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# Judicial Interference With Effective Advocacy by the Defense

**Bennett L. Gershman\***

*A fundamental premise of the American criminal justice system is defense counsel's zealous professional advocacy. Representation of a criminal defendant to be effective must be vigorous. In administering a trial, judges have a duty to ensure a fair and orderly proceeding. On occasion, however, judges overstep the line and impede defense counsel's advocacy functions unfairly. This article describes some of the ways that trial judges may violate legal and ethical standards by improperly interfering with defense counsel's courtroom functions.*

A cornerstone of the criminal justice system is the ability of defense counsel to advocate his or her case effectively. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel.<sup>1</sup> Interference by the trial judge in the advocacy functions of defense counsel can undermine this fundamental constitutional right or otherwise deprive the defendant of a fair trial. The proper role of a trial judge is one of impartiality in demeanor as well as in actions.<sup>2</sup> A judge's mistreatment of defense counsel, or impairment of counsel's ability to represent a client effectively, can violate ethical standards,<sup>3</sup> as well as provide grounds for reversal.

## Criticism, Abuse, and Threats

Trial judges must display patience, courtesy, and respect toward counsel so as not to prejudice counsel's client or give the jury an impression of partisanship.<sup>4</sup> Judges, however, are only human, and the

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<sup>1</sup> *Gideon v. Wainwright*, 372 US 335 (1963). Civil litigants also have a right to be represented by retained counsel. See *Anderson v. Sheppard*, 856 F2d 790, 794 (6th Cir. 1988); *Potashnick v. Port City Constr. Co.*, 609 F2d 1101, 1117 (5th Cir. 1980).

<sup>2</sup> *United States v. Frazier*, 584 F2d 790, 794 (6th Cir. 1978).

<sup>3</sup> See, e.g., ABA Standards for Criminal Justice 6-1.1 (2d ed. 1986) (judge's conduct toward counsel should manifest professional respect, courtesy, and fairness); 6-2.4 (judge should respect obligation of counsel to present objections, make offers of proof, and to make a record); 6-2.5 (judge should respect attorney-client relationship).

<sup>4</sup> *United States v. Pisani*, 773 F2d 397, 403-404 (2d Cir. 1985); *Oglen v. State*, 440 So. 2d 1172, 1174-1175 (Ala. Crim. App. 1983); *People v. DeJesus*, 369 NE2d

pressures of a trial, or the conduct of an attorney, "can on occasion cause even the most imperturbable judge to vent irritation or impatience that ideally should be suppressed."<sup>5</sup> Nevertheless, depending on the nature of the remarks and the circumstances under which they are made, a judge's disparagement of counsel may so undermine the attorney's effectiveness that it prejudices the jury against the client.<sup>6</sup> Disparaging remarks made in the jury's presence are potentially the most damaging. However, even disparaging remarks made outside the presence of the jury can be seriously prejudicial to the extent that such remarks unnerve and demoralize counsel and impede counsel's effectiveness.<sup>7</sup> Moreover, apart from appellate rebuke, abusive and intemperate remarks can also result in disciplinary action.<sup>8</sup>

Remarks that impugn counsel's integrity are a striking example of misconduct.<sup>9</sup> A federal conviction was reversed when the judge admonished defense counsel in front of the jury: "I won't let you tell them rotten law."<sup>10</sup> Another federal judge interrupted counsel's closing argument to advise the jury that counsel's assertion was "absurd and bordering upon a lie," and that "counsel won't get away with it."<sup>11</sup> Clearly, such reprimands, even if warranted, should be made outside the jury's presence. As one court observed, "The judge's castigation of counsel

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752, 755 (NY 1977). See also ABA Model Code of Judicial Conduct, Canon 3B(4) (1990).

<sup>5</sup> *United States v. Nazzaro*, 472 F2d 302, 304 (2d Cir. 1973).

<sup>6</sup> *U.S. v. Donato*, 99 F3d 426, 435 (D.C. Cir. 1997) (trial judge's constant criticism of defense counsel denied defendant a fair trial); *United States v. Cassagnol*, 420 F2d 868, 879 (4th Cir. 1970) ("constant or persistent interruption of defense counsel may have the effect of contaminating the jury's verdict by indicating the judge's evaluation of the weight of the evidence and the merits of the defense").

<sup>7</sup> *United States v. Robinson*, 635 F2d 981, 986 (2d Cir. 1980) ("a trial judge's improper remarks to counsel outside of the jury's presence may unnerve an attorney and make it difficult for him to serve his client to the full extent of his ability"); *Walberg v. Israel*, 766 F2d 1071 (7th Cir. 1985) (accusing attorney of ingratitude and reminding him of his dependence on judge's goodwill may have caused counsel to "pull his punches"); *Drayton v. Hayes*, 589 F2d 117, 122 (2d Cir. 1979) (judge's "clumsy effort at comedy" by engaging in hoax with prosecutor and pretending that case was going to be reopened was in "poor taste" and reflected "astonishingly bad judgment" but did not prejudice defense counsel's ability to function); *Oglen*, 440 So. 2d at 1172, 1174 (judge displayed unprofessional conduct during in-chambers conference, but jury "shielded" from prejudicial remarks).

<sup>8</sup> *In re Waltemede*, 409 NYS2d 989 (NY App. Div. 1975) (judge censured, in part, for unjustifiable criticism of public defenders).

<sup>9</sup> *Derden v. McNeel*, 938 F2d 605, 611 (5th Cir. 1991).

<sup>10</sup> *United States v. Hickman*, 592 F2d 931, 936 (6th Cir. 1979).

<sup>11</sup> *United States v. Spears*, 558 F2d 1296, 1297 (7th Cir. 1977) (trial judge's "devastating" remark was not only improper, it was also erroneous).

so discredited him in the eyes of the jury that he could not have remained an effective spokesman for his client."<sup>12</sup> Similarly, after an attorney stated to the judge, "I'm sure the court does not mean to criticize my trial tactics in front of the jury," the judge responded: "I do. I think you sat there and sandbagged us to be frank about it, and I think the jury and I are entitled to know why."<sup>13</sup> Equally reprehensible are remarks accusing counsel of "throwing up smoke screens,"<sup>14</sup> "pulling a filibuster,"<sup>15</sup> "playing games," or "putting words in the witness's mouth."<sup>16</sup>

A judge's remarks may also impugn counsel's competence. A judge occasionally may find it necessary to admonish an attorney to ask proper questions, not to be repetitive, and to adhere to proper rules of courtroom decorum. Although such remarks are permissible, stern corrective action ordinarily should be taken outside the presence of the jury.<sup>17</sup> Gratuitous reproaches about counsel's ineptness in the jury's presence can throw counsel off balance and impair counsel's effectiveness.

For example, in a highly publicized trial,<sup>18</sup> the judge in the jury's presence repeatedly criticized defense counsel's competence by remarks such as: "I haven't any right in a public trial to give you a course in evidence;" "You will have to see a lawyer if you don't understand [my ruling];" "I don't know about a defense, but you are doing some conducting." Similarly degrading were another judge's remarks admonishing defense counsel to "sit down and let the other attorney take over if you don't know how to cross-examine this man," "Your tactics are not correct," and "You are going at it in a very awkward way. Let's do it in the right way."<sup>19</sup>

<sup>12</sup> *Id.* at 1298. See also *United States v. Nazzaro*, 472 F2d 302, 311 (2d Cir. 1973) (prejudice from "numerous acrimonious exchanges with defense counsel, many of which occurred in the presence of the jury"). See also *Etzel v. Rosenbloom*, 189 P2d 848, 850 (Cal. 1948) (judge tells counsel he will sustain objection "if [counsel] does not want the jury to know the truth about that").

<sup>13</sup> *Spencer v. State*, 543 A2d 851, 854 (Md. App. 1988) (appellate court noted that defense counsel did not engage in unethical conduct; had requested to be heard at the bench several times concerning the subject of the judge's rebuke, but the request was denied).

<sup>14</sup> *United States v. Williams*, 809 F2d 1072, 1089 n.15 (5th Cir. 1987).

<sup>15</sup> *State v. Hammler*, 312 So. 2d 306, 314 (La. 1975).

<sup>16</sup> *People v. DeJesus*, 369 NE2d 752, 754 (NY 1977).

<sup>17</sup> *Spears*, 558 F2d at 1296, 1298; *United States v. Gomez*, 529 F2d 412, 419 (5th Cir. 1976).

<sup>18</sup> *United States v. Dellinger*, 472 F2d 340, 387-388 ns. 83, 84 (7th Cir. 1972).

<sup>19</sup> *Bursten v. United States*, 395 F2d 976, 983-987 (5th Cir. 1968). See also *Pau v. Yosemite Park & Curry Co.*, 928 F2d 880, 885 (9th Cir. 1991) (judge states: "Counsel, I didn't realize I had to conduct a law school class, but I guess I do.").



## JUDICIAL INTERFERENCE

Accusing counsel of being asleep, and suggesting sarcastically that somebody was using ventriloquism to make counsel's statements for him or her;<sup>20</sup> rebuking counsel for asking "absurd questions,"<sup>21</sup> for "foolishness,"<sup>22</sup> or for failing to comply with the court's procedures<sup>23</sup>, or other denigrating comments frequently contributes to appellate reversal.<sup>24</sup> Moreover, harsh rebukes even outside the jury's presence, such as accusing counsel of "disgusting and shysterlike" behavior, can create "an embattled and prejudicial atmosphere in the courtroom that makes a fair trial impossible."<sup>25</sup>

Finally, threatening counsel in the presence of the jury can be serious misconduct. A federal conviction for attempted extortion was reversed when the trial judge threatened to send defense counsel to jail if he made any argument relating to the victim's fear.<sup>26</sup> Equally improper was threatening defense counsel with having to take the stand and respond to questions of the prosecutor.<sup>27</sup> Citing a lawyer for contempt in the presence of the jury is improper.<sup>28</sup> Factors that are considered in determining whether threatening or other heavy-handed remarks by the judge require reversal include whether the jury heard the remarks,<sup>29</sup>

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<sup>20</sup> *People v. Zammora*, 152 P2d 180 (Cal. Ct. App. 1944).

<sup>21</sup> *United States v. Williams*, 809 F2d 1072, 1088 n.15 (5th Cir. 1987).

<sup>22</sup> *McAllister v. State*, 178 SW2d 67, 69 (Ark. 1944).

<sup>23</sup> *United States v. Diharce-Estrada*, 526 F2d 637, 640 (5th Cir. 1976) (judge accused counsel of trying to take advantage of the court by requesting a brief continuance to produce an expert witness).

<sup>24</sup> *United States v. Pisani*, 773 F2d 397, 403-404 (2d Cir. 1985) (criticizing judge's "unnecessary barbs" at counsel that were made with "distressing frequency"); *People v. Pressley*, 513 NE2d 921 (Ill. App. Ct. 1987) (judge raises objection to counsel's question on own motion and then grants it); *People v. Johns*, 415 NYS2d 71 (NY App. Div. 1979) (antagonistic and disparaging attitude toward manner in which counsel conducted himself).

<sup>25</sup> *United States v. Boatner*, 478 F2d 737, 740 (2d Cir. 1973). See also *In re Cooper*, 821 F2d 833, 839 (1st Cir. 1987) ("occasionally exceptional circumstances do arise where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality toward the client may reasonably be questioned").

<sup>26</sup> *United States v. Kastenbaum*, 613 F2d 86, 88 (5th Cir. 1980).

<sup>27</sup> *United States v. Beaty*, 722 F2d 1090, 1093 n.3 (3d Cir. 1983). See also *United States v. DiPaolo*, 804 F2d 225, 232 (2d Cir. 1986) (threatening defense lawyer with jail if he cross-examined government witness about where he was presently living).

<sup>28</sup> *United States v. Edwards-Franco*, 885 F2d 1002, 1008 (2d Cir. 1989); *United States v. Williams*, 809 F2d 1072, 1089-1090 (5th Cir. 1987).

