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Recommended Citation
Bennett L. Gershman, Judicial Interference With Effective Assistance of Counsel, 31 Pace L. Rev. 560 (2011), available at http://digitalcommons.pace.edu/lawfaculty/752/.

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Judicial Interference with Effective Assistance of Counsel

Bennett L. Gershman*

I. Introduction

Of all the rights that an accused person possesses, the right to counsel is by far the most important because it affects the ability to assert all other rights. A defendant's right to counsel, guaranteed by the Sixth Amendment, has long been understood to include the right to the effective assistance of counsel.[1] However, the standard for "effective assistance" in defending a client is complex and controversial. In *Strickland v. Washington*,[2] the Supreme Court set out the analytical framework for deciding claims of ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness," the Court said, "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[3] Counsel's effectiveness can be impaired by both internal and external constraints. For example, a defendant's right to effective counsel can be violated because of counsel's own personal failings and mistakes. A lawyer who is drunk or sleeping during a trial may be unable to render effective advocacy.[4] By the same token, a lawyer may be incapable of rendering effective assistance who is so professionally incompetent that his representation falls below the standard of objective reasonableness, which is the standard

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1. United States v. Cronic, 466 U.S. 648, 654 (1984).

2. 466 U.S. 668 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

3. *Id.* at 686.

4. Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (en banc) (presumption of prejudice based on counsel's sleeping during prosecution's presentation of scientific evidence in rape trial).

articulated by the Court in *Strickland*.[5] However, even if counsel is professionally competent and not suffering from personal deficiencies that would impair sound representation, his ability to defend his client effectively may nevertheless be impeded by external factors that may affect counsel's advocacy in ways that violate both the defendant's Sixth Amendment right to counsel and his Due Process right to a fair trial.[6]

Probably the most damaging external impediment to a lawyer's ability to render effective assistance to a client may come from the interference by the trial judge in counsel's advocacy. A judge supervises the conduct of a trial but he is more than a mere umpire or moderator. A trial judge, by his rulings, questions, and comments, has an enormous capacity to affect the merits of a party's case and thereby influence the verdict of the jury.[7] To be sure, the basic requirement of a trial judge, both legally and ethically, is to be impartial in demeanor as well as in actions.[8] However, some judges deviate from this precept of neutrality, and through inadvertence or willfulness,

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5. *Strickland*, 466 U.S. at 687 (deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment").

6. A defendant has a right to counsel of his choice. *See* Powell v. Alabama, 287 U.S. 45, 53 (1932) ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). Nevertheless, a judge in administering a trial has broad discretion to make rulings that may frustrate a defendant's choice of counsel. For example, denying a defendant the right to have an attorney appear *pro hac vice* implicates constitutional concerns, but is within a court's broad discretion to ensure competent and ethical lawyering. *See* United States v. Ries, 100 F.3d 1469 (9th Cir. 1996) (denial of application of out-of-state attorney to appear *pro hac vice* is within the court's discretion to ensure competent and ethical lawyering). Similarly, no abuse of discretion is found when a judge denies a last-minute continuance to obtain substitute counsel. *See* United States v. Armstrong, 112 F.3d 342, 345 (8th Cir. 1997). The right to counsel includes the right to self-representation. *See* Faretta v. California, 422 U.S. 806, 836 (1975) ("In forcing [defendant], under these circumstances, to accept against his will a state-appointed public defender, the [trial court] deprived him of his constitutional right to conduct his own defense.").

7. Quercia v. United States, 289 U.S. 466, 470 (1933) ("The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling.") (internal citation omitted).

8. Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

engage in conduct that subverts a lawyer's ability to effectively defend his client. A judge has broad discretion to administer a trial and supervise the flow of the evidence and the conduct of the attorneys. However, this broad discretion does not authorize a judge to improperly impede defense counsel's representation in ways that destroy a defendant's right to a fair trial and the effective assistance of his attorney. When a trial judge improperly interferes with counsel's representation, to the extent that the defendant suffers substantial prejudice, an appellate court may conclude that a defendant's right to effective assistance of counsel has been violated and the conviction will be reversed.

II. *People v. Borukhova*

The issue of judicial interference with the right to effective assistance of counsel arose dramatically in a recent and highly publicized New York State murder trial. In *People v. Borukhova*,[9] the defendant, Mazultov Borukhova, along with a co-defendant, Mikhail Mallayev, were convicted of shooting to death Borukhova's husband, Daniel Malakov, in a Queens playground in front of their four-year-old daughter. The crime received enormous press coverage, and the media quickly focused on Borukhova as a probable suspect.[10] Following an investigation, she was charged with murder on the theory that she hired Mallayev to kill her husband. The evidence against Mallayev as the shooter was substantial; his fingerprints were found on a silencer discovered at the crime scene[11] and he was

9. No. 2009-04153 (Queens Cnty. Apr. 21, 2009).

10. *See, e.g.*, Nicholas Hirshon, *Queens' Most Significant Events in '07*, N.Y. DAILY NEWS, Jan. 22, 2008, http://www.nydailynews.com/ny_local/queens/2007/12/30/2007-12-30_queens_most_significant_events_in_07.html; Tim Bukher et al., *Cops Probe Calls of Slain Doc's Ex-Wife*, N.Y. POST, Oct. 30, 2007, http://www.nypost.com/p/news/regional/cops_probe_calls_of_slain_doc_ex_0IqMue9XDR0VD2DhfgofIJ;
Tamer El-Ghobashy et al., *Mom of Slain Dentist Certain Son's Ex-Wife is to Blame*, N.Y. DAILY NEWS, Oct. 30, 2007, http://www.nydailynews.com/news/ny_crime/2007/10/30/2007-10-30_mom_of_slain_dentist_certain_sons_exwife.html.

