankel noted that "[t]his observation has a clarion ring to the judicial ear. It is not inspiring to be a 'mere' anything. The role of moderator is not heady. The invitation from the highest court to play a doughtier part is instantly attractive." *Id.* at 1041-42.

Facing the judge whose desire to join the fray seems a little, well, overdeveloped, two mores from the world of basketball may help. First, don't just sit there and take it. As anyone who's watched even one NBA game knows, players and coaches never stop working the refs. If the referee makes a call a coach or player believes is off base, they are immediately in the ref's ear letting him know it, usually in language the FCC doesn't want you to hear on television. Not because



they expect the referee to change the call—that almost never happens—but so he will keep the protest in mind on the next close play, and the one after that. Or so the referee may consciously or unconsciously come to feel the need to even things up and start whistling the other side a little bit.

Nor are complaints limited to the 48 minutes at hand. When the game is over, coaches sometimes criticize referees through the media hoping to influence future games—a tactic Lakers coach Phil Jackson has acknowledged occasionally works. Scott Ostler, *Blowing the Whistle on NBA Referees*, June 12, 2008, http://www.sfgate.com. Teams may also "appeal" to the NBA league office, complaining about this or that refereeing tendency or a specific call. In 2005, while the Dallas Mavericks were locked in a tight playoff series against the Houston Rockets, Dallas owner Mark Cuban complained to the NBA that the refs were letting Houston center Yao Ming get away with a particular illegal move. As is customary, he included videotape of the supposed transgressions. Late during the next game, a referee called Yao for the same move that had previously prompted no whistles, leading to a win for the Mavericks and howls of protest from the Houston coach. The Mavericks went on to win the series. Recently disgraced referee Tim Donaghy, convicted for feeding information to gamblers, claimed that the call on Yao was made to extend the series to seven games and boost ratings, though no evidence supports the charge beyond Donaghy's not entirely reliable word. *See* Jonathan Feigen, "Donaghy Points Smoking Gun at Rockets Series, Misfires," on the blog, Chron.com, June 11, 2008.

Like aggrieved coaches, lawyers on the wrong end of the overactive judge have to object. As with questions from opposing counsel, failure to object to improper examination from the bench will waive the error. Ditto with remarks to the jury. On appeal, if no objection was made, review will be for plain error, and only those errors resulting in an unfair trial will merit reversal. Courts recognize that objecting to the judge's questions and comments can be touchy and difficult, but still require counsel to give it a go. If the judge wishes to examine witnesses at any length, there is precedent for seeking a sidebar out of the hearing of the jury or a recess and asking the court to inform counsel of the desired line of questioning, so the examination will come from the lawyers and not carry the imprimatur of the court.

To the extent possible, lawyers should also make sure the objectionable conduct is fully on the record, even the little things that will add flavor to the appeal but may not always come through on the cold page, like the judge's demeanor, tone or volume. For example, in one case, the judge's repeated pointing to the defendant's lawyer in an effort to prompt him to object made it into the record because the plaintiff's lawyer, finally exasperated with the court's unusual theatrics, said, "Your honor, I haven't even finished my question, and you're pointing to the defense counsel to object to my question." *Nationwide Mutual*, 174 F.3d at 808.

Moreover, lawyers have other ways to fight back besides simply objecting. Make sure the court gives the standard instruction that its questions and comments are not evidence and should be given no special weight, and that the jury's recollections and views control. Anticipating the instruction, lawyers themselves can make the same point to the jury in opening or closing argument, as long as they don't misstate the law. In addition, a lawyer picked on by a judge who seems to be taking sides can often garner the sympathy of the jury. Interventions by the court that appear to be biased can be used to build rapport with the jury, especially if the client already seems to be the underdog.

Never forget Paul Newman as Frank Galvin in *The Verdict*. A down and out Boston lawyer trying to make a comeback from his slide into booze, disgrace and failure, he represents a working class family against a charity hospital and pillar of the medical establishment who, all the same, forgot to check the chart to see how recently his patient ate before surgery. Oh, and Galvin's expert witness has skipped town and the judge hates him. When not condescendingly badgering him to settle, his honor, a feckless creature of the local machine, repeatedly embarrasses him in full view of the jury. At one point, the judge takes over the questioning, causing Galvin to erupt, "Your Honor, with all due respect, if you're going to try my case for me, I wish you wouldn't lose it!" How often have you wanted to say that to a judge? By the end—aided by Galvin's stirring argument and revelations from a key witness—the jury loves and rewards him, in part because everyone else in the courtroom treated him so shabbily.