<sup>29</sup> *United States v. DiPaola*, 804 F2d 225, 232 (2d Cir. 1986); *United States v. Pisani*, 773 F2d 397, 404 (2d Cir. 1985); *United States v. Block*, 755 F2d 770, 776 (11th Cir. 1985); *United States v. Beaty*, 722 F2d 1090, 1093-1094 (3d Cir. 1983); *United States v. Boatner*, 478 F2d 737, 741 (2d Cir. 1973); *People v. Harbolt*, 253

whether the remarks were provoked by counsel,<sup>30</sup> whether the remarks were isolated or repeated,<sup>31</sup> the length of the trial,<sup>32</sup> the evenhandedness of the judge's behavior toward the defense and the prosecution,<sup>33</sup> the presence and effect of curative instructions,<sup>34</sup> and the strength of the evidence.<sup>35</sup>

Threats to counsel made outside the jury's presence also can result in a deprivation of the right to the effective assistance of counsel. For example, a constitutional violation of the right to counsel was found when the judge chastised a court-appointed defense lawyer for ingratitude, and "made a thinly veiled threat not to approve [counsel's] fee request at the end of the trial."<sup>36</sup>

### Interference with Counsel's Representational Functions

Even absent outright threats, ridicule, or abuse, a court can so interfere with defense counsel's representational functions that it destroys the defendant's right to a fair trial and the effective assistance of his or her attorney. When the judge's interference is sufficiently pronounced that the judge is claimed to have displayed an appearance of bias against the defendant, appellate courts review the claim *de novo* to determine whether the conduct communicated to the jury a predisposition against the defendant who was thus denied a fair trial.<sup>37</sup> When the judge's interference is challenged as error and the subject matter of the ruling allows the judge room to exercise discretion (as do virtually all rulings on evidence and

Cal. Rptr. 390, 401 (1988); *Olgen v. State*, 440 So. 2d 1172, 1174 (Ala. Crim. App. 1983).

<sup>30</sup> *Beatty*, 722 F2d at 1090, 1094 (3d Cir. 1983); *United States v. Pritchett*, 699 F2d 317, 320 (6th Cir. 1983); *United States v. Robinson*, 635 F2d 981, 985 (2d Cir. 1980).

<sup>31</sup> *United States v. Okoronkwo*, 46 F3d 426, 436 (5th Cir. 1995); *United States v. Williams*, 809 F2d 1072, 1089 (5th Cir. 1987).

<sup>32</sup> Compare *United States v. Hickman*, 592 F2d 931 (6th Cir. 1979) (one-day trial), with *United States v. Williams*, 809 F2d 1072 (5th Cir. 1987) (eight-week trial), and *United States v. Beatty*, 722 F2d 1090 (3d Cir. 1983) (two-week trial).

<sup>33</sup> Compare *United States v. Tilton*, 714 F2d 642, 644 (6th Cir. 1983) (intrusions evenly felt by both sides), with *Beatty*, 722 F2d at 1090, 1095 (disparate treatment), and *United States v. Boatner*, 478 F2d 737, 740 (2d Cir. 1973) (same).

<sup>34</sup> *Okoronkwo*, 46 F3d at 426, 436; *Boatner*, 478 F2d at 737, 741; *People v. Harbolt*, 253 Cal. Rptr. 390, 401 (1988).

<sup>35</sup> *Beatty*, 722 F2d at 1090, 1095; *Boatner*, 478 F2d at 737, 742.

<sup>36</sup> *Wallberg v. Israel*, 766 F2d 1071 (7th Cir. 1985).

<sup>37</sup> *United States v. Bermea*, 30 F3d 1539, 1569 (5th Cir. 1994).

procedure), appellate courts typically accord the trial judge very broad deference and find error only if that discretion is clearly abused.

### **Rulings on Objections and Motions**

A judge should allow counsel the opportunity to state objections, request rulings, and make a record to describe the judge's conduct that counsel considers improper and prejudicial.<sup>38</sup> A judge's refusal to allow counsel to object or make a record may compound the prejudice resulting from any impropriety by preventing counsel from attempting to limit the impact of the judge's conduct.<sup>39</sup> Although a numerical tally of the judge's rulings favoring one side or against the other side ordinarily is not the test of unfairness,<sup>40</sup> such measurement can be an indication of a judge's lack of neutrality.<sup>41</sup>

For example, in *United States v. Dellinger*,<sup>42</sup> the well-known trial of the "Chicago Seven," the judge's rulings were most often adverse to the defense, and suggested "hostility" and "contempt" for the defendants. The judge deliberately tried to frustrate the defense's ability to present its extensive case by restricting the attorneys' ability to interview witnesses, extending afternoon sessions when the defense case began, and then announcing for the first time during a late Friday afternoon session, after the defense ran out of witnesses, that the trial would continue on Saturdays. In another case, partisanship also was demonstrated when a judge refused to allow defense counsel to reserve making an opening statement until after the government had presented its case,<sup>43</sup> and systematically interrupted defense witnesses or defense counsel *sua sponte* with the words "objection sustained."<sup>44</sup> As one appellate panel observed, "It apparently never occurred to the district judge to either wait for an objection, or to call counsel up before him out of the

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<sup>38</sup> ABA Standards for Criminal Justice 6-2.4 (2d ed. 1986).

<sup>39</sup> *United States v. Moorehead*, 57 F3d 875 (9th Cir. 1995); *People v. Mato*, 633 NE2d 446 (NY 1994). The practice of holding unrecorded bench conferences on trial motions is disapproved. See *State v. Fletcher*, 717 P2d 866, 868 (Ariz. 1986).

<sup>40</sup> *United States v. Pisani*, 773 F2d 397, 402 (2d Cir. 1985).

<sup>41</sup> *United States v. Dellinger*, 472 F2d 340, 387 (7th Cir. 1972) (judge more likely to rule against defense than against government).

<sup>42</sup> *Dellinger*, 472 F2d at 340.

<sup>43</sup> *United States v. Hickman*, 592 F2d 931, 934 (6th Cir. 1979).

<sup>44</sup> *Crandell v. United States*, 703 F2d 74, 76-77 (4th Cir. 1983); *Hickman*, 592 F2d at 934; *People v. Pressley*, 513 NE2d 921, 925 (Ill. App. Ct. 1987).

hearing of the jury and admonish them if they were misbehaving or bungling an examination of a witness."<sup>45</sup>

Determining whether such interference displays an appearance of partiality or is appropriately related to efficient trial management depends on a careful review of the facts. For example, a trial of multiple defendants, or a lengthy or complex trial, may allow more room for judicial involvement to prevent repetition and confusion.<sup>46</sup> Refusing to allow counsel to make an offer of proof as to the correctness of his or her position ordinarily is improper.<sup>47</sup> Ruling on a motion for acquittal in the jury's presence is also improper.<sup>48</sup> Counsel's objections on matters of law typically should be made outside the jury's presence to prevent any suggestion of antagonism between counsel and the judge. Therefore, denying counsel the opportunity to make objections to jury instructions outside the jury's presence is error,<sup>49</sup> and may even constitute reversible error.<sup>50</sup>

Some rulings that hamper counsel's ability to make objections, such as requiring counsel to write out objections, or denying sidebar conferences, are problematic, but may be allowed when the ruling appears to be a reasonable measure to expedite the examination of witnesses, and no prejudice is shown.<sup>51</sup> A court has considerable latitude in deciding whether an evidentiary hearing should be granted. Denying an evidentiary hearing on a motion is error only if there are factual disputes that, if resolved in the defendant's favor, would entitle him or her to the requested relief.<sup>52</sup>

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<sup>45</sup> *Hickman*, 592 F2d at 934. See also *People v. Ashwal*, 347 NE2d 564 (NY 1975) (judge's repeated overruling of proper defense objections during prosecutor's summation enhances the possibility of prejudice by "giving standing to the statement of the District Attorney as legitimate argument").

<sup>46</sup> *United States v. Bermea*, 30 F3d 1539, 1570-1571 (5th Cir. 1994); *United States v. Manko*, 979 F2d 900 (2d Cir. 1992).

<sup>47</sup> *People v. Eckert*, 551 NE2d 820, 822-824 (Ill. App. Ct. 1990); *Pressley*, 513 NE2d at 921, 926.

<sup>48</sup> *United States v. Diharce-Estrada*, 526 F2d 637, 641 (5th Cir. 1976).

<sup>49</sup> *Hamling v. United States*, 418 US 87 (1974) (construing Fed. R. Crim. P. 30). See also Fed. R. Civ. P. 51. The rule is "designed to avoid the subtle psychological pressures upon the jurors which would arise if they were to view and hear defense counsel in a posture of antagonism toward the judge." *Hamling*, *supra* at 134.

<sup>50</sup> *United States v. Sloan*, 811 F2d 1359 (10th Cir. 1987); *United States v. Salinas*, 601 F2d 1279 (5th Cir. 1979).

<sup>51</sup> *United States v. Pisani*, 773 F2d 397, 402-403 (2d Cir. 1985) (requiring written objections); *United States v. Van Dyke*, 14 F3d 415 (8th Cir. 1993) (disallowing sidebar conferences).

<sup>52</sup> *United States v. Staula*, 80 F3d 596, 603 (1st Cir. 1996).

### Limiting Argument of Counsel

A trial judge has broad discretion over the subject matter of closing argument, and the amount of time allotted to counsel for making closing argument, and error will be found only if that discretion is abused.<sup>53</sup> Although a judge has an obligation to use judicial time efficiently,<sup>54</sup> an undue emphasis on speed can deprive a defendant of a fair trial and the effective assistance of counsel.<sup>55</sup> Although counsel is not allowed to filibuster, he or she must be given sufficient time to fully and completely present argument to the jury.<sup>56</sup> Imposing unreasonable time limits on counsel's closing argument may be an abuse of discretion,<sup>57</sup> as well as an interference with counsel's ability to develop plausible legal arguments supported by the facts.<sup>58</sup>

Important factors bearing on the appropriateness of the judge's time limitations are length and complexity of the trial, severity of the charges, number of defendants, number of witnesses, and possible punishment. Thus, a 30-minute limitation on counsel's closing argument in a murder case was found to have unreasonably deprived the defendant of a fair trial.<sup>59</sup> The trial was complex, and the restriction severely impeded

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<sup>53</sup> *United States v. Moye*, 951 F2d 59 (5th Cir. 1992) (time limits); *United States v. Gaines*, 690 F2d 849 (11th Cir. 1982) (counsel may not be prevented from making all legal arguments supported by the facts).

<sup>54</sup> ABA Standards for Criminal Justice 6-1.4 (2d ed. 1986).

<sup>55</sup> *United States v. Diharce-Estrada*, 526 F2d 637 (5th Cir. 1976) ("The court's opening remarks to the jurors emphasizing the dispatch he expected, coupled with the immoderate treatment accorded defense counsel for his allegedly unjustified attempts to delay the trial, can only be judged by us to have put undue pressure on the jury to reach a verdict more swiftly than the ends of justice will allow.").

<sup>56</sup> *United States v. Okoronkwo*, 46 F3d 426, 437 (5th Cir. 1995) ("in multiple-count, multiple-defendant criminal cases tried *en masse*, especially those involving complex factual scenarios, trial courts should be mindful that each defendant should be given adequate time in closing argument to mete out the evidence and issues particular to that defendant and individualize his/her defense to the jury").

<sup>57</sup> Compare *State v. Mitchell*, 365 SE2d 554 (NC 1988) (refusing to allow both defense attorneys to address jury during closing argument in murder case prejudicial error), and *Stanley v. State*, 453 So. 2d 530 (Fla. Dist. Ct. App. 1984) (arbitrarily limiting closing argument in grand larceny prosecution to 10 minutes reversible error), with *United States v. Bednar*, 728 F2d 1043 (8th Cir. 1984) (limit of 20 minutes upheld), and *United States v. Fesler*, 781 F2d 384 (5th Cir. 1986) (limit of 22.5 minutes upheld).

<sup>58</sup> *United States v. Hall*, 77 F3d 398, 400 (11th Cir. 1996) (preventing counsel from arguing legal concepts that would be included in judge's jury instructions was abuse of discretion); *United States v. Tory*, 52 F3d 207, 210 (9th Cir. 1995) (excluding legal argument plausibly based on the evidence was abuse of discretion).

<sup>59</sup> *Stockton v. State*, 544 So. 2d 1006 (Fla. 1989).

counsel's ability to develop his argument. Moreover, the time limit was set mainly for the convenience of the jurors to enable them to finish the case before the weekend. Similarly, restricting counsel's argument to one hour in a capital murder case was held to be an abuse of discretion.<sup>60</sup> As the court noted, "[T]he unreasonableness of this restriction is accentuated when it is realized that the outcome was to cast the die of fate for the whole of eternity for the defendant."<sup>61</sup>

However, when potentially complex issues are not seriously disputed,<sup>62</sup> or do not require elaborate presentation,<sup>63</sup> no abuse of discretion will be found. Moreover, the failure of defense counsel to request additional time at the termination of closing argument may bear on the soundness of the judge's limitation.<sup>64</sup> Other substantive restrictions also can be error.<sup>65</sup> Examples include forbidding counsel to argue proper inferences from the evidence,<sup>66</sup> refusing to allow arguments on points of law that are included in the judge's charge,<sup>67</sup> refusing to allow more than one of defendant's counsel to address the jury in a capital murder case,<sup>68</sup> refusing to allow defense counsel to reserve opening argument until the government completed its case,<sup>69</sup> or forcing defense counsel to complete closing argument before a recess as a sanction for purportedly delaying the trial.<sup>70</sup>

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<sup>60</sup> *Collier v. State*, 705 P2d 1126 (Nev. 1985).

