

# Some Thoughts on Engaged Judging

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***“The Passive Judge[s] ... do their job, answer questions, ... and give warnings when necessary. But most of the times [sic] that is as far as they go.***

***“The Active Judge ... is the person you see walking around, ... and fixing problems as they happen, cleaning up the mess players left behind.”<sup>1</sup>***

Chief Justice John Roberts famously described the role of a judge as that of a baseball umpire, passively calling balls and strikes.<sup>2</sup> This model has been substantially and accurately criticized, especially in the context of state court adjudications, where the litigants often do not have legal representation.<sup>3</sup> That criticism, however, has focused primarily on procedural remedies, tied to the notion of an “active” or “engaged” judge<sup>4</sup> as a means of improving the ability of the adversary system to deliver justice.<sup>5</sup> In this article, I suggest that while this notion is important, it is incomplete, for a judge (in state court at least) is faced with a complex web of problems to solve, problems that in appropriate cases require not just a facilitator but a willingness to step outside the adversarial mode and to move the parties toward resolving issues in the context of the non-jury hearings<sup>6</sup> the judge conducts.<sup>7</sup>

I.

I will start with some vignettes from my own experience that illustrate how a rigid deference to the adversary system is not always necessary or effective.

## A TRIAL-SETTING CONFERENCE IN A DOMESTIC RELATIONS CASE

Trial-setting conferences are a fixture of the court system. They provide an easy way by which the judge and the parties can address any preliminary issues relating to discovery and the like and to identify the issues to be addressed at the trial, the length of the trial, and the date of the trial. In the context of “engaged” judging, where the judge will assist unrepresented parties to understand the underlying legal context and provide a map of how the case will proceed, the trial-setting conference is a valuable tool to ensure that each side can well and fairly present their case.<sup>8</sup>

But a trial-setting conference can also be a vehicle actually to resolve, or at least partially resolve, a case, particularly in the context of a domestic relations case where the parties do not have lawyers. For example, one of my cases only involved property—when I asked the plaintiff at the trial-setting conference what he saw as the key issues, he told me he wanted his stereo back; the defendant responded that that was fine, if he repaid his half of the deposit on the apartment; and when he agreed, I put the parties under oath and finalized the divorce. I had similar experiences in custody cases, where the parties came to an agreement on custody and visitation when a discussion of what the issues may be turned into one about the details of visitation.

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### Footnotes

1. Article in “Magic the Gathering,” available at <https://www.wizards.com/dci/judge/main.asp?x=articles/jc20020606b>.
2. <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.
3. See, e.g., Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004); Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L. ETHICS, AND PUB. POLY 367 (2008); Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899; Carpenter, *Active Judging and Access to Civil Justice*, 93 NOTRE DAME L. REV. 647 (2017); Carpenter et al., *Studying the New Civil Judges*, 2018 WIS. L. REV. 249.
4. Richard Zorza suggested persuasively to me in a conversation that it is more appropriate to use the term “engaged” rather than “active.” I accordingly will use this term in this article.

5. See sources cited in note 3, *supra*.
6. I have excluded jury trials because they present a number of unique considerations, primarily relating to how a judge’s conduct affects the jurors’ deliberations. I will, however, provide some thoughts *infra* regarding how jury trials implicate some of the same concerns and approaches a trial judge needs to consider.
7. Court systems throughout the country offer a wide variety of services designed both to resolve cases short of trial and to facilitate the ability of unrepresented litigants to navigate their way through a court case. As discussed in greater detail *infra*, I do not mean to suggest that the approach I outline in this article should substitute for those services—rather, I see it as an important additional tool that judges can use, especially in cases in which the parties have not been able to resolve their differences before trial.
8. I am describing here my own practice as a judge. I agree, however, that it can be productive to hold an initial status conference to get an understanding of the basic issues of this case in a more neutral setting, without setting a trial date, reserving the “trial-setting conference” for a time when an adversarial trial is unavoidable. See IAALS, Working Smarter Not Harder, How Excellent Judges Manage Cases, January 2014.

