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Combating Judicial Misconduct: A Stoic Approach

MICHAEL D. CICCHINI†

I like and respect some judges, but not as many as I should. Too many are mean-spirited and arrogant, going out of their way to insult, ridicule, and demean those who come before them.

—**Abbe Smith**, Law Professor and Clinic Director

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A vast variety of missiles are launched with us as their target.

If you want a man to keep his head when the crisis comes you must give him some training before it comes.

—**Seneca**, Stoic Philosopher and Imperial Advisor

ABSTRACT

Judicial ethics rules require criminal court judges to be competent, even-tempered, and impartial. In reality, however, many judges are grossly ignorant of the law, incredibly hostile toward the defense, and outright biased in favor of the state. Such acts of judicial misconduct

† Criminal Defense Lawyer, Cicchini Law Office LLC, Kenosha, Wisconsin. J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin-Parkside (1990). Many thanks to Mauricio Hernandez, lawyer and legal blogger, for generously sharing his research on judicial misconduct.

pose serious problems for the criminal defense lawyer and violate many of the defendant's statutory and constitutional rights.

This Article presents a framework for the defense lawyer to use in combating judicial misconduct. The approach is rooted in a principle of Stoic philosophy called "negative visualization." That is, the lawyer should anticipate and visualize judicial incompetence, hostility, and bias within the context of the client's case. This Stoic practice has two primary benefits.

First, by envisioning such problems before they occur, the defense lawyer may be able to prevent some of them from happening in the first place. Toward that end, this Article identifies several preemptive legal strategies to prevent the unethical judge from infecting the client's case.

Second, envisioning acts of judicial ignorance, hostility, and bias before they occur will render them less of a shock when they do occur in the middle of trial, in front of the jury, and in a full courtroom. This, in turn, allows the defense lawyer to remain calm in the face of adversity and formulate an effective response to protect the client. Toward that end, this Article identifies several responsive legal strategies for the lawyer to use when confronted with judicial misconduct in the courtroom.

The criminal defense lawyer who steps into the courtroom naively assuming the trial judge will perform and behave ethically does his or her client a tremendous disservice. On the other hand, the defense lawyer who anticipates and prepares for judicial incompetence, aggression, and bias will be in a better position to protect the defendant's important statutory and constitutional rights.

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INTRODUCTION

Judicial ethics rules require judges to maintain competence in the law, demonstrate the proper judicial temperament, and preside over their cases in an impartial manner.[1] Yet, despite the clarity of these rules, criminal court judges violate them with alarming frequency. For example, many judges are ignorant of the law and fail to grasp even the most basic legal principles that are supposed to govern their decisions.[2] Other judges are incredibly short-fused and hot-headed, quick to anger and lash-out at the defense lawyer for any or no reason.[3] Worst of all, some judges, far from being neutral and detached magistrates, are outright and unashamedly biased in favor of the state.[4]

When judges commit acts of misconduct in criminal cases, they create very serious problems for the defense lawyer and the defendant. First, defense lawyers are often surprised, shocked, and even struck numb by such judicial misbehavior, and are therefore unable to effectively respond on behalf of their clients.[5] Second, the clients *need* their lawyers to effectively respond, as judicial misconduct often violates several of the defendant's important statutory and constitutional rights.[6]

Given the seriousness of the problem, this Article provides a theoretical and practical framework for combating judicial misconduct in the courtroom. Part I provides a broad overview of the problem and explains why unethical judges often target defendants and defense lawyers. Part II then explains that, because encountering an ignorant, hostile, or biased judge can be an unsettling and even shocking

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1. *See infra* Part III.
2. *See infra* Section III.A.
3. *See infra* Section III.B.
4. *See infra* Section III.C.
5. *See infra* Part II.
6. *See infra* Part III.

experience for the defense lawyer, he or she must learn to expect such misconduct before it occurs. This approach is rooted in Stoic philosophy, which teaches that "we should be anticipating not merely all that commonly happens but all that is conceivably capable of happening," so that we are not "overwhelmed and struck numb by rare events as if they were unprecedented ones[.]"[7]

In order to implement this Stoic practice of "negative visualization," the defense lawyer must know what the ethics rules require of judges, how judges commonly break those rules, and how such rule-breaking harms the defendant. Therefore, Part III sets forth the ethics rules pertaining to judicial competence, demeanor, and impartiality. It also provides numerous, specific examples of how judges commonly break each of those rules, and explains which of the defendant's rights are violated in the process.

Understanding and anticipating acts of judicial misconduct, along with maintaining the proper mindset when confronted by an unethical judge, are indeed important steps. However, that is only half the battle. In addition, the defense lawyer needs to know what can be done, from a legal perspective, to protect the defendant. The remainder of this Article therefore identifies and discusses several legal strategies for dealing with judicial incompetence, hostility, and bias.

In some cases, the defense lawyer may be able to take preemptive measures to avoid problems before they materialize. Toward that end, Part IV discusses several preventative legal strategies: the substitution of judge request, the motion to recuse, the motion in limine, and the trial brief. The substitution of judge request can prevent all forms of anticipated misconduct; the motion to recuse is suitable only in cases of previously demonstrated bias; and the motion in limine and trial brief are designed to educate the judge, thus preventing his or her incompetence from

7. SENECA, LETTERS FROM A STOIC 179 (Penguin Books 2004).

infecting the trial.

Despite the defense lawyer's best efforts, however, many instances of judicial misconduct are simply unavoidable. Therefore, when a judge unexpectedly misbehaves, the lawyer must react. Toward that end, Part V discusses several legal strategies for responding to an unethical trial judge. These include a timely and properly stated objection, the request for a curative instruction or mistrial, the offer of proof, the closing argument to the jury, and even possible post-conviction measures. Most significantly, given the difficulty in reacting to certain forms of judicial misconduct in front of a jury or a full courtroom, Part V also discusses how *not* to respond to the unethical judge.

I. JUDGES BEHAVING BADLY

Judicial ethics rules clearly set forth the basic duties of trial court judges. Yet, despite the clarity of the rules, many judges break them with alarming frequency and amazing creativity. As this Article will demonstrate, "The varieties of judicial misbehavior are limited only by the imagination[.]"[8]

Law professor and clinic director Abbe Smith describes the problem this way: "I like and respect some judges, but not as many as I should. . . . Too many are mean-spirited and arrogant, going out of their way to insult, ridicule, and demean those who come before them."[9] Similarly, Alan Dershowitz explains: "I have been more disappointed by judges than by any other participants in the criminal justice system. . . . Beneath the robes of many judges, I have seen corruption, incompetence, bias, laziness, meanness of spirit, and plain ordinary stupidity."[10]

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8. Charles M. Sevilla, *Protecting the Client, the Case and Yourself from an Unruly Jurist*, THE CHAMPION, Aug. 2004, at 28, 29 (2004).

9. Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253, 253 (2017).

10. Alan Dershowitz, THE BEST DEFENSE xvii-iii (Random House 1982); *see also* Dayvid Figler, *Who Judges the Judges?*, THE NEVADA INDEPENDENT (May 28, 2019), https://thenevadaindependent.com/article/who-judges-the-judges ("Any

There are many reasons for judicial misbehavior.[11] Nonetheless, the following two-part explanation usually rings true. First, whether strategic or merely habit, we lawyers obsessively fawn over judges. We "engage in stylized demonstrations of obeisance. We stand when the judge enters and leaves the room. Our 'pleadings' are 'respectfully submitted.' Before speaking, we make sure that it 'pleases the court.' We obey the judge's orders and we even say 'thank you' for adverse rulings."[12] And second, from the judge's perspective, "When your daily life consists of sitting in an elevated position in judicial robes, with people bowing and scraping before you, it likely goes to your head."[13]

When facing discipline for multiple acts of misconduct, one rather bold judge even attempted to use his outsized ego as a defense. "In an interesting attempt to mitigate his discipline," the judge argued that "his misconduct was attributable to a mental disability—narcissistic personality disorder ('NPD')."[14] This is "a condition in which people have an inflated sense of self-importance and an extreme preoccupation with themselves."[15] Paradoxically, the judge's defense was spot-on but ineffective. Because "NPD was not readily treatable," the disciplinary authority "declined to afford it significant mitigating effect."[16]

There is some debate regarding the pervasiveness of

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jerk with a law degree can become a judge and as a former judge, I'm living proof. There is no guarantee that a person elevated to the bench will be a good/wise/thoughtful/tempered judge, no matter his or her predictable proclamations to be all those things.").

11. *See, e.g.*, Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949 (2013).

12. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12 (2001).

13. Smith, *supra* note 9, at 254.

14. Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 334 (2012) (discussing Disciplinary Counsel v. Parker, 876 N.E.2d 556 (Ohio 2007)).

15. *Id.* at 334 n.60 (quoting *Narcissistic Personality Disorder*, PUBMED HEALTH (2010), http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH001930).

16. *Id.* at 334.

judicial misconduct. On the one hand, Judge Carl E. Stewart concedes that any particular act of misconduct can have serious negative consequences; however, he contends that "the overwhelming majority of judges adhere to the highest standards of ethical conduct, and that judicial misconduct cases do not constitute a systemic crisis for the judiciary."[17]

On the other hand, Smith argues that the problem "is more widespread than many people believe—*especially judges*."[18] That is, "When told about the brazenly bad behavior of their brethren, judges are often incredulous. How quickly they forget their own experience as lawyers. How quickly they assume the role of judge and become apologists for others."[19] Additionally, most judges are simply out of the loop, as they "seldom visit each other's courtrooms and know little of what goes on there."[20]

Although judicial misconduct is now getting some national attention,[21] it is difficult to quantify the true scope of the problem. Cases in which judges commit misconduct typically "are not reported to judicial conduct commissions or appealed on that basis because the lawyers appear before the offending judges with sufficient frequency that they must be concerned about possible retribution."[22] Trial lawyers in particular "cannot call judges out on their [misconduct] without risking reprisal. Many lawyers—especially public defenders—are repeat players. Even if indignation is

17. Hon. Carl E. Stewart, *Abuse of Power & Judicial Misconduct: A Reflection on Contemporary Ethical Issues Facing Judges*, 1 U. ST. THOMAS L.J. 464, 465 (2003).

18. Smith, *supra* note 9, at 255 (emphasis added).

19. *Id.* at 255–56.

20. *Id.* at 256.

21. *See* Wendy Davis, *Bullying from the Bench: A Wave of High-Profile Bad Behavior has put Scrutiny on Judges*, ABA JOURNAL (Mar. 1, 2019), http://www.abajournal.com/magazine/article/bullying-from-the-bench ("Across the country, judges are creating embarrassing headlines when they are accused of abusive behavior toward lawyers and litigants.").

22. Richmond, *supra* note 14, at 346.

warranted in the moment, we have to be mindful of the impact on other clients."[23]

Regardless of its true frequency, judicial misconduct often violates several of the criminal defendant's important statutory and constitutional rights. This is true even when the judge's misconduct is not directed at the defense in particular. For example, when judges fail to act with the diligence required by the ethics rules, cases can be delayed by months and even years. Meanwhile, indigent defendants remain locked-up, often in violation of their statutory and constitutional speedy trial rights, while they await trial.[24]

The bigger problem, however, is that judicial misconduct often *is* directed at the defense. "Criminal defendants are regular targets and so are their lawyers. Getting slapped down, dressed down, and put down is part of the job."[25] In other words, "Most criminal defense lawyers experience this reality not anecdotally but daily."[26]

Defense lawyer Charles Sevilla elaborates: "We are targeted because, if we do our jobs, we obstruct the state's case with such incendiary devices as the effective assistance of counsel, the presumption of innocence, demanding proof beyond a reasonable doubt and adherence to rules of

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23. Smith, *supra* note 9, at 272. It would be nice to think that judges would not retaliate against a defense lawyer, as such retaliation ultimately hurts the lawyer's *client*. However, in some cases, this is hoping for too much. *See* Davis, *supra* note 21 (discussing one judge's threat, after learning of a lawyer's prior criticism, that "[w]hat goes around comes around").

24. Judicial laziness violates the ethics rule requiring judges to perform their duties diligently. However, this Article focuses on judicial misconduct that causes shock, frustration, anger, and embarrassment for the criminal defense lawyer. Therefore, while judicial laziness can seriously impact a defendant's rights, it is beyond the scope of this Article. For more on the topic, see Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 440 (2004) ("Whether because of physical or emotional problems or simple laziness, [some judges] fail to rule on motions, set cases for trial, or issue decisions.").

25. Smith, *supra* note 9, at 256.

26. *Id.* at 269.

procedure."[27] Many judges do not take kindly to such advocacy. In fact, if a defense lawyer merely tries "to slow things down to have a conversation about the facts or the law," that alone is enough to brand him or her an "obstructionist."[28]

Despite the problem that judicial misconduct poses for defense lawyers and, consequently, their clients, most lawyers fail to give any thought to the matter until it is too late. Such passivity does the client a tremendous disservice. By failing to anticipate possible judicial misbehavior ahead of time, the lawyer has no chance of preventing it from happening. Further, in those situations where it cannot be prevented, the lawyer will be unprepared to respond to it. The unprepared lawyer who is blindsided by judicial ignorance, hostility, or bias in the middle of a hearing or trial is often shocked, or even struck numb, and cannot effectively mitigate the damage and protect the client.

The impact of judicial misconduct on the defense lawyer's ability to do his or her job should not be underestimated. For example, with regard to hostility, "some judges are so unpleasant it's hard to make a cogent argument in their presence."[29] In other cases, a bad judicial temperament can quickly turn into a direct assault on the defense lawyer. Smith describes one explosion on the bench that materialized out of nowhere: "I am not sure I have ever received such a dressing down by a judge. . . . I have repressed the substance of it because it was so shaming. I felt about an inch tall."[30]

Even run-of-the-mill judicial incompetence can impact a lawyer's ability to function. Smith recounts a colleague's experience where the judge's order was so detached from the

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27. Sevilla, *supra* note 8, at 29.

28. Davis, *supra* note 21 (quoting law professor and defense clinic director Steve Zeidman).

29. Smith, *supra* note 9, at 263.

30. *Id.* at 265.

rule of law that the lawyer was "[s]peechless with surprise."[31] She then had to "regain[] her equilibrium" before she was able to react.[32] I can certainly relate to that experience—although I can't claim to have always regained my equilibrium in time to effectively respond.

Not surprisingly, less experienced lawyers and their clients are at greater risk of harm from judicial ignorance. "[Y]oung lawyers expect judges to be like their best, most able professors, nimble and knowledgeable. Appearing before a judge who is the opposite is a great challenge for them."[33] This challenge increases exponentially when the judge is not only incompetent, but also has a short fuse or is outright biased in favor of the state.