<sup>61</sup> *Id.* at 1131-1132. Compare *Stanley v. State*, 453 So. 2d 530 (Fla. Dist. Ct. App. 1984) (limiting time for closing argument in grand larceny case to 10 minutes reversible conduct), with *Williams v. State*, 453 So. 2d 516 (Fla. Dist. Ct. App. 1984) (limiting time for closing argument in burglary prosecution to 45 minutes permissible).

<sup>62</sup> *United States v. Okoronkwo*, 46 F3d 426 (5th Cir. 1995) (existence of conspiracy not challenged).

<sup>63</sup> *United States v. Leal*, 30 F3d 577, 586 (5th Cir. 1994) (defense of lack of intent did not require extended discussion).

<sup>64</sup> *Leal*, 30 F3d at 577, 586.

<sup>65</sup> Preventing defense counsel from arguing possible punishment is generally disallowed. See *United States v. McDonald*, 933 F2d 1519, 1526 (10th Cir. 1991). But see *United States v. Datcher*, 830 F. Supp. 411 (MD Tenn. 1993) (permitting argument on possible punishment under federal sentencing guidelines).

<sup>66</sup> *Tory*, 52 F3d at 207, 210.

<sup>67</sup> *United States v. Hall*, 77 F3d 398, 400-401 (11th Cir. 1996) (error to prevent counsel from speaking about concept of reasonable doubt). But see *United States v. Lerch*, 996 F2d 158, 162 (7th Cir. 1993) (circuit rule barring attorneys from attempting to define reasonable doubt to a jury).

<sup>68</sup> *State v. Mitchell*, 365 SE2d 554 (NC 1988).

<sup>69</sup> *United States v. Hickman*, 592 F2d 931, 934 (6th Cir. 1979).

<sup>70</sup> *United States v. Diharce-Estrada*, 526 F2d 637 (5th Cir. 1976).



A judge has the discretion to allow additional argument following a supplemental instruction, particularly when a new legal theory is presented to the jury.<sup>71</sup> Refusing to allow additional argument in such circumstances may constitute an abuse of discretion when it prevents counsel from making a point essential to the defense.<sup>72</sup> Appellate courts will examine the contested limitation in light of the issues and counsel's main argument to determine whether the defense was prejudiced by the limitation.<sup>73</sup>

### Restricting Cross-Examination

The Sixth Amendment's confrontation clause guarantees a defendant the right to cross-examine adverse witnesses.<sup>74</sup> However, the right of cross-examination, whether analyzed as a constitutional or an evidentiary matter, is not absolute. As a constitutional issue, a judge must afford the defense a reasonable opportunity to develop the whole picture, and an appellate court reviews any limitation *de novo*.<sup>75</sup> Assuming that core constitutional concerns have been satisfied, judges are afforded broad discretion to impose reasonable limitations on cross-examination. Legitimate concerns include harassment of witnesses, confusion of issues, witness safety, or interrogation that is repetitive or only marginally relevant, and such restrictions will be reversible error only when discretion has been manifestly abused.<sup>76</sup> As the United States 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."<sup>77</sup>

However, a judge's wide latitude to regulate cross-examination does not justify a "curtailment which keeps from the jury relevant and im-

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<sup>71</sup> *United States v. Civelli*, 883 F2d 191, 196 (2d Cir. 1989); *Loveless v. United States*, 260 F2d 487 (DC Cir. 1958).

<sup>72</sup> *United States v. Sawyer*, 443 F2d 712, 713 (DC Cir. 1971).

<sup>73</sup> *United States v. Horton*, 921 F2d 540 (4th Cir. 1990) (no prejudice by judge permitting only three minutes of argument after supplementary instruction).

<sup>74</sup> *Davis v. Alaska*, 415 US 308, 315-316 (1974).

<sup>75</sup> *United States v. Laboy-Delgado*, 84 F3d 22, 28 (1st Cir. 1996).

<sup>76</sup> *Delaware v. Van Arsdall*, 475 US 673, 679 (1986); *Alford v. United States*, 282 US 687, 694 (1931); *Laboy-Delgado*, 84 F3d at 22, 28; *United States v. Maldonado-Rivera*, 922 F2d 934, 955 (2d Cir. 1990). See, e.g., Fed. R. Evid. 611(a) ("court shall exercise reasonable control over mode and interrogation of witnesses"); Fed. R. Evid. 611(b) (judge controls scope of cross-examination).

<sup>77</sup> *Delaware v. Fensterer*, 474 US 15, 20 (1985). See also *Davis*, 415 US at 308, 316.



portant facts bearing on the trustworthiness of crucial testimony."<sup>78</sup> Probing a witness's motivation in testifying, including possible self-interest and any bias or prejudice against the defendant, is one of the principal objects of cross-examination, whose limitation by the judge produces frequent appellate challenges. A judge's prohibition or substantial curtailment of cross-examination into a witness's bias is likely to be error.<sup>79</sup>

Thus, in *Delaware v. Van Arsdall*,<sup>80</sup> it was constitutionally impermissible for the trial judge to bar all cross-examination of a government witness concerning a prior criminal charge that had been dismissed in an effort to secure the witness's testimony. Similarly, in *Davis v. Alaska*,<sup>81</sup> counsel was not allowed to cross-examine the government's principal witness as to the reason for his cooperation. Convictions ordinarily are reversed when the judge completely bars cross-examination as to the witness's motivation for testifying,<sup>82</sup> or with respect to other relevant areas of testimony.<sup>83</sup> A judge acts within permissible discretion when he or she limits cross-examination that is cumulative,<sup>84</sup> repetitive,<sup>85</sup> of marginal relevance,<sup>86</sup> harassing,<sup>87</sup> or otherwise improper.<sup>88</sup>

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<sup>78</sup> *United States v. Pedroza*, 750 F2d 187, 195-196 (2d Cir. 1990) (quoting *Gordon v. United States*, 344 US 414, 423 (1953)).

<sup>79</sup> *Olden v. Kentucky*, 488 US 227 (1988); *Van Arsdall*, 475 US at 678-679; *Davis v. Alaska*, 415 US 308, 318 (1974); *Henry v. Speckard*, 22 F3d 1209 (2d Cir. 1994). But see *United States v. Salerno*, 937 F2d 797, 810 (2d Cir. 1991) ("a defendant does not have an absolute right to examine a government witness to elicit evidence of bias"); *Ebb v. State*, 671 A2d 974 (Md. 1996) (barring cross-examination of government witness about pending criminal charges not abuse of discretion).

<sup>80</sup> *Van Arsdall*, 475 US at 673.

<sup>81</sup> *Davis*, 415 US at 308.

<sup>82</sup> *United States v. Alexius*, 76 F3d 642 (5th Cir. 1996); *United States v. Pritchett*, 699 F2d 317 (6th Cir. 1983); *People v. Eckert*, 551 NE2d 820 (Ill. App. Ct. 1990); *Ford v. United States*, 549 A2d 1124 (DC App. 1988); *People v. Pressley*, 513 NE2d 921 (Ill. App. Ct. 1987).

<sup>83</sup> *United States v. Reindeau*, 947 F2d 32 (2d Cir. 1991) (improper restriction of cross-examination of expert); *Crandell v. United States*, 703 F2d 74, 76 (4th Cir. 1983) (restricting cross-examination of expert witness); *People v. Carter*, 450 NYS2d 203 (NY App. Div. 1982) (restricting cross-examination of complainant). See also *Pollard v. Fennell*, 400 F2d 421 (4th Cir. 1968).

<sup>84</sup> *United States v. Mitchell*, 49 F3d 769, 780 (DC Cir. 1995) (defense counsel cross-examined another government witness concerning same matter).

<sup>85</sup> *Laboy-Delgado*, 84 F3d at 22, 28.

<sup>86</sup> *United States v. Corgain*, 5 F3d 5 (1st Cir. 1993) (fact that bank teller had not identified other participants in robbery marginally relevant).

<sup>87</sup> *United States v. McCarty*, 82 F3d 943 (10th Cir. 1996) (questions concerning unsupported allegations of sexual impropriety of government witness disallowed).

<sup>88</sup> *United States v. Rainone*, 32 F3d 1203 (7th Cir. 1994) (questions about notes witness wrote to his attorney invade attorney-client privilege).

Even if the judge's restriction on cross-examination is unreasonable and arguably a violation of the right of confrontation, harmless error analysis must still be performed.<sup>89</sup> Among the factors considered in assessing the effect of the error are the importance of the witness's testimony, whether the testimony was cumulative, the presence of contradictory evidence on material points, the extent of cross-examination otherwise permitted, and the strength of the evidence against the defendant.<sup>90</sup> When a judge does not bar cross-examination completely, but allows counsel some latitude to explore the issue, the restriction ordinarily will be upheld.<sup>91</sup> Counsel whose cross-examination has been restricted should make reasonable efforts to alert the judge to the relevance of the proposed interrogation.<sup>92</sup>

### Interference With Attorney-Client Consultation

A judge has a duty to respect the attorney-client relationship.<sup>93</sup> Judicial interference with counsel's ability to consult with a client may run afoul of this precept and violate the Sixth Amendment right to assistance of counsel. Such nonconsultation directives typically occur during recesses in a trial when the defendant is on the witness stand. The rationale behind such nondiscussion orders rests not on the assumption that defense counsel will engage in unethical coaching, but rather, that when a defendant becomes a witness he or she has no constitutional right to consult with his or her lawyer while testifying.<sup>94</sup>

For example, in *Geders v. United States*,<sup>95</sup> the Supreme Court held that a trial judge's order directing the defendant not to consult with his

<sup>89</sup> *Henry v. Speckard*, 22 F3d 1209, 1215–1216 (2d Cir. 1994) (constitutional error in restricting cross-examination into possible bias but error harmless).

<sup>90</sup> *Id.* at 1215–1216.

<sup>91</sup> *Laboy-Delgado*, 84 F3d at 22, 28; *United States v. Cruz*, 894 F2d 41 (2d Cir. 1990); *United States v. Slone*, 833 F2d 595 (6th Cir. 1987); *Van Ness v. United States*, 568 A2d 1079 (DC App. 1990).

<sup>92</sup> *Jones v. Berry*, 880 F2d 670, 673 (2d Cir. 1989). See also *United States v. Blackwood*, 456 F2d 526 (2d Cir. 1972) (judge's refusal to recall government witness during defendant's case not abuse of discretion when defense counsel failed to explain why he did not cross-examine witness on subject during his earlier cross-examination).

<sup>93</sup> ABA Standards for Criminal Justice 6-2.5 (2d ed. 1986).

<sup>94</sup> *Perry v. Leeke*, 488 US 272 (1989). Such nondiscussion orders are a corollary to the broader rule authorizing judges to sequester witnesses to lessen danger that their testimony will be influenced by hearing what other witnesses say and to increase likelihood that they will give truthful testimony.

<sup>95</sup> *Geders v. United States*, 425 US 80 (1976).

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. Because normal consultation between counsel and client during an overnight recess would 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, the judge's order effectively barred discussion of these matters and thereby violated the defendant's constitutional right to consult with counsel.

Since *Geders*, federal and state courts have addressed the permissibility of orders barring access by a criminal defendant to his or her attorney during other trial recesses.<sup>96</sup> In reviewing the permissibility of such nonconsultation orders, a distinction is usually drawn between lengthy and brief recesses. For example, in *Perry v. Leeke*,<sup>97</sup> the Supreme Court limited *Geders*, holding that an order directing the defendant not to consult with his attorney during a 15-minute recess declared after the defendant completed his direct examination did not violate the defendant's right to counsel: "[W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying."<sup>98</sup> In distinguishing between long and short recesses, the Supreme Court explained that a defendant should not be prevented from consulting with counsel on trial-related matters during a lengthy re-

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<sup>96</sup> *United States v. Cobb*, 905 F2d 784 (4th Cir. 1990) (order prohibiting defendant from discussing cross-examination during weekend recess violated Sixth Amendment); *Sanders v. Lane*, 861 F2d 1033 (7th Cir. 1988) (error to deny access during lunchtime recess); *Bova v. Dugger*, 858 F2d 1539 (11th Cir. 1988) (error to deny access during 15-minute recess); *People v. Joseph*, 646 NE2d 807 (NY 1994) (error to bar communication during weekend recess); *People v. Enrique*, 600 NE2d 229 (NY 1992) (not improper to bar consultation during luncheon recess called during cross-examination of defendant); *Moore v. Commonwealth*, 771 SW2d 34 (Ky. 1989) (not improper to bar consultation during luncheon recess called during direct examination of defendant); *Wooten-Bey v. State*, 547 A2d 1086 (Md. App. 1988) (error to deny access during lengthy luncheon recess, but error cured by permitting postluncheon discussion with counsel and opportunity for further redirect).