These kinds of results arose because I often used the following procedure in my trial-setting conferences. I would begin by explaining that to set a trial date, I needed to know how long the trial would take, and that in turn meant that I needed to know what the issues were. I would then ask the plaintiff what he or she wanted me to do, after which I would ask the defendant what they thought about that. I would then follow up with the plaintiff, asking them their reaction. A discussion often would ensue that led to an agreement between the parties—the trial-setting conference in essence became a settlement conference. Or put differently, the parties and I abandoned the adversary system in the midst of a proceeding designed to lead to an adversarial trial.<sup>9</sup>

### AN EVICTION HEARING

A landlord had sought to evict a tenant for non-payment of rent—neither had attorneys. The judge hearing the case at the time suggested (appropriately) they talk in the hallway, and they came back with an agreement. Two months later, the landlord once again filed for an eviction. I told the parties that it would be helpful for me to learn about the issues before we began the actual hearing. The landlord explained that the tenant had not paid her rent or utilities and had to go. When I asked the tenant her position, she said that she was planning to leave the town for good in 10 days and was willing to let the landlord keep the deposit. I asked the landlord what she thought; she said the deposit would not cover the utilities. The tenant responded that she would pay what she owed on the utilities before she left. I pointed out to the landlord that this was only the eviction hearing—any monetary issues would have to be addressed at a later hearing—and that we were looking at a 5-day difference between the statutory eviction date and when the tenant planned to leave; and I asked her what she wanted to do. The landlord then agreed to the tenant’s proposal, a result that freed the landlord of the tenant and got her what she was owed, and that avoided the tenant being tarred with a record of having been evicted.

This was all done in the context of what was scheduled to be an evidentiary, adversarial hearing, one that, had it proceeded, would have damaged the defendant over the long term, as she did not deny she had not paid her rent and so was subject to eviction. But I was able to resolve it in the context of asking the parties what they wanted, and then seeing where the discussion led. Again, the manner in which the hearing was conducted led to a resolution, a procedure that might be termed a settlement conference in the guise of a trial—and, more important, a proceeding that led to a result that met both parties’ needs for equity and justice.

### PROBATION REVOCATION

Alaska has implemented the PACE program,<sup>10</sup> which is designed to improve the ability of medium-risk probationers to succeed on probation. It is not a therapeutic program, but it does have a therapeutic flavor. Basically, probationers are told that the

purpose of the program is to help them succeed; but they are also told that they will be arrested if they do not appear for their appointment, if they refuse to take a drug test, or if they test positive for drugs—there are no second chances. But if the person admits the violation right away, then the sanction is quite lenient, usually 3 days in jail; if they do not, the consequences are more severe: 15 days if they lie, 30 days if they do not show up. My experience over a period of many years is that this approach was quite effective in reducing recidivism compared to other probationers, with the exception of opiate addicts.

The important feature of this program was the manner in which the hearing was held. The usual procedure in a probation revocation proceeding is that the court is asked first to determine if a violation has occurred, perhaps through an evidentiary hearing; if a violation is admitted or found, then the court sets the consequences after a formalized process by which the district attorney is the first to talk, perhaps with testimony from the probation officer, after which the defense attorney will speak, followed by the probationer if they want to say something. The PACE hearing, by contrast, started with an admission by the probationer. The proceeding after that was less formalized: usually, the probation officer would present his or her sense of the probationer’s situation, the DA and defense attorney would add their perspective, and a conversation generally would then ensue, one that included the defendant and me, in an interactive, problem-solving discussion that sometimes would lead to a collaborative decision, and always included an effort by all involved to point toward the future rather than to resolve some factual or legal dispute. Of significance here is that the process was rarely adversarial, and there was no effort to determine a prevailing party.

### PROPERTY DISPUTE

A central, and often boring, feature of divorce trials is the procedure by which the court is asked to value the personal property of the parties, a key part of the allocation of the marital estate. It is far from unusual for a judge to have to determine the value of some two or three hundred items, including the sofa, the pots and pans, the tools, the clothing, and even the blue plastic pitcher.<sup>11</sup> The values on these items often do not vary very much (\$1 versus \$2 on the pitcher), but the judge still has to make a call.

I initially handled this process through a standard adversarial proceeding, with the plaintiff testifying about each item as part of their case in chief, the defendant providing their response as part of their case in chief, and then hearing any rebuttal testimony. It could be very difficult keeping track of it all, especially if each item came with a picture or some other demonstrative exhibit. I decided that it would be easier for me to make a ruling if we went

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9. A similar conversation could be held at an initial status conference, since the purpose of the conference is to identify key issues, and the process of identifying those issues could, in appropriate cases, lead to a discussion of how to resolve them.

10. PACE is an acronym for Probation Accountability and Certain

Enforcement, and is based on Hawaii’s Opportunity Probation with Enforcement, or HOPE. See <http://www.correct.state.ak.us/blog/alaskapace/2010/08/04/what-is-pace/>.