Unfortunately, most law professors have spent little if any time in the courtroom; they are unable even to warn their students about this problem, let alone teach them how to deal with it.[34] Worse yet, some law schools have taken a page from the modern university: when students become upset or offended by something, administrators validate their feelings and may even rush to their aid with "self-care activities such as coloring sheets, play dough, positive card-making, Legos, and bubbles with your fellow law students."[35] The downside of such coddling, of course, is that when newly

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31. *Id.* at 267.

32. *Id.*

33. *Id.* at 259.

34. *See* Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 112-13 (2012) (explaining that "practical experience often *hurts* an aspiring professor's chances of being hired" and "the typical new professor possesses only one year of practical experience"); Paul Campos, *Legal Academia and the Blindness of the Elites*, 37 HARV. J.L. & PUB. POL'Y 179, 180 (2014) ("A 2003 study found that the average amount of experience in the practice of law among new hires at top twenty-five law schools, *among those hires who had any such experience*, was 1.4 years." (emphasis added)).

35. Greg Piper, *UMich law school scrubs Post-Trump Play-Doh and coloring event from website*, THE COLLEGE FIX (Nov. 11, 2016), https://www.thecollegefix.com/umich-law-school-scrubs-post-trump-play-doh-coloring-event-website/.

minted lawyers find themselves in the crosshairs of an unethical judge, toys such as "Play-Doh and coloring books won't be there to comfort them."[36] (Aside from being inappropriate for would-be professionals, I can't imagine how such a childish approach could even be *effective*.)

Given this, what should the conscientious criminal defense lawyer—whether a rookie or battled-tested veteran—do about the very real, if not looming, prospect of judicial misconduct? This Article offers both a philosophical framework and some very specific, practical legal strategies for preventing the problem and, when necessary, dealing with it after the fact. As the next Part explains, in order to effectively manage an unethical judge, the criminal defense lawyer must first develop the proper mindset.

II. THINK NEGATIVE: LESSONS FROM THE STOICS

As Abbe Smith's previous examples of judicial hostility and incompetence demonstrated, the defense lawyer is often caught off guard by acts of judicial misconduct. When the lawyer is blindsided this way, negative emotions such as shock, frustration, anger, and embarrassment make it difficult to formulate an effective and timely response in front of a full courtroom or jury. Given the potential for this type of negative psychological impact, it is imperative for the defense lawyer to develop the proper mindset before even stepping foot into the courtroom.

One way to do this is to draw from the lessons of Stoic philosophy.[37] Stoicism is concerned with practical wisdom rather than linguistics, semantics, and wordplay—topics

36. Michael D. Cicchini, *Law Schools, Lawyers, and Dead Philosophers*, WIS. L.J. (Dec. 14, 2016), https://wislawjournal.com/2016/12/14/critics-corner-law-schools-lawyers-and-dead-philosophers/.

37. *See* PETER ADAMSON, PHILOSOPHY IN THE HELLENISTIC AND ROMAN WORLDS 3–9 (2015); Chuck Chakrapani, *Stoic Minimalism: Stripping the Dead Bark Off Orthodox Stoicism*, MODERN STOICISM (Oct. 27, 2018), https://modernstoicism.com/stoic-minimalism-stripping-the-dead-bark-off-orthodox-stoicism-by-chuck-chakrapani/.

that occupy the time of the typical philosophy professor.[38] Seneca, who is considered one of the three great Roman Stoics,[39] explained the difference between the Stoics and most other philosophers this way:

> [L]ook at the amount of useless and superfluous matter to be found in the philosophers. Even they have descended to the level of drawing distinctions between the uses of different syllables and discussing the proper meanings of prepositions and conjunctions. They . . . know more about devoting care and attention to their speech than about devoting such attention to their lives. Listen and let me show you the sorry consequences to which subtlety carried too far can lead, and what an enemy it is to truth. Protagoras declares that it is possible to argue either side of any question with equal force, even the question whether or not one can equally argue either side of any question! . . . Well, all these theories you should just toss on top of that heap of superfluous liberal studies.[40]

On the other hand, the practical wisdom in which the Stoics were interested centered on "how to live."[41] Specifically, for our purposes, the Stoics' primary goal was to obtain "freedom from disturbance."[42] This is accomplished by preventing, or at least managing, negative emotions such as shock, frustration, anger, and embarrassment, as these are "the chief threat[s] to our tranquility."[43]

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38. *See* WILLIAM B. IRVINE, A GUIDE TO THE GOOD LIFE: THE ANCIENT ART OF STOIC JOY 13 (2009) ("Although modern philosophers tend to spend their days debating esoteric topics, the primary goal of most ancient philosophers was to help ordinary people live better lives. Stoicism . . . was one of the most popular and successful of the ancient schools of philosophy.").

39. ADAMSON, *supra* note 37, at 81 (Seneca "is the first of three great figures to work in the imperial period, known collectively as 'Roman Stoics': Seneca, Epictetus, and Marcus Aurelius."); DONALD ROBERTSON, THE PHILOSOPHY OF COGNITIVE-BEHAVIOURAL THERAPY (CBT): STOIC PHILOSOPHY AS RATIONAL AND COGNITIVE PSYCHOTHERAPY 262 (2010) (describing Seneca, Epictetus, and Marcus Aurelius as "philosophical heroes, veritable warriors of the psyche").

40. SENECA, *supra* note 7, at 160–61. To express Seneca's thought in modern day terms, "Stoic philosophy is too important to be left to academic philosophers." Chakrapani, *supra* note 37.

41. ADAMSON, *supra* note 37, at 9.

42. *Id.* at 82.

43. *Id.*

With this goal in mind, "The Stoics . . . develop[ed] techniques for preventing the onset of negative emotions and for extinguishing them when attempts at prevention failed."[44] For the defense lawyer, these Stoic methods can be used to maintain "calm in the face of adversity"[45]—a disposition that is incredibly important when confronted with an ignorant, intemperate, or biased judge in a packed courtroom or in front of a jury.

The Stoic technique of greatest value to the defense lawyer is what philosopher William Irvine calls "negative visualization," or the practice of envisioning the bad things that can happen *before* they actually happen.[46] For our purposes, this means anticipating, before the lawyer even steps foot into the courtroom, the ways the judge could act unethically to the client's detriment. While this may at first seem counterintuitive—why should we spend time thinking about bad things that might never happen?—Irvine provides two very practical reasons for engaging in this Stoic practice.

First, by anticipating how the judge is likely to commit misconduct, we may be able to "take preventative measures" to avoid the problem entirely.[47] Second, "no matter how hard we try to prevent bad things from happening to us, some will happen anyway."[48] In this case, if we are prepared for the misconduct before it occurs—even if we cannot predict its precise form—we will be better able to react to it.[49] Conversely stated, "Those who are *unprepared* . . . are panic-

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44. IRVINE, *supra* note 38, at 5.

45. ROBERTSON, *supra* note 39, at 210.

46. IRVINE, *supra* note 38, at 68 ("This technique—let us refer to it as *negative visualization*—was employed by the Stoics at least as far back as Chrysippus. It is, I think, the single most valuable technique in the Stoics' psychological tool kit.").

47. *Id.* at 65.

48. *Id.*

49. *See* ALAIN DE BOTTON, THE CONSOLATIONS OF PHILOSOPHY 81 (Vintage Books 2001) ("[W]e best endure those frustrations which we have prepared ourselves for.").

stricken by the most insignificant happenings."[50] Our goal is to avoid this pitfall and "see to it that nothing takes us by surprise."[51]

As though he were writing directly to the modern criminal defense lawyer, Seneca described the psychological benefits of negative visualization as follows. "A vast variety of missiles are launched with us as their target."[52] Given this, "If you want a man to keep his head when the crisis comes you must give him some training *before* it comes."[53] He offered an illustration using the common crises of his day:

> Rehearse them in your mind: exile, torture, war, shipwreck. . . . [W]e should be anticipating not merely all that commonly happens but all that is conceivably capable of happening, if we do not want to be overwhelmed and struck numb by rare events as if they were unprecedented ones[.][54]

> And since it is invariably unfamiliarity that makes a thing more formidable than it really is, this habit of continual reflection will ensure that no form of adversity finds you a complete beginner.[55]

How does the lawyer adapt this strategy to modern criminal defense practice? He or she simply replaces "exile, torture, war, [and] shipwreck" with incidents of judicial incompetence, hostility, pro-state bias, and other forms of judicial misconduct. Then, the defense lawyer spends a brief period of time envisioning and bracing for such conduct, within the context of a particular case, before stepping foot into the courtroom.[56]

Due in part to the coddling approach of modern

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50. SENECA, *supra* note 7, at 198 (emphasis added).

51. *Id.*

52. *Id.*

53. *Id.* at 67 (emphasis added).

54. *Id.* at 179.

55. *Id.* at 198.

56. *See* DE BOTTON, *supra* note 49, at 91 ("In the early morning, we should undertake . . . a meditation in advance, on all the sorrows of mind and body to which [Fortune] may subsequently subject us.").

academia, the practice of anticipating negative events will be unheard of for many younger attorneys. In addition to having to shift gears on a psychological level, young lawyers may also face another hurdle in practicing negative visualization: a lack of experience. While battle-tested veterans can draw directly from experiences in their prior cases when envisioning the disasters that await them in court, newer lawyers will have to read the written work of others.

As Charles Sevilla cautions, however, "reading about the issue is nothing compared to experiencing the trauma of trial before an arbitrary or biased judge."[57] This is where the inexperienced lawyer may have to invest some additional effort in the practice of negative visualization:

> First, it is not a question of imagining the future as it is likely to turn out but to imagine the worst that can happen, even if there's little chance it will turn out that way . . .
>
> Second, one shouldn't envisage things as possibly taking place in the distant future but *as already actual and in the process of taking place*. For example, imagining not that one might be exiled but rather that one is already exiled[.][58]

Once again, the lawyer merely has to replace "exile" with incidents of judicial incompetence, hostility, and pro-state bias. Within the context of the courtroom, then, "Nothing ought to be unexpected by us. Our minds should be sent forward in advance to meet all the problems[.]"[59]

The Stoic practice of negative visualization can produce immediate results, as the next two examples illustrate. To begin, in one case I was making an argument at a client's sentencing hearing. During my argument, the judge repeatedly interrupted me by *yelling*—in a packed courtroom, no less—that I was a liar. In a case of life imitating bad network television, it was like a hostile

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57. Sevilla, *supra* note 8, at 28.

58. ROBERTSON, *supra* note 39, at 211 (quoting the French philosopher Michel Foucault) (emphasis added).

59. DE BOTTON, *supra* note 49, at 88.

courtroom scene from one of those cookie-cutter legal dramas that litter our airwaves.

In response to this slander, I tried to explain that I was not lying and even provided the source of my information; however, my reaction was not calm or particularly effective. I'm sure I appeared frustrated, angry, disheveled, and frenzied. The reason for my emotional state was that I had entered the courtroom naively expecting things to go smoothly. Then, I was caught off guard when the judge behaved like a belligerent hack. And that was my own fault. "If we find ourselves shocked or surprised that a boor behaves boorishly, we have only ourselves to blame: We should have known better."[60]

By comparison, shortly after that case I appeared in front of the same judge for a different client's sentencing hearing. This time I had mentally prepared myself for chaos, even though I couldn't possibly have predicted its precise form. My preparation was simple: before court, I merely reminded myself that "today I shall meet with people who are . . . aggressive, treacherous, malicious, unsocial. All this has afflicted them through their ignorance[.]"[61] I then visualized the judge becoming unhinged and screaming at me for no identifiable reason—an easy task, as the judge's previous meltdown was fresh in my mind. I also briefly envisioned other forms of misconduct, including judicial ignorance of the relevant law—a topic discussed later.

At this sentencing hearing, I was arguing to the judge that my client's actions, while criminal, did not cause any actual harm. The judge went apoplectic, as if I had just committed a heinous misstep such as asking for probation after a murder conviction. I sat quietly during the judge's outburst—it is important to let the judge get it all out—and then *calmly* stated: "I see I've upset the Court. But the level

60. IRVINE, *supra* note 38, at 137.

61. MARCUS AURELIUS, MEDITATIONS 10 (Martin Hammond trans., Penguin Books 2006).

of harm caused by a defendant is an element of this offense, and I have to point out mitigating factors. I should probably finish my argument, and if it is helpful to the Court, that's great; if not, the Court can disregard it."

I also made sure to speak *slowly*, which not only calms the mind but also improves the argument. Seneca's advice on this point is as valuable today as it was when he wrote it to a young advocate thousands of years ago:

> One might add, too, that there is not even any pleasure to be found in such a noisy promiscuous torrent of words. . . . Even in an advocate I should be [loath] to allow such uncontrollable speed in delivery, all in an unruly rush; how could a judge (who is not uncommonly, too, inexperienced and unqualified) be expected to keep up with it? Even on the occasions when an advocate is carried away . . . he should not increase his pace and pile on the words beyond the capacity of the ear.[62]

My experience at the two sentencing hearings, described above, also provides evidence for this tenet of Stoicism: "It is not events that disturb people"; rather, "it is their judgments" about those events that disturb them.[63]

> In other words, most people tend to describe their emotional reactions in broadly *stimulus-response* ("A causes C") language: for example, he shouted at me (environmental stimulus or "A") and that made me [embarrassed or angry] (emotional response or "C"). However, [Albert] Ellis and other cognitive therapists are keen to emphasize the intermediate role of . . . cognitions: for example, he shouted at me (A), I told myself "That's awful, I can't stand it, he's an idiot!" (B), and that made me [embarrassed or angry] (C).[64]

To streamline the above concept, and to apply it to my experience at the first sentencing hearing described above: An external event (the judge screaming at me and calling me a liar) caused me to form a judgment about the event ("this is awful, I can't stand it, the judge is an idiot!") and it was

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62. SENECA, *supra* note 7, at 84.