<sup>97</sup> *Perry v. Leeke*, 488 US 272 (1989).

<sup>98</sup> *Id.* at 281. The Court analogized the situation to the familiar rule allowing a judge to sequester witnesses to maintain the integrity of testimony. See *Fed. R. Evid.* 615; *United States v. Hargrove*, 929 F2d 316, 320-321 (7th Cir. 1991) (no violation of sequestration order when government's witness was not intended to be called and was called only after testimony of surprise witness for the defense); *United States v. Lussier*, 929 F2d 25, 30 (1st Cir. 1991) (defendant not prejudiced by judge's order allowing government's case agent to remain in court); *United States v. Nazzaro*, 472 F2d 303 (2d Cir. 1973) (judge acted improperly in exempting government agent from sequestration order); *State v. Kennedy*, 250 SE2d 338 (SC 1978) (judge refuses to sequester witnesses during defendant's testimony, telling defense counsel in presence of jury: "I want them to hear this fellow's lies.").

cess.<sup>99</sup> Moreover, even during a short recess, a judge may permit consultation with counsel regarding trial issues generally, but bar discussion concerning ongoing testimony.<sup>100</sup>

### **Undermining Counsel's Ability to Defend Effectively**

Judges in various ways can hamper defense counsel's ability to challenge the prosecution's case effectively. Some of these actions defy any unifying principle; they often appear to be idiosyncratic. Judges have interfered with counsel's ability to make independent decisions concerning how to present the defense by barring defense summation at a bench trial,<sup>101</sup> barring the defendant from giving testimony in his or her own defense,<sup>102</sup> requiring that the defendant be the first defense witness,<sup>103</sup> barring direct examination of the defendant,<sup>104</sup> limiting the number of witnesses that the defense may call,<sup>105</sup> restricting defense counsel's right to consult with his or her own expert,<sup>106</sup> and limiting defense access to prospective witnesses.<sup>107</sup>

Judicial actions that deny the defendant the resources to mount an effective defense must be carefully scrutinized under equal protection and due process principles. An indigent defendant may not be deprived of the basic tools necessary to conduct an adequate defense. Transcripts of prior proceedings, such as prior trials, suppression hearings, preliminary hearings, and previous testimony in the same trial, are vital tools needed to conduct an effective defense. Indigents have a constitutional right to be afforded free transcripts when reasonably necessary to present

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<sup>99</sup> *Cobb*, 905 F2d at 784 (order prohibiting defendant from discussing cross-examination during weekend recess violated Sixth Amendment).

<sup>100</sup> *People v. Stoner*, 432 NE2d 348 (Ill. App. Ct. 1982).

<sup>101</sup> *Herring v. New York*, 422 US 853 (1975).

<sup>102</sup> *Rock v. Arkansas*, 483 US 44 (1987). But see *United States v. Stewart*, 20 F3d 911 (8th Cir. 1994) (refusal to allow defendant to testify after both sides rested and closing arguments about to begin not error).

<sup>103</sup> *Brooks v. Tennessee*, 406 US 605 (1972).

<sup>104</sup> *Ferguson v. Georgia*, 365 US 570 (1961).

<sup>105</sup> *United States v. Holmes*, 44 F3d 1150 (2d Cir. 1995).

<sup>106</sup> *People v. Santana*, 600 NE2d 201 (NY 1992) (court bars consultation until after prosecution expert completed his testimony).

<sup>107</sup> *United States v. Medina*, 992 F2d 573 (6th Cir. 1993) (denial of defense request to interview government witness until after his direct testimony did not deprive defendants of right to fair trial).

an effective defense.<sup>108</sup> The mere request for a transcript, however, does not automatically require the court to order its preparation at state expense. The denial of a transcript, which is reviewed *de novo*, is a constitutional error only when the transcript is of value to the trial for which it is sought, and there are no adequate alternatives that would fulfill the same functions as a transcript.<sup>109</sup>

It can ordinarily be assumed that a transcript is valuable in providing the defense with pretrial discovery as well as a tool for impeachment of prosecution witnesses. It is infrequent that a transcript will be found to be of little value in challenging the prosecution's case.<sup>110</sup> More likely will be the claim that adequate alternatives exist, such as the ability of counsel to reconstruct the prior proceedings, or to call the court reporter as a witness.<sup>111</sup> Relevant factors are the nature of the proceeding, length of the proceeding, length of the interval, and familiarity of present counsel with the previous proceeding.<sup>112</sup> The defense does not have any burden of establishing a particularized need for the transcript, or to refute a claim that adequate alternatives exist.<sup>113</sup> Whether prejudice needs to be shown following the denial of a transcript is unclear.<sup>114</sup>

In addition to denying free transcripts, courts can also impede an effective defense by denying an indigent free expert or investigative assistance. A defendant is constitutionally entitled to such assistance.<sup>115</sup> In contrast to the furnishing of transcripts, the defendant bears the burden of establishing with reasonable particularity the necessity for such assistance.<sup>116</sup> The court's determination is reviewed for abuse of discre-

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<sup>108</sup> *Britt v. North Carolina*, 404 US 226 (1971); *Roberts v. LaVallee*, 389 US 40 (1967); *United States v. Pulido*, 879 F2d 1255 (5th Cir. 1989); *People v. Coleman*, 611 NE2d 285 (NY 1993). See also 18 USC § 3006A(e)(1).

<sup>109</sup> *Britt*, 404 US at 227.

<sup>110</sup> *Matthews v. Price*, 83 F3d 328 (10th Cir. 1996) (transcript would have offered relatively little value in cross-examining police officer about lack of penetration during sexual assault because penetration is not element of crime).

<sup>111</sup> *Britt*, 404 US at 228.

<sup>112</sup> *Pulido*, 879 F2d at 1255.

<sup>113</sup> *Britt*, 404 US at 228. *Britt* was a unique case, resting on highly specialized circumstances, including defense counsel's virtual concession of the existence of adequate alternatives to a transcript.

<sup>114</sup> Compare *United States v. Kirk*, 844 F2d 660 (9th Cir. 1988) (prejudice required), and *United States v. Bari*, 750 F2d 1169 (2d Cir. 1984) (prejudice required), with *United States v. Pulido*, 879 F2d 1255 (5th Cir. 1989) (no prejudice need be shown).

<sup>115</sup> *Ake v. Oklahoma*, 470 US 68 (1985).

<sup>116</sup> *Caldwell v. Mississippi*, 472 US 320, 323 n.1 (1985) (ballistics and fingerprint expert); *Ake*, 470 US at 68 (psychiatric expert); *United States v. Greschner*, 802 F2d 373 (10th Cir. 1986) (investigative assistance).

tion,<sup>117</sup> and any error in denying the request must be shown to have prejudiced the defense.<sup>118</sup>

Finally, courts can undermine effective representation in other ways, such as ordering the defense to proceed under conflicted representation,<sup>119</sup> removing the defense attorney from the case,<sup>120</sup> or denying a pro se defendant the right to participate in sidebar conferences with the court.<sup>121</sup> A judge's failure to adequately explain the basis for a ruling or order not only hampers defense counsel's ability to make subsequent decisions but also interferes with an appellate court's ability to review the record properly.<sup>122</sup>

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<sup>117</sup> *United States v. Nichols*, 21 F3d 1016 (10th Cir. 1994).

<sup>118</sup> *Id.*

<sup>119</sup> *Holloway v. Arkansas*, 435 US 475 (1978); *Selsor v. Kaiser*, 81 F3d 1492 (10th Cir. 1996).

<sup>120</sup> *People v. Johnson*, 547 NW2d 65 (Mich. Ct. App. 1996); *Harling v. United States*, 387 A2d 1101 (DC App. 1978); *Smith v. Superior Ct. of Los Angeles County*, 440 P2d 65 (Cal. 1968). A court may remove a lawyer on the basis of gross incompetence, physical incapacity, or contumacious conduct. *Johnson*, 547 NW2d at 68. Prejudice need not be shown when defendant is arbitrarily denied his Sixth Amendment right to counsel of his choice. *Bland v. California Dep't of Corrections*, 20 F3d 1469, 1478 (9th Cir. 1994).

<sup>121</sup> *United States v. McDermott*, 64 F3d 1448 (10th Cir. 1995); *People v. Rosen*, 613 NE2d 946 (NY 1993). See *Faretta v. California*, 422 US 806 (1975). But see *United States v. Mills*, 895 F2d 897 (2d Cir. 1990) (no "substantial violation" of sixth amendment *Faretta* right where standby counsel participated and defendant excluded in only a few instances). If a Sixth Amendment violation relating to the *Faretta* right to conduct one's own defense is found, harmless error analysis does not apply. *McKaskle v. Wiggins*, 465 US 168, 177 n.8 (1984).

<sup>122</sup> A judge should adequately explain the basis for ruling to enable an appellate court to review the matter. Failure to make a proper record may require remand for factual findings. See *Guzman v. Scully*, 80 F3d 772, 776 (2d Cir. 1996) (remand for failure to make specific findings demonstrating that closing the courtroom during testimony of prosecution witness essential and narrowly tailored); *Duckett v. Godinez*, 67 F3d 734, 749 (9th Cir. 1995) (remand for failure to make sufficient and specific findings as to necessity of physical restraints on defendant); *United States v. Nagib*, 56 F3d 798, 807 (7th Cir. 1995) (remanded for failure to make specific findings to support admission of evidence of prior bad acts as probative of defendant's knowledge and motive). See also *United States v. Jackson*, 60 F3d 128, 135 (2d Cir. 1995) ("It would have been helpful to our review of the [sequestration] issue if the trial judge had articulated the basis for the exercise of her discretion"); *Hellum v. Warden*, 28 F3d 903, 907 (8th Cir. 1994) ("It would have been helpful to us" if trial court articulated its reasons for imposing security measures); *United States v. Perez*, 35 F3d 632 (1st Cir. 1994) ("as a general matter district courts should articulate the bases of their factual findings related to Batson challenges more clearly"). But see *United States v. Gonzales*, 12 F3d 298, 300 (1st Cir. 1993) ("We do not demand that judges, when explaining the bases for their rulings, be precise to the point of pedantry.").



## Refusal to Grant Recess or Continuance

The decision to grant or deny a recess or continuance ordinarily lies within a judge's broad discretion to administer the trial.<sup>123</sup> Such determinations are error only for a clear abuse of discretion<sup>124</sup> "Only unreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay constitutes an abuse of discretion."<sup>125</sup> The burden is on the defense to demonstrate clearly that it has been prejudiced by the judge's refusal to grant a delay.<sup>126</sup> A reviewing court will examine several factors, including the inconvenience on the court, witnesses, counsel, or the parties; whether other continuances have been granted; whether legitimate reasons exist for the delay; whether the delay is the defendant's fault; and whether a denial would prejudice the defendant.<sup>127</sup> The last factor is the most critical. An appellate court will not reverse unless the defendant suffered prejudice.<sup>128</sup>

To be sure, judges "cannot permit themselves to become sanctuaries for chronic procrastination and irresponsibility on the part of either litigants or attorneys."<sup>129</sup> Nevertheless, requests for continuances are often made in good faith, and not for lack of due diligence, and under circumstances in which the denial may seriously impair a defendant's right to a fair trial. The denial of a request for a delay based on illness of a party, witness, or counsel may be an abuse of discretion when there has been a sufficient showing that the request was made in good faith, and that prejudice would result from the denial.<sup>130</sup> Similarly, when a

<sup>123</sup> *Morris v. Slappy*, 461 US 1, 11 (1983); *United States v. Tran*, 16 F3d 897, 905 (8th Cir. 1994); *United States v. Lussier*, 929 F2d 25, 28 (1st Cir. 1991); *United States v. Wynne*, 993 F2d 760, 767 (10th Cir. 1993); *United States v. Cordell*, 924 F2d 614 (6th Cir. 1991); *People v. Singleton*, 361 NE2d 1003 (NY 1977). See Annotation, Propriety and Prejudicial Effect of Federal District Judge's Granting or Denying Brief Recess During Trial, 21 ALR Fed. 948 (1974).