11. Cf. Bob Dylan, “Subterranean Homesick Blues”: “Twenty years of schooling and they put you on the day shift.”

**“‘Truth’ in baseball is clear-cut: a ball is fair or foul, the runner is safe or out, the pitch is a ball or a strike ....”**

item by item—for example, I would have the plaintiff value the bed or the picture and then get the defendant’s testimony. But a very interesting pattern emerged: the parties initially would each tell me why the couch was worth \$40 as opposed to \$50, but over time, as we worked through the list, they would stop fighting about the values, and a consensus would

emerge as to most of the minor property at least. The proceeding thereby led to a settlement of sorts, which in turn tended to reduce the overall heat of the hearing. It was noteworthy in this respect that I did nothing to encourage the settlement—the agreement arose purely by virtue of the structure of the proceeding.

## II.

The underlying feature of the adversary system is that it is meant “to get to truth and justice through a competition between two versions of fact and law before a neutral decision-maker.”<sup>12</sup> The courtroom is viewed in this context as “at least to the first order, a zero-sum environment [in which] one [side] loses and one wins.”<sup>13</sup> The judge’s role in this context has traditionally been that of a neutral and largely passive umpire, with the parties having the sole responsibility “to control investigation, define the issues at stake in the case, and present evidence and argument to the court.”<sup>14</sup> Judges in this construct “play no independent role in shaping the content or outcome of cases.”<sup>15</sup> Rather, their “primary function is to ensure a level playing field upon which the skilled advocates battle.”<sup>16</sup> Or as Chief Justice Roberts described it:

Judges are like umpires. Umpires don’t make the rules; they apply them.

The role of an umpire and a judge is critical. They make sure everybody plays by the rules.

But it is a limited role. Nobody ever went to a ball game to see the umpire.

[I]t’s my job to call balls and strikes and not to pitch or bat.<sup>17</sup>

The judge-as-umpire model does have some validity. Many of the calls a judge must make are relatively straightforward, akin to a pitch that clearly is in or out of the strike zone—“Billy said it is raining” obviously is hearsay if offered to prove that it is raining, and obviously is not hearsay if offered to prove Billy is delusional. The calls also tend generally to be black or white—a particular piece of evidence either is or is not admissible, the elements of the crime have or have not been proven. In addition, like judges, umpires have to manage the game, making sure that the rules are

followed, controlling the behavior of the players, and at times dealing with the crowd to ensure that the game can proceed appropriately. And as every person who follows baseball knows, each umpire has his or her own strike zone, just as different judges can and do issue very different rulings based on the same facts and law.

This last point is significant, however, for it undercuts a key element of the umpire model even as it supports that model. The notion of calling a pitch a ball or strike carries with it the belief that there is only one concrete, objective answer—the pitch can only be either a ball or a strike. But even in baseball, this is not true—a ball to one umpire might be a strike to another, and umpires do, after all, call a pitch a strike even though the box on the television screen (which is supposed to be objective) indicates that it is a ball. This in turn entails that the judge-as-umpire model is misleading, because it implies that judges, like umpires, are identifying an objective truth, when in fact they are exercising their own discretion and understanding in applying what is supposed to be a clear rule.<sup>18</sup> Or put differently, the judge’s ruling, just like the umpire’s call, does not necessarily constitute some objective “truth.”

This leads to a more fundamental difficulty with viewing the role of a judge as akin to that of an umpire. “Truth” in baseball is clear-cut: a ball is fair or foul, the runner is safe or out, the pitch is a ball or a strike (even if reasonable minds might differ on specific pitches). More important, the manner in which this “truth” is determined is equally straightforward and unaffected by process—the umpire looks at where the ball goes or whether the ball arrives at the base before the runner. But neither of these factors applies in the context of a trial, for “the law may have both a different concept of truth and a different way of finding truth than do other systems of thought.”<sup>19</sup>

As noted above, the adversary system is designed to be a mechanism for finding out what actually happened, for eliciting the “truth.” That process requires adjudicating a variety of facts. But as Goodpaster points out:

the law manufactures facts from the raw data of reality so that it can perform its operations on them. Facts do not announce themselves as facts. The data from which factual conclusions are drawn is ambiguous and subject to varying interpretations. Furthermore, the same data can constitute a different fact under a different theory of what the data means.<sup>20</sup>

Thus, unlike baseball, facts attain their meaning in a court of law only in the context of the particular theory or issue in which they are presented. Snapping a bicycle lock with a bolt cutter can constitute theft if done by a stranger, or recovery of one’s bike if done by an owner who lost the key.