63. EPICTETUS, DISCOURSES AND SELECTED WRITINGS 223 (Robert Dobbin ed. & trans., Penguin Books 2008).

64. ROBERTSON, *supra* note 39, at 114.

that judgment that caused my emotional disturbance (embarrassment and anger). Put in even clearer terms: "Emotional disturbance is the result of mindlessly becoming absorbed in external events[.]"[65]

My experience at the second sentencing hearing was dramatically different, even though I faced the same judge and was confronted with the same unprofessional, boorish conduct. Because I was *expecting* hostility at the second hearing, I was prepared for it and did not read more into the judge's tantrum than was warranted. I was unfazed by the judge's outburst and remained in complete control of my emotional response.[66] Maintaining this calm in the face of the judge's attack allowed me to formulate a rational, measured legal response. I demonstrated "a temperate, self-possessed approach to disaster" in the courtroom.[67]

It is also important for the defense lawyer to recognize and remember that any judge is capable of exploding, or committing other forms of misconduct, at any time. This includes, of course, the frequent-flyer types who are chronically ignorant of the law, perpetually hot-headed, or openly biased in favor of the state. Charles Sevilla describes this type of nasty, habitual offender as "the 100 percent pure-beef black-robed jackass, who promises to make life a living hell."[68]

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65. *Id.* at 11.

66. As explained earlier, preventing or terminating negative emotions is the primary goal of Stoicism. Toward this end, another Stoic principle that is of great value, especially to the criminal defense lawyer, is the "dichotomy of control." IRVINE, *supra* note 38, at 85–101. In a nutshell, we must learn "to carefully distinguish between our own voluntary judgments and intentions, for which we have responsibility, and *external events* and the actions of others, which lie outside of our direct sphere of control." ROBERTSON, *supra* note 39, at 61 (emphasis added). This principle can also be applied to goal setting. For example, using the dichotomy of control, we would set only "internal goals" (e.g., to *prepare* well for trial, which is within our control) rather than "external goals" (e.g., to *win* the trial, which is outside of our control or, at best, only partly within our control). IRVINE, *supra* note 38, at 95.

67. DE BOTTON, *supra* note 49, at 78.

68. Sevilla, *supra* note 8, at 28.

But not all offending judges fall into this category. Equally if not more dangerous, Sevilla warns, is the "ordinarily decent judge" who violates his or her ethical duties unexpectedly.[69] Put another way, a judge's background or personal characteristics cannot be used to predict whether he or she will be an ethical judge, an occasional ethics rule-breaker, or an ongoing train wreck in the courtroom. With regard to judicial hostility, Abbe Smith describes the diversity of the offending judges this way:

> Judicial bullies run the gamut. There are smart bullies and stupid ones, experienced bullies and novices, bullies that pick on some people and parties in particular, and equal opportunity bullies. Although in my experience, judicial bullies tend to be more male than female, they come in all different shapes, sizes, races, and ethnicities. They also come from different practice backgrounds: sadly, former defense lawyers can become bullies too[.][70]

Given this, it is important for the criminal defense lawyer to practice negative visualization even, and especially, when it appears to be unnecessary. Recall the Stoic advice to anticipate "the worst that can happen, even if there's little chance it will turn out that way . . . ."[71] By planning for the worst, we will not be struck numb if a judge unexpectedly goes off the rails. And if, on the other hand, things go smoothly in court as they sometimes do, we will be pleasantly surprised.

Finally, although a defense lawyer could spend a great deal of time implementing negative visualization and other Stoic practices,[72] such level of commitment is not required to reap some of Stoicism's benefits. Rather, "the power of philosophy is such that she helps not only those who devote themselves to her but also those who come into contact with

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69. *Id*.

70. Smith, *supra* note 9, at 257.

71. ROBERTSON, *supra* note 39, at 211 (quoting the French philosopher Michel Foucault).

72. *See generally* IRVINE, *supra* note 38 (discussing numerous Stoic practices and principles).

her."[73] In other words, "continual practice" of Stoicism would no doubt be beneficial; however, "the Stoics clearly feel that grasping the basic [tenets] of their philosophy in a more general sense also has a liberating and therapeutic effect."[74]

III. EXAMPLES OF JUDICIAL MISCONDUCT

Regardless of whether we devote significant time or minimal time to the Stoic practice of negative visualization, we must first learn what, exactly, can go wrong in the courtroom. (Without having some idea of the disasters that await us, there would be nothing for us to visualize.) Therefore, the following Sections discuss a judge's ethical duties of competence, demeanor, and impartiality. Each Section provides specific examples of how judges commonly violate the rules, and then identifies the defendant's statutory and constitutional rights that are commonly impacted by such misconduct.

The ethics rules cited in this article are from the ABA's Model Code of Judicial Conduct.[75] However, each state's rules will vary—if not in substantial ways, probably in nuance or at least in their organization and structure.[76] Similarly, the defendant's rights that are impacted by the misconduct will also vary by state. This is true not only with regard to statutory rights, but even constitutional rights.[77]

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73. SENECA, *supra* note 7, at 84. Given his general hostility toward semantics and wordplay—the stock-in-trade of most philosophers—Seneca is no doubt referring to Stoic philosophy and other Hellenistic philosophies, including Epicureanism, which he often quotes and discusses.

74. ROBERTSON, *supra* note 39, at 118.

75. MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS'N 2007).

76. For example, Wisconsin's rules were last amended in 1979. *See* WIS. CODE OF JUDICIAL CONDUCT (1979), https://www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=214570.

77. Not only are federal constitutional rights interpreted differently across states, but state constitutions can provide more (but not less) protection than the U.S. Constitution. For an example in the Fifth Amendment context, compare United States v. Patane, 542 U.S. 630, 643–44 (2004) (holding, in a plurality decision, that a failure to give Miranda warnings does not require suppression of

This Article does not attempt to discuss every judicial ethics rule, every way that a judge could violate a given rule, or every one of the defendant's underlying rights that could be affected by the judge's misconduct. This would be impractical if not impossible, as "[t]he varieties of judicial misbehavior are limited only by the imagination as any review of the cases in which judges have been disciplined would reveal."[78] Nonetheless, the rule-breaking discussed in this Article covers substantial ground, thus providing an excellent foundation for the criminal defense lawyer's practice of negative visualization.

A. *Judicial Incompetence*

Just as lawyer ethics rules require lawyers to be competent in the law, judicial ethics rules require the same of judges. The mandate is simple: "A judge shall perform judicial and administrative duties, *competently and diligently*."[79] A comment to the rule elaborates: "Competence in the performance of judicial duties requires the legal *knowledge, skill, thoroughness, and preparation* reasonably necessary to perform a judge's responsibilities of judicial office."[80]

Maintaining competence in the law entails far less work for a judge than for the attorneys, as a judge can simply order the prosecutor and defense lawyer to cite legal authority and, if necessary, submit briefs on the contested issue. Even assuming the judge is starting from a point of complete

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the "physical fruit" of the suspect's statements) with State v. Knapp, 700 N.W.2d 899, 921 (Wis. 2005) (providing greater protection under the Wisconsin Constitution and suppressing physical evidence obtained as a result of a Miranda violation).

78. Sevilla, *supra* note 8, at 29.

79. MODEL CODE OF JUDICIAL CONDUCT R. 2.5(A) (emphasis added). As discussed earlier, judicial laziness often violates the ethical duty of diligence and often implicates important constitutional rights in the process. Judicial laziness, however, is beyond the scope of this Article.

80. *Id.* cmt. 1 (emphasis added).

ignorance, then, he or she merely has to read and apply the attorneys' work product; independent research is usually optional.

Nonetheless, incompetence is probably the most frequent judicial ethics violation. As Abbe Smith explains, some judges are "bewildered by the most basic procedural and evidentiary rules," and will "say and do idiotic things with no awareness of their idiocy."[81] Worse yet, such judges are often overconfident in their knowledge, and it is difficult for the defense lawyer to correct an "often-wrong-but-never-in-doubt" jurist.[82]

Law students and inexperienced lawyers may find Smith's warning hard to believe, just as I would have when I started my criminal defense practice nearly two decades ago. At that time, I dismissed the well-intentioned warnings of other defense lawyers. I had mistakenly attributed their words of caution to what must have been, I thought, *their own* ignorance of the law. It just wasn't imaginable to me that *a judge* would fail to grasp such basic legal concepts.

I quickly lost my naiveté, however, as I began to experience judicial incompetence firsthand. For example, I was once told by a court commissioner that I could not file a substitution request against him for a preliminary examination, even though the substitution-of-judge statute reads: "'judge' includes a circuit court commissioner who is assigned to conduct the preliminary examination."[83] (Although there was no excuse for the commissioner's ignorance, much to his credit he stopped yelling, and even conceded I was correct, after I showed him the statute.)

Even more befuddling, when challenging a commissioner's bind-over decision after the preliminary hearing in a different case, the trial judge denied my motion

81. Smith, *supra* note 9, at 259.

82. *Id.* at 263.

83. WIS. STAT. ANN. § 971.20(3)(a) (West 2019).

to dismiss.[84] Why? The judge couldn't formulate an actual reason, but predicted with great confidence that "the legislature will soon be eliminating preliminary hearings anyway"—so much for even the pretense that the rule of law matters.[85]

The stakes get much higher at trial. I have had judges shut me down when cross-examining police officers about their shoddy investigation in the case because, the judges believed, "the police are not the ones on trial." These judges are blissfully unaware of the defendant's constitutional right to present a defense,[86] and counsel's right (or even duty) "to discredit the caliber of the investigation or the decision to charge the defendant[.]"[87]

Similarly, in a colleague's case, I witnessed a judge preclude his use of the wrong-person defense at trial unless the true perpetrator "marches down to the prosecutor's office and signs an affidavit admitting guilt." While the test for using the wrong-person defense is not the easiest to satisfy, the requirement of a sworn confession—something the judge articulated with unbelievable confidence—was just a figment of a wild judicial imagination.[88]

On an even more fundamental level, I have had several

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84. Although a preliminary hearing may be rooted in state statute rather than the Constitution, it is considered a "critical stage" of the process at which the defendant has the constitutional right to the assistance of counsel. *See* Coleman v. Alabama, 399 U.S. 1 (1970).

85. The judge prematurely reached this conclusion based on the legislature's consistent chipping away of defendants' rights at the preliminary hearing, including its elimination of the rule against hearsay. *See* State v. O'Brien, 850 N.W.2d 8 (Wis. 2014). However, many years after the judge's ignorant and lawless utterance, the preliminary hearing remains part of the procedural law. *See* WIS. STAT. ANN. § 973.03 (West 2019).

86. Holmes v. South Carolina, 547 U.S. 319, 319 (2006).

87. Kyles v. Whitley, 514 U.S. 419, 446 (1995) (quoting Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986)).

88. *See* Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 25 GEO. MASON U. C.R. L.J. 1, 8–9 (2013) (discussing the three-part test for admissibility of the wrong-person defense).

judges try to prevent me from impeaching witnesses with their prior inconsistent statements, unless such statements were both written and witnessed by a police officer. I have explained to judges *ad nauseam* that it doesn't matter whether the prior statement was made in writing to a police officer, typed on "social media," audio-recorded, video-recorded, or merely uttered to a drunk on the street. The rules of evidence require that I first confront the witness with his or her prior statement to "give the witness an opportunity to explain or to deny the statement,"[89] regardless of whether it was "written or not."[90]

Even when I have been successful in explaining this rule of law, judges never seem to retain the lesson from one trial to the next. And when judges limit cross-examination by preventing defense lawyers from impeaching witnesses with their prior inconsistent statements, they violate not only a rule of evidence but also the defendant's constitutional right of confrontation.[91]

Judicial incompetence shines brightest when it comes to the rule against hearsay, and the published case law is rich with examples. In a sexual assault trial, one defendant tried to tell the jury what the complaining witness was saying, before and during their sexual encounter, to demonstrate that he had *consent* for sexual relations. This defense couldn't have been simpler or clearer. Yet, the judge mistakenly believed that such statements by the complaining witness were hearsay and excluded them, thereby leaving the defense literally defenseless.[92]

Similarly, in a bankruptcy fraud case, another defendant tried to explain to the jury *why* he went to the bank to

89. WIS. STAT. ANN. § 906.13(2)(a)(1) (West 2019).

90. *Id.* § 906.13(1).

91. *See* Crawford v. Washington, 541 U.S. 36 (2004).

92. State v. Prineas, 809 N.W.2d 68, 70 (Wis. Ct. App. 2011) (explaining that such statements are not hearsay and, even if they were, they would have been admissible under a hearsay exception).

purchase a CD on the day in question, thus demonstrating he did not have the requisite *intent* or *knowledge* for the charged crime. Three times the judge mistakenly ruled that such testimony called for hearsay and excluded it.[93] Just as in the sexual assault case, the judge's gross misunderstanding of the law prevented the defendant from ever putting on a defense and, equally important, from testifying in his own defense.[94]

If one were to set forth all varieties of judicial incompetence, one would essentially be writing three full-length books: one on substantive criminal law, one on criminal procedure, and one on the rules of evidence. But such grand ambitions have already been achieved, and recreating those wheels is not the purpose of this Article. Although the above examples address only a few basic laws, they are sufficient to hammer home this point: judges frequently misunderstand and misapply nearly every rule of law—whether substantive, procedural, or evidentiary—no matter how important, simple, or clear the rule may be.[95]

To conclude this Section, and to hammer home this point even more forcefully, law professor Geoffrey P. Miller warns: "Bad judges may lack even slight command of the law. They . . . misunderstand fundamental rights, rule prematurely, and generally display egregious ignorance of the rules that supposedly govern their decisions."[96]

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93. United States v. Leonard-Allen, 739 F.3d 948, 952–55 (7th Cir. 2013) (explaining that the out-of-court statements were not offered for their truth, but rather to show their effect on the defendant and to explain his thinking and actions, and therefore are not hearsay).

94. *See* Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-the-Record Waiver*, 51 U. PITT. L. REV. 809, 809 (1990) ("[T]he Supreme Court has directly held that a criminal defendant has a constitutional right to testify at her trial.").

95. For additional examples of judicial incompetence, see Miller, *supra* note 24, at 439–41; Smith, *supra* note 9, at 257–59.

96. Miller, *supra* note 24, at 439–40.

B. *Judicial Hostility*

Many judges act as though it is in their job description to treat defendants, defense witnesses, and defense lawyers with outright hostility. However, the ethics rule clearly states: "A judge shall be *patient, dignified, and courteous* to litigants, jurors, witnesses, lawyers, . . . and others with whom the judge deals in an official capacity[.]"[97]

When a judge is short-tempered, condescending, or critical, such behavior demonstrates, at a minimum, the *appearance* of bias.[98] The harmful effects are magnified, of course, when the judge misbehaves in front of the jury. "The judge's influence upon [jurors] is of great weight, thus his slightest remark or intimation is received with deference and may prove controlling. In a criminal trial, a hostile attitude toward [the defense] is very apt to influence the jury in arriving at its verdict."[99] "Even facial expressions and body language can convey . . . an appearance of bias or prejudice."[100] Therefore, "A judge must avoid conduct that may reasonably be perceived as prejudiced or biased."[101]

Acting like a neutral and detached magistrate, especially in front of the jury, should be easy for any judge. Unlike the prosecutor and defense lawyer who are advocates and are trying to win the case, the judge does not have a horse in the race. When things get heated in the courtroom, the judge can easily rise above the fray, keep calm, maintain order, and treat the defendant, his lawyer, and his witnesses with

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97. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (AM. BAR. ASS'N 2007) (emphasis added).

