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# HOW TO TELL A JUDGE HE SCREWED UP

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## ABSTRACT

*Like all of us, judges sometimes make mistakes. Pointing out these mistakes can be crucial, whether the mistake is small or large, given that the duty and desire of a judge is to prevent a miscarriage of justice. What, then, is the best way to point out a judge's error in a productive and respectful manner? Useful advice on the subject is included, such as preparedness, the dos and don'ts of sidebars, flexibility, and when and why to file a motion to reconsider.*

# How to Tell a Judge He Screwed Up

by Robert W. Gettleman

I was finishing the first week of a two-week drug conspiracy trial when I had the feeling of *déjà vu*. The first jury had hung, and this was a retrial. I had a pile of draft opinions from my law clerks sitting back in my office, the court of appeals had reversed one of my opinions earlier in the week, and I had to sit through some dreadful play that evening. It was the end of a long, hard day.

A DEA agent was on the stand. He had arrested a number of people involved with the drug-dealing gang, three of whose members were on trial (again). A question was asked that drew an objection: “Please tell the jury what Manuel Diaz said to you after you arrested him.” “Objection, hearsay.”

(This was easy.) “Sustained.”

The young assistant U.S. attorney (AUSA) froze, turned to his opponent who had made the objection, and said something like, “How could you possibly object to that question?” The AUSA literally stamped his foot. He finally remembered that I was there and turned to the bench. “That’s a perfectly proper question.” “Sustained,” I repeated. “Ask your next question.”

By now the AUSA’s face had grown red, his mouth hung open, and he scowled back at me. “But . . .”

In that gentle and patient way all judges always exhibit, I suggested he move on: “No buts. Ask your next question.” The AUSA took a deep breath, returned to his table, and whispered for several seconds with his co-counsel. He straightened himself up, came back to the podium, and asked the next question.

I had the uneasy feeling that I had made a mistake. As I said, it was a long, hard day.

A short time later, we dismissed the jury for the day (thank God). Before leaving the courtroom, I turned to the lawyers: “Is there anything we should discuss before we resume tomorrow?” The young prosecutor approached the bench. “Your Honor, the statement I asked the agent to testify to about Manuel Diaz was disclosed in our *Santiago* proffer [*United States v. Santiago*, 582 F.2d 1128, (7th Cir. 1978), which requires the government to detail the evidence proving the conspiracy] as the statement of a co-conspirator in furtherance of the conspiracy under Evidence Rule 801(d)(1)(E). The defense never objected to the *Santiago* proffer, and I believe the question was totally proper. Perhaps counsel had forgotten about this.” He turned to face the defense lawyer. I went back to my seat and sat down. I looked at the defense lawyer. “What do you have to say?” The lawyer looked down at his feet for a moment and said, “I’ll have to take a look at the *Santiago* proffer.”

“I’ll look at it for you.” I swung my chair around and pulled the proffer from the bench file I always keep behind me during a trial. “What page?” I asked the prosecutor. His co-counsel handed him a copy of the proffer turned to the page mentioning Diaz’s post-arrest statement. We all looked at it together. “I’ll let you ask the question tomorrow morning. Any objection?” I asked the defense lawyer.

“No objection,” he said.

There are several points to this story. First—as if I had to tell you—judges make mistakes. We make them at every stage of the litigation process. Most of them are made because we simply forget or misinterpret a communication. Sometimes, we are just flat-out wrong and have to be educated.

Second, when judges make mistakes, lawyers have to find a way to inform the judge of both the mistake and the means to correct it. The worse the mistake, the more delicately the lawyer has to approach her attempt to correct it. No one likes to look foolish, neither the judge nor the lawyer. The trick is

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to bring the error to the judge's attention in a way that will allow the judge to understand how he or she came to make the error, and will provide a method for making it right.

The first thing that both lawyers and judges should keep in mind is that judges are in the decision business. Decisions are the end product of what we do, whether they are the most mundane evidentiary rulings or the loftiest Supreme Court opinions. Decisiveness is every bit as important as correctness. The indecisive judge, in my experience, is the most dangerous.