12. Zorza, *supra* note 3, at 429, n.15.

13. *Id.* at 440, n.31.

14. Steinberg, *supra* note 4, at 901.

15. *Id.*

16. Carpenter, *supra* note 4, at 659.

17. Testimony of John Roberts at his confirmation hearing, September 12, 2005. Available at <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

18. A long-time baseball umpire pointed out in this context that “there are many intangibles when it comes to calling balls and strikes.” Evans, *Sorry, Judges, We Umpires Do More Than Call Balls and Strikes*, WASH. POST, September 7, 2018.

19. Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 130 (1987-88).

20. *Id.* at 131.

The difficulty of ascertaining the “truth” in the adversary system—a task akin to encountering an iceberg, 90% of which is underwater<sup>21</sup>—is further confounded by three other factors. First, most factual findings in trials rely heavily on the testimony of witnesses, which notoriously often can be quite unreliable. Faulkner summarized this dilemma well:

“I want the truth,” the Justice said. “If I can’t find that, I got to have sworn evidence of what I will have to accept as truth.”<sup>22</sup>

This potential unreliability is compounded by the fact that judges generally must make a determination of what has already occurred; yet

it is not always possible to be sure of the past. Witnesses may differ in what they think they saw; or there may be no witnesses on a significant issue so that the past must be reconstructed from circumstantial evidence; or, in some cases, witnesses may deliberately lie. Once the evidence is presented, it must be interpreted, leaving room for further indeterminacy.<sup>23</sup>

Second, the legal system imposes different burdens of proof, which means that something may be “true” in the sense of having been proved in one context, but not in another; and it utilizes evidentiary rules that block access to the truth.<sup>24</sup> And third, trials in many ways consist of two lawyers talking to the judge<sup>25</sup>; yet as Judge Marvin Frankel noted, “the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time.”<sup>26</sup>

In short, as Goodpaster so eloquently framed it:

the issue in a trial is the truth of the accusation, and the accusation is true if it is proven to be true within the rules of proof and persuasion. In this manner, a trial produces truth, rather than finds it. This truth is a “legal” truth and is that which the system recognizes as true.<sup>27</sup>

And this epistemological difference in the nature of “truth” in a trial as opposed to a baseball game leads to the other, fundamental limitation with using the judge-as-umpire metaphor: the very structure of the adversary trial is dramatically different from that of a game.

Baseball, like trials, has two elements from the umpire’s point of view: the acts which make up the game—balls and strikes, hits and outs—and the outcome—one team wins and the other loses. Umpires operate passively under clearly defined rules which they cannot change with respect to the first element, and they have no role whatsoever in deciding who wins or who loses. But the judge’s role in both elements is very different and vastly more complex in at least three respects. First, as noted above, umpires merely apply the rules—they cannot redefine the strike zone. By contrast, judges can and do change the rules—they can decide to exclude evidence in a criminal case based on a new interpretation of the Constitution,<sup>28</sup> or, at the appellate level, overturn long-existing precedent regarding the limits of governmental action, as the recent case of *Janus v. AFSCME* demonstrates.<sup>29</sup> A judge, in short, can decide that what previously was a ball is now a strike—they have a lot more control over just what the rules might be.

Second, as many commentators have pointed out, judges, in state court at least, participate in a very different “game” than does an umpire. Baseball umpires deal with two sides who are, formally at least, equally matched—both teams are composed of trained ballplayers who have been selected to play at the highest level. The umpire analogy as it applies to court proceedings assumes that both parties have lawyers, but this assumption simply is not true in many civil state court cases, the majority of which involve persons who represent themselves.<sup>30</sup> And this fact requires a very different kind of judge than a passive observer rendering rulings.

Lawyers are trained to gather and to present evidence and to identify the key issues in a case. The legal system is designed with that training and ability in mind. But most people who represent themselves in court have no real idea of what they are doing, much less how to deal with the many evidentiary rules. The result is that they often do not know the specific legal requirements they need to meet (such as the elements of a prescriptive easement), the facts that are necessary to prove those requirements, or the manner in which they can or should present that information. A judge who fails to understand this reality, forcing self-represented parties to follow the rules without providing any guidance, may

**“[M]ost people who represent themselves in court have no idea of what they are doing ...”**

21. I cannot claim credit for this comparison, but cannot recall where I read it.

22. William Faulkner, *THE HAMLET*, at 326.

23. Svard, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 304-05 (1989).

24. Frankel, *The Search for Truth: An Umpireal View*, 123 *U. PA. L. REV.* 1031, 1036-39 (1975).

25. I cannot claim credit for this observation, but cannot recall where I read it.

26. Frankel, *supra* note 24, at 1037.

27. Goodpaster, *supra* note 19, at 130.

28. While this obviously can happen at the appellate level, *see, e.g., Miranda*, it is far from unusual for a trial judge to render such an opinion.