11. Transcript of Record at 2104-07, 2282, People v. Borukhova, No.

identified as the shooter by a witness in the playground.[12] The case against Borukhova was weaker; she was related to Mallayev through marriage, was alleged to have had a motive to gain custody of her daughter, and had made numerous telephone calls to Mallayev's cell phone around the time of the shooting.[13]

The trial lasted six weeks and involved several hotly contested evidentiary rulings that affected Borukhova's ability to present her defense intelligently.[14] The rulings by the trial judge almost always favored the prosecution. Moreover, because there were grounds to believe even before the trial started, that the judge would favor the prosecution, the judge should have disqualified himself based on his close family connections to the Queens District Attorney's office.[15] However, one critical ruling by the trial judge stands out and appears to have had an unusual impact on the ability of both defense attorneys to present their case to the jury effectively. In a surprise ruling at the close of testimony at 5 p.m. on March 5th, the last Thursday of the trial, the judge ordered both defense attorneys to give their closing arguments the following

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2009-04153 (Queens Cnty. 2009) [hereinafter Transcript].

12. *Id.* at 1651-52, 1660-63, 1665-66, 1713, 1742-43.

13. *Id.* at 3630-34.

14. Controversial evidentiary rulings included the court's admission of extensive hearsay statements, *see, e.g.*, Brief for Appellant, app. 1113-15, 1119-20, People v. Borukhova, No. 2009-04153 (Queens Cnty. 2009) [hereinafter Brief], the court's refusal to allow Borukhova to testify as to her state of mind, *see, e.g.*, *id.* at 1417, 1471-72, the court's barring cross-examination of police witnesses of omissions in their notes, *see, e.g.*, *id.* at 1309-14, 1316-20, 1331-34, 1337, the court's denial of a hearing and precluding cross-examination into the scientific basis for the fingerprint evidence, *see, e.g.*, *id.* at 1146-1158, 1159-62.

15. The trial judge's children held ranking positions in the Queens District Attorney's office. His son was Deputy Bureau Chief of the Career Criminal Major Crimes Bureau and his daughter was Deputy Bureau Chief of the Economic Crimes Bureau. *Id.* at 86. The motion to disqualify was based on N.Y. JUD. LAW § 14 (McKinney 1945) (prohibiting judge from presiding over any matter where he is "interested"), and N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(E)(1), (c) (2006) (requiring disqualification in a proceeding "in which the judge's impartiality might reasonably be questioned," including matters where judge has an "interest that could be substantially affected by the proceeding").

morning.[16] In other words, after a lengthy trial with numerous witnesses and difficult evidentiary issues, the lawyers only had an overnight recess to prepare their closing arguments. By contrast, the judge allowed the prosecutor to give his closing argument the following Monday morning.[17] This ruling appears to have taken the lawyers by surprise. It was issued after the judge's law secretary had advised defense counsel earlier that week that all summations would take place the following Monday.[18] This notification followed an acrimonious debate between counsel and the court over whether all of the summations could be given on Saturday or Sunday. Moreover, to some observers in the courtroom, the judge's unexpected ruling appeared to mesh with remarks he made earlier in the trial, such as that the trial "would have to end by St. Patrick's Day, March 17th—because that was the day he was going on vacation."[19] As it turned out, the closing argument by Borukhova's defense counsel, as he acknowledged, was seriously deficient due to lack of sleep and sufficient time for preparation.[20] And the prosecutor, as noted above, had the entire weekend to prepare his summation and respond to the defense arguments.[21]

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16. Brief, *supra* note 14, at 1479.

17. *Id.* at 70-71, 266-67, 1456-73, 1476-79, 1480-83.

18. *Id.* at 266-67, 1457-59, 1465.

19. Janet Malcolm, *Iphigenia in Forest Hills,* THE NEW YORKER, May 3, 2010, at 53 (journalist who covered trial quoted judge's comment before trial began that trial "would have to end by St. Patrick's Day, March 17th—because that was the day he was going on vacation," and quoted another remark allegedly made by the judge to one of the defense attorneys that "[t]his trial is going to be over on March 17th because I'm going to be sipping piña coladas on the beach in St. Martin"). The pressure of a trial judge's vacation plans on the continuation of a trial was featured in People v. Michael, 394 N.E.2d 1134 (N.Y. 1979) (holding that trial judge's declaration of mistrial because the trial could not end in time for the vacation was not "manifestly necessary" and therefore double jeopardy protected the defendant from being retried on robbery and rape charges). The decision by the New York Court of Appeals rebuking the trial judge was criticized by the New York City and County Bar Associations as unfair to the judge. The Bar Report was subsequently criticized. *See* Editorial, *A Disservice by the Bar*, N.Y. TIMES, June 7, 1980, at 18.

20. Brief, *supra* note 14, at 72.

21. *See, e.g.*, Ferrer v. State, 718 So.2d 822 (Fla. App. 1998) (violation of defendant's right to fair trial to compel defendant's attorney to select jury in

The *Borukhova* case describes one unusual instance in which a ruling by a trial judge almost certainly impaired the ability of defense counsel to represent his client effectively, as well as conferring an obviously unfair advantage on the prosecution. However, the *Borukhova* case is not unique. Judicial interference with counsel's representation, like the Hydra slain by Hercules, has many heads. Some of these interferences are idiosyncratic and defy any unifying principle. For example, trial judges have impaired counsel's ability to make independent decisions on how to present the defense by prohibiting defense counsel from making a closing argument in a bench trial,[22] barring the defendant from giving testimony in his own defense,[23] requiring that the defendant be the first witness called by the defense,[24] barring direct examination of the defendant,[25] limiting the number of witnesses that the defense can call,[26] restricting the ability of defense counsel to consult with his own expert,[27] limiting defense access to prospective witnesses,[28] and imposing a time limit on defendant's direct testimony.[29] The discussion that follows describes several broad categories of judicial interference that may have the effect of undermining defense counsel's ability to represent his client effectively.

III. Interrogation of Witnesses

One of the most common ways in which a judge can interfere with counsel's effective representation is to take over

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the evening when lawyer was tired and not performing at his usual level of competency).