Having worked at all levels of the litigation process, first as an appellate court law clerk, then as a practicing lawyer, and now as a trial judge, I am confident in saying that the hardest decisions are the ones we have to make under the pressure of a trial. Objections are often made without thinking, but the rulings on those objections must be thoughtful. Sometimes, as in the example above, we get it wrong. When that happens, what's a lawyer to do?

It's pretty easy to say what a lawyer shouldn't do. A lawyer shouldn't stamp his feet, pout, or act like a sore loser. A lawyer should not be discourteous to court or opposing counsel. The lawyer, in short, should be professional and prepared.

Every time an objection is sustained or overruled, one lawyer is bound to be unhappy. Hopefully, we don't see too many objections that the lawyer knows are not well taken, or too many questions posed to a witness that are clearly inadmissible. There is usually some basis for the objection, although often it is based on a misconception of the rules of evidence or a lack of appreciation for the context in which the question was posed. This often happens when a question that would otherwise be hearsay is asked not for the truth of the matter asserted but for some non-hearsay purpose, and thus is not hearsay under Evidence Rule 801(c). So, although the question seems to ask for a hearsay answer, the questioner should be prepared to cite the rule and tell the court immediately before ruling that the statement is not being offered for the truth of the matter asserted and, even more importantly, to explain the relevancy of the non-hearsay purpose of the statement. *See* Jeffrey Cole, "Hearsay, Juries, White Elephants, and Hippopotamuses," Vol. 30 No. 2 LITIGATION at 49 (Winter 2004).

Once the mistake has been made, it is much harder to correct. As I said before, judges are in the decision business. If we had to revisit every decision we made, particularly at the trial level, we would be doing nothing but arguing about those decisions. Most of those rulings are final and generally, for all practical purposes, nonappealable. *See United States v. Walton*, 217 F.3d 443, 449 (7th Cir. 2000) (Indeed, appellants "who challenge evidentiary rulings of the district court are like rich men who wish to enter the Kingdom: their prospects compare with those of camels who wish to pass through the eye of the needle.").

## Screwups at Trial

Here are some tips for telling a trial judge that the judge screwed up during the trial:

**1. Be prepared.** Know the Federal Rules of Evidence. Try to anticipate where you might draw an objection or where an objection should be interposed. Anticipate your opponent's response or, perhaps, even a knee-jerk reaction from the court. If you are making an objection, cite the rule as you

make it: "Objection, 403"—and be prepared to explain exactly why the probative significance of the evidence is substantially outweighed by the danger of the unfair prejudice. Merely invoking the rule, "Objection, hearsay," may not be enough. When responding to an objection, be similarly prepared: "Your Honor, the statement is not hearsay because it is not being offered for the truth of the matter asserted." In the example above, "The statement is admissible because it is the statement of a co-conspirator and thus not hearsay at all." Being prepared may prevent the mistake from happening.

**2. Ask for a sidebar when necessary.** Sidebars stink. I hate them. I tell lawyers to front all evidentiary issues with me before the trial begins, after we recess, or at a break. More importantly, juries don't like sidebars. Despite our instructions to the contrary, there is always someone on the jury trying to guess what we are talking about outside the jury's presence. That said, if a judge really screws up, the sidebar may be the only way to gently explain the error before it is too late. If the court refuses, bring the matter up at the earliest opportunity and make your record. You are entitled to do so, and if you don't, not only do you deprive the trial judge of the opportunity to correct a mistake, you may find that on appeal you will be deemed to have waived the issue.

**3. Be respectful and professional.** Don't look like a sore loser. As I said before, every ruling on an objection means that one of the lawyers lost a point. It is no big deal. Couch your reaction in terms that are understandable and will get the judge's attention: "Perhaps counsel has forgotten about the motion in limine/pretrial conference/*Santiago* proffer." The notion of having forgotten something that occurred perhaps weeks or even months previously is one that any judge should be able to understand. It means we have to go back and think about what we did before. It doesn't necessarily mean that the decision was wrong; it merely ignored a prior ruling (that was right).