<sup>124</sup> *United States v. Studley*, 783 F2d 934 (9th Cir. 1986); *United States v. Martin*, 740 F2d 1352 (6th Cir. 1984).

<sup>125</sup> *United States v. Rodriguez Cortes*, 949 F2d 532, 545 (1st Cir. 1991).

<sup>126</sup> *United States v. Wirsing*, 719 F2d 859, 866 (6th Cir. 1983).

<sup>127</sup> *United States v. Fowlie*, 24 F3d 1059, 1069 (9th Cir. 1994). For a similar formulation, see *United States v. Soldevila-Lopez*, 17 F3d 480, 488 (1st Cir. 1994) (citing as factors the defendant's diligence in being ready for the proceeding; the likelihood that a continuance would serve a useful purpose; inconvenience to the parties, court, or witnesses; and prejudice to the defendant); *United States v. Wynne*, 993 F2d 760, 767 (10th Cir. 1993) (same).

<sup>128</sup> *United States v. Maybusher*, 735 F2d 366, 369 (9th Cir. 1984).

<sup>129</sup> *County of San Bernardino v. Dorio Mining & Eng'g Corp.*, 72 Cal. App. 3d 776, 780, 140 Cal. Rptr. 383 (1977).

<sup>130</sup> *Moll v. Moll*, 231 NW2d 769 (Mo. 1975); *Kalmus v. Kalmus*, 230 P2d 57, 63 (Cal. 1951).



fundamental right is involved, such as securing the attendance of a material witness, a judge's refusal to grant a delay may be an abuse of discretion and a violation of the Sixth Amendment.<sup>131</sup> When delays are requested to secure the attendance of witnesses, counsel must show that he or she made a good faith effort to secure the witness's attendance prior to requesting the adjournment,<sup>132</sup> and that the witness would provide favorable evidence.<sup>133</sup>

By contrast, denying a brief recess during the trial to permit counsel to confer with a client concerning crucial trial matters, such as whether the defendant should take the stand, does not obstruct orderly procedure.<sup>134</sup> However, some showing should be made as to the necessity for the delay, and the prejudice that would result from its denial.<sup>135</sup> Moreover, when the defense has been given ample opportunity to protect its interests, such as having already been granted several adjournments, the refusal of a judge to further accommodate counsel will ordinarily be upheld.<sup>136</sup>

Denial of a request to give counsel more time to prepare will be evaluated in light of the reasons for the request, the good faith and diligence of counsel, and the resulting prejudice from the refusal of the judge to honor the request.<sup>137</sup> A request for a continuance based on preju-

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<sup>131</sup> *Bland v. California Dep't of Corrections*, 20 F3d 1469 (9th Cir. 1994) (denial of continuance to obtain new counsel violated Sixth Amendment); *Wirsing*, 719 F2d at 859; *Singleton v. Lefkowitz*, 583 F2d 618 (2d Cir. 1978); *Johnson v. Johnson*, 375 F. Supp. 872 (WD Mich. 1974) (defendant's motion for a day's continuance to secure presence of crucial witnesses violated right to compulsory process); *People v. Foy*, 299 NE2d 664 (NY 1973); *People v. Osburn*, 547 NYS2d 749 (NY App. Div. 1989). But see *United States v. Tran*, 16 F3d 897, 906 (8th Cir. 1994); *United States v. Beverly*, 5 F3d 633, 641 (2d Cir. 1993); *People v. Belotti*, 563 NYS2d 510 (NY App. Div. 1990); *State v. Monahan*, 480 A2d 863 (NH 1984).

<sup>132</sup> *Belotti*, 563 NYS2d at 510.

<sup>133</sup> *Lefkowitz*, 583 F2d at 623 ("in the absence of some showing of what favorable evidence the witness would provide if compelled to testify, it is not improper to deny a continuance"). When government conduct has contributed to the unavailability of the witness, the requisite showing is relaxed. *Id.*

<sup>134</sup> *People v. Spears*, 474 NE2d 1189 (NY 1984).

<sup>135</sup> *United States v. Darby*, 744 F2d 1508 (11th Cir. 1984).

<sup>136</sup> *United States v. Brand*, 80 F3d 560 (1st Cir. 1996); *People v. Singleton*, 361 NE2d 1003 (NY 1977).

<sup>137</sup> *Bland v. California Dep't of Corrections*, 20 F3d 1469 (9th Cir. 1994) (denial of continuance to substitute new counsel abuse of discretion and violation of Sixth Amendment); *Darby*, 744 F2d at 1508 (denial of continuance neither an abuse of discretion nor a violation of due process); *Kelly v. Wingo*, 472 F2d 717 (6th Cir. 1973); *Commonwealth v. Fleming*, 480 A2d 1214 (Pa. Super. Ct. 1984); *Nave v. State*, 318 SE2d 753 (Ga. Ct. App. 1984). Moreover, counsel's failure to file a motion for a continuance is an important factor in evaluating the claim. See *Birt v. Montgomery*, 725 F2d 587, 595 (11th Cir. 1984) (en banc).

dicial media publicity must be carefully examined to determine whether there is a reasonable likelihood that absent such relief a fair trial cannot be had.<sup>138</sup> Finally, denial of a request for a continuance because the defendant is surprised by unexpected evidence is usually error only when the defendant can show that the situation was unforeseen and that prejudice resulted.<sup>139</sup>

### Rulings on Evidence and Witnesses

Evidentiary rulings can be the most pivotal events in a trial. A trial judge enjoys considerable discretion in ruling on the admissibility of evidence,<sup>140</sup> and rulings that are not unreasonable or arbitrary withstand appellate attack. The familiar yardstick used by appellate courts in reviewing evidentiary rulings is abuse of discretion.<sup>141</sup> Discretion, of course, "does not mean immunity from accountability."<sup>142</sup> When discretion is abused, error is committed, and if sufficiently harmful, may result in reversal of the conviction.<sup>143</sup> Although abuse of discretion with

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<sup>138</sup> *United States v. De Cruz*, 82 F3d 856 (9th Cir. 1996); *United States ex rel. Dogget v. Yeager*, 472 F2d 229 (3d Cir. 1973); *United States v. Perez-Casillas*, 593 F. Supp. 794 (D. PR 1984).

<sup>139</sup> *United States v. Brand*, 80 F3d 560 (1st Cir. 1996) (last-minute decision of co-defendant to plead guilty and become government's chief witness neither unforeseeable nor prejudicial); *United States v. Dennis*, 843 F2d 652 (2d Cir. 1988).

<sup>140</sup> *Hamling v. United States*, 418 US 87, 124-125 (1974); *United States v. Fountain*, 83 F3d 946, 949 (8th Cir. 1996) (evidentiary rulings will not be disturbed "absent a clear and prejudicial abuse of that discretion"); *United States v. Krenzelok*, 874 F2d 480, 482 (7th Cir. 1989) ("Only in an extreme case are appellate judges competent to secondguess the judgment of the person on the spot, the trial judge."); *United States v. MacDonald*, 688 F2d 224, 234 (4th Cir. 1982) (Murnaghan, J., concurring) ("I would have exercised the wide discretion conferred on [the trial judge] to allow the testimony to come in."). The subject of judicial discretion in trial rulings generally is an extremely broad and complex topic. For extensive treatment of the subject, see Aharon Barak, *Judicial Discretion* (1987); J. Eric Smithburn, *Judicial Discretion* (1980); Jerome Frank, *Courts on Trial* (1949).

<sup>141</sup> However, when legal issues predominate, appellate review of evidentiary rulings is *de novo*. See *United States v. Thompson*, 37 F3d 450, 452 (9th Cir. 1994) (whether admissibility of physical evidence is relevant to defense based on lack of knowledge is a legal question subject to *de novo* review).

<sup>142</sup> *United States v. Dwyer*, 539 F2d 924, 928 (2d Cir. 1976).

<sup>143</sup> See, e.g., *United States v. Sorondo*, 845 F2d 945 (11th Cir. 1988); *United States v. Dotson*, 799 F2d 189 (5th Cir. 1986); *United States v. McBride*, 786 F2d 45 (2d Cir. 1986); *Bowden v. McKenna*, 600 F2d 282 (1st Cir. 1979). But see *United States v. Krenzelok*, 874 F2d 480 (7th Cir. 1989) (no abuse of discretion to admit statements by federal judge in unrelated case in rebutting defendant's claim that he in good faith believed that certain trusts were invalid); *United States v. Sullivan*, 803 F2d 87 (3d Cir. 1986) (no abuse of discretion to exclude 10 judges as character

respect to evidentiary rulings is not coextensive with trial misconduct, erroneous evidentiary rulings, when considered together with other instances of misconduct or bias, may tend to magnify errors and more likely result in reversal.<sup>144</sup>

Erroneous evidentiary rulings are usually analyzed as nonconstitutional events. However, such rulings, particularly when they exclude critical defense evidence, may also be interpreted as constitutional error when the defense has been deprived of a fair opportunity to establish a defense in violation of due process or compulsory process.<sup>145</sup> If an appellate court frames the error in that fashion, a much more defendant-friendly standard of review is used,<sup>146</sup> and reversal consequently is more likely. Appellate courts appear to exercise somewhat tighter control when reviewing a judge's evidentiary rulings that exclude vital defense evidence.<sup>147</sup> By contrast, rulings that admit relevant prosecution evidence, even evidence that is highly inflammatory and prejudicial, are often accorded considerable appellate deference.<sup>148</sup>

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witnesses); *United States v. Ciampa*, 793 F2d 19 (1st Cir. 1986) (no abuse of discretion to exclude evidence as being cumulative). Erroneous evidentiary rulings are subject to the "harmless error" rule. See *United States v. Puzzo*, 928 F2d 1356 (2d Cir. 1991) (restriction of defendant's testimony harmless error); *United States v. Cortez*, 935 F2d 135 (8th Cir. 1991) (allowing law enforcement witnesses to testify to truthfulness of government witness improper, but harmless).

<sup>144</sup> *United States v. Van Dyke*, 14 F3d 415 (8th Cir. 1994); *United States v. Edwardo-Franco*, 885 F2d 1002 (2d Cir. 1989).

<sup>145</sup> *State v. Carter*, 636 A2d 821, 830 (Conn. 1994) (exclusion of vital defense evidence deprived defendant of Sixth Amendment right fairly to present to the jury his version of the facts).

<sup>146</sup> *Chapman v. California*, 386 US 18, 24 (1967) (prosecution must demonstrate that error was harmless beyond reasonable doubt).

<sup>147</sup> *United States v. Hall*, 93 F3d 1337 (7th Cir. 1996); *United States v. Thompson*, 37 F3d 450 (9th Cir. 1994); *United States v. Van Dyke*, 14 F3d 415 (8th Cir. 1994); *State v. Carter*, 636 A2d 821 (Conn. 1994). A defense witness's refusal to testify based on a privilege raises other significant issues. When a prosecution witness asserts a privilege on cross-examination and thereby deprives the defense of the ability to test the witness's veracity on important substantive matters, the judge is obligated to strike the direct testimony, and the failure to do so is error. *United States v. Cardillo*, 316 F2d 606, 611 (2d Cir. 1963). However, there is no duty to strike testimony when the privilege bars cross-examination into collateral matters only. See *United States v. Brooks*, 82 F3d 50, 54-55 (2d Cir. 1996) (prosecution witness's invocation of privilege after direct examination did not prevent cross-examination "into the details of his direct testimony" so that "the defense is deprived of the right to test the truth of his direct testimony"); *United States v. Berrio-Londono*, 946 F2d 158 (1st Cir. 1991) (not error to refuse to strike direct testimony of co-conspirator who took Fifth Amendment in regard to prior drug deals with a co-conspirator other than defendant).