22. *See* Herring v. New York, 422 U.S. 853, 855 (1975).

23. *See* Rock v. Arkansas, 483 U.S. 44, 47 (1987).

24. *See* Brooks v. Tennessee, 406 U.S. 605, 606 (1972).

25. *See* Ferguson v. Georgia, 365 U.S. 570, 571 (1961).

26. *See* United States v. Gray, 105 F.3d 956, 963 (5th Cir. 1997); United States v. Holmes, 44 F.3d 1150, 1156 (2d Cir. 1995).

27. *See* People v. Santana, 600 N.E.2d 201, 202 (N.Y. 1992).

28. *See* United States v. Medina, 992 F.2d 573, 579 (6th Cir. 1993), *receded from on other grounds*, United States v. Jackson-Randolph, 282 F.3d 369, 388 (6th Cir. 2002).

29. *See* United States v. Hay, 122 F.3d 1233, 1237 (9th Cir. 1997).

the examination of witnesses, including both prosecution and defense witnesses, as well as the testimony of the defendant himself. A judge has the responsibility to take an active role in the conduct of the trial to assure that the proceedings are conducted in a fair, orderly, and expeditious manner. Courts recognize that this judicial function may include the questioning of witnesses in order to clarify the testimony, elicit necessary facts, and facilitate the orderly and efficient progress of the trial.[30] However, given the trial judge's ability to influence the jury, the judge must be extremely careful when participating in the examination of a witness to avoid indicating through questions, tone, or demeanor that the judge has an opinion about the merits of the case or the credibility of the witness.[31] Even the most conscientious and well-intentioned judge may ask questions that, from her content, manner, or tone, may suggest an opinion about the case or may indicate an attitude with respect to the credibility of the witness. When analyzing whether a judge overstepped the limits in questioning witnesses, reviewing courts properly consider the necessity for asking questions, the extent of the interrogation, the evenhandedness in asking questions, the manner and tone of the questions, and whether the trial was by a judge or a jury.

A judge's intervention may be more necessary in a lengthy trial involving complex issues in order to clarify testimony and expedite the proceedings.[32] Moreover, if a witness's testimony is unresponsive or confusing, and counsel, either from inexperience or lack of preparation, fails to elicit clear and appropriate answers, it may be necessary for the judge to

30. United States v. Flying By, 511 F.3d 773, 777 (8th Cir. 2007) (court's questions helped clarify witness's testimony); United States v. Bermea, 30 F.3d 1539, 1572 (5th Cir. 1994) (multi-defendant trial required judge's intervention to expedite trial and prevent repetition).

31. Quercia v. United States, 289 U.S. 466, 470 (1933) ("The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling.") (internal citation omitted).

32. *Compare* Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982) (complex and protracted trial), *with* United States v. Hickman, 592 F.2d 931 (6th Cir. 1979) (one-day trial with single issue).

clarify the testimony.[33] Further, if a witness, because of age or physical or mental infirmity, has difficulty in understanding questions or giving clear and responsive answers, the judge may need to intervene to assist the witness in giving appropriate answers.[34] However, even if a judge is justified in asking questions, a reviewing court will examine the extent of the interrogation and its evenhandedness. Appellate courts have actually tallied up the number of questions asked by the judge, the number of transcript pages covered by the judge's questions, and the numerical ratio between the judge's questions and those of counsel.[35] Although the sheer number of questions asked by the judge may not by itself be determinative of the judge's attitude about the case, it can provide some insight into whether the judge may have conveyed an opinion about the merits of the case. Moreover, if the judge's questioning is so one-sided as to appear to favor one party, a reviewing court will be much more likely to find error than if the questioning, although extensive, was spread out equally among witnesses for both sides.[36]

Finally, the manner and tone of the judge's questions are highly relevant considerations in determining whether the judge conveyed an opinion about the case or the credibility of the witness. Although it is difficult for a reviewing court to discern a judge's tone, mannerisms, and facial expressions from the "cold black and white of a printed record,"[37] the types of questions and accompanying colloquy may provide an informed

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33. United States v. Pisani, 773 F.2d 397, 403 (2d Cir. 1985).

34. *Hickman*, 592 F.2d at 933 ("It is often impossible for counsel to deal with a difficult witness without judicial intervention.").

35. United States v. Filani, 74 F.3d 378, 386 (2d Cir. 1996) (judge's questions during defendant's testimony covered twenty-five percent of transcript pages); People v. Yut Wai Tom, 422 N.E.2d 556, 564 (N.Y. 1981) (judge asked more than 1300 questions).

36. People v. Arabadjis, 432 N.Y.S.2d 391, 393 (App. Div. 1980) (judge's "'slanted' questioning . . . unfairly buttressed the People's case"); Gerichten v. Ruiz, 435 N.Y.S.2d 783, 784 (App. Div. 1981) (judge's questions rehabilitated one party's expert and blunted testimony of other side's expert); United States v. Tilton, 714 F.2d 642, 644 (6th Cir. 1983) (judge's intervention in questioning "appeared to go in both directions, affecting the defendant *and* the prosecution").