29. 585 U.S. \_\_\_\_, 138 S. Ct. 2448 (2018), overturning *Abood v. Detroit*

*Board of Education*, 431 U.S. 209 (1977).

30. Carpenter et al., *supra* note 3, at 262. The National Center for State Courts released a landscape study about civil cases, analyzing a data set encompassing nearly one million civil cases, excluding domestic cases, that reflected approximately 5% of civil cases nationally. “The traditional view of the adversarial system assumes the presence of competent attorneys zealously representing both parties. One of the most striking findings in the Landscape dataset, therefore, was the relatively large proportion of cases (76 percent) in which at least one party was unrepresented, usually the defendant.” Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee, at 8, 2016, *available at* <https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx>.

**“Justice plays no role in baseball. But the provision of justice is a central element of our judicial system ...”**

well be “neutral” in a formal sense, but will not be providing justice in any meaningful sense at all.<sup>31</sup>

A judge, in short, can no longer be passive, relying on the parties to supply the information. Rather, as many commentators have persuasively argued, they need to be “active” or “engaged” participants in the hearing in

order to assure that the necessary information is elicited to make an appropriate ruling. This often will require the judge to adjust procedures (such as relaxing many of the rules of evidence<sup>32</sup> or requiring less formality in pleadings), to explain the relevant law and process to the parties both at the outset of the trial, and to take an active role in eliciting information.<sup>33</sup> In effect, the judge does at times pitch or bat, and people most definitely come to the “ball game” to see them.

The adjustments identified above are procedural in nature—they are designed, as Richard Zorza put it, “to make sure that the adversary system does what it is supposed to do at its best—to get to truth and justice through a competition between two versions of fact and law before a neutral decision-maker.”<sup>34</sup> This leads to the third key reason why judges are not simply umpires: unlike umpires, they decide the outcome of the “game”; and that outcome, unlike baseball (which is effectively a zero-sum game with one clear winner and one clear loser) often is not based purely on “truth” and may well not involve an actual winner or loser.

Justice plays no role in baseball. But the provision of justice is a central element of our judicial system, and as Faulkner so beautifully illustrated:

“I’m interested in truth,” the sheriff said.

“So am I,” Uncle Gavin said. “It’s so rare. But I am more interested in justice and human beings.”

“Ain’t truth and justice the same thing?” the sheriff said.

“Since when?” Uncle Gavin said. “In my time, I have seen truth that was anything under the sun but just. . . .”<sup>35</sup>

As noted above, the adversarial system uses many tools, most notably many of the rules of evidence and the concept of the burden of proof, essentially to block the search for truth to meet the requirements of justice. In this way, in rendering a ruling, a judge’s determination of the outcome may well depart from the “truth” to deliver justice. Thus, a person might “win” in criminal court, but lose in civil court.

The “winner” of a trial, unlike a baseball game, therefore can

be quite contextual. But there are many hearings that a judge may hold which are not zero-sum games in which one side wins and the other loses. For example, the task of a “problem-solving” court is not to determine a winner or loser, but to enable a defendant to sober up or a family to keep their apartment or a parent to keep their job. And no one actually “wins” a custody battle: the judge’s job is to evaluate what custodial arrangement best benefits the children, an outcome that cannot properly be evaluated in terms of whether one parent “won” the case.

Both of these examples illustrate the final, and in some ways most fundamental, way in which the outcome of a case can and will be very different from that of baseball. Baseball is purely competitive. But contrary to Zorza’s comment quoted above, there are many kinds of court proceedings that need not and should not be competitive; and the competitive underpinnings of the adversary system can often be at odds with the delivery of justice. A judge conducting these kinds of proceedings is in fact very much a pitcher or batter, not a passive observer calling balls and strikes.