If the court's interventions are serious enough, another weapon is a mid-trial motion for recusal followed up by a petition for mandamus if and when the trial court denies the motion. While mandamuses will only issue in these sorts of cases in extreme instances, and the court of appeals will take the trial's state of completeness into consideration in deciding the petition, mandamus and recusal are not precluded merely because the trial is already underway. *See In re Chevron, USA*, 121 F.3d 163, 167 n .17 (5th Cir. 1997). Assuming the test for disqualification under 28 U.S.C. § 455—personal bias or knowledge of disputed facts, or reasonable questions about the court's impartiality—has been met, the question for the court of appeals will be whether the aggrieved party can obtain a fair trial if proceedings continue, or whether going forward would represent an "exercise in futility." *Id.* at 165-67.

The second lesson from the hardwood that may be applicable is appreciation of the context. Basketball players often say that they ask nothing more of the referee than consistency. The referee may call the game closely, whistling the most minor infractions. Or he may "let them play" and wave off all but the most blatant, dirty and bone crushing fouls. But if he's stuck to one or the other way of calling the game from the opening tip to the final minutes, players won't gripe because they will know what they can get away with. Similarly, if something is a foul for one team or player, it has to be for the other.

Context and consistency are equally important in assessing judicial interventions at trial. Just as the most important question isn't necessarily "was that a foul?" but "how was the play called throughout the game?"—the pivotal question in court may be "is the judge doing the same thing to the other side?" The judge who frequently questions witnesses and summarizes the evidence for the jury will usually not commit reversible error unless he is doing so in a manner that suggests partiality, and the overall conduct of the trial appears to be tainted by the judge's excessive involvement. If the judge's questions or remarks suggest that he disbelieves a party or key witness, or has concluded that one or another result is more appropriate or accurate, his interventions will come closer to reversible error.

As Learned Hand put it, criticizing a trial judge for "exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded," the court "must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused." *Marzano*, 149 F.2d at 926.

The party defending the overactive trial judge is therefore wise to focus on the overall fairness of the trial, whether the evidence supports the result despite the judge's eruptions, and to marshal all examples of the court giving the business to both sides. For instance, in a tax fraud prosecution where the judge questioned the defendant about his explanation for not filing returns and then commented that "I was just trying to figure out what his defense is, counsel, and I still haven't heard one," the court of appeals upheld the conviction because the overall conduct of the trial was fair and because the incoherence of the defendant's testimony justified the remark. *U.S. v. Carpenter*, 776 F.2d 1291, 1294-95 (5th Cir. 1985). In another case, the judge's equal opportunity crotchetiness saved the day because his "recurring demonstrations of apparent partiality and disfavor were distributed between the government and the defendant with remarkable, though purely random, evenhandedness—if without a consistent and informed judiciousness. . . . Considered in their totality, they probably only conveyed an impression of general irritation and impatience with counsel for both sides and with the whole course of the proceedings." *U.S. v. Head*, 697 F.2d 1200, 1210 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). The holding recalls Francis Bacon, said to have defended against charges of bribery by claiming that his impartiality was beyond reproach since he took bribes from both ~~parties~~ sides.

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Judges have individual styles and will intervene more or less often accordingly. Judge Frankel argued against frequent interruptions and commentary on the ground that the court is likely to be misled by its incomplete view of the facts, and because whatever the judge says has such disproportionate weight on the jury. "He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. . . . [T]he American trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times." Frankel, *An Umperial View*, at 1042. Corrupt or no, Lord Bacon agreed. "[A]n overspeaking judge is no well-tuned cymbal," he wrote four hundred years ago. *Filani*, 74 F.3d at 385 (quoting Francis Bacon, Essays, *Of Judicature* 138, in *Harv. Classics* (P.F. Collier & Son 1909)). "It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short." *Id.* On the basketball court, ignoring a clear foul on the last play of the game is debatable, but in the courtroom, judges just might have something to learn from NBA referees and game 4 of the 2008 Western Conference finals.