37. *Pisani*, 773 F.2d at 402 (internal citation omitted).

basis for an appellate court to infer that a particular tone or manner was expressed by the judge. Thus, appellate courts have found that a judge's questions to witnesses displayed ridicule,[38] "hostility,"[39] "disbelief,"[40] "skepticism,"[41] incredulity,[42] argumentativeness,[43] "inquisition,"[44] "zeal,"[45] sarcasm,[46] slant,[47] and aggressiveness.[48] By the same token, at least one appellate court has also noted a trial judge's benevolent disposition towards a witness, interpreting the judge's tone and manner as protective, reassuring, and reinforcing.[49]

A good example of a judge's improper intrusion in questioning a witness is *People v. Ellis*,[50] a New York State murder trial in which the appellate court observed that "[t]hroughout the trial, the court assumed the function of the prosecutor to such an extent as to deprive defendant of a fair trial and to impair the aura of impartiality which should surround every judicial proceeding."[51] During his direct testimony, the defendant denied acknowledging to the police that he owned a particular hat found by the arresting officer that was critical to the identity of the killer.[52] The trial court interrupted defense counsel's examination and, by skillful questions, transparent sarcasm, and ridicule, all but destroyed

38. Walberg v. Israel, 766 F.2d 1071, 1073 (7th Cir. 1985).
39. United States v. Cassiagnol, 420 F.2d 868, 879 (4th Cir. 1970).
40. United States v. Van Dyke, 14 F.3d 415, 420 (8th Cir. 1994).
41. United States v. Mazzilli, 848 F.2d 384, 388 (2d Cir. 1988).
42. People v. Tucker, 455 N.Y.S.2d 1, 3 (App. Div. 1982).
43. United States v. Lanham, 416 F.2d 1140, 1141 n.1 (5th Cir. 1969).
44. Knapp v. Kinsey, 232 F.2d 458, 461 (6th Cir. 1956).
45. United States v. Hoker, 483 F.2d 359, 366 n.10 (5th Cir. 1973).
46. Gayle v. Scully, 779 F.2d 802, 807 (2d Cir. 1985).
47. People v. Arabadjis, 432 N.Y.S.2d 391, 393 (App. Div. 1980).
48. Minor v. Harris, 556 F. Supp. 1371, 1383-84 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1430 (2d Cir. 1983).
49. *Id.* at 1382, 1384 (judge's "protective and reassuring attitude toward the prosecution witnesses" and "coming quickly to the aid of prosecution witnesses during cross-examination").
50. 404 N.Y.S.2d 862 (App. Div. 1978).
51. *Id.* at 864.
52. *Id.* at 863-64.

the defendant's credibility.[53] Further, in an obvious effort to blunt the effectiveness of defense counsel's cross-examination of the prosecutor's key witness, who testified that he pleaded guilty to a lesser crime in exchange for his testimony, the trial judge again interrupted defense counsel's questioning with the rhetorical question: "Ninety percent of those sitting in prison, were they allowed to plead to a lesser crime than that for which they were indicted, as far as you know?"[54]

A judge's participation in questioning may not only damage a defendant's credibility, as in *People v. Ellis*, but may also enhance the credibility of a prosecution witness, thereby impliedly endorsing the prosecution's case and subverting the defendant's case. Such conduct obviously is objectionable because it suggests to the jury that the judge is not impartial but holds a favorable view of the government's case. A judge can undermine a defense counsel's cross-examination of a government witness by questions that either rehabilitate the witness[55] or blunt a prosecution witness's testimony that appeared to support the defense.[56] Moreover, whereas a lawyer is not permitted to express an opinion about the credibility of a witness,[57] it is even more egregious for a judge to do so because such conduct adds considerable influence to the jury's evaluation of the evidence. Thus, judges have disparaged the

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53. *Id.* at 864.

54. *Id.* (internal citation omitted). For other prejudicial interventions, see People v. De Jesus, 369 N.E.2d 752 (N.Y. 1977) (judge accused defense counsel of playing "games" and "putting words in . . . (the witness') mouth" (internal citation omitted)); People v. Eldridge, 542 N.Y.S.2d 65 (App. Div. 1989) (judge forced defendant to characterize prosecution witnesses as "liars"); People v. Connor, 524 N.Y.S.2d 287 (App. Div. 1988) (judge gratuitously advised jury that defendant was attempting to delay his trial); People v. Iskandar, 426 N.Y.S.2d 24 (App. Div. 1980) (judge insinuated that defendant committed crime).

55. United States v. Barnhart, 599 F.3d 737, 745 (7th Cir. 2010) (judge's "attempt to bolster the prosecution's witness took the wind out of the sails of the defense attorney's cross-examination").

56. United States v. Filani, 74 F.3d 378, 381-82 (2d Cir. 1996) (judge's follow-up questions demolished helpful concession made by prosecution witness).

57. MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2010) (duty of attorney not to "state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused").

credibility of witnesses with outrageous remarks,[58] made gratuitous remarks that favor the prosecution,[59] made comments that have endorsed the prosecutor's high moral character thereby manipulating the jury's sympathies for the government,[60] and have made snide and belittling comments to defense witnesses.[61]

IV. Mistreatment of Counsel

A judge's criticism and abuse of defense counsel may be so pronounced as to impair counsel's ability to effectively defend his client. Trial judges should display patience, courtesy, and respect toward counsel so as not to prejudice the jury by giving an impression of the court's partisanship. However, judges are only human; the pressures of a trial, or the conduct of defense counsel, may cause even the most mild-tempered judge to vent irritation or impatience. Although any disparaging comments to defense counsel ideally should be suppressed, and certainly should not be made in the jury's presence, some remarks may be so intense and so frequent that they may unnerve and demoralize counsel, impair his ability to function effectively, and prejudice the jury against him.

A judge's remarks that impugn a lawyer's integrity are a striking example of misconduct that often results in the reversal of a conviction. For example, one judge admonished defense counsel in front of the jury: "I won't let you tell them rotten law."[62] Another judge interrupted counsel's summation

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58. Minor v. Harris, 556 F. Supp. 1371, 1389 (S.D.N.Y. 1983) (judge ridiculed defendant's colloquial expression of young people as "dudes"), *aff'd*, 742 F.2d 1430 (2d Cir. 1983).

59. People v. Sprinkle, 189 N.E.2d 295, 297 (Ill. 1963) (before leading elderly robbery victim into making courtroom identification of the defendant, judge remarked "God bless you," and later "I think you are marvelous") (internal citation omitted).

60. United States v. Assi, 748 F.2d 62, 68 (2d Cir. 1984) (referring to prosecutor as "the distinguished Assistant United States Attorney who's been handling this case before us") (internal ciation omitted).