Problem-solving courts, for example, are an important response to the recognition that the competition inherent in the adversary system simply does not work in key areas, most notably where the parties (civil or criminal) suffer from substance abuse. Again, there is no actual “winner” or “loser” in these kinds of cases—there is a problem to be solved: how to enable the party to get clean and, in many cases, to get their kids back home. In those courts, “the problem-solving judge, instead of being a remote adjudicator, asks what needs to be done to get the parent off drugs, and takes a leadership role in seeing that everyone works together.”<sup>36</sup>

The central recognition underlying these kinds of proceedings is that the competitive approach of the adversary system simply does not work in many cases. This, of course, is one reason why there is such a focus on settlement in civil cases, especially those where the parties (e.g., parents, neighbors, or siblings) will have an ongoing relationship once the case is concluded. But where outside settlement efforts have failed, a judge may well have to tailor the hearing and the ruling in a way that enables the parties to continue to coexist, a far cry from simply deciding if the evidence is admissible.

In short, the adversary system requires a very different sort of “umpire” than baseball. In baseball, the “truth” is readily ascertained (if occasionally the subject of memorable disputes). But a judge operates in a much more complex arena, where truth is contextual and elusive, and “in the last analysis, . . . not the only goal.”<sup>37</sup>

### III.

A recent review of the literature regarding “active judging” identified four categories of behavior judges engage in that depart

31. See generally, Zorza, *supra* note 3; Engler, *supra* note 3.

32. This can be a particularly useful step, for as Frankel points out, the rules of evidence were written to protect juries from hearing unduly prejudicial evidence, Frankel, *supra* note 24, at 1042-43, a concern simply not present in a bench trial. A judge, after all, knows the rules of evidence and can determine the appropriate weight and credibility, if any, to give to a particular piece of evidence, particularly since most of the evidence addressed in the evidentiary rules is competent evidence unless an objection is made. In addition to giving the judge the fullest possible record on which to ask questions and render a ruling, allowing the litigants to provide any evidence they find relevant

would also benefit self-represented litigants, since, in my experience at least, they tended to censor themselves for fear of violating an evidentiary rule.

33. These arguments are well and forcefully set out in the articles cited in note 3 *supra*.

34. Zorza, *supra* note 3, at 429, n.15.

35. William Faulkner, *An Error in Chemistry*, in KNIGHT’S GAMBIT, at 111.

36. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POLY REV. 125, 138 (2004).

37. Frankel, *supra* note 24, at 1037.

from the traditional norms of passive judging and party control: (1) adjusting procedures; (2) explaining law and process; (3) eliciting information; and (4) raising new legal issues not previously raised by parties, as well as additional potential categories of judicial activity, including (5) referring parties to court-based and nonprofit service providers; and (6) facilitating negotiation between parties.<sup>38</sup>

The first four categories, while important, are entirely procedural in nature, designed to improve the manner in which an adversarial trial is conducted. Of course, in recognition of the limitations of the adversarial system, many judges actively and appropriately encourage the parties to take advantage of the many opportunities that every court system has provided to resolve cases short of trial—the last category—but that focus needs to go well beyond simply encouraging the parties to talk or referring them to mediation. Rather, a key element of “engaged” judging includes, where appropriate, structuring the hearing process itself to facilitate a resolution.

It is important at the outset to define what the term “resolution” means in this context. The most obvious meaning is that the parties actually settle the case—they agree on an outcome that lays out precisely what their obligations will be, such as the payment terms of a contract, the specifics of an easement, or the details of the custodial arrangement for the children.

But “resolution” can and must be given a broader meaning, for a case can be “resolved” in key ways even if it does not settle. This is due to two central elements that underlie many civil trials, in state court at least. First, as noted above, many such trials are not zero-sum games, where one party wins and the other loses. Second, a lot of trials involve parties who know each other—they are married, neighbors, siblings, or friends. Adversarial trials bring out the worst in people,<sup>39</sup> for they have to fight hard and look for the strongest evidence to present against the other party, which necessarily tends to lead them to view the other in a highly negative way.<sup>40</sup> Thus, a fight over a lot line may lead to long-term enmity, as can a battle over sibling debt. A short-term “victory” in these cases may well lead to a long-term loss for all concerned.

This dynamic not only will require a judge to find ways to ameliorate the tensions that arise during the trial, but also offer the judge an opportunity to structure both the hearing and the manner in which he or she rules on a case in a way that enables the parties to move forward in a positive way—to “resolve” the issues between them such that they can continue their relation-

ship in a healthy way or, at worst, to coexist. Put differently, the “engaged” judge here not only seeks procedural fairness, but also seeks to structure the entire hearing and result in a manner that promotes, where appropriate, an ongoing positive relationship between the parties.