<sup>148</sup> *United States v. Rivera*, 83 F3d 542 (1st Cir. 1996) (unrelated prior rape); *Ortiz-Sandoval v. Gomez*, 81 F3d 891 (9th Cir. 1996) (threats to witnesses); *United*

The more rigorous appellate oversight that is usually associated with rulings that exclude relevant defense evidence is often noticeable with respect to rulings relating to scientific or other technical proof. Thus, excluding psychiatric testimony when the defendant's mental state is a crucial issue in the case can be an abuse of discretion.<sup>149</sup> Error may also be shown in rulings excluding expert testimony on the issue of the reliability of eyewitness identification.<sup>150</sup> Exclusion of expert testimony in other contexts has also been held to be an abuse of discretion.<sup>151</sup> Discretion, of course, must be applied evenhandedly. Excluding expert proof for the defense while allowing expert proof from the prosecution on the same issue ordinarily is an abuse of discretion.<sup>152</sup>

One of the more controversial issues involves the imposition of evidentiary sanctions against the defense, particularly the preclusion of defense proof, for violations of discovery rules. In *Taylor v. Illinois*,<sup>153</sup>

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*States v. Butler*, 71 F3d 243 (7th Cir. 1995) (gang membership); *People v. Wood*, 591 NE2d 1178 (NY 1992) (gruesome photos). But see *United States v. Irvin*, 87 F3d 860 (7th Cir. 1996) (abuse of discretion to admit extensive evidence of defendant's membership in gang); *Standen v. Whitley*, 994 F2d 1417 (9th Cir. 1993) (withdrawn guilty plea improperly admitted as substantive proof of guilt); *Hughes v. Commonwealth*, 431 SE2d 906 (Va. Ct. App. 1993) (forensic evidence improperly admitted and discretion abused when prejudice substantially outweighs probative value).

<sup>149</sup> *United States v. McBride*, 786 F2d 45 (2d Cir. 1986); *United States v. Dwyer*, 539 F2d 924 (2d Cir. 1976). But see *United States v. Newman*, 849 F2d 156 (5th Cir. 1988) (no abuse of discretion in excluding expert testimony that certain mental defects make one more susceptible to entrapment); *United States v. Esch*, 832 F2d 531 (10th Cir. 1987) (no abuse of discretion in excluding testimony of clinical psychologist that defendant did not possess the capacity to form the requisite mental state).

<sup>150</sup> *United States v. Stevens*, 935 F2d 1380 (3d Cir. 1991); *State v. Moon*, 726 P2d 1263 (Wash. App. 1986). See *United States v. Sellers*, 566 F2d 884 (4th Cir. 1977). But see *United States v. Kime*, 99 F3d 870, 883-884 (8th Cir. 1996) (no abuse of discretion to exclude expert witness on reliability of eyewitness identification); *United States v. Blade*, 811 F2d 461 (8th Cir. 1987) (no abuse of discretion in excluding expert testimony on eyewitness identification when government's case did not rest exclusively on eyewitness testimony).

<sup>151</sup> See, e.g., *United States v. Hall*, 93 F3d 1337 (7th Cir. 1996) (abuse of discretion to exclude expert testimony regarding defendant's susceptibility to giving false confession). This assumes that the defendant has complied with discovery rules. See *United States v. Nobles*, 422 US 225 (1975) (no error in excluding testimony of expert witness after defendant refused to permit discovery of relevant investigative report); *United States v. Cervone*, 906 F2d 332, 346 (2d Cir. 1990) (no error to exclude testimony of expert witness for defendant's failure to comply with statutory notice requirements). For civil cases finding an abuse of discretion in excluding expert testimony, see *Garrett v. Desa Indus., Inc.*, 705 F2d 721 (4th Cir. 1983) (abuse of discretion to exclude mechanical engineer's testimony concerning issue of safety of particular tool); *Rutter v. Northeastern Beaver Cty. Sch. Dist.*, 437 A2d 1198 (Pa. 1981) (abuse of discretion to exclude former football coach's testimony concerning issue of safety in conducting practices).

<sup>152</sup> *United States v. Sellers*, 566 F2d 884 (4th Cir. 1977).

<sup>153</sup> 484 US 400 (1984).

the Supreme Court ruled that preclusion of defense testimony of an alibi witness as a sanction for a discovery violation did not violate the Sixth Amendment compulsory process clause, particularly when the violation appeared to be willful and the proffered evidence perjurious.<sup>154</sup> Courts relying on *Taylor* to exclude defense evidence have emphasized that the discovery violation was deliberate,<sup>155</sup> involved dilatory tactics,<sup>156</sup> related to evidence of minimal probative value,<sup>157</sup> or was prejudicial to the judicial process.<sup>158</sup> Appellate courts routinely allow the trial judge wide latitude in policing discovery violations, and find error only when discretion is abused.<sup>159</sup> Moreover, preclusion of defense evidence, even if erroneous, is reversible only when it is sufficiently prejudicial.<sup>160</sup>

Aside from preclusion for discovery violations, other restrictive rulings or conduct with respect to defense evidence can be a source of error. Consistent with the function as manager of the trial, a judge is authorized to exclude defense evidence that is irrelevant, repetitive, or cumulative;<sup>161</sup> to limit the number of defense witnesses;<sup>162</sup> and even to exclude the defendant's own testimony.<sup>163</sup> A judge under certain circumstances may restrict defense access to prosecution witnesses.<sup>164</sup> However, a judge has a duty to ensure that a defendant's right to compulsory process is not impaired when an important defense witness fails to honor a subpoena.<sup>165</sup>

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<sup>154</sup> *Id.* at 416–417. But see *Michigan v. Lucas*, 500 US 145, 153 (1991) (indicating that *Taylor* authorizes preclusion even if no suggestion that proffered evidence was perjurious). Preclusion is most often encountered in the context of alibi witnesses.

<sup>155</sup> *Tyson v. Trigg*, 50 F3d 436 (7th Cir. 1995); *Bowling v. Vose*, 3 F3d 559 (1st Cir. 1993); *Escalera v. Coombe*, 852 F2d 45 (2d Cir. 1988); *State v. Passino*, 640 A2d 547 (Vt. 1994); *Commonwealth v. Zimmerman*, 571 A2d 1062 (Pa. Super. Ct. 1990).

<sup>156</sup> *Tyson*, 50 F3d 436 (7th Cir. 1995); *State v. Killean*, 915 P2d 1225 (Ariz. 1996); *Zimmerman*, 571 A2d at 1062.

<sup>157</sup> *People of Territory of Guam v. Palomo*, 35 F3d 368 (9th Cir. 1994); *United States v. Duggan*, 743 F2d 59 (2d Cir. 1984).

<sup>158</sup> *United States v. Johnson*, 970 F2d 907 (DC Cir. 1992).

<sup>159</sup> *United States v. Davis*, 40 F3d 1069 (10th Cir. 1994); *Sandoval v. Acevedo*, 996 F2d 145 (7th Cir. 1993); *Fendler v. Goldsmith*, 728 F2d 1181 (9th Cir. 1983); *People v. Gonzales*, 28 Cal. Rptr. 325 (1994).

<sup>160</sup> *Tyson*, 50 F3d at 436.

<sup>161</sup> *Delaware v. Van Arsdall*, 475 US 673, 679 (1986).

<sup>162</sup> *United States v. Holmes*, 44 F3d 1150 (2d Cir. 1994).

<sup>163</sup> *United States v. Stewart*, 20 F3d 911 (8th Cir. 1994).

<sup>164</sup> *United States v. Medina*, 992 F2d 573 (6th Cir. 1993).

<sup>165</sup> *United States v. Simpson*, 992 F2d 1224 (DC Cir. 1993).



Trial judges also enjoy extremely broad discretion with respect to real and demonstrative evidence. Rulings of admissibility are ordinarily upheld if the evidence is relevant and properly authenticated. Special problems can arise with respect to some types of real evidence. For example, sound recordings containing inaudible portions are admissible unless the incomprehensible portions are so significant as to render the recording as a whole unreliable.<sup>166</sup> Transcripts are admitted if reasonably accurate, and courts have devised procedures to minimize distortion and assist the jury's comprehension.<sup>167</sup> Courtroom demonstrations purporting to reenact events at trial are permitted as long as the demonstration fairly depicts the events at issue.<sup>168</sup> Charts, summaries, and transparencies are cautiously allowed, as long as the evidence assists the jury and the judge imposes safeguards to minimize possible prejudice.<sup>169</sup>

A judge ordinarily should make specific findings of the basis for an evidentiary ruling.<sup>170</sup> Failure to state the reasons for an evidentiary ruling can be a factor in finding an abuse of discretion.<sup>171</sup> The "law of the case" doctrine ordinarily is not applicable to evidentiary rulings made during prior proceedings; coordinate courts, therefore, are not bound by such rulings but may, in the exercise of discretion, reconsider such rulings.<sup>172</sup>

### **Rulings That Undermine the Presumption of Innocence**

A fair trial before a fair tribunal is a basic requirement of due process.<sup>173</sup> A fundamental component of this due process guarantee is the

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<sup>166</sup> *United States v. Webster*, 84 F3d 1056, 1064 (8th Cir. 1996); *United States v. Howard*, 80 F3d 1194, 1198-1199 (7th Cir. 1996).

<sup>167</sup> *Howard*, 80 F3d at 1199 (judge should conduct hearing to assess accuracy of government's transcript; if stipulated or official transcript cannot be produced, then each side may produce its own version, and may introduce evidence supporting its version).

<sup>168</sup> *United States v. Birch*, 39 F3d 1089 (10th Cir. 1994) (demonstration reenacting defendant's version of shooting).

<sup>169</sup> *United States v. Johnson*, 54 F3d 1150, 1162 (4th Cir. 1995) (organizational chart summarizing complex drug conspiracy allowed with caveat that such evidence would not be admissible in "ordinary federal drug prosecution"); *United States v. Crockett*, 49 F3d 1357, 1362 (8th Cir. 1995) (prosecutor's use of overhead transparencies to characterize evidence allowed; although judges "have virtually unfettered discretion to regulate the use of such non-evidentiary devices. . . prosecution runs a tangible risk of creating reversible error when it seeks to augment the impact of its oral argument with pedagogic devices").

<sup>170</sup> *United States v. Nagib*, 56 F3d 798 (7th Cir. 1995).

<sup>171</sup> *United States v. Dwyer*, 539 F2d 924 (2d Cir. 1976).

<sup>172</sup> *United States v. Todd*, 920 F2d 399, 402 (6th Cir. 1990).

<sup>173</sup> *Drope v. Missouri*, 420 US 162, 172 (1975); *In re Murchison*, 349 US 133, 136 (1955); *In re Oliver*, 333 US 257 (1948); *Tumey v. Ohio*, 273 US 510 (1927).

presumption of innocence.<sup>174</sup> Conduct and rulings by the trial judge can violate due process by depriving an accused of the presumption of innocence. Thus, permitting a trial to take place in an atmosphere inflamed by public passion and a biased jury violates due process,<sup>175</sup> as does allowing a trial to be conducted in a "carnival atmosphere" of media excess to the point where "bedlam reigned."<sup>176</sup> More subtle, but equally harmful impediments to a fair trial, include allowing spectators to engage in demonstrations against the defendant,<sup>177</sup> carry identifiable signs prejudicial to a defendant (such as wearing buttons inscribed with the words "Women Against Rape" during a defendant's trial for sex offenses),<sup>178</sup> or insinuate to the jury that the defendant has AIDS by offering to provide them with gloves if they wished to handle any exhibits.<sup>179</sup>

Logistical decisions by the judge can impair the presumption of innocence. Placing a jury in the custody of deputy sheriffs who are also prosecution witnesses potentially erodes the presumption of innocence.<sup>180</sup> So do seating arrangements that allow the victim to sit at counsel table with the prosecuting attorney during the trial.<sup>181</sup> Actual prejudice

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<sup>174</sup> The presumption of innocence is a basic component of a fair trial. As the Supreme Court observed in *Coffin v. United States*, 156 US 432, 453 (1895):

The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

<sup>175</sup> *Irvin v. Dowd*, 366 US 717 (1961); *Stroble v. California*, 343 US 181 (1952); *Moore v. Dempsey*, 261 US 86 (1923).

<sup>176</sup> *Sheppard v. Maxwell*, 384 US 333 (1966). See also *Estes v. Texas*, 381 US 532 (1965).

<sup>177</sup> *Cox v. Louisiana*, 379 US 559, 562 (1965).

<sup>178</sup> *Norris v. Risley*, 918 F2d 828 (9th Cir. 1990). See *People v. Pennisi*, 563 NYS2d 612 (NY Sup. Ct. 1990) (judge refuses to allow courtroom spectators to wear obtrusive corsages of red and black ribbons to show sympathy for victims in homicide prosecution). The situation probably is different where no jury is present. See *Matter of Frankel v. Roberts*, 567 NYS2d 1018 (NY App. Div. 1991) (improper restriction on free speech to order attorney to remove from lapel political button during nonjury proceedings).