98. In addition to actual bias, the rules also prohibit the *appearance* of bias. *See id.* R. 1.2 (prohibiting "the appearance of impropriety"); *id.* R. 1.2 cmt. 5 (defining the "appearance of impropriety" as conduct that creates a negative perception of the judge's "impartiality, temperament, or fitness to serve as a judge"); *id.* R. 2.3(B) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . .").

99. People v. Eckert, 551 N.E.2d 820, 824 (Ill. App. Ct. 1990).

100. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 2.

101. *Id.*

respect. Yet, despite the clarity of the ethics rule and the ease with which it could be followed, judges often throw themselves into the fray and go on the offensive.

For example, when one defense lawyer questioned prospective jurors about their ability to be fair and impartial—this is, after all, the purpose of *voir dire*—the judge, "without any objection from the prosecutor," cut off the line of questioning.[102] He then said to the jurors, "Isn't that one of the biggest insults you have received lately? It is improper."[103] The judge made the defense lawyer apologize to the jury, and then continued to complain that he, too, was offended. The lawyer could only sheepishly conclude *voir dire* by stating, "I apologize to you, too, Judge. I have no further questions."[104] In reversing the conviction, the appellate court held:

> We find counsel's attempted inquiry of the jurors neither insulting nor improper. Unfortunately, the judge's interjection conveyed to the jury that counsel had done something improper. Forcing him to apologize in the presence of the jurors could only have created a stigma on defense counsel in the minds of the jurors. . . . These unjustified remarks undoubtedly prejudiced defense counsel in the eyes of the jury and destroyed the fairness of the trial.[105]

Judicial hostility often continues from jury selection into opening statements. One defense lawyer learned this when the trial judge—again without objection from the prosecutor—decided he didn't like what he heard and took aim at the lawyer: "If you do any more of this, I am going to find you, in front of this jury, in contempt of the Court. Now, stop it right now, and stop it throughout the trial."[106] This threat, combined with several other acts of judicial misconduct, "painted defense counsel in such a negative light

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102. Brown v. State, 678 So. 2d 910, 913 (Fla. Dist. Ct. App. 1996).

103. *Id.* at 912.

104. *Id.*

105. *Id.* at 913.

106. Johnson v. State, 722 A.2d 873, 874 (Md. 1999).

that it deprived [the defendant] of a fair trial."[107]

Things can really heat-up once the evidentiary portion of the trial begins. When one defense lawyer was cross-examining a state investigator about his experience with false accusations, the judge jumped in: "You are shooting goose shot hoping to hit something. . . . You are trying to louse up the case, too."[108]

This was a nonsensical criticism, of course, as it is *not* the defense lawyer's job to help the prosecutor *build-up* the state's case. Worse yet, when the defense lawyer asked to make an offer of proof to justify his line of questioning, the judge compounded the problem by childishly proclaiming: "You can make anything you want, I can't hear you."[109] (It is even easy to visualize the judge's cupped hands placed firmly around the ears, blocking out the defense lawyer's voice.)

In reversing the conviction in the above case, the appellate court cited the ethics rule requiring judges to be "patient, dignified, and courteous," and concluded that "[t]he trial judge's remarks not only conveyed an impression to the jury that he felt defense counsel was not doing his job properly, but also that the defense was wasting the court's time."[110] Further, the judge's refusal to hear the defense lawyer's offer of proof "denied defense counsel the opportunity to present his case effectively."[111]

When it comes to defense *witnesses*, judges sometimes resort to facial expressions and body language to express their disagreement, distrust, or outright disgust. Charles Sevilla rhetorically asks, "How many times have you seen a judge whose attention has been serious, if not laser focused, during the prosecution's case, and then totally disinterested

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107. *Id.* at 879.

108. People v. Eckert, 551 N.E.2d 820, 823 (Ill. App. Ct. 1990).

109. *Id.*

110. *Id.* at 824.

111. *Id.*

when defense witnesses testify?"[112] He offers examples: "Perhaps the judge turns his or her chair away from the witness, engages in eye-rolling, or talks with the courtroom clerk" when defense witnesses are testifying.[113]

During my own direct examination of defense witnesses, one judge would not only roll his eyes and sigh, but would thrash about in the oversized judicial throne so violently that I thought his honor might fall out of it. Such behavior "is as clear a communication of disbelief as if the judge were orally telling the jury to not believe the witness."[114] These "gestures and grimaces" create the appearance of bias and "prejudice[] the jury against [the defendant], thus depriving him of a fair and impartial trial and due process of law."[115]

When it comes to timing, judicial hostility during closing argument may be the most harmful of all; this conduct is the last thing a jury will see and hear before it begins deliberating. For example, one defense lawyer argued in closing that the state's witnesses lied during trial. The judge, once again "[w]ithout objection from the prosecutor," jumped in *sua sponte* to show-off his own unique blend of ignorance and hostility. "That is just improper for you to call anybody a liar. It's up to the jury to determine who might be mistaken or wrong. . . . There is no evidence that anybody is a liar. . . . Do you understand that?"[116] Given the power imbalance between the two, the defense lawyer sheepishly groveled in response, "Yes, Your Honor."[117]

Fortunately, the appellate court didn't tolerate the judge's behavior. First, "For the trial judge to say in open court during final argument that there is no evidence that

112. Sevilla, *supra* note 8, at 30.

113. *Id*.

114. *Id*.

115. Johnson v. State, 722 A.2d 873, 879 (Md. 1999).

116. Brown v. State, 678 So. 2d 910, 911 (Fla. Dist. Ct. App. 1996).

117. *Id*.

either witness had lied amounted to the trial judge's assessment of the very issue . . . given to the jury to resolve[.]"[118] This is highly improper and, by itself, warranted a new trial.[119] And second, the defense lawyer did nothing wrong. "Counsel's argument in this case was manifestly referring to specific testimony given by the witnesses so characterized [as liars]. The trial judge was wrong to suggest that this argument was improper. . . . [C]astigation of counsel impaired the fairness of the trial for the defendant."[120]

The above examples demonstrate that judges will attack defense lawyers and defense witnesses at all stages of the criminal process. But the examples only scratch the surface with regard to the *types* of missiles that judges will launch at the defense. Other judges have called the defense lawyer a thief,[121] a drunk,[122] a liar,[123] and a clown[124]—all in front of the jury.

In another case, a judge told the lawyer, "I'm trying to find out if you're the least bit competent to represent anyone at any kind of trial."[125] While that particular attack occurred at a *pretrial* hearing, such comments from the bench, even

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118. *Id.* at 912.

119. *Id.*

120. *Id.*

121. *See* Johnson v. State, 722 A.2d 873, 876 (Md. 1999) (accusing the defense lawyer of "attempting to steal a marker from the courtroom").

122. *See* Earl v. State, 904 P.2d 1029, 1033 (Nev. 1995) (accusing the defense lawyer of not knowing "how to practice law" and even suggesting that counsel may have been drinking).

123. *See* Spencer v. State, 543 A.2d 851, 854–55 (Md. Ct. Spec. App. 1988) (accusing the defense lawyer of being "dishonest with the court and the jury").

124. People v. Leggett, 908 N.Y.S.2d 172, 174 (N.Y. App. Div. 2010) (telling defense counsel to "behave like a professional, please and not a clown").

125. Ed Trevelen, *Murder Trial Postponed after Judge Removes Defense Attorney for being "Grossly Incompetent"*, WIS. ST. J. (Sept. 28, 2016), https://madison.com/wsj/news/local/crime-and-courts/murder-trial-postponed-after-judge-removes-defense-attorney-for-being/article_05160c11-7ccb-5de8-a743-9fce298d50d4.html.

without a jury present, are still harmful to the attorney-client relationship and are so shocking and embarrassing that they have a tremendous negative impact on the defense lawyer's ability to function.

Finally, when verbal attacks on defense lawyers aren't quite enough, some judges have resorted to other forms of hostility, including having defense attorneys handcuffed in the courtroom[126] or arrested for contempt in front of the jury.[127] In many cases, not surprisingly, judges wield their contempt powers freely and without even a basic understanding of the applicable rules and procedures.[128] In rare cases, judges may escalate even further. One infamous judge resorted to threats of violence, and even actual violence, against defense counsel.[129]

While all acts of judicial hostility are harmful regardless of whether the jury is present, the harm is greatly magnified when the jury sees or hears the misconduct. In the broadest sense, such misbehavior "lead[s] to an atmosphere resulting

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126. David Ferrara, *Las Vegas Judge Handcuffs Public Defender in Courtroom*, L.V. REV.-J. (May 23, 2016), https://www.reviewjournal.com/local/local-las-vegas/las-vegas-judge-handcuffs-public-defender-in-courtroom/. The handcuffed lawyer later stated, "When I became a public defender, never in a million years did I expect I would end up in handcuffs[.]" Davis, *supra* note 21 (quoting public defender Zohra Bakhtary).

127. *See* Sevilla, *supra* note 8, at 30 ("[A]n unfortunately all too common problem is the court's taking offense at defense counsel during the trial and dragging him off in chains."); Smith, *supra* note 9, at 260 ("[I]ll-tempered judges are quick to hold lawyers in contempt . . . it is not uncommon."); Miller, *supra* note 24, at 442–43 ("Misuse of the contempt power is common."); Johnson v. State, 722 A.2d 873, 874–75 (Md. 1999) (holding defense counsel in contempt and having him arrested in front of the jury multiple times).

128. *See* Gretchen Schuldt, *Public Defender's Office Asks Judge to Vacate Contempt Finding against Lawyer*, WIS. JUST. INITIATIVE BLOG (Nov. 7, 2018), https://www.wjiinc.org/blog/public-defenders-office-asks-judge-to-vacate-contempt-finding-against-lawyer (denying the attorney "an opportunity to speak before having him incarcerated, even though the right to speak before contempt sanctions are imposed is well-established in Wisconsin").

129. *See* Sean Federico-O'Murchu, *Florida Judge John C. Murphy Fired for "Appalling Behavior"*, NBC NEWS (June 3, 2014), https://www.nbcnews.com/news/us-news/florida-judge-john-c-murphy-fired-appalling-behavior-n482626.

in unacceptable prejudice to a defendant's right to a fair trial."[130]

C. *Judicial Bias (the Prosecutor-in-Chief)*

As the two previous Sections demonstrated, the categories of judicial misconduct often bleed into one another. For example, a judge's ignorance of the law can create hostility toward the defense—particularly when defense counsel asserts the client's rights and insists the judge follow a law that he or she doesn't understand. To continue with that example, a judge's hostility toward the defense often crosses the line that separates the appearance of bias from actual bias. And this leads nicely into our third and final category of judicial misconduct: the judge as prosecutor-in-chief.

Judges are required to be neutral and detached magistrates; they must not be advocates for the state.[131] For our purposes, this means two things. First, with regard to the judge's behavior, the judge "shall uphold and apply the law, and shall perform all duties of judicial office *fairly and impartially*."[132] That is, the judge must not prosecute from the bench. And second, in addition to conducting themselves appropriately, the judge also "must be *objective and open-minded*."[133] That is, the judge must not prejudge the defendant or the case.

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130. Johnson v. State, 722 A.2d 873, 881 (Md. 1999).

131. To the contrary, the law actually requires judges to protect *the defendant*. *See* Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 HOFSTRA L. REV. 139, 140 (2017) ("A trial judge 'does not serve his purpose or function by being merely an umpire, a referee, a symbol, or an ornament.'"); Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH. L. REV. 1, 34 (2012) ("[T]he Supreme Court in *Cuyler v. Sullivan* confirmed a long established duty upon the trial court—a duty to the Constitution and a duty to the defendant—to protect the defendant and his right to a fair trial.").

132. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS'N 2007) (emphasis added).

133. *Id.* cmt. 1 (emphasis added).

Despite the trial judge's well-defined role, many jurists cannot resist playing the prosecutor-in-chief. Jumping ahead to the end of the criminal process, this often occurs during sentencing hearings. Instead of listening to what the lawyers have to say about the defendant, many judges like to scour the internet for evidence. Their goal is to find information that the prosecutor may have missed, which can then be used to justify a harsher sentence.

For example, in one case a defense lawyer argued for probation as the defendant had no criminal record, had been a nurse for eighteen years, served as a U.S. Army reservist for four years, and suffered from serious health problems.[134] But instead of listening, the judge was more interested in conducting his own internet investigation. He found that, contrary to defense counsel's assertion, the defendant did *not* have a nursing license in Illinois.[135] The defendant offered to prove that she did, but the judge told her to "close her mouth."[136] He added that "your lies are getting you into trouble," and that the defendant was "probably the biggest liar that ever came before the court."[137]

The disputed nursing license was significant to the judge.[138] Consequently—and perhaps unsurprisingly—his Honor disregarded the sentencing recommendations of the defense *and the department of corrections*. Although both asked for probation,[139] the judge sentenced the defendant to five years of initial confinement in prison before she could be released on extended supervision, which would last another six years.[140]

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134. State v. Enriquez, No. 2015AP1850-CR, 2016 WL 4015230 (Wis. Ct. App. July 27, 2016).

135. *Id.* at *8.

136. *Id.* at *2 (internal brackets omitted).

137. *Id.* (internal quotation marks omitted).

138. *See id.* at *8.

139. *Id.* at *1.

140. *Id.* at *4.

Not only did the judge violate the ethics rules on impartiality and objectivity by prosecuting from the bench, but he also violated a different ethics rule prohibiting a lesser known form of *ex parte* communications: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented[.]"[141] In practice, of course, judges routinely violate this rule. Internet sleuthing is so common that most defense lawyers I discussed this with are surprised to learn that it is even an ethics violation.

But worse yet, the judge in the above case was particularly inept when conducting his independent investigation. In determining that the defendant was lying about having an Illinois nursing license, the judge "apparently limited [his] search to Cook County[,]" a single county in that state.[142] This explains why his Honor—much to his own delight at the time—was unable to verify the existence of the defendant's license. At a subsequent hearing, the defendant "produced documentation showing that she *was* licensed in the State of Illinois[,]"[143] and the appellate court eventually held that the judge violated the defendant's due process rights to a fair sentencing hearing and to be sentenced on accurate information.[144]

Unlike the proactive, sleuthing jurist discussed above, some judges aren't quite that ambitious. Instead of doing an independent online investigation, one judge instead complained that prosecutors "aren't providing [the judge] with information that can be used to extend prison sentences."[145] This judge—herself a former prosecutor who

141. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C) (AM. BAR ASS'N 2007).