There are a variety of ways in which this can be done. First, the judge can ask the parties at the beginning of a bench trial in civil cases whether they want to take an hour and see if they can settle some or all of the case. I routinely employed this practice, regardless of whether the parties had tried mediation in the past—the parties, represented or not, usually would agree to try, and we often would be successful. But even if we were not, the discussion often had a somewhat positive impact on the trial, for the parties generally found some areas in which they agreed, and they discovered that they could work together at least in some fashion, both of which tended to reduce the tension and anger during the trial.

Second, it can be possible to conduct the trial in a way that leads the parties to resolve some or all of the issues. As noted in section I, a judge can use the initial case conference or trial-setting conference in this manner, asking the parties what the issues are and then framing the ensuing conversation to see if they can come to an agreement. A judge can also start the trial itself by asking the parties what outcome they are seeking or what their basic position may be, and then using that as a framework within which to ask relevant questions, which again may lead the parties to come to an agreement. And as arose in the context of the property valuations discussed in section I above, there are ways to receive the evidence that leads the parties to stop disagreeing, at least as to some issues.

I generally would put the parties under oath in the second context described above, so that their comments could form the basis for either the settlement or my ultimate ruling if they did not resolve the case. This leads to a third way that the conduct of a trial can lead to “resolution” in the broader sense: a judge can take an active role not only to ensure that he or she receives the necessary relevant evidence, but also in how the evidence is received, so as to try to reduce the animosity in the room. This can include such techniques as reminding the parties at the outset of the trial that they are going to still have to deal with each other long after the trial is over, encouraging the parties to focus the evidence in a positive way (e.g., the strengths they bring to raising the children

**“A judge can also start the trial itself by asking the parties what outcome they are seeking ...”**

38. Carpenter et al., *supra* note 3, at 279-280.

39. As one critic characterized it, “the formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.” Weinstein, *And Never the Twain Shall Meet Again: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 132-33 (1997).

40. This is particularly true in family law cases:

[I]n family cases a rational fact-finding process promoting a “final” resolution is difficult to attain. . . . More than in any other type of case, the “truth” in family cases is defined less by rational and empirical fact-finding and more by perception, emotion, con-

flict, anger and anxiety. As courts and litigants repeatedly experience, few family cases—particularly those involving children—are resolved with “finality” the first or even second time around. In addition, as the percentage of pro se litigants involved in family cases grows, approaches traditionally used by courts to promote rational fact-finding become even more difficult to apply. Thus, in far too many cases “finality” is eventually reached through the operation of law (emancipation of a minor) or the exhaustion of personal funds, not by a court aiding the parties in reaching a just resolution.

Conference of State Court Administrators, Position Paper on Effective Management of Family Law Cases (2002), at 3.

**“The way in which a judge explains a sentence ... can go a long way toward facilitating rehabilitation ...”**

rather than the manifold reasons why the other is an awful parent), and using the judge’s inherent authority to ask questions to assure that the parties remain focused on the key elements of the case.

This kind of approach can and does apply in a variety of contexts, not just the standard bench trial in a civil matter. Probation revocation hearings can be conducted as more of a discussion with the parties, with direct communi-

cation with the defendant, a method employed by the wellness courts that does not need to be restricted to that format. Child protection hearings can be held in a manner that leads the parties to look to reunification, rather than focusing on what the parents have done wrong or the failings of the social worker. The problem-solving courts have taken this approach in a variety of contexts; there is no reason why similar approaches cannot be used in every case.

It should be noted that, perhaps paradoxically, some of these approaches may well work best when neither party is represented. It is much more difficult to have a direct conversation with a party when they have a lawyer, since that party generally will only speak through the attorney, either by having the attorney talk for them or by participating only in the context of answering questions. In addition, lawyers tend, understandably, to be focused on what they perceive is best for their client, and this may lead them to block their clients from the kind of discussion that can lead to a resolution.

Finally, the manner in which a judge issues their ruling can help “resolve” a case. The content of the order can be very important. For example, accentuating the positive aspects of both parties can be a valuable way to assist in preserving their relationship. Saying that a party was “not credible” as to a particular factual issue often is a far better choice than concluding they “lied.” A judge can also choose not to resolve a factual issue that was hotly litigated but not necessary to the ultimate result, where a ruling on that issue might appear to validate a party’s negative feelings in a way that will not be helpful in the long term.