<sup>179</sup> *Commonwealth v. Martin*, 660 NE2d 670 (Mass. App. Ct. 1996), rev'd, 676 NE2d 451 (Mass. 1997). See also *Wiggins v. State*, 554 A2d 356 (Md. 1989) (judge committed reversible error in permitting guards to wear rubber gloves during trial of defendant suspected of having AIDS). But see *People v. Bonaventura*, 563 NYS2d 465 (NY App. Div. 1990) (allowing court officers to wear surgical gloves while handling evidentiary articles of defendant's clothing did not stigmatize defendant as being diseased).

<sup>180</sup> *Turner v. Louisiana*, 379 US 466 (1965).

<sup>181</sup> *Mask v. State*, 869 SW2d 1, 4 (Ark. 1994) ("manipulation of seating arrangement . . . tantamount to the Trial Court expressing an opinion on the credibility of witnesses"). But see *Crowe v. State*, 485 So. 2d 351 (Ala. Crim. App. 1984) (statute allows crime victim to sit at counsel table).



in such cases may not need to be shown because the conduct is inherently prejudicial; it presents "an unacceptable risk of impermissible factors coming into play."<sup>182</sup>

Other types of logistical arrangements usually withstand attack. For example, judges have broad discretion to take measures to ensure the safety and order of the proceedings. Thus, allowing uniformed and armed police officials to sit directly behind a defendant was not error.<sup>183</sup> Nor was it error to allow police officers to escort a defendant, a convicted murderer, to the witness stand, remain next to him while he testified, and escort him back to his chair.<sup>184</sup> These measures have been held not "inherently prejudicial," and do not pose an "unacceptable risk of prejudice."<sup>185</sup>

By contrast, compelling a defendant to wear identifiable prison attire is inherently prejudicial, and may be violative of a fair trial by impairing the presumption of innocence.<sup>186</sup> Such a requirement plainly "furthers no essential state policy," and violates the concept of equal justice because it usually operates against indigents who cannot post bail.<sup>187</sup> However, because the particular evil is compulsion, a defendant must object to having to wear prison clothes at trial.<sup>188</sup> Moreover, even

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<sup>182</sup> *Estelle v. Williams*, 425 US 501, 505 (1976).

<sup>183</sup> *Id.* at 572.

<sup>184</sup> *Wainwright v. Lockhart*, 80 F3d 1226, 1232 (8th Cir. 1996) ("jury would view the officers' presence and actions as ordinary and normal concern for the safety and order of the proceedings"). See also *United States v. Darden*, 70 F3d 1507 (8th Cir. 1995) (in trial of violent criminal enterprise, it was not error to use metal detectors outside courtroom, sequestration, transportation by marshals, armed guards along street, helicopters, and snipers on courthouse roof); *Hopkinson v. Shillinger*, 866 F2d 1185 (10th Cir. 1989) (not error when guards used magnetometer to check everyone entering courtroom, prosecutor's bodyguards wore bulletproof vests and visibly carried guns, and guards audibly cocked guns when lights went out in courtroom); *State v. Aguilar*, 352 NW2d 395, 396-397 (Minn. 1984) (no prejudice from use of metal detector).

<sup>185</sup> *Holbrook v. Flynn*, 475 US 560, 571 (1986).

<sup>186</sup> *Estelle*, 425 US at 504. See also ABA Standards for Criminal Justice 15-3.1(c) (2d ed. 1986).

<sup>187</sup> *Estelle*, 425 US at 505-506.

<sup>188</sup> *Id.* at 509-510 (no compulsion when, possibly for tactical reasons, neither defendant nor his counsel objected either before or at any time during trial). An objection must be timely. See *United States v. Hurtado*, 47 F3d 577, 581 (2d Cir. 1995) (objection made on first day of trial timely because counsel objected as soon as he became aware of client's appearance); *United States v. Harris*, 703 F2d 508, 511 (11th Cir. 1983) (same). But see *United States v. Martin*, 964 F2d 714, 719 (7th Cir. 1992) (defendant should have objected before any trial proceedings had commenced and not waited until the middle of the first day of trial after entire jury empaneled).

when the defendant is compelled to wear prison clothes, the constitutional error is subject to harmless error analysis.<sup>189</sup>

Ordering a defendant to be shackled, or even gagged, presents more difficult problems. Clearly, the sight of a defendant bound and gagged could have a profound impact on a jury's feelings about that defendant. Shackles alone are inherently prejudicial because they are an "unmistakable indication of the need to separate a defendant from the community at large."<sup>190</sup> Nevertheless, the Supreme Court in *Illinois v. Allen*<sup>191</sup> upheld the practice of binding and gagging a defendant when necessary to control disruptive and contumacious conduct. Because "dignity, order, and decorum be the hallmarks of all court proceedings in our country,"<sup>192</sup> the Court allowed trial judges wide discretion to control unruly defendants, including exclusion from the courtroom, citing for contempt, or shackling and gagging.

Due process requires that shackles be used only as a "last resort."<sup>193</sup> A judge acts within his or her discretion when he or she has a rational and justifiable basis for such restraint.<sup>194</sup> The court's decision is error only when the discretion is abused.<sup>195</sup> Shackling is appropriate when the defendant presents a clear risk of escape,<sup>196</sup> or there is a threat to the

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<sup>189</sup> *United States v. Hurtado*, 47 F3d 577, 581 (2d Cir. 1995) (harmless error when defendant appeared in prison attire for only one day; evidence of guilt overwhelming; and district court offered to give curative instruction, which defendant rejected). See also *Duckett v. Godinez*, 67 F3d 734, 747 (9th Cir. 1995) ("prison clothing cannot be considered inherently prejudicial when the jury already knows, based upon other facts, that the defendant has been deprived of his liberty").

<sup>190</sup> *Holbrook*, 475 US at 568-569.

<sup>191</sup> *Illinois v. Allen*, 397 US 337 (1970).

<sup>192</sup> *Id.* at 343. A judge has an obligation to maintain courtroom decorum in other ways. For example, failing to take action when a witness on the stand ingested drugs in open view of some jurors constituted "a serious abdication of [the judge's] responsibility to maintain order and to control the proceedings." *United States v. Van Meerbeke*, 548 F2d 415 (2d Cir. 1976).

<sup>193</sup> *Allen*, 397 US at 344. Some appellate courts require that the trial judge pursue less restrictive alternatives before imposing physical restraints. See *Castillo v. Stainer*, 983 F2d 145, 147-148 (9th Cir. 1992).

<sup>194</sup> *Hellum v. Warden*, 28 F3d 903 (8th Cir. 1994); *Morgan v. Bunnell*, 24 F3d 49 (9th Cir. 1994); *Brewster v. Bordenkircher*, 745 F2d 913, 915 (4th Cir. 1984); *People v. Rouse*, 591 NE2d 1172 (NY 1992); *People v. Bosket*, 564 NYS2d 785 (NY App. Div. 1990). A trial judge need not conduct an evidentiary hearing or make formal findings before ordering that a defendant be shackled. See *Morgan v. Bunnell*, 24 F3d 49, 52 (9th Cir. 1994); *United States v. Stewart*, 20 F3d 911, 915 n.8 (8th Cir. 1994). However, the basis for the decision to shackle should be apparent from the record. *Duckett v. Godinez*, 67 F3d 734, 749 (9th Cir. 1995); *Hellum v. Warden*, 28 F3d 903, 907 (8th Cir. 1994).

<sup>195</sup> *Hellum*, 28 F3d at 907.

<sup>196</sup> *Id.* at 907; *Morgan*, 24 F3d at 49; *United States v. Weeks*, 919 F2d 248 (5th Cir. 1990); *People v. Greiner*, 549 NYS2d 831 (NY App. Div. 1989).

safety and security of court personnel or spectators.<sup>197</sup> Shackling a defendant who is representing himself or herself poses special problems about which the judge must inform the defendant.<sup>198</sup> Shackling a co-defendant,<sup>199</sup> or a defense witness,<sup>200</sup> is also within the judge's discretion. Courts make a distinction between a defendant's exposure to the jury inside the courtroom under unusual conditions of restraint, and an inadvertent exposure while under routine security restraints outside the courtroom.<sup>201</sup> When shackling is used, judges should try to minimize the potential for prejudice by employing restraints, that is, leg braces, that can be hidden from the jury's view.<sup>202</sup>

Gagging is allowed when the defendant poses a clear risk of disrupting the trial by making statements that might impair the orderly trial process. An order gagging a defendant was upheld after the defendant violated the judge's warning by blurting out that he had not been permitted to take a lie detector test, and that the government's main witness was a convicted car thief.<sup>203</sup> When shackling or gagging is used, a curative instruction should be given that the restraint has no bearing on the defendant's guilt.<sup>204</sup> However, when the defense fails to request an instruction, the judge is under no obligation to give one sua sponte.<sup>205</sup>

### Coercing Witnesses

A judge may not coerce a witness either to give testimony, or to refrain from giving testimony. Due process guarantees a criminal defendant the right to offer the testimony of witnesses to establish his defense.<sup>206</sup> A judge's conduct in pressuring defense witnesses not to

<sup>197</sup> *Hellum*, 28 F3d at 903; *Morgan*, 24 F3d at 49; *Stewart v. Corbin*, 850 F2d 492 (9th Cir. 1988); *Bosket*, 564 NYS2d at 785.

<sup>198</sup> *Abdullah v. Groose*, 44 F3d 692, 695 (8th Cir. 1995) ("once the court decided to shackle him, the court made no effort to ascertain whether [defendant] understood the effect shackling would have on his ability to represent himself").

<sup>199</sup> *State v. Brewer*, 301 So. 2d 630 (La. 1974).

<sup>200</sup> *People v. Bryant*, 551 NYS2d 612 (NY App. Div. 1990).

<sup>201</sup> *United States v. Moreno*, 933 F2d 362 (6th Cir. 1991).

<sup>202</sup> *Hellum*, 28 F3d at 903; *Weeks*, 919 F2d at 248. Other ways to minimize prejudice include excusing the jury when the defendant walked to the witness stand. See *Morgan*, 24 F3d at 52.

<sup>203</sup> *Stewart v. Corbin*, 850 F2d 492, 495-496 (9th Cir. 1988).

<sup>204</sup> *Moreno*, 933 F2d at 362; *Stewart*, 850 F2d at 492, 495-496; *People v. Hart*, 491 NYS2d 74 (NY App. Div. 1985).

<sup>205</sup> *Rouse*, 591 NE2d at 1172.

<sup>206</sup> *Washington v. Texas*, 388 US 14, 19 (1967).

testify by admonishing them about the consequences of giving false testimony can violate due process. Thus, in *Webb v. Texas*,<sup>207</sup> the judge gratuitously singled out the defendant's only witness with a lengthy admonition on the dangers of perjury, and threatened him with severe consequences if he lied, following which the witness refused to testify and was excused.<sup>208</sup> The Supreme Court reversed the conviction on due process grounds. The Court found that the judge's strong-arm tactics "could well have exerted such duress on the witness's mind as to preclude him from making a free and voluntary choice whether or not to testify."<sup>209</sup> The Court concluded that "the judge's threatening remarks, directed only at a single witness for the defense, effectively drove that witness off the stand."<sup>210</sup>

However, judges have discretion to warn witnesses about the possibility of incriminating themselves by giving perjured testimony.<sup>211</sup> Thus, discussing the consequences of giving perjured testimony with a potential defense witness is not necessarily improper, particularly when the judge has a legitimate basis for believing that the witness might

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<sup>207</sup> *Webb v. Texas*, 409 US 95 (1972).

<sup>208</sup> The judge admonished the witness as follows:

Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood (sic) is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking.

*Id.* at 95-96.

<sup>209</sup> *Id.* at 98.

<sup>210</sup> *Id.* See also *Anderson v. Warden, Md. Penitentiary*, 696 F2d 296 (4th Cir. 1982) (judge "openly and successfully pressed defendant's two key witnesses to change their testimony"); *Berg v. Morris*, 483 F. Supp. 179 (ED Cal. 1980) (judge clearly indicated disbelief in witness's testimony and threatened witness with perjury and parole revocation). Although the Court in *Webb* reversed the conviction without discussing the prejudicial effect of the loss of the defense witness, subsequent cases clearly hold that harmless error analysis is required for *Webb* violations.