142. *Enriquez*, 2016 WL 4015230, at *8.

143. *Id.*

144. *Id.* at *7.

145. Douglass A. Berman, *New federal judge in Iowa accused of acting as "prosecutor-in-chief at sentencing,* SENT'G L. & POL'Y (June 5, 2013), https://sentencing.typepad.com/sentencing_law_and_policy/2013/06/new-federal-judge-in-iowa-accused-of-acting-as-prosecutor-in-chief-at-sentencing.html.

was unable to abandon the role of advocate upon ascending to the bench—even "sent prosecutors an email comparing herself to the comic book superhero the Hulk, saying there was 'a lesson' there for attorneys: 'You won't like me when I'm angry.'"[146]

In addition to demonstrating unbridled arrogance and violating the bias-related ethics rules, emailing the prosecutors also constitutes the more familiar form of illegal *ex parte* communications. That is, "A judge shall not initiate . . . ex parte communications . . . concerning a pending or impending matter[.]"[147] Or, as the defense lawyer in the above matter explained: "Most defendants have a hard enough time defending against the prosecuting attorney. . . . They at least should expect the judge will not be assuming the role of prosecutor-in-chief."[148]

The sentencing hearing is not the only stage where a judge might play the role of prosecutor. At the jury trial, the opportunities for pro-state advocacy are near limitless. One judge, during defense counsel's cross-examination of a witness, told the prosecutor, "I will sustain if I heard [sic] an objection," thus prompting defense counsel to ask, "Judge, do we have two prosecutors here?"[149] Then, whenever the prosecutor declined the invitation to object, the judge would simply "sustain objections never made[.]"[150] How is that even possible from a logistical perspective? In the middle of defense counsel's questions, the judge would simply interrupt by blurting out: "Sustained."[151]

Another example of unethical, pro-state advocacy at trial is "interrupt[ing] the proceedings to ask [the judge's] own

146. *Id.*

147. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (AM. BAR ASS'N 2007).

148. Berman, *supra* note 145.

149. Johnson v. State, 722 A.2d 873, 877 (Md. 1999).

150. *Id.* (internal quote marks omitted).

151. *Id.* at 876.

questions and to prevent defense counsel from asking his questions."[152] Similarly, in more of a supporting-actor type of role, "[T]he judge occasionally instructed the State's Attorney on how to ask proper questions of her witnesses. During these incidents, the defense counsel often complained about the judge acting as a prosecutor."[153]

Other examples of in-trial misbehavior include propping up the credibility of the state's witnesses[154] or criticizing the defense's theory of the case[155]—all in front of the jury. Charles Sevilla explains the general rule in these situations:

> The court cannot, under the guise of the right to comment, use that as an opportunity to give a biased view. Thus, the court cannot instruct jurors that it believes the defendant is guilty. Any judicial comment on the evidence must be accurate, temperate, non-argumentative, and scrupulously fair. The trial court may not . . . usurp the jury's ultimate fact finding power. In essence, the trial judge cannot become an advocate in the guise of commenting on the evidence.[156]

Finally, in addition to proper judicial *behavior*, the ethics rule cited earlier also requires judges to maintain the proper *mindset*: to be objective and open-minded. Of course, we cannot read judges' minds, but experienced defense lawyers believe that judges often form opinions about the defendant's guilt before a verdict is received or a plea is entered. Surprisingly, judges sometimes openly express these opinions that the law forbids them from even holding.

One judge, for example, candidly told the jury that "I cannot, in honesty, say as I look at [the defendant], that I presume him to be innocent."[157] Usually, judges will express their belief in the defendant's guilt in more subtle ways. For

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152. *Id.* at 877.

153. *Id.* at 877–78.

154. *See* Brown v. State, 678 So. 2d 910, 911 (Fla. Dist. Ct. App. 1996).

155. *See* Oade v. State, 960 P.2d 336, 339 (Nev. 1998).

156. Sevilla, *supra* note 8, at 30 (internal quotation marks omitted).

157. People v. Conyers, 487 N.W.2d 787, 789 (Mich. Ct. App. 1992).

example, when one defense lawyer raised a legal issue for the trial judge's consideration, the judge simply replied: "save that . . . for the appeal."[158] However, "This too is misconduct. The judge's expectation of an appeal manifests his belief in the certainty of a jury conviction, and this is not a message the jury should be receiving."[159]

Prejudgment of a case is not limited to premature determinations of guilt; the unethical judge might prejudge other issues at other stages of the proceedings. For example, before hearing a single word of the attorneys' arguments or the defendant's allocution at a sentencing hearing, one judge "repeatedly told [the defendant] his release to probation was 'probably not going to happen.'"[160] Similarly, before hearing testimony from even a single witness at a restitution hearing, another judge told the defense lawyer that "the victim's word 'is more credible than your client's words.'"[161] And finally, before a defendant's probation-extension hearing even took place, another judge actually *wrote out* the following prejudgment: "I want his probation extended."[162]

All of the acts and expressions of judicial bias discussed in this Section violate the defendant's constitutional rights. In general, Due Process is always implicated. When bias manifests at a sentencing hearing it may also implicate, for example, the defendant's right to be sentenced upon accurate information.[163] When bias manifests before or during trial it will also implicate, among other things, "a defendant's right to be tried by an impartial judge[.]"[164]

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158. Sevilla, *supra* note 8, at 30.

159. *Id.* (internal citations omitted).

160. State v. Lamb, No. 2017AP1430-CR, 2018 WL 4619535, at *4 (Wis. Ct. App. Sept. 25, 2018).

161. State v. Driver, No. 2018AP870-CR, 2019 WL 1921458, at *1 (Wis. Ct. App. Feb. 26, 2019).

162. State v. Gudgeon, 720 N.W.2d 114, 116 (Wis. Ct. App. 2006).

163. *See* State v. Tiepelman, 717 N.W.2d 1 (Wis. 2006).

164. Franklin v. McCaughtry, 398 F.3d 955, 959 (7th Cir. 2005); *see also*

IV. PREVENTATIVE STRATEGIES

The previous Part set forth numerous examples of judicial incompetence, hostility, and bias. With an understanding of how judges commit such misconduct, the criminal defense lawyer is able to anticipate and brace for such acts. That is, the defense lawyer is now able to implement the Stoic practice of negative visualization. Within the context of any given case, the lawyer can imagine the judge being ignorant of the rules and procedures on which the case will turn; hostile to the defense for no reason other than the defense lawyer doing his or her job; and biased in favor of the state.

But once the lawyer visualizes some of the disastrous things that could happen in the courtroom, what's next? As discussed earlier, the practice of negative visualization produces at least two benefits. The first is that, in some cases, the defense lawyer may be able to take preventative measures to avoid disaster before it even materializes. Toward that end, four such preventative strategies are discussed in the Sections below.

A. *Substitution of Judge*

If the defense lawyer is somewhat experienced and familiar with the assigned judge, counsel may, after considering the facts of the case and the anticipated legal issues, decide to file a substitution of judge request.[165] Also known as a "peremptory challenge," some states permit the defense to file such a request even without "an allegation of

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Johnson v. State, 722 A.2d 873, 882 (Md. 1999) (discussing the defendant's right "to a fair and impartial trial").

165. It is not clear, at least to me, whether the decision to substitute judges is the client's or the attorney's. I always discuss the issue with the client and make a recommendation, but then leave the decision whether to substitute to him or her. Sometimes, particularly when the client has a criminal history in the county, he or she may have a strong opinion on the matter; more commonly, however, they defer to my recommendation.

cause."[166] That is, the defense may be able to obtain a new judge, as a matter of right, for *any* reason or *no* reason.

This is a highly state-specific law. One state's substitution statute reads: "In any criminal action, the defendant has a right to only one substitution of a judge[.]"[167] Provided the request is timely, the defendant may substitute against the commissioner assigned to the preliminary hearing or against the judge to which the case is assigned following bind-over.[168]

Exercising this right does not mean the defendant gets to choose his or her judge.[169] And even where the state legislature has granted this peremptory right, judges often devise ways to deter defendants from exercising it. For example, there may be an "unspoken policy," or sometimes a spoken but unwritten policy, "to assign parties who peremptorily challenge a judge to a like-minded jurist—out of the judicial frying pan and once more into the . . . fire."[170]

Substituting against the assigned judge can be an effective strategy for preventing all three forms of judicial misconduct discussed in this Article: incompetence, hostility, and outright, pro-state bias. For example, I often have cases where there is a significant amount of defense evidence that I anticipate introducing at trial. Such evidence may take the form of presenting "other acts" against the complaining witness, exposing a shoddy police investigation, or cross-examining state witnesses about their pending cases or probationary status in order to expose their motive to divert blame away from themselves and toward the defendant. Some judges, however, may not understand the legal

166. Miller, *supra* note 24, at 479–80.

167. WIS. STAT. ANN. § 971.20(2) (West 2019).

168. *See id.* § 971.20(3)(a).

169. In some cases, the court system may name in advance the judge to whom the case will be assigned, or there may be only two judges in the county to begin with. In these situations, the defendant does, in a sense, get to pick the judge.

170. Sevilla, *supra* note 8, at 29.

principles that govern the use of such evidence at trial (incompetence) or, even if they do understand them, are unlikely to let the defense present such evidence (general pro-state bias). Therefore, if my case is assigned to such a judge, I will consider filing a substitution of judge request to prevent getting shutdown in the middle of trial. In doing so, I can avoid that problem entirely.

However, in addition to the risk of getting an assigned judge who is essentially the equivalent of, or worse than, the substituted judge, there are at least two other risks to consider before using this substitution of judge strategy.

First, if counsel decides to substitute against a judge because of the judge's hostility or bias, there is the risk the judge may retaliate in other cases. "No doubt, the exercise of such challenges to the judicial bully will provoke only more bullying."[171] And some judges aren't shy about it. In a California case, for example, one judge "was removed in part for his vehement criticism of public defenders for exercising such challenges."[172]

Second, if defense counsel requests a substitution of a judge because of the judge's ignorance of the law, it then follows (somewhat ironically) that the judge could reject the request because of the very same ignorance that counsel is attempting to escape by filing the request in the first place. To illustrate this conundrum, consider a case where the defendant filed a timely substitution request.[173] Because the judge failed to understand the statute, he went on to preside over the defendant's trial, sentence him after conviction, and (unsurprisingly) deny his post-conviction motions.[174] Fortunately, although it took nearly *five years* from the day the defendant first requested the substitution, the case was

171. *Id.* at 29 n.5.

172. *Id.* (citing McCartney v. Comm'n on Judicial Qualifications, 12 Cal. 3d 512, 531–32 (1974)).

173. State v. Harrison, 858 N.W.2d 372, 373 (Wis. 2015).

174. *Id.* at 375.

eventually reversed and remanded for a new trial in front of a different judge—the very thing the statute requires.[175]

B. *Motion for Recusal*

Even if the opportunity to file a substitution of judge request has passed, the defense lawyer may still have ways of removing a judge who appears hell-bent on hanging the defendant—either figuratively or literally.[176] "If during the course of pre-trial litigation, judicial bias appears, one can try to disqualify the judge by timely use of a challenge *for cause*."[177]

In some sense, this motion for recusal is a reactive, rather than preventative, strategy, in that it is used in response to actual evidence of bias. Further, if the judge's bias surfaces during trial and the defense makes a motion to recuse at that time, then this strategy would definitely be considered reactive and should be included in the next Part (on responsive strategies) instead of in this Part (on preventative strategies).

However, the motion to recuse is in some ways similar to the request for a substitution of judge. When a motion to recuse is filed early in the criminal process, it is designed to prevent further problems and is therefore rightly considered a preventative measure. But regardless of its classification, the motion to recuse is not appropriate for all forms of judicial misconduct; its use is much more limited than the statutory substitution of judge that was discussed in the previous Section. More specifically:

> Recusal . . . [is] not available to challenge a judge on grounds that she is incompetent or dilatory. Nor will [recusal] provide a basis for

175. *Id.*

176. Interestingly and surprisingly, three states still allow for hanging as a method of execution, though it is not their primary modus operandi. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/methods-execution?scid=8&did=245 (last visited May 4, 2019).

177. Sevilla, *supra* note 8, at 29 (emphasis added).

> removing a judge who is waspish or ill-tempered, so long as the abuse is dispensed on an evenhanded basis. [Recusal] offer[s] little help for litigants before judges who display poor judgment or inappropriate behaviors.[178]

Rather, the form of misconduct to which a motion for recusal is best suited is judicial bias. Bias can surface in unexpected ways during the course of a case. Defense counsel must be alert, otherwise he or she could later be blamed for failing to identify the problem and raise the issue. For example, I once represented a client in a codefendant case. The codefendant was convicted at her own jury trial, well before my client ever had her day in court. In preparing for my client's trial, I read the transcript from the codefendant's sentencing hearing to see if the prosecutor was advancing inconsistent theories of the case depending on *which* defendant was in the state's crosshairs at any given time.

While I didn't find what I was looking for, I did find that, when sentencing the codefendant, the judge had condemned *my client*, by name, as the more culpable person in the alleged crime—even though my client was not present to defend herself at the codefendant's trial. The judge also said that the complaining witness was honest and trustworthy—a rather alarming declaration, as this judge would soon be deciding my pretrial motion to allow me to impeach that same witness, at my client's trial, with numerous prior criminal convictions involving dishonesty and numerous other instances of untruthfulness.

Despite forming and then publicly expressing these views about my client and her case, the judge had every intention of presiding over my client's trial. And the judge probably would have done so had I not filed the following six-point motion to recuse.[179]

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178. Miller, *supra* note 24, at 461.

179. I discuss this case and reproduce the relevant part of the motion (with minor modifications) after full compliance with even the State Bar of Wisconsin's onerous, anti-lawyer interpretation of ethics rule 1.9 on the duty of confidentiality to former clients. That is, I have obtained written consent from

1. Every defendant is entitled to an unbiased tribunal. "A biased tribunal . . . constitutes a structural error." *State v. Gudgeon*, 720 N.W.2d 114, 119 (Wis. Ct. App. 2006). "Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process." *Id*. Bias can take the form of "subjective bias" or "objective bias." *Id*. at 121. Objective bias, in turn, can take the form of either "actual bias" or "the appearance of partiality." *Id*.