61. Such remarks may be the basis for disciplinary action. *See, e.g.*, *In re* Agresta, 476 N.E.2d 285 (N.Y. 1985); *In re* Waltemade, 409 N.Y.S.2d 989 (Ct. Jud. 1975); *In re* Gorenstein, 434 N.W.2d 603 (Wis. 1989).

62. United States v. Hickman, 592 F.2d 931, 936 (6th Cir. 1979)

to advise the jury that counsel's assertion was "absurd and bordering upon a lie," and that counsel "won't get away with it."[63] As the appellate court noted, "the court's castigation of counsel so discredited him in the eyes of the jury that he could not have remained an effective spokesman for his client."[64] Another judge, in the presence of the jury, accused counsel of "sandbagging" conduct and remarked, "I think the jury and I are entitled to know why."[65] Equally reprehensible are a judge's remarks accusing counsel of throwing up "a smoke screen,"[66] "pull[ing] a filibuster,"[67] playing games,[68] and "putting words in . . . (the witness') mouth."[69]

A judge's remarks may also impugn counsel's competence. Although a judge occasionally may find it necessary to admonish counsel to ask proper questions, not to be repetitive, and to adhere to proper rules of courtroom decorum, such remarks, as well as any corrective action, should be made outside the presence of the jury. Gratuitous reproaches about counsel's ineptness in the presence of the jury can throw counsel off balance and impair his effectiveness. Disparaging remarks made by the judge in the jury's presence, such as: "I haven't any right in a public trial to give [the attorney] a course in evidence,"[70] "[y]ou will have to see a lawyer, . . . if you don't understand [my ruling],"[71] and "I don't know about a defense, but you are doing some conducting,"[72] "[y]our tactics are not

(internal citation omitted).

63. United States v. Spears, 558 F.2d 1296, 1297 (7th Cir. 1977) (internal ciation omitted).

64. *Id.* at 1298.

65. Spencer v. State, 543 A.2d 851, 854 (Md. Ct. Spec. App. 1988) (internal citation omitted).

66. United States v. Williams, 809 F.2d 1072, 1088 n.15 (5th Cir. 1987) (internal citation omitted).

67. State v. Hammler, 312 So.2d 306, 314 (La. 1975) (internal citation omitted).

68. People v. De Jesus, 369 N.E.2d 752, 754 (N.Y. 1977).

69. *Id.* (internal citation omitted).

70. United States v. Dellinger, 472 F.2d 340, 388 n.84 (7th Cir. 1972) (internal citation omitted).

71. *Id.*

72. *Id.* at 387 n.83.

correct,"[73] and to "sit down and let the other attorney take over if you don't know how to cross examine this man"[74] are offensive and frequently reversible error. Rebuking comments that include sarcasm, ridicule, and personal humiliation often lead to reversal.[75] Harsh rebukes, even outside the jury's presence, such as accusing counsel of "disgusting and shyster-like" behavior, can create an "embattled and prejudicial atmosphere in the courtroom that makes a fair trial impossible."[76]

Finally, threatening counsel with disciplinary sanctions in the presence of the jury is serious misconduct that can undercut counsel's effectiveness and deprive a defendant of a fair trial.[77] Such threats might intimidate a lawyer to temper his zealous defense of his client, and thereby undercut his effectiveness, as well as suggest to a jury that the lawyer is behaving unethically and thereby prejudice the jury against the lawyer. Even threats made outside the jury's presence can result in a deprivation of the right to counsel, as when a judge chastised a court-appointed lawyer for ingratitude and "made a thinly veiled threat not to approve [counsel's] fee request at the end of the trial."[78] Obviously, such threats have the likelihood of hampering the lawyer's aggressive conduct in order to curry favor with the judge.

V. Interfering With Attorney-Client Consultation

Another way that a judge can undermine a defendant's right to counsel is by interfering with his ability to consult with his attorney during the trial. A judge's order barring such

73. Bursten v. United States, 395 F.2d 976, 984 (5th Cir. 1968) (internal citation omitted).

74. *Id.*

75. United States v. Pisani, 773 F.2d 397, 403 (2d Cir. 1985) (criticizing judge's "unnecessary barbs" at counsel, which were made with "distressing frequency"); People v. Johns, 415 N.Y.S.2d 71 (App. Div. 1979) (noting court's antagonistic and disparaging attitude toward counsel).

76. United States v. Boatner, 478 F.2d 737, 740 (2d Cir. 1973) (internal citation omitted).

77. United States v. Kastenbaum, 613 F.2d 86, 88-89 (5th Cir. 1980).

78. Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985).

consultation often occurs when a defendant is on the witness stand. The justification for such a non-consultation order does not rest on the assumption that defense counsel will engage in unethical coaching; rather, such orders are justified on the theory that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.[79] However, in the leading case of *Geders v. United States*,[80] the Supreme Court ruled a trial judge's order directing the defendant not to consult with his attorney during an overnight recess, called while the defendant was on the witness stand, violated the defendant's Sixth Amendment right to the assistance of counsel. The Court reasoned that normal consultation between a lawyer and his client during an overnight recess would ordinarily embrace matters that go well beyond the defendant's own testimony, such as the availability of other witnesses, trial tactics, and the possibility of a plea bargain, but the judge's order effectively barred discussion of all of these matters.[81] The judge's order easily could have been framed to limit discussion with respect to the defendant's testimony only. Moreover, denial of a brief recess during the trial to permit counsel to confer with his client over whether the defendant should take the stand constituted an abuse of discretion; such a brief recess would not obstruct orderly trial procedure.[82]

Courts reviewing the permissibility of orders barring a defendant's ability to consult with his attorney during other trial recesses, such as weekends, luncheon recesses, and recesses during the trial day, usually make a distinction between lengthy and brief recesses.[83] For example, in *Perry v. Leeke*,[84] the Supreme Court limited *Geders*, holding that an order directing the defendant not to consult with his attorney

79. *See* Perry v. Leeke, 488 U.S. 272, 281 (1989).