**4. Be flexible.** If an objection has been sustained, try asking the question another way. There usually is another way to ask most questions. This will give the judge time to think about his ruling, and it will get you time to try to explain to the judge, either by your questions or by a dialogue outside the jury's presence, what you are trying to accomplish and why you should be allowed to accomplish it. This happens most in the area of leading questions. You would be surprised how many lawyers actually move on to another subject rather than ask the question in a non-leading manner.

**5. Use written motions.** If the trial proceeds past an error by the judge, file an appropriate motion. If the trial is moving forward, get a written motion in the judge's hands prior to the beginning of the next trial day. Keep it short, and keep it respectful.

**6. When all else fails, file a motion for a new trial.** Most such motions are made perfunctorily, and most judges either deny them outright or reserve ruling on them. If a serious error has been made during the trial, put your motion in writing, and put that error as paragraph 1. Again, keep it short and respectful. Repeat after verdict if necessary.

**7. If all of the above fails, save it for appeal.**

## Motions to Reconsider

Before asking a judge to reconsider an interlocutory decision, lawyers should be mindful of our colleague Judge

Milton Shadur's words: "This court's opinions are not intended to be mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus. Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1998). Most judges are conscientious and hard working. They read the briefs, hear the arguments of counsel, hash out the issues with their law clerks, and arrive at what they believe are reasoned, correct decisions. When a judge expresses that decision in oral or written word, she expects it to be respected, knowing full well that at least one side is likely to disagree. Most of the issues that lead to motions to reconsider do not lend themselves to compromise. A defendant is entitled to summary judgment or is not. A complaint either states a claim and must be answered or doesn't and must be amended or dismissed. An expert is qualified to offer an opinion or is not.

Being mindful of the need to be decisive and move cases forward, however, does not mean that judges regard themselves as infallible. Sometimes a decision neglects to account for a fact that got lost in the shuffle or a pertinent precedent that wasn't fully comprehended. Most judges would rather have obvious errors brought to their attention so the judge can get it right. There is also the incentive to correct the mistake before the court of appeals can get its hands on it.

That being said, though, why is it we see so many frivolous, ill-formed motions to reconsider? Are many lawyers such poor sports that they can't accept even a momentary and inconsequential defeat? Have they promised their clients (or themselves) a victory at every turn? Do they believe that they must win every skirmish in order to win the war? Or do many lawyers really believe that the judiciary is composed mainly of careless and uncaring judges who snap out decisions without much thought?

Most of these motions to reconsider fall into two categories: the "Please, please, please, don't do that to me!" entreaty, and the "Judge \_\_\_\_, you ignorant dummy" category.

The first type, although most annoying, is perhaps the most understandable. Take, for example, an order setting a final pretrial schedule and trial date. The lawyers have appeared a number of times in a civil case, say one for employment discrimination. Some claims have been thrown out on summary judgment, discovery has been completed, and the case is set for a pretrial order and trial for which the court has set aside four days. A week before the pretrial order is due, the plaintiff files a motion to reset the schedule because (a) he has a prepaid vacation with his family the week the pretrial order is due; (b) he still has two key depositions to take and has been unable to schedule them; (c) his computer crashed; (d) he has another trial set to begin the day before this one is scheduled; (e) well, you get it.

Although not substantive, these types of motions wreak havoc with the schedules of opposing counsel, witnesses, and the court. When the original schedule was set, lead trial counsel wasn't present and the judge "failed" to ask the hapless associate who appeared in his place to check the boss's calendar. Some judges won't budge for these types of entreaties; some are softies; most are somewhere in between. But regardless whether the pretrial order or the trial ultimately gets postponed, the lawyer who files such a motion inevitably concedes that he has failed to keep control of his own schedule. Of course, stuff happens—illness, death, military service—but not nearly with the frequency that the volume of motions would indicate.

The other and most difficult type of motion to reconsider is meant to bring to the attention of the judge an error of law or fact on which an interlocutory ruling was based. It is vitally important for lawyers to know when and how to bring these motions.