2. "[A] judge who has prejudged the facts or the law cannot decide a case consistent with due process[.]" *Id*. at 122. In our case, as demonstrated below, the Court has, while presiding over the codefendant's case, prejudged my client's case (actual bias) and expressed its views in a way that an "ordinary reasonable person would discern a great risk that the trial court in this case had already made up its mind (the appearance of partiality)." *Id*. at 123.

3. More specifically, when sentencing the codefendant, the Court made the following statements about the facts of the case and about the guilt of my client, who had not been tried and was not present to defend herself: "And you bring [name of my client] along . . . So you and [name of my client] had a plot and it was evil and it was horrifying . . . And you were just as much a part of it as [name of my client] who apparently is quite a dangerous person."

4. The Court not only prejudged my client's guilt, but also concluded that she was more culpable than the codefendant who had been tried and convicted and was being sentenced. The Court stated to the codefendant: "That you would . . . do this kind of a thing and go along with [name of my client]. Does she have some hold over you? . . . You're a much better person than this. . . . I hope you have changed and I hope you know better than to . . . hang around with people that might convince you that you ought to [commit this type of crime]."

5. The Court has also prejudged the facts of our case by determining that the complaining witness was being truthful in his accusations against my client. More specifically: The Court stated that the complaining witness "seemed like a very decent guy. . . . He wasn't

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the client to reproduce this information. Further, although not necessary in this particular case, I have also removed the client's name. For more on the trap awaiting unsuspecting attorneys who discuss the public aspects of their closed cases, see Michael D. Cicchini, *On the Absurdity of Model Rule 1.9*, 40 VT. L. REV. 69, 69 (2015). For more on my (ultimately failed) efforts to change this ethics rule in the state of Wisconsin, see Michael D. Cicchini, *Changing Rule 1.9*, THE LEGAL WATCHDOG (Dec. 3, 2015, 2:24 PM), http://thelegalwatchdog.blogspot.com/2015/12/changing-rule-19.html.

> no [sic] liar. He wasn't a nasty person. He was a really decent person. He spoke well. He presented himself well. And you and [name of my client] make a plot[.]"
>
> 6. This prejudgment is problematic, as my client intends to demonstrate at trial, through counsel, that the complaining witness is, in fact, a liar. He has not only committed crimes of dishonesty but has, in the recent past, made false statements to the police and to his probation agent. This evidence is admissible pursuant to Sec. 906.08 (2), Wis. Stats.

Filing a motion for recusal, however, is "a high-risk strategy" for both the client and the lawyer.[180] "There is always a risk that the judge will resent having [his or] her impartiality questioned. If the judge does take umbrage and refuses to recuse, the party who sought [recusal] may face hostility for the remainder of the trial."[181]

But when I showed my client what I had read in the codefendant's sentencing transcript, the client understandably did not want to be tried by a judge who had prejudged her guilt, viewed her as the leader of the criminal enterprise, anointed the complaining witness as the victim, and even praised that witness's credibility—all before the client had ever set foot into the courtroom. Despite the risks, I had no choice but to file the motion. Fortunately, and much to the judge's credit, the motion was immediately granted.

Whether a lawyer who obtains recusal will face retaliation down the road in future cases is, I suppose, anyone's guess and certainly depends on the judge being recused.[182] However, my own intuition is that most judges would not retaliate in this way given that a different, real-life defendant would suffer the resulting harm. But regardless, this is just one of the risks a defense lawyer must take when zealously advocating for a client.

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180. Miller, *supra* note 24, at 462.

181. *Id.* at 461–62.

182. *See* Smith, *supra* note 9, at 272 ("Trial lawyers cannot call judges out . . . without risking reprisal."); *see also infra* Section V.G (discussing reporting judicial misconduct and the risk of retaliation in future cases).

C. *Motion in Limine*

Some judges won't understand the legal issues likely to arise in a given trial. However, many of these judges are at least willing to try to apply the law. In these cases, counsel can prevent the negative impact of judicial incompetence by educating the trial judge on the legal issues through a motion in limine.

A motion in limine is a pretrial motion seeking an advanced ruling on the admission of evidence or on some other issue likely to arise at the trial.[183] Case law, statutory law, judicial scheduling orders, local rules, or local custom may even *require* a motion in limine, or other form of pretrial motion, before certain evidence or defenses can be used at trial.[184] But even when a pretrial motion is purely optional, filing it will give the judge the opportunity to (hopefully) read and calmly reflect on the matter, rather than being forced into a snap decision in the middle of trial on an issue that is completely foreign to him or her.

By way of example, the following motion in limine is designed to educate the judge about, and get an advance ruling on, the defendant's cross-examination of a state's witness. In this situation, the witness, who was on probation, was initially under investigation for the crime. However, the witness diverted blame to the defendant, thus leading to the state's decision to charge the defendant instead of the witness. Cross-examination to expose possible biases is fair game.

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183. *See* Frank D. Celebrezze, *Prosecutorial Misconduct: Quelling the Tide of Improper Comment to the Jury*, 35 CLEV. ST. L. REV. 237, 245 (1987) (discussing defense counsel's use of a motion in limine to prevent anticipated prosecutorial misconduct in closing arguments); *see also* State v. English-Lancaster, 642 N.W.2d 627 (Wis. Ct. App. 2002) (discussing the benefits and increased use of motions in limine).

184. The law varies greatly by state, but examples where pretrial notice or a motion might be required *by statute* could include the defendant's use of an alibi defense or the introduction of evidence that may fall within a so-called rape-shield statute.

> 1. The defendant moves the Court to permit defense counsel to question the state's witnesses about their probationary status (or extended supervision status) at the time of the alleged crime and/or at the time of their in-court testimony. More specifically:
>
> a. "[T]he Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness's probationary status[.]" *Davis v. Alaska*, 415 U.S. 308, 309 (1974). *See also* Sec. 906.16, Wis. Stats.
>
> b. In *Davis*, Mr. Green was a witness for the state. "At the time of the trial and at the time of the events Green testified to, Green was on probation[.]" *Id*. at 311-12. The trial court, however, prevented defense counsel from cross-examining Green on his probationary status. *Id*. at 313-14. The United States Supreme Court reversed the conviction, holding:
>
> i. "The accuracy and truthfulness of Green's testimony were key elements in the State's case against [the defendant]. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, as well as of Green's possible concern that he might be a suspect in the investigation." *Id*. at 318-19.
>
> ii. Had the defendant been allowed to "introduce evidence of Green's probation for the purpose of suggesting that Green was biased," then "serious damage to the strength of the state's case would have been a real possibility." *Id*. at 319.
>
> c. Finally, a witness's probationary status can be proved by extrinsic evidence. As *Davis* establishes, probationary status goes to a witness's bias. Consequently, extrinsic evidence is admissible. That is, "The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." *State v. Williamson*, 84 Wis. 2d 370, 383 (1978).

While the motion in limine might cure judicial ignorance, its primary disadvantage is that it puts the prosecutor on notice of the defense's trial strategy. Therefore, in cases where a pretrial motion is not legally required for the introduction of the defendant's evidence (or the exclusion of the state's evidence or the resolution of some other legal issue), counsel may instead wish to consider a different means of educating the judge: the trial brief.

D. *Trial Brief*

The trial brief is a very short memo on the legal issue the judge is likely to misunderstand or, perhaps, has never even heard of before. Because the brief will be used in the middle of trial, it should ideally be a single page in order to increase the chance the judge will read it. Toward that end, it should also have some eye-catching formatting, if possible. This may strike the conscientious defense lawyer as superficial; however, it is important to remember that the reason for drafting the trial brief in the first place is to educate a judge who has no knowledge of—and, therefore, probably little or no interest in—the applicable law.

The trial brief is a preventative measure in the sense that the lawyer anticipates problems and drafts the brief before trial. However, it is reactive in the sense that, in order to avoid alerting the prosecutor to the defense's strategy, it is not used until mid-trial, *after* the issue first arises.

To demonstrate, I will revisit the example in the previous Section: cross-examining the state's witness about his probationary status. Continuing with that theme, defense counsel may also wish to cross-examine the investigating officer about his willingness to blindly accept the witness's story instead of thoroughly investigating the case. Just as some judges are unaware that a witness's probationary status could be evidence of his motive to shift blame to the defendant, some judges are also blissfully unaware of the defendant's right to challenge the quality of the police investigation.

In this situation, rather than filing a motion in limine which will tip off the prosecutor about the defendant's strategy, defense counsel may consider drafting a trial brief on the matter. The brief can then be used, at trial, if the prosecutor objects to this line of questioning or if the judge shuts it down *sua sponte*. Below is an excerpt of a trial brief on the defendant's right to expose the poor quality of law enforcement's investigation and the wisdom of the

prosecutor's charging decision.

> At trial, the defense is permitted to "discredit the caliber of the investigation or the decision to charge the defendant." *Kyles v. Whitley,* 514 U.S. 419, 446 (1995). Citing *Kyles*, state law specifically holds that the defendant is "entitled to challenge the reliability of the police investigation and to challenge the credibility of [the government agents]." *State v. DelReal*, 225 Wis. 2d 565, 571 (Ct. App. 1999). This "common trial tactic of defense lawyers" (*Kyles,* 514 U.S. at 446) is accomplished in numerous ways, including:
>
> - "[D]iscrediting of the police methods employed in assembling the case." *Kyles,* 514 U.S. at 446.
> - Attacking "the thoroughness and even the good faith of the investigation, as well." *Id.* at 445.
> - Arguing that "the police had been guilty of negligence." *Id*. at 447.
> - Throwing "the reliability of the investigation into doubt" and "sully[ing] the credibility of [the lead] Detective." *Id*.
> - Launching "an attack on the integrity of the investigation." *Id*.
> - Demonstrating "that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of [a witness] whose accounts were inconsistent to the point." *Id*. at 453.
>
> Further, when state investigators were aware of statements made by others, such statements, when explored by the defense during cross-examination of the investigators, are not hearsay. Rather, they are admissible to attack the quality of the investigation, even if the defense chooses not to call the persons who made the statements to the witness stand.
>
> For example, in *Kyles*, a person named "Beanie" made several statements to the police. The state failed to disclose these statements, and the Court reversed the conviction, stating: "Even if Kyles's lawyer had followed the more conservative course of *leaving Beanie off the stand*, though, the defense could have examined the police to good effect on their *knowledge of Beanie's statements* and so have attacked the reliability of the investigation in failing to even consider" the possibility that the defendant was innocent. *Id*. at 446 (emphasis added).

In the event the judge is unaware of the law and shuts down defense counsel's cross-examination at trial,

submitting the above trial brief has an additional advantage: if the judge *still* refuses to permit the line of questioning, the trial brief can serve as a supplement to the defense lawyer's offer of proof. Then, if the defendant is convicted and later appeals, the trial brief can also be helpful to the appellate lawyer and may strengthen the basis for the appeal.

While the above preventative strategies can be very effective in some cases, in most cases the judge's misconduct falls well outside the defense lawyer's control. That is, despite the best laid plans and preemptive measures, the judge's incompetence, hostility, and bias simply cannot be prevented. In these situations where prevention is not possible, the defense lawyer must react or respond to judicial misconduct.

V. RESPONSIVE STRATEGIES

The second benefit of the Stoic practice of negative visualization—that is, envisioning acts of judicial incompetence, hostility, and bias in the context of a particular case before such events unfold—is that defense counsel will not be struck numb, panic-stricken, or even mildly surprised when the judge botches the law, becomes unhinged, or acts as a second prosecutor in the courtroom.

But while maintaining calm in the face of courtroom adversity is a necessary step in effectively responding to judicial misconduct, it is not, in itself, sufficient. The lawyer also needs to have a plan for what, specifically, to say or do when faced with acts of judicial ignorance, hostility, or pro-state bias.

While it is not possible to develop a response for every possible act of misconduct, the defense lawyer can develop strategies based on the general type of judicial misbehavior. Several possible responsive strategies are discussed below. First and most significantly, however, the defense lawyer must learn how *not* to respond.

A. *How Not to Respond*

I don't know if defense lawyer Charles Sevilla is a Stoic. But even if he isn't, he provides excellent Stoic-like advice about what *not* to do when faced with a bully on the bench: "One thing is clear. If the judge is acting like an ass toward the client or defense counsel, *it does no good to engage the court with in-kind retorts*. That only provokes predictable responses none of which will be helpful in front of a jury."[185]

An example of the toe-to-toe exchange Sevilla warns against can be found in a case cited previously, where the trial quickly devolved into a verbal slugfest between the defense lawyer and the judge.[186] By any objective account, the defense lawyer held his own when exchanging barbs with the unethical jurist. This includes asking the judge, "You want to take over the case? If you try the case for me . . . you will lose it," and "Can I hold *you* in contempt of Court?"[187]

The problem, however, is that such a competition does not occur on a level playing field. The jury sees the judge wearing a flowing robe and sitting in an elevated position in the courtroom, all the while looking down upon the mere mortals who bow and scrape. Jurors will naturally think the judge *must be* the smartest person in the room. For this reason, at least from the jury's perspective, the defense lawyer is unlikely to win an exchange of barbs—no matter how sharp and timely the lawyer's delivery.

Given this, the defense lawyer must, above all, rise above the fray, maintain a calm and professional demeanor, and avoid returning the judge's insults in tit-for-tat fashion. As the Sections below illustrate, however, this does *not* mean that defense counsel should simply roll over and accept the judge's abuse.

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185. Sevilla, *supra* note 8, at 29 (emphasis added).

186. Johnson v. State, 722 A.2d 873, 874–77 (Md. 1999).

187. *Id.* at 876 (emphasis added).

B. *Objection*

In his article, Charles Sevilla identifies numerous categories of judicial misconduct, and then states that "[t]he suggested remedy for most of them is a specifically stated objection" followed by "a request for a curative instruction, and/or a mistrial."[188]

It is unfair to burden defense counsel with having to monitor and correct the trial judge—that is, to referee the referee. On top of that, doing the judge's job for him carries a real risk for the defendant. Defense lawyers "are, understandably, loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case."[189] Nonetheless, despite the unfair burden on the defense lawyer and the risk to the defendant, Sevilla is generally correct. The widely-accepted rule is that defense counsel's "failure to object or assign misconduct will generally preclude review by [the appellate] court."[190]

Put another way, "It will be a rare case where the failure to object . . . is excused."[191] This means that, even in cases where the appellate court is willing to review acts of judicial misconduct *despite* counsel's failure to object at trial,[192] it will be defense counsel, *not the judge*, who is on the hook for

188. Sevilla, *supra* note 8, at 29.

189. Oade v. State, 960 P.2d 336, 338 (Nev. 1998) (internal quotation marks omitted).

190. *Id*.