80. 425 U.S. 80 (1976).

81. *Id.*

82. *See* People v. Spears, 474 N.E.2d 1189 (N.Y. 1984).

83. *Compare* People v. Joseph, 646 N.E.2d 807 (N.Y. 1994) (error to bar communication during weekend recess), *with* People v. Enrique, 600 N.E.2d 229 (N.Y. 1992) (no error to ban consultation during luncheon recess called during cross-examination of defendant).

84. 488 U.S. 272 (1989).

during a fifteen-minute recess declared after the defendant completed his direct examination did not violate the defendant's right to counsel. As the Court observed: "[W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying."[85] Even during a short recess, a judge could permit a defendant to consult with his attorney about trial issues generally, but bar discussion concerning his ongoing testimony.[86]

A judge's interference with consultation may take other forms, such as requiring that the defendant communicate with his lawyer only in writing while court is in session.[87] Non-consultation orders may also include orders barring defense consultation with prospective witnesses. In one New York case, *People v. Santana*,[88] the trial court barred defense counsel from discussing the testimony of the prosecution's expert with his own expert until after the prosecution's expert completed his testimony. This unusual ruling, according to the New York Court of Appeals, presented defense counsel with a Hobson's choice—either he could consult with his own expert and forgo calling his expert as his witness, or refrain from consultation and be free to call him in rebuttal.[89] In reversing, the Court of Appeals found that the prejudice to defense counsel's ability to effectively defend his client was incalculable.[90]

VI. Refusal to Grant a Recess or Continuance

A judge's refusal to grant a recess or continuance may also impair a lawyer's ability to represent a client effectively. Ordinarily, the decision to grant or deny a recess or continuance lies within a judge's broad discretion to administer the trial, and such decisions constitute error only when there is

85. *Id.* at 281.

86. People v. Stroner, 432 N.E.2d 348, 351 (Ill. App. Ct. 1982).

87. Moore v. Purkett, 275 F.3d 685 (8th Cir. 2001) (holding this practice to be a violation of the defendant's rights).

88. 600 N.E.2d 201 (N.Y. 1992).

89. *Id.* at 204.

90. *Id.* at 205.

a clear abuse of discretion.[91] As a general rule, a trial judge's unreasonable and arbitrary insistence upon expedition in the face of a reasonable and good faith request for an adjournment usually constitutes an abuse of discretion.[92] The most critical factor bearing on whether the denial of a request for a continuance constitutes error is whether the defendant suffered prejudice.[93] Without establishing how the denial impacted the defendant's ability to prove his case, the ruling denying an adjournment probably will be sustained.[94]

Although a judge should not tolerate chronic procrastination and irresponsibility on the part of a lawyer, requests for continuances are often made in good faith and not for lack of due diligence. For example, where a defendant charged with drug crimes sought a continuance after a co-defendant changed his story fifteen hours before trial to implicate the defendant in two prior drug transactions, the judge's denial of a continuance was a clear abuse of discretion.[95] The change in the co-defendant's testimony was unforeseen and defense counsel had virtually no time to prepare for it.[96] Moreover, the dramatic change in testimony conflicted sharply with the witness's prior statements, which portrayed the defendant as a reluctant participant.[97] In other contexts, the denial of a request for an adjournment based on the illness of a party, witness, or counsel may be an abuse of discretion when the request is made in good faith and there is a showing that prejudice will result from a denial.[98] Moreover, when a fundamental right is involved, such as securing the attendance of a material witness,[99] obtaining new counsel,[100] or

91. Morris v. Slappy, 461 U.S. 1, 11-12 (1983); United States v. Edwards, 101 F.3d 17, 19 (2d Cir. 1996).

92. United States v. Rodriguez Cortes, 949 F.2d 532, 545 (1st Cir. 1991).

93. *See id.*

94. United States v. Maybusher, 735 F.2d 366, 369 (9th Cir. 1984).

95. United States v. Heron, 564 F.3d 879, 882-83 (7th Cir. 2009).

96. *Id.* at 882.

97. *Id.* at 883.

98. *See, e.g.*, Virgin Islands v. Charleswell, 115 F.3d 171, 175 (3d Cir. 1997).

99. Pazden v. Maurer, 424 F.3d 303 (3d Cir. 2005) (denial of continuance in a complex fraud trial to allow defense counsel to adequately prepare and

permitting the attorney to consult with his client over whether the defendant should testify,[101] a judge's refusal to grant a brief delay may be an abuse of discretion, and a violation of the Sixth Amendment and the right to a fair trial.

When delays are requested to secure the attendance of witnesses, counsel must demonstrate both that he made a good faith effort to secure the witness's attendance prior to requesting the adjournment, and that the witness would provide favorable and material evidence.[102] When a defendant has been given ample opportunity to protect his interests, such as having already been granted several adjournments, the refusal of a judge to further accommodate counsel ordinarily will be upheld.[103] Similarly, when a request is made for an adjournment to secure new counsel, or to give present counsel more time to prepare, the decision to grant or deny the request will be evaluated in light of the reasons for the request, the good faith and diligence of the party, and the resulting prejudice from the refusal of the judge to accede to the request.[104] Finally, as noted above, denying a request for a continuance because defense counsel was surprised by unexpected evidence is improper only when the lawyer can show that the situation was unforeseen, and that prejudice resulted.[105]

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interview 560 witnesses, especially in light of the government's dilatory compliance with discovery obligations, violated defendant's Sixth Amendment right to counsel); People v. Walker, 813 N.Y.S.2d 600 (App. Div. 2006) (denial of request for a forty-five minute recess to produce an alibi witness deprived defendant of fundamental right to defend himself).