A recent motion to reconsider the denial of a motion to dismiss began as follows: "This Court's denial of [defendant's] motion to dismiss rests on a fundamental mistake of law." Translated: "Judge, you dolt." This is not the way to get any judge's attention, even though it correctly states the appropriate legal standard that must be applied in this type of motion to reconsider. It is bound to provoke the only too-human defensive reaction that anyone would have toward being called, in effect, *stupid*.

In addition to Judge Shadur's caution that our opinions are not meant as first drafts, it is important to keep in mind that reconsideration is an exceptional remedy and should be applied only when

- (1) the court has patently misunderstood a party;
- (2) the

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## Judges expect, indeed demand, that their decisions be respected.

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court has made a decision outside the adversarial issues presented . . . by the parties; (3) the court has made an error not of reasoning but of apprehension; (4) there has been a controlling or significant change in the law . . . [;] or (5) there has been a controlling or significant change in the facts.

*Ramada Franchise Systems, Inc. v. Royal Vale Hospitality of Cincinnati, Inc.*, 2004 U.S. Dist. LEXIS 24036, Civ. No. 02-1941, at \*12 (N.D. Ill. Nov. 23, 2004) (citing *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)).

The first question any lawyer considering filing a motion to reconsider should examine is whether the perceived error clearly meets these standards. Examine the words of the ruling (whether oral or written) closely. Determine whether the judge considered the precedents you believe govern her decision as well as the facts that were pertinent to that decision. If the answer is yes, the chance of that judge's changing her mind is remote. You will only be rearguing what you already argued before. If the judge got it wrong, she is unlikely to change her reasoning or to listen to a repeat of arguments she already rejected.

If, after examining the standards and the decision, you sincerely believe the judge has made a manifest error by either disregarding or totally misinterpreting legal precedent or ignoring pertinent facts, you must determine how to bring this to the judge's attention without triggering the defensive mechanism mentioned above. You should not begin by telling the judge that she is a dummy, or even that she made a manifest error of law or fact. She knows by the title of your

motion that that's where you're going. Instead, begin the motion by reminding the judge what the case is about and giving a short summary of the decision itself. You should then disclaim any intent to reargue matters that have already been expressly rejected (and *mean* it) and briefly identify where you think the decision went wrong.

"Respectfully submitted" is not merely a phrase to be added to the end of a pleading. Judges expect, indeed demand, that their decisions be respected. Judges do not want to revisit these decisions unless there is an absolute need to do so to avoid an error that would result in a manifest injustice. Unless you are able to articulate succinctly that the judge's decision meets these standards, take your hit and move on to the next phase of the litigation, be it an amended pleading, a response to the pleading under attack, or an appeal. Keep in mind that your motion will no doubt be met with a response from your opponent that allies him with the judge and against you. Try to predict this response (as well as the reaction by the judge) and to get ahead of it by including your entire point in the initial motion. Don't wait for the reply brief that you might be able to file, because the judge is likely to make up her mind before even finishing reading

your motion; it either is worth considering or is merely a rehashing of an argument by a disgruntled litigant.

I make it a practice never to read the briefs filed in the court of appeals concerning my rulings. Lawyers should be free to argue vigorously about the correctness of the procedures and results achieved in the trial court when taking an appeal. Knowing what those lawyers say about me in the court of appeals serves no purpose and risks wounded feelings or resentment. Reading a motion to reconsider an interlocutory decision contains these same risks but is unavoidable. Keep this in mind when you are thinking of filing such a motion. Don't get a reputation of being a sore loser.

Many years ago, I ran into a criminal defense lawyer—the sort of Damon Runyonish character who has gone the way of the dodo bird—who had just lost a highly publicized case. I began to commiserate with him, but he stopped me and, beaming, said, "Don't be silly. I have just taken the first step toward a successful appeal." The moral of the story is: When, despite all of your efforts, the judge refuses to undo her mistake, there is still hope and the comforting certainty that if you win in the court of appeals, your next motion for reconsideration might have a different outcome. ☐

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