191. Sevilla, *supra* note 8, at 29 n.8 (citing State v. Larmond, 244 N.W.2d 233 (Iowa 1976), as a rare case where the defense lawyer's failure to object *was* excused).

192. Appellate courts aren't always willing to do this. Many will go to great lengths to blame defense counsel in order to protect judges from their own misconduct. One way to do this is to hold that counsel's failure to object precludes appellate review entirely. *See, e.g.*, Admin, *SCOW to decide if failing to object to consideration of information at sentencing forfeits right to review*, ON POINT (May 15, 2019), at http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scow-to-decide-if-failing-to-object-to-consideration-of-information-at-sentencing-forfeits-right-to-review/.

the judge's misconduct via an ineffective assistance of counsel (IAC) claim.[193]

For example, in one case of extreme judicial ignorance, the judge refused to let a young witness for the defense testify because, the judge claimed, the defense lawyer failed to establish the witness's competence to testify.[194] The law, however, clearly stated that the burden falls to the party *objecting* to the testimony to establish the witness's *incompetence*.[195] Yet, even though it is the judge's duty to know how to run a courtroom, the appellate court actually blamed defense counsel "for the *failure to correct the judge's mistake*"; the court then reversed the conviction *not* for judicial error, but because counsel was ineffective for failing to teach the trial judge how to do his job.[196]

Even in cases where the appellate court doesn't try to hold the defense lawyer accountable for the judge's misconduct, counsel's failure to object could still harm the defendant on appeal. The reason is that, when there is no objection, the appellate court may analyze the judge's misdeeds under the difficult-to-satisfy "plain error doctrine," which often results in the appellate court forgiving the trial judge's misconduct and affirming the conviction.[197]

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193. *See* Jon M. Woodruff, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 IOWA L. REV. 1811, 1835 (2017) (blaming the defense lawyer for failing to correct the trial judge's errors has made "defense counsel the ultimate gatekeeper of all error at the trial level").

194. Harris v. Thompson, 698 F.3d 609, 612–13 (7th Cir. 2012).

195. *Id.* at 613.

196. *Id.* at 644 (emphasis added).

197. Oade v. State, 960 P.2d 336, 338 (Nev. 1998). *Oade* is actually a rare case where the court reversed for judicial misconduct under the plain error doctrine. The court did this, in part, because the defense lawyer, "early in the trial, moved for a mistrial based on the court's 'attitude'" and was denied. *Id.* Therefore, the defense lawyer wasn't required to continue to lodge repeated, fruitless objections. Some states' plain error tests could, at least in theory, be more difficult for a defendant to satisfy than the IAC test. *See, e.g.*, United States v. Roberts, 119 F.3d 1006, 1014 (1st Cir. 1997) (At least with regard to *prosecutorial* misconduct, "Plain error review is ordinarily limited to 'blockbusters' and does not 'consider

Sevilla also advises that counsel must be clear about what he or she is objecting to, and must also state the legal authorities on which the objection is based. "Whenever making an objection to judicial misconduct, it cannot be emphasized enough that the objection must be stated for the record, and it must be based on a denial of the Fifth and/or Fourteenth Amendment due process rights to a fair and impartial tribunal."[198]

Further, as many of the examples in this Article demonstrate, judicial misconduct often impacts other rights as well. For example, when the judge cuts off defense counsel's cross-examination of a police officer under the false theory that "the police are not on trial," the judge also violates the defendant's Sixth Amendment right of confrontation and to present a defense. Therefore, in cases where the judge's misconduct impacts multiple constitutional (and even statutory) rights, counsel should state as many bases as possible for his or her objection.

It is also important to remember this: one possible response to judicial misconduct is to do nothing. This is a judgment call for the defense lawyer and, in some cases, it is the right call. For example, I was once trying a case in front of a judge who had a decent grasp of the rules of evidence and was giving the defense a fair trial. Things were going well until, without any objection from the prosecutor, the judge unexpectedly sniped at me and cut off my line of questioning of a key witness. Because I had, to some extent, already made my point with the witness, I decided to move on without objecting.

Things went well from that point forward, including the jury's favorable verdict. In hindsight, my decision not to object to the single instance of relatively mild judicial misconduct turned out to be the correct one—or, even if

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the ordinary backfires—whether or not harmful to a litigant's cause—which may mar a trial record.'").

198. Sevilla, *supra* note 8, at 29.

incorrect, a harmless one. But if I had lost the trial, and the defendant's appellate lawyer raised the issue of judicial misconduct, the claim likely would have been filtered through the IAC framework. That is, *I* would have been blamed for failing to correct the judge's behavior on the spot and in the middle of trial.

When the defense lawyer decides not to object to an initial act of judicial misconduct, it is important not to become desensitized to subsequent transgressions. As the acts of misconduct start to accumulate, counsel may wish to change course and object. In addition to stating the bases for the objection, counsel may also want to refer to the prior instances where no objection was raised. This will establish, for the appellate record, the serious and cumulative nature of the judge's misbehavior.

Finally, not only do objections carry the risk of offending an already incompetent, hostile, or biased trial judge, but objecting (in and of itself) will *at best* put an end to the misconduct. An objection does nothing to cure the harm that the judge has already caused. This means that the defense lawyer may also wish to request a remedy along with lodging the objection.

C. *Request for a Remedy*

As discussed above, in a mild, isolated case of judicial misconduct, the defense lawyer may simply decide to ignore it to avoid drawing further attention to the judge's remarks or behavior. In other cases, defense counsel may want to object in order to terminate the misconduct and (hopefully) prevent future incidents of it. However, in many cases, counsel may wish to follow-up his or her timely, specific, and supported objection with a request for a remedy. The two most common remedies for judicial misconduct are the curative instruction and the mistrial.[199]

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199. *See id.*

A curative instruction may be a sufficient remedy in many cases. When a judge slips into the role of prosecutor-in-chief and vouches for a state witness, a curative instruction may solve that problem. Even when a judge disparages the defense lawyer in front of the jury, a curative instruction may fix that damage as well. However, as with jury instructions in general, the devil is in the details. The effectiveness of the curative instruction depends on the words used to compose it.

For example, one judge vouched for a state witness by telling the jury "she is going to be telling the truth" and "[t]here is no question about that."[200] However, the appellate court held the judge's curative instruction to be adequate, thus rendering the earlier vouching harmless:

> The judge later explained to the jury that what he "meant to say by that statement was that the witness would be sworn under oath and would be sworn to tell the truth, as all the witnesses would. But as to whether or not, in fact, you want to believe that testimony, it is up to you to decide. You make the determination as regarding the credibility of any witness that testifies."[201]

But judges often have difficulty issuing a proper curative instruction, particularly when one is needed, essentially, to apologize to the defense lawyer (rather than merely to correct a judicial misstatement). For example, after disparaging defense counsel and even ordering "the sheriff to take a hold of him" in front of the jury, one judge attempted to give a curative instruction for his own misbehavior.[202] "During that instruction, however, the trial judge told the jury that his own behavior was 'because the defendant's lawyer was about ten miles out of limit.'"[203] Such language did nothing to fix the problem. Instead, it disparaged the

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200. Pertgen v. State, 774 P.2d 429, 431 (Nev. 1989).

201. *Id.*

202. Johnson v. State, 722 A.2d 873, 879 (Md. 1999) (discussing Suggs v. State, 589 A.2d 551 (Md. 1991)).

203. *Id.*

defense lawyer a *second* time, thus repeating the very misconduct the instruction was supposed to cure. The judge's instruction therefore exacerbated, rather than mitigated, the harm.[204]

But even *good* curative instructions may not work. Regardless of how well they are drafted, they have inherent limits. "[J]uries are highly sensitive to every utterance by the trial judge, the trial arbiter, and . . . some comments may be so highly prejudicial that even a strong admonition by the judge to the jury . . . will not cure the error."[205] This problem is compounded when the judge commits multiple acts of misconduct. Therefore, in these severe cases, defense counsel may wish to request the remedy of a mistrial.

A mistrial request raises several complicated issues. First, the general rule is that when *the defense* requests the mistrial and the judge grants it, the prosecutor can simply retry the defendant.[206] However, even in these situations, retrial may be barred in some circumstances. One state's test reads that "if [a] defendant's motion for mistrial is prompted by prosecutorial or *judicial misconduct* which was *intended 'to provoke'* defendant's motion[,]" then retrial is barred.[207] When requesting a mistrial, then, counsel should indicate that the request was provoked by the judge's misconduct. This will be an easier case to make, of course, when the judge demonstrated bias (as opposed to incompetence or even general hostility), or when the judge misbehaved repeatedly (as opposed to committing a single transgression).

Preventing the state from retrying the defendant will likely be an uphill battle. Assuming the defense lawyer's request for a mistrial is granted, counsel will likely have to move for the judge's recusal (assuming the judge

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204. *See id*.

205. Sevilla, *supra* note 8, at 29 (quoting Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968)).

206. *See* Oregon v. Kennedy, 456 U.S. 667, 673–75 (1982).

207. State v. Jenich, 288 N.W.2d 114, 122 (Wis. 1980) (emphasis added).

demonstrated bias) and then file a motion with the newly assigned judge to bar retrial, based on the original judge's intent to provoke the mistrial request. The odds of a new trial judge finding that a colleague intended to provoke the mistrial request, thus barring retrial, are probably very low.

Another question with regard to mistrials is: Who decides to make the request, the defense lawyer or the defendant? Even some courts don't know. One appellate court opined that it was "an intriguing and sophisticated" question as to whether defense counsel or the defendant "should be permitted to make a mistrial decision" in the context of *prosecutorial* misconduct.[208] Some of the complications are as follows:

> [E]ven if the mistrial decision is, in theory, left to the lawyer, it is often—probably always—intertwined with decisions that are left to the defendant. For example, the defendant has the constitutional right to counsel of choice. But what if the defendant could not afford to pay his lawyer for a second trial and would instead have to obtain state- or court-appointed counsel for the retrial? In that case, wouldn't a mistrial request implicate a constitutional right? And shouldn't the decision whether to ask for a mistrial be left to the defendant?
>
> Similarly, many defendants are unable to post bail and therefore must remain incarcerated during their cases—a key reason that a defendant has a constitutional right to a speedy trial. But what if, due to court congestion, unavailable witnesses, or some other reason, a mistrial would result in a long delay? In that case, wouldn't a mistrial request implicate yet another constitutional right? And, once again, shouldn't the decision whether to ask for a mistrial be left to the defendant?[209]

Given these complications—along with the general awkwardness of calling a judge incompetent, intemperate, or outright biased to his or her face—this much is obvious: It is

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208. State v. Washington, 419 N.W.2d 275, 277 (Wis. Ct. App. 1987).

209. Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 928–29 (2018) (discussing a mistrial request in the context of prosecutorial misconduct and citing State v. Jenich, 288 N.W.2d 114, 123 (Wis. 1980) (defendant has a "'valued right' to secure a verdict from the first tribunal")).

not easy for the criminal defense lawyer to make an objection, instantly articulate the bases for that objection, and then request the appropriate remedy on the spot, in the middle of the jury trial. Therefore, the following Section will discuss the matter of timing with regard to objections and requests for remedies.

D. *Timing*

Because state law varies dramatically, it is difficult to develop an effective, one-size-fits-all plan for the timing of objections and the request for remedies. Therefore, the following outline provides only a general framework that should be modified based on several factors, including (most significantly) the applicable state procedure.[210]

First, *before trial*, the defense lawyer should briefly discuss with the defendant the possibility of judicial misconduct, the effect it could have on the jury, and the potential remedies for the various forms of misconduct. With regard to the possibility of a mistrial motion at trial, "[D]efense counsel should explain the possibility—or likelihood—of retrial as well as other consequences including a lengthy delay, continued incarceration, additional attorney's fees and other trial expenses, and, most significantly, the possibility of the state developing a stronger case for the second trial."[211] Discussing these matters with the client *before* trial will make any in-trial discussions more efficient and productive, and any in-trial decisions will be easier to make.

Second, at trial, many forms of judicial misconduct will require an objection (as opposed to an offer of proof, which is discussed in the next Section). For example, suppose the trial

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210. Some states have bizarre and illogical requirements governing the timing and order of the requested remedies. *See* Cicchini, *supra* note 209, at 919–20 (discussing the timing and possible waiver of remedies in the context of prosecutorial misconduct).

211. *Id.* at 927.

judge disparages the defense lawyer in front of the jury by questioning his competence or calling him a liar. It is well-settled that "[i]t is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of attorneys in a trial."[212]

Given this, defense counsel might respond to the judge's remarks as follows: "I object to the court's comments and request a sidebar to state the basis for my objection and to request a remedy." At the sidebar, counsel might elaborate as follows:

> I objected because the court's comments about me in front of the jury were highly improper and violated the defendant's due process rights, including the right to a fair trial before an impartial judge and jury. The court's comments from the bench expressed a negative opinion of me, demonstrated judicial bias, and infected the jurors.[213] I ask the court to issue a curative instruction indicating that the remarks were improper and should be disregarded.[214]

Then, it is critical to make a record of the substance of the sidebar at the first opportunity outside of the jury's presence. Alternatively, if the court denies the request for a sidebar, counsel may then want to make the same record, stated above, *in front of the jury*. If counsel decides *not* to do so, he or she should revisit the issue at the first opportunity outside the jury's presence. At that point, counsel should say that he or she was unable to elaborate earlier, as the judge had refused to hold a sidebar.

Third, if the court overruled the objection, refused to give

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212. Sevilla, *supra* note 8, at 29 (quoting People v. Fatone, 165 Cal. App. 3d 1164, 1174–75 (1985)).

213. Sevilla suggests that, as a basis for an objection to judicial statements constituting bias (as opposed to attacks on defense counsel), counsel may state: "I object. The court appears to have left its role as a neutral and detached magistrate and has taken up the role of the prosecutorial partisan." *Id.* at 30.