100. United States v. Santos, 201 F.3d 953 (7th Cir. 2000) (arbitrary denial of continuance to retain counsel of choice violated Sixth Amendment).

101. People v. Spears, 474 N.E.2d 1189 (N.Y. 1984).

102. Singleton v. Lefkowitz, 583 F.2d 618, 623 (2d Cir. 1978); People v. Belotti, 563 N.Y.S.2d 510 (App. Div. 1990).

103. United States v. Brand, 80 F.3d 560 (1st Cir. 1996); People v. Singleton, 361 N.E.2d 1003 (N.Y. 1977).

104. Bland v. Cal. Dep't of Corrs., 20 F.3d 1469 (9th Cir. 1994) (denial of continuance to substitute new counsel was an abuse of discretion and violation of Sixth Amendment).

105. United States v. Heron, 564 F.3d 879 (7th Cir. 2009).

VII. Restrictions on Counsel's Summation

Judicial interference with effective representation may also occur, as in the *Borukhova* case, when a judge imposes unwarranted and burdensome restrictions on counsel's summation. Such interference most often occurs when the judge imposes time limits on the attorney's summation. Although a judge has an obligation to use judicial time efficiently, an undue emphasis on speed can deprive a defendant of a fair trial and effective assistance of counsel. Imposing unreasonable time constraints on counsel's closing argument can be an abuse of discretion, as well as an infringement on defendant's right to counsel, when the court's order prevents competent counsel from having sufficient time to fully and completely present her defense to the jury and develop plausible legal arguments supported by the facts. Factors bearing on the appropriateness of the trial judge's time limitations are the length and complexity of the trial, the number of defendants, the number of witnesses, and the potential punishment. Thus, a thirty-minute limitation in a murder case was found to be unreasonable,[106] as was a one-hour limitation in a capital murder trial.[107] However, when potentially complex issues are not seriously disputed, or do not require elaborate presentation, it is less likely that an abuse of discretion will be found.[108]

In addition to time constraints, abuse of discretion has been found from a trial court's restrictions on jury argument in the following: disallowing counsel to argue proper inferences from the evidence,[109] refusing to allow counsel to argue points of law that are included in the judge's charge,[110] refusing to

106. Stockton v. State, 544 So.2d 1006 (Fla. 1989).

107. Collier v. State, 705 P.2d 1126 (Nev. 1985).

108. *See* United States v. Okoronkwo, 46 F.3d 426 (5th Cir. 1995).

109. United States v. Tory, 52 F.3d 207, 211 (9th Cir. 1995).

110. United States v. Hall, 77 F.3d 398, 401 (11th Cir. 1996), *abrogated on other grounds by* Hunter v. United States, 559 F.3d 1188, 1190 (11th Cir. 2009) (court determined that carrying a concealed weapon is not a violent felony and also is not a crime of violence pursuant to the Sentencing Guidelines).

allow more than one counsel to address the jury,[111] refusing to allow counsel to reserve his opening argument until the prosecution has completed its case,[112] and forcing defense counsel to complete his closing argument before a recess as a sanction for purportedly delaying the trial.[113]

VIII. Restrictive Evidentiary Rulings

Evidentiary rulings may be the most pivotal events in a trial. A trial judge enjoys considerable discretion in ruling on the admissibility of evidence. When a trial court abuses its discretion, error is committed, and, if sufficiently harmful, may result in reversal of a conviction. Rulings on evidence naturally will affect the ability of counsel to represent his client effectively, but such rulings are the types of routine trial events that ordinarily do not raise issues of ineffectiveness. However, evidentiary rulings that exclude critical defense evidence are usually reviewed more closely than rulings that admit relevant prosecution evidence, and such exclusionary rulings may implicate Sixth Amendment concerns.[114] This is particularly so with respect to rulings that exclude relevant scientific or other technical defense proof.[115] Thus, excluding psychiatric testimony when a defendant's mental state is a crucial issue obviously impairs effective representation,[116] and may be an abuse of discretion. A judge's exclusion of testimony on the issue of identification may create the same problem.[117] Moreover, discretion in making evidentiary rulings must be applied evenhandedly. Thus, a judge's exclusion of an expert's testimony for the defense while allowing an expert's testimony

111. State v. Mitchell, 365 S.E.2d 554 (N.C. 1988).

112. United States v. Hickman, 592 F.2d 931 (6th Cir. 1979).

113. United States v. Diharce-Estrada, 526 F.2d 637 (5th Cir. 1976).

114. Chambers v. Mississippi, 410 U.S. 284 (1973) (application of state evidence rule that denied defendant the ability to present crucial testimony violated due process).

115. United States v. Rahm, 993 F.2d 1405 (9th Cir. 1993) (reversible error to exclude expert's psychological testimony that defendant had difficulties with visual perception).

116. United States v. McBride, 786 F.2d 45 (2d Cir. 1986).

117. Bowden v. McKenna, 600 F.2d 282 (1st Cir. 1979).

for the prosecution on the same issue is an abuse of discretion.[118]

The imposition of sanctions against the defense for violating discovery rules also may seriously impede effective representation. Thus, in *Taylor v. Illinois*,[119] the Supreme Court ruled that a judge's preclusion of defense testimony of an alibi witness as a sanction for the attorney's discovery violation did not violate the defendant's Sixth Amendment right to compulsory process, especially since the violation appeared to be willful and the proffered evidence may have been perjury. Courts relying on *Taylor* to exclude defense evidence have emphasized that the discovery violation was deliberate,[120] involved dilatory tactics,[121] related to evidence whose probative value was minimal,[122] or evinced conduct prejudicial to the judicial process.[123] Although such rulings can severely prejudice the defendant by depriving him of critical evidence, appellate courts routinely allow the trial judge wide latitude in policing discovery violations and find error only when the discretion is abused.[124]

A judge also burdens effective representation when he makes rulings that deprive a defendant of the basic tools necessary to conduct an adequate defense. Transcripts of earlier proceedings are a vital tool for conducting an effective defense.[125] As is the assistance of experts or investigators provided to an indigent defendant at the government's expense.[126] Thus, for example, when the assistance of an expert

118. United States v. Sellers, 566 F.2d 884 (4th Cir. 1977).

119. 484 U.S. 400 (1988).