<sup>211</sup> *United States v. Smith*, 997 F2d 674, 680 (10th Cir. 1993); *United States v. Arthur*, 949 F2d 211, 215 (6th Cir. 1991).

commit perjury.<sup>212</sup> Of course, distinguishing proper concern from improper intimidation is not easy. Even the conscientious judge must be careful lest his or her comments become so intimidating that they create a real possibility that the witness's decision not to testify was based on the judge's coercive language rather than on the witness's own voluntary choice.<sup>213</sup>

Nor may a judge coerce a witness into giving testimony. Occasional admonishments to a reluctant witness are proper.<sup>214</sup>

Moreover, a judge is empowered to order testimony from a witness who has been granted immunity.<sup>215</sup> However, a judge may not use the contempt power, or his or her sentencing authority, as pretexts to coerce witnesses into giving favorable testimony for the government.<sup>216</sup> Similarly, a judge's comments to a defendant that her only chance of acquittal is to take the stand and testify "went too far," and in any event should have been directed to defense counsel.<sup>217</sup> Nevertheless, a reviewing court will examine the record to determine whether such coercive remarks deprived the witness of the free will to make a voluntary decision.<sup>218</sup>

### Failing to Sequester Witnesses

The sequestering of witnesses has existed since Biblical times<sup>219</sup> and serves two purposes: it "exercises a restraint on witnesses' 'tailor-

<sup>212</sup> *United States v. Simmons*, 670 F2d 365, 368-369 (DC Cir. 1982) ("*Webb* thus holds that a defendant is denied due process of law when a trial judge, without any basis in the record to conclude that a witness might lie, sua sponte admonishes the defendant's only witness . . . and thereby discourages the witness from testifying"); *Reese v. United States*, 467 A2d 152 (DC App. 1983) (judge's perjury remarks based on witness's plan to recant grand jury testimony that defendant confessed to the crime).

<sup>213</sup> *Yates v. United States*, 513 A2d 818 (DC App. 1986) (conviction affirmed in a "close case" despite judge's unnecessarily repetitive and emphatic remarks that caused witness to change his testimony).

<sup>214</sup> *Gaston v. Hunter*, Ariz. 588 P2d 326 (1978).

<sup>215</sup> *Kastigar v. United States*, 406 US 441, 448-459 (1972).

<sup>216</sup> *United States v. Giraldo*, 822 F2d 205 (2d Cir. 1987) (judge's threatening witness with civil contempt and severe sentence "subvert[ed] both the proper purposes of sentencing for criminal offenses and the temporal limitations on civil contempt sanctions"; nevertheless, no prejudice to defendant was proved).

<sup>217</sup> *United States v. Goodwin*, 770 F2d 631 (7th Cir. 1985) (although judge's remarks "came very close to resulting in improper coercion," defendant's decision to testify apparently voluntary and any error harmless).

<sup>218</sup> *Id.* See *United States v. Hoffman*, 832 F2d 1299, 1303 (1st Cir. 1987) (requiring "some plausible nexus" between the challenged conduct and the witness's decision); *United States v. Crawford*, 707 F2d 447, 449 (10th Cir. 1983) (test is whether conduct substantially interfered with witness's decision).

<sup>219</sup> *Government of Virgin Is. v. Edinborough*, 625 F2d 472, 473 n.3 (3d Cir. 1980).

ing' their testimony to that of earlier witnesses, and it aids in detecting testimony that is less than candid."<sup>220</sup> Modern statutes make sequestration a matter of right rather than a matter committed to the trial judge's discretion.<sup>221</sup> Although statutes typically limit coverage to the physical boundaries of the courtroom, in effect affording parties only the right to close the courtroom to prospective witnesses,<sup>222</sup> judges retain considerable discretion to enter much broader orders that may include sequestration of witnesses before, during, and after their testimony,<sup>223</sup> entering nondiscussion orders,<sup>224</sup> and compelling parties to present witnesses in a prescribed sequence.<sup>225</sup>

Sequestration rules also provide for exemptions, and a judge has discretion to determine whether a witness or witnesses may be exempted from the rule.<sup>226</sup> Such exemptions frequently involve government agents who have assisted the prosecution in developing the case.<sup>227</sup> Among the factors relevant to the exercise of discretion are the importance of the

<sup>220</sup> *United States v. Geders*, 425 US 80, 87 (1976).

<sup>221</sup> *United States v. Jackson*, 60 F3d 128, 134–135 (2d Cir. 1995) ("strong presumption in favor of sequestration"). See also *State v. Omechinski*, 468 SE2d 173, 177 (W. Va. 1996) (rule also applies to rebuttal witnesses). The mandatory language of modern sequestration statutes is illustrated by Rule 615 of the Federal Rules of Evidence, which states:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Many states continue to leave sequestration to the trial judge's discretion. See, e.g., *RIR Evid.* 615.

<sup>222</sup> But see *United States v. Greschner*, 802 F2d 373, 376 (10th Cir. 1986) (circumvention of rule occurs when parties indirectly defeat its purpose by discussing their testimony with other witnesses who are to testify).

<sup>223</sup> *United States v. Sepulveda*, 15 F3d 1161, 1176 (1st Cir. 1993).

<sup>224</sup> *Id.* at 1176 ("non-discussion orders are generally thought to be a standard concomitant of basic sequestration fare"); *United States v. Greschner*, 802 F2d 373, 376 (10th Cir. 1986) (nondiscussion component implicit in rule); *State v. Omechinski*, 468 SE2d at 178 ("in addition to instructing the witnesses to leave the courtroom, the judge should instruct them not to discuss the case").

<sup>225</sup> *Sepulveda*, 15 F3d at 1176.

<sup>226</sup> Compare *Jackson*, 60 F3d at 128, 134–135 (allowing three case agents to remain in the courtroom at prosecutor's table may be permissible) with *United States v. Ramirez*, 963 F2d 693 (5th Cir. 1992) (assumption that judge abused discretion in allowing more than one case agent to remain in courtroom).

<sup>227</sup> *Jackson*, 60 F3d at 128, 134–135 (exempting three case agents not necessarily abuse of discretion); *Ramirez*, 963 F2d at 693 (allowing two case agents to remain in courtroom assumed to constitute abuse of discretion).



testimony; whether it will involve controverted facts; whether the information is ordinarily subject to tailoring such that cross-examination could expose deficiencies; the extent that the testimony will encompass the same issues as that of other witnesses; the order in which the witnesses will testify; any potential bias that might motivate the witness's testimony; and whether the witness's presence is essential or merely desirable.<sup>228</sup> Errors typically associated with sequestration include a judge's failure to give witnesses appropriate nondiscussion instructions,<sup>229</sup> exclusion of evidence that a witness violated the sequestration order,<sup>230</sup> and a judge's failure to order witnesses to leave the courtroom.<sup>231</sup>

A court may impose various sanctions for a violation of sequestration, including holding the offending party in contempt, permitting cross-examination concerning the violation, and precluding the witness from testifying.<sup>232</sup> Disqualifying a witness from testifying should not be lightly imposed, and it is usually an abuse of discretion to preclude testimony unless the defendant or the defendant's counsel has cooperated in the violation.<sup>233</sup> Declaring a mistrial is also within a court's discretion.<sup>234</sup>

Any error in administering sequestration is subject to a showing of prejudice.<sup>235</sup> Courts differ as to which party has the burden on the issue of prejudice. Several courts require the party aggrieved by the sequestration error to demonstrate prejudice.<sup>236</sup> Other courts place the burden on the prosecution to prove that the error was harmless on the theory

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<sup>228</sup> *Jackson*, 60 F3d at 135.

<sup>229</sup> *United States v. Greschner*, 802 F2d 373 (10th Cir. 1986); *Omechinski*, 468 SE2d at 173.

<sup>230</sup> *Childress v. State*, 467 SE2d 865 (Ga. 1996) (reversible error after one witness attempted to influence testimony of another witness who had not yet testified).

<sup>231</sup> *Solomon v. State*, 913 SW2d 288 (Ark. 1996) (judge commits reversible error in allowing prosecution witnesses to remain in courtroom).

<sup>232</sup> *United States v. Hobbs*, 31 F3d 918, 921 (9th Cir. 1994); *United States v. Eyster*, 948 F2d 1196, 1211 (11th Cir. 1991).

<sup>233</sup> *Hobbs*, 31 F3d at 921; *Braswell v. Wainwright*, 463 F2d 1148, 1157 (5th Cir. 1972).

<sup>234</sup> *United States v. Klinginsmith*, 25 F3d 1507, 1511 (10th Cir. 1994) (mistrial considered a "rather drastic remedy"). See also *United States v. Womack*, 654 F2d 1034, 1040 (5th Cir. 1981).

<sup>235</sup> *Jackson*, 60 F3d at 136 (citing cases from other circuits).

<sup>236</sup> *United States v. Sykes*, 977 F2d 1242, 1245 (8th Cir. 1992); *United States v. Ramirez*, 963 F2d 693, 704 (5th Cir. 1992); *Government of Virgin Is. v. Edinborough*, 625 F2d 472, 474 (3d Cir. 1980); *Solomon v. State*, 913 SW2d at 290-291.



that it probably is impossible to tell how a witness's testimony would have differed had there been compliance with the rule.<sup>237</sup>

### "Sandbagging" Counsel

A judge frequently makes trial rulings on which defense counsel relies. For example, a judge might represent to counsel that he or she will instruct the jury on a particular legal theory, or allow a party to introduce evidence or examine a witness at a future point in the trial, or, in a bench trial, make a credibility determination concerning a witness. Counsel in such a case should be able to rely on the judge's representations, and might reasonably formulate subsequent trial strategy based on those assurances.<sup>238</sup> However, if the judge later reverses his or her position, and takes no steps to avoid prejudice, he or she can deprive a party of a fair trial.

That precise situation occurred in *United States v. Mendel*<sup>239</sup> when, during a bench conference, the judge stated to defense counsel that he did not find a government witness's testimony reliable. However, following summations, the judge changed his position and indicated that the witness was indeed credible in certain respects. Defense counsel had relied on the judge's earlier credibility announcement by forgoing submission of evidence that would have impeached the witness. A motion for a mistrial was denied, but the Second Circuit reversed the conviction, observing, "It cannot be said that a criminal trial was fair when the judge in mid-trial announced that certain testimony will not be credited and then without warning based a conviction in major part on that very testimony."<sup>240</sup>

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<sup>237</sup> *Jackson*, 60 F3d at 128; *United States v. Pulley*, 922 F2d 1283, 1286 (6th Cir. 1991); *United States v. Farnham*, 791 F2d 331, 335 (4th Cir. 1986); *Omechinski*, 468 SE2d at 180-181.

<sup>238</sup> Rule 30 of the Federal Rules of Criminal Procedure requires the district judge to inform counsel of which instruction are going to be given in order to allow counsel to argue the case intelligently to the jury. A violation of this rule is reversible conduct if it prejudices the defendant. See *United States v. Gaskins*, 849 F2d 454 (9th Cir. 1988) (giving supplemental instruction concerning aiding and abetting in response to jury note, after advising counsel that it would not do so, reversible conduct).

<sup>239</sup> *United States v. Mendel*, 746 F2d 155 (2d Cir. 1984).

<sup>240</sup> *Id.* at 163. See also *United States v. Ienco*, 92 F3d 564 (7th Cir. 1960) (prejudicial error for judge to announce during prosecution's case in chief that it would not give a *Pinkerton* instruction, and then after both sides completed examining witnesses changed his mind and said he would give such an instruction).

In a similar situation a judge advised defense counsel that his cross-examination of government witnesses regarding bias and illicit motive in their preparation of tape recordings and transcripts would have to await the defense case.<sup>241</sup> When the defense commenced its case, the judge again denied counsel the opportunity to question these witnesses because "he could well have done that on his earlier cross-examination of the agents." The Second Circuit reversed the conviction, finding that the trial judge's about-face in effect "sandbagged" defense counsel into forgoing defense options. A similar about-face resulted in reversible error when the judge, after assuring defense counsel that he would instruct the jury on a particular legal theory, and after counsel gave a closing argument premised on that assurance, reversed himself and refused to give that instruction.<sup>242</sup>

### Conclusion

A linchpin of the criminal justice system is the ability of defense counsel to represent a client effectively. The trial judge's conduct can hamper defense counsel's performance either by remarks that denigrate or threaten counsel, rulings that undermine effective representation, or other conduct that communicates to the jury the judge's disposition either to favor the prosecution or to disfavor the defense. The judge's behavior, in the various contexts described earlier, has the potential to seriously impair defense counsel's ability to represent the client effectively, and thereby prejudice the defendant's right to a fair trial.

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<sup>241</sup> *United States v. Salerno*, 937 F2d 797 (2d Cir. 1991).

<sup>242</sup> *People v. Greene*, 553 NE2d 1014 (NY 1990). See also *United States v. Gaskins*, 849 F2d 454 (9th Cir. 1988) (improper to give supplemental instruction concerning particular legal theory after assuring defense counsel that it would not do so).