214. Sevilla suggests that, to cure judicial statements constituting bias (as opposed to attacks on defense counsel), the instruction may conclude: "[I]t has been pointed out to me that some of my words and actions could be misconstrued as biased, and if you have taken them that way, I apologize because in no way should that influence your judgment." *Id.* at 32.

a curative instruction, gave a poorly-worded instruction, or engaged in subsequent acts of misconduct after giving the instruction, counsel will want to remind the client of the mistrial option. For numerous reasons identified earlier, the defense lawyer and the defendant should, ideally, *agree* on whether to request a mistrial. When requesting this remedy, counsel might make a record as follows:

> The defense requests a mistrial. I previously objected to the court's disparaging comments about me in the jury's presence. Such commentary is highly improper and violates the defendant's due process rights, including the right to a fair trial with an unbiased judge and jury. However, [the court overruled the objection] *or* [the court refused to issue a curative instruction] *or* [the court's curative instruction was insufficient] *and/or* [the court continued to engage in similar misconduct]. Therefore, the court's conduct has provoked me to move for a mistrial.

Fourth, if the court overruled the defense lawyer's objection, or denied earlier requests for a remedy, counsel may wish to renew the objection and the requests during the jury instruction conference or even later, once the jury begins deliberating. In some jurisdictions this is possible and even desirable, as counsel may be permitted to move for a mistrial late in the proceedings, as long as the motion is made *before* "the jury returns its judgment."[215]

E. *Offer of Proof*

While most acts of judicial misconduct require the defense lawyer to object, others require counsel to make an offer of proof. Suppose that during the defense lawyer's cross-examination of an investigating officer, the court cuts off questioning because of the now-familiar judicial misconception that "the police are not the ones on trial." In this situation, "Just as the objection is the key to saving for review any error in admitting evidence, the offer of proof is

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215. State v. Rockette, 718 N.W.2d 269, 277 (Wis. Ct. App. 2006) (discussing mistrial requests in the context of prosecutor misconduct).

the key to saving error in excluding evidence."[216] Counsel should therefore ask to make an offer of proof, or simply make one without permission. Such a request or offer should literally include the words "offer of proof" to highlight the matter for possible appeal, and might take the following form:

> I make the following offer of proof in response to the [state's objection] *or* [the court's action or ruling]. Cross-examination of this witness regarding his investigation of the case is not only proper but required. The defendant has constitutional rights of confrontation, to present a complete defense, and to the effective assistance of counsel. These rights require that I explore the thoroughness of the police investigation and the state's decision to charge the defendant. In this case, my areas of inquiry would include [identify specific topics or questions].[217]

If the defense lawyer has prepared a trial brief on this issue—a strategy discussed in Section IV.C—counsel should simultaneously reference that document and submit it as a supplement to the offer of proof. Legally, the court *must* let the defense lawyer make this record. "It is a well settled rule of law that it is error for the trial court to refuse to permit counsel to make an offer of proof."[218] Without such an offer, it would be impossible for the court to "make an informed decision as to admissibility" of the evidence.[219] If the court refuses to listen, counsel should state that "I have to protect the record and make an offer of proof. [It is] a matter of right for this defendant to make an offer of proof in this case."[220] If that fails, counsel should consider submitting a written offer of proof, at the earliest opportunity, that covers both the facts and the law.

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216. People v. Eckert, 551 N.E.2d 820, 825 (Ill. Ct. App. 1990).

217. *See* Kyles v. Whitley, 514 U.S. 419, 446 (1995) (explaining that a "common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant").

218. *Eckert*, 551 N.E.2d at 825.

219. *Id.*

220. *Id.* at 822.

F. *Closing Argument*

In a very creative response to judicial hostility or outright bias, Charles Sevilla recommends that if the judge committed severe or multiple transgressions during the trial, the defense lawyer should address the issue directly in closing argument.[221] Sevilla's strategy is based upon the standard, pattern instruction that is given in many jurisdictions warning jurors *not* to be influenced by judicial bias. One such instruction from the bench reads as follows:

> If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.[222]

The following closing argument of defense counsel is designed to draw the jury's attention to, and even reinforce, the above instruction:

> The court [has instructed you] that nothing in its conduct or comments during the trial are to be deemed an alignment [of] the court with either side. Now, given what has transpired during the trial, you may find that hard to follow. You have seen and heard the judge not only rule against me, but do so using very harsh terms. . . . I ask that you heed the instruction and not be influenced by the court's conduct toward me. My client deserves a fair trial by fair jurors in front of a fair judge, and because you are the ultimate decision-makers, into your able hands falls the final burden of fairness. I ask that if you have perceived a bias on the part of the judge that you not let it influence you in any way.[223]

Sevilla's strategy of addressing the jury directly in closing argument might be effective and, in cases where other remedies were denied or have failed, even necessary. Further, it is arguably a legally proper strategy based upon the following two-part theory.

First, the defense can (and necessarily must) deliver a

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221. Sevilla, *supra* note 8, at 32.

222. WIS. CRIM. JURY INSTRUCTION No. 100 (UNIV. OF WIS. 2000).

223. Sevilla, *supra* note 8, at 32.

closing argument centered on other jury instructions issued by the court. Common examples include arguing that the state failed to establish an element of the crime (substantive instruction),[224] the state failed to prove the case beyond a reasonable doubt (burden of proof instruction),[225] the state's witnesses are biased and should not be believed (credibility of witness instruction),[226] the state's other-acts evidence must not be used to conclude the defendant is a bad person and therefore is guilty (cautionary instruction),[227] the jury must begin by presuming the defendant is innocent (presumption of innocence instruction),[228] the prosecutor failed to produce evidence to support his opening statement (instruction that opening statements are not evidence),[229] and so on.

Second, although the judge might not enjoy listening to the defense lawyer's closing argument criticizing the judge's words or conduct at trial, such an argument is legally proper. It is based on a jury instruction (warning the jury to disregard its impression of the judge's personal views) that the *court itself* has just read.

G. *Appeal and Report*

Even if defense (trial) counsel does not practice appellate law, counsel may still have continuing obligations to advise

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224. *See, e.g.*, WIS. CRIM. JURY INSTRUCTIONS No. 1900 (UNIV. OF WIS. 2018) (listing the elements of the crime of disorderly conduct).

225. *See, e.g.*, WIS. CRIM. JURY INSTRUCTIONS No. 140 (UNIV. OF WIS. 2017) (discussing the state's burden of proof beyond a reasonable doubt).

226. *See, e.g.*, WIS. CRIM. JURY INSTRUCTIONS No. 300 (UNIV. OF WIS. 2000) (listing factors that can be used to determine witness credibility).

227. *See, e.g.*, WIS. CRIM. JURY INSTRUCTIONS No. 275 (UNIV. OF WIS. 2018) ("You may not consider [other-acts] evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character . . . .").

228. *See, e.g*, WIS. CRIM. JURY INSTRUCTIONS No. 140 (UNIV. OF WIS. 2017) (discussing presumption of innocence and burden of proof in one instruction).

229. *See, e.g.*, WIS. CRIM. JURY INSTRUCTIONS No. 50 (UNIV. OF WIS. 2010) ("I must caution you, however, that the opening statements are not evidence.").

the client of his or her appellate rights. This obligation may even extend to filing the necessary paperwork to preserve those rights.[230] In addition to possibly obtaining a reversal of the conviction, of course, the virtues of basing an appeal on judicial misconduct include the following:

> The right of appeal can correct some of the mistakes of bad judges and acts as a deterrent against judges making improper rulings in the first place. Appeals can have the additional virtue of generating a public decision by the appellate tribunal that can embarrass a bad judge and bring public attention to his or her deficiencies, as well as warning other judges of the fate that awaits them if they make similar mistakes. Appeals also preserve judicial independence because the correction of error occurs within the judicial branch.[231]

When discussing appellate rights with the client, defense (trial) counsel should be sure to discuss all known appellate issues, including instances of judicial misconduct. One criminal-defense practice aid also recommends that counsel set forth the possible bases for appeal in a letter to the public defender's appellate division or the client's privately-retained appellate lawyer. "[T]he trial attorney's evaluation of the potential grounds for appeal, although not binding, is always an invaluable aid to the appellate attorney."[232]

In addition to protecting the client's appellate rights and even identifying incidents of judicial misconduct for the appeal, defense counsel should also consider reporting the trial judge's acts of misconduct to the state's judicial ethics board. Abbe Smith writes:

> Rule 8.3(b) of the American Bar Association's Model Rules of Professional Conduct, on maintaining the integrity of the profession and reporting misconduct, requires "[a] lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." The comment to Rule 8.3 notes that self-regulation of the legal profession includes

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230. *See, e.g.*, WIS. STAT. ANN. § 973.18 (West 2019).

231. Miller, *supra* note 24, at 462.

232. KATHLEEN PAKES, WISCONSIN CRIMINAL DEFENSE MANUAL CHAPTER 9: POSTCONVICTION PROCEEDINGS 57 (6th ed. 2016).

> initiating a disciplinary investigation when a lawyer encounters misconduct by judges as well as lawyers. The comment further notes that lawyers should report even an "apparently isolated violation," as this might "indicate a pattern of misconduct that only a disciplinary investigation can uncover."[233]

Reporting ethics violations is a grossly underutilized mechanism for punishing and deterring judicial misconduct. In the entire state of California in 2014, for example, only 43 judges were reprimanded for misconduct.[234] In reality, however, "[J]udges disparage lawyers and litigants much more than the number of disciplinary cases would suggest."[235]

There are two things that deter lawyers and others from reporting judicial misconduct. First, as discussed earlier in the context of recusal motions, "Trial lawyers cannot call judges out on their bullying without risking reprisal."[236] And second, other than trial lawyers, "few people know there is even a mechanism for filing complaints" against unethical judges.[237]

The first problem could be avoided, and the second problem could be solved, if defense attorneys simply notified their clients of *the client's right* to report judicial misconduct in their cases. Attorneys could do this at the same time they

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233. Smith, *supra* note 9, at 272 (quoting MODEL RULES OF PROF'L CONDUCT R. 8.3(b) (AM. BAR ASS'N 2016)).

234. Maura Dolan, *43 California judges were reprimanded for misconduct last year*, L.A. TIMES (Apr. 4, 2015, 7:37 PM), https://www.latimes.com/local/california/la-me-judges-discipline-20150404-story.html.

235. *Id.* (internal quotation marks omitted). Wisconsin's numbers are similarly low. *See* WIS. JUDICIAL COMMISSION, ANNUAL REPORT 4 (2018) ("In 2018, the Judicial Commission received 408 initial inquiries from which it evaluated 31 new RFI files. The Commission authorized eleven new investigations in 2018."). Further, with regard to RFIs, "[T]he Commission may dismiss the matter with a communication of the Commission's concern or a warning, cautioning the judge or court commissioner not to engage in specified behavior. Such an expression of concern or warning is not discipline." *Id.* at 6. In fact, in 2018, the Commission appears to have filed only *two* complaints. *Id.*

236. Smith, *supra* note 9, at 272.

237. Dolan, *supra* note 234.

advise their clients about their right to appeal their conviction.

To continue with the California example, the Commission on Judicial Performance has a very helpful website that provides a link to the complaint form and even gives examples of the types of misconduct that can be reported.[238] These include "*improper demeanor*, failure to disqualify when the law requires, receipt of information about a case outside the presence of one party, abuse of contempt or sanctions, and delay in decision-making."[239] The website also offers helpful information for properly completing the complaint form:

> A complaint should not simply state conclusions, such as "the judge was rude" or "the judge was biased." Instead, the complaint should fully describe what the judicial officer did and said. If a court document or an audio or video tape evidences the misconduct, you may submit a copy (do not send original documents) or mention it in your complaint.[240]

Defense counsel's letter to the client's appellate attorney—which would outline the acts of judicial misconduct that could serve as the bases for an appeal—can also be of great help to the client when completing the complaint form and lodging a formal ethics complaint against the judge.

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238. *See* CAL. COMM'N ON JUDICIAL PERFORMANCE, FILING A COMPLAINT, https://cjp.ca.gov/file_a_complaint/ (last visited Sept. 29, 2019); *see also* WIS. JUDICIAL COMM'N, FAQ, https://www.wicourts.gov/courts/committees/judicialcommission/faq.htm (last visited Sept. 29, 2019) (providing information about reporting judicial misconduct in Wisconsin).

239. CAL. COMM'N ON JUDICIAL PERFORMANCE, *supra* note 238 (emphasis added).

240. *Id*. For Wisconsin's complaint form, see WIS. JUDICIAL COMM'N, INSTRUCTIONS FOR COMPLETING "REQUEST FOR INVESTIGATION," https://www.wicourts.gov/courts/committees/judicialcommission/complaintform.pdf (last visited Sept. 29, 2019).

CONCLUSION

Judicial misconduct in the courtroom—which frequently takes the form of incompetence, hostility, or bias—poses serious problems for the criminal defense lawyer and, consequently, for the defendant.[241] This Article offers the criminal defense lawyer a framework for dealing with unethical trial court judges.

To begin, the lawyer should implement a fundamental practice of Stoic philosophy and anticipate acts of judicial misconduct within the context of his or her cases.[242] Toward that end, this Article has identified three relevant judicial ethics rules, provided specific examples of how judges break those rules, and described many of the defendant's statutory and constitutional rights that are violated in the process.[243]

This Stoic practice of anticipating negative events—known as "negative visualization"—produces at least two benefits.[244] One is that it allows the lawyer to take preemptive measures to avoid or prevent misconduct before the judge has the chance to commit it.[245] For example, the substitution of judge request allows the defense to avoid all three forms of judicial misconduct by simply obtaining a new judge as a matter of right. The motion to recuse can prevent a biased judge from continuing to preside over the case. And the motion in limine and trial brief can educate the incompetent judge, thus preventing his or her ignorance of the law from infecting the client's trial.

The other benefit of negative visualization is that, by bracing the defense lawyer for the acts of judicial incompetence, hostility, and bias that await him or her, it allows the lawyer to maintain "a temperate, self-possessed

241. *See supra* Part I.

242. *See supra* Part II.

243. *See supra* Part III.

244. *See supra* Part II.

245. *See supra* Part IV.

approach to disaster" in the courtroom.[246] With that state of mental calm, the lawyer can more effectively react to an unethical judge.[247] Reactive strategies include the objection, the request for a remedy, the offer of proof, a specially-tailored closing argument, the appeal of a conviction, and the reporting of the misconduct to the appropriate ethics commission.

In sum, when a criminal defense lawyer naively steps into the courtroom assuming the trial judge will behave ethically, the lawyer does his or her client a tremendous disservice. On the other hand, when the lawyer anticipates acts of judicial incompetence, hostility, and bias—even when he or she cannot predict their precise form—the lawyer will be better able to prevent, or at least react to, judicial misconduct. This, in turn, will go a long way toward ensuring the defendant's right to due process and to be tried by a competent, temperate, and impartial judge.

246. DE BOTTON, *supra* note 49, at 78.

247. *See supra* Part V.