120. Bowling v. Vose, 3 F.3d 559, 561 (1st Cir. 1993).

121. Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995).

122. Guam v. Palomo, 35 F.3d 368, 374 (9th Cir. 1994).

123. United States v. Johnson, 970 F.2d 907, 910 (D.C. Cir. 1992).

124. LaJoie v. Thompson, 217 F.3d 663 (9th Cir. 2000) (preclusion of relevant evidence as sanction for discovery violation violated defendant's Sixth Amendment right to counsel); Commonwealth v. Dranka, 702 N.E.2d 1192 (Mass. App. Ct. 1998) (abuse of discretion to preclude testimony of defense expert based on defense counsel's untimely disclosure of witness's identity).

125. *See* Britt v. North Carolina, 404 U.S. 226 (1971); People v. Coleman, 611 N.E.2d 285 (N.Y. 1993).

126. Ake v. Oklahoma, 470 U.S. 68 (1985).

will be crucial to a defendant's ability to present his defense, and when a proper showing has been made, a defendant is constitutionally entitled to such assistance.[127] A defendant has the burden of establishing with reasonable particularity the necessity for such assistance, and the court's determination is reviewed for abuse of discretion.[128]

IX. Restricting Cross-Examination

The Sixth Amendment's Confrontation Clause guarantees a defendant the right to cross-examine adverse witnesses.[129] However, the right of cross-examination, whether analyzed as a constitutional or evidentiary matter, is not absolute. As a constitutional matter, a judge must afford defense counsel "a reasonable chance to develop the whole picture."[130] Assuming constitutional concerns have been satisfied, a judge is afforded broad discretion to impose reasonable limitations on cross-examination based on concerns of harassment, prejudice, confusion of issues, witness safety, or interrogation that is repetitive or only marginally relevant.[131] As the Supreme Court has observed, counsel must be allowed "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[132] However, although a judge has broad discretion to regulate cross-examination, when the judge curtails questioning into important and relevant facts bearing on the trustworthiness of crucial testimony, such interference may deprive a defendant of the effective assistance of counsel.

One of the most important objectives of cross-examination

127. Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (finding refusal to appoint ballistics and fingerprint experts based on a general statement of request did not violate defendant's rights); Castro v. Ward, 138 F.3d 810, 826-27 (10th Cir. 1998) (upholding denial of investigative assistance based on defendant's failure to show the necessity of an investigator for an adequate defense).

128. United States v. Nichols, 21 F.3d 1016, 1018 (10th Cir. 1994).

129. Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

130. United States v. Laboy-Delgado, 84 F.3d 22, 28 (1st Cir. 1996).

131. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

132. Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

is the opportunity of counsel to probe a witness's motivation for testifying, including possible biases, prejudices, or ulterior motives.[133] A judge's prohibition or substantial curtailment of cross-examination into facts indicative of a witness's bias is likely to be a constitutional error. Thus, in *Delaware v. Van Arsdall*,[134] it was held constitutionally impermissible for the trial judge to bar all cross-examination of a prosecution witness about a prior criminal charge that had been dismissed by the government in an effort to obtain the witness's cooperation and testimony. Similarly, in *Davis v. Alaska*,[135] it was constitutional error for the trial judge to bar defense counsel from cross-examining the government's principal witness as to the reason for his cooperation. However, a judge acts within his discretion when he limits cross-examination that is cumulative,[136] repetitive,[137] of marginal relevance,[138] harassing,[139] or otherwise improper.[140] Assessing the seriousness of the restriction, the reviewing judge should consider factors such as the importance of the witness's testimony, whether the testimony was cumulative, the existence of contradictory evidence on material points, the extent of cross-examination otherwise permitted, and the strength of the evidence against the defendant.[141] When a judge does afford counsel some latitude in exploring issues germane to the case, it probably cannot be said that the judge interfered unduly in the effectiveness of counsel's representation.

X. Conclusion

A lawyer's ineffective representation of a client may be attributable to a lawyer's own personal failings. However,

133. Olden v. Kentucky, 488 U.S. 227, 231 (1988).
134. 475 U.S. 673.
135. 415 U.S. 308 (1974).
136. United States v. Mitchell, 49 F.3d 769, 779 (D.C. Cir. 1995).
137. United States v. Laboy-Delgado, 84 F.3d 22, 29 (1st Cir. 1996).
138. United States v. Ragland, 555 F.3d 706, 712 (8th Cir. 2009).
139. United States v. McCarty, 82 F.3d 943, 950 (10th Cir. 1996).
140. United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994).
141. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

impairment of the right to effective assistance of counsel may also come from a trial judge's conduct, and can take many forms and occur in varying circumstances. It is therefore difficult to formulate clear principles to cover all of the various situations in which a judge can undermine effective representation. The *Borukhova* case is only the most recent illustration of the way a ruling of a judge—forcing the lawyer to sum up his case without giving the lawyer adequate time for preparation—may deprive the defendant of the effective representation by his attorney.

The discussion in this Article of the various types of conduct and rulings that a trial judge may make that impede effective advocacy is not intended to suggest that there may not be other examples of judicial interference. Trial judges have extremely broad discretion to administer the trial, but must do so impartially and with deference to a defendant's right to the competent assistance of his attorney. When a judge makes rulings that: (1) undermine counsel's effectiveness and ability to be the guiding hand to his client that the Sixth Amendment contemplates; (2) have no clear justification for the judge's intervention; or (3) cause the defendant to suffer prejudice from the judge's interference, then a reviewing court usually will reverse the conviction and conclude that the judge abused his discretion and infringed on the defendant's right to a fair trial and the effective assistance of his counsel.