A judge’s choice as to how to announce the ruling can also be significant. In many cases, a written order may well suffice. But there also are times where it is important for the judge to put a ruling on the record in the presence of the parties. This enables the judge to look at the parties in the eye; and perhaps of equal or greater importance, the parties have to respond to the judge’s non-verbal cues. There also may be people involved in the case who are not parties, such as grandparents or siblings, and they may well need to hear the ruling as well. It was not unusual for me to

talk to the parties in custody cases about the fact they were going to have to work together to raise their children long after the case was over, a discussion that cannot really be very effective in writing. And sometimes I would talk directly to the others in the room, encouraging the grandparents to focus on the joy of having grandchildren rather than facilitating the fight between their children.

Nor is the value of an oral ruling confined to a standard civil case. The way in which a judge explains a sentence or probation revocation in a criminal case can go a long way towards facilitating rehabilitation and enabling victims to achieve some closure—and even, where appropriate, some form of reconciliation between the offender and the victim or at least between their families. Child protection cases can involve many of the same dynamics as custody cases—accentuating the parents’ positive elements and encouraging them to keep up their good work in an oral ruling explaining why the state will retain custody can facilitate reunification. In both of these situations (and in many other contexts as well), looking the party in the eye as one points out what more needs to be done is an important part of “resolving” the case.

One final note: a judge necessarily must take a different approach in cases tried to a jury than in a bench trial, since the judge must be extremely careful not to intimate his or her opinions on the case to the jurors. This can impede most importantly the judge’s ability to ask questions to witnesses, since the questions may well require expressing some concern about the witness’s testimony, which in turn could prejudice the jury. But this does not mean that a judge cannot take the kind of active role discussed above in jury cases, especially where the parties may have a relationship that extends beyond the case. For example, judges can work to reduce hostility and facilitate resolution during the discovery phase. There often are pretrial motions to address, where the judge can be active in the same manner as in a bench trial. And a judge can tailor the way in which he or she delivers a ruling to accomplish the same kinds of goals as in a bench trial.

#### IV.

It is more than likely that almost every judge is actively involved in some fashion in how a case proceeds — the differences among judges in all probability revolve around how engaged they believe they ought to be. The appropriate level of such “activism,” as it were, also necessarily is constrained by the basic ethical duty to act impartially and to appear impartial, a duty that is of particular importance whenever a judge chooses to try to help the parties achieve a resolution of the case. After all, the words and actions of the judge matter as the judge works with the parties, a dynamic that is of particular concern whenever a judge seeks to settle a case in which the judge may later participate.<sup>41</sup>

It also is important to note that the context in which a judge hears a case is a critical component of “engaged” judging.<sup>42</sup> There

41. While there is no ethical bar to a judge settling a civil case in which they sit, provided that the parties do not object (see, e.g., Alaska Commission on Judicial Conduct Advisory Opinion #2006-01 (October 30, 2006)), many judges prefer not to do it; and as I understand it, some jurisdictions flatly prohibit judges from doing so. Needless to say, if one does facilitate a settlement in one’s own case, it is important both to make a record that any settlement into which the parties enter is not unduly influenced by the judge and to be prepared to recuse

oneself if the settlement fails and either the parties request recusal or one recognizes that one has formed a bias due to the parties’ behavior or positions in the settlement discussions.

42. See generally Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999), which contains a detailed discussion of the issues raised in this paragraph.

are many actors involved in a court case beyond the parties, any attorneys, and the judge, all of whom can, do, and, indeed, must play an important role in ensuring that cases move smoothly and fairly and whenever possible can be resolved short of an actual trial. The kinds of actions described in this article were used by me, and are meant to be used, as an element of, not a substitution for, those very important services. In addition, there often can be a significant imbalance of power between the parties (as in landlord/tenant cases or where domestic violence is present), a key complicating factor of which a judge must be aware and that might interfere with a fair discussion and resolution of the issues. And there may be cases where the judge is not aware of key background facts (such as the actual availability of affordable housing for a tenant who is willing to move out to resolve a landlord/tenant dispute) that could mean that what appears to be a sensible and fair resolution in fact is not one at all.

All of these concerns warrant attention in any given case, and each could stand alone as a topic for a scholarly article. But none of them mean that a judge must act in a manner consistent with the classic model of the umpire judge.<sup>43</sup> Indeed, much of the research cited in this article basically seems intended both to document and to encourage the ways in which judges do and should go beyond that classic model. The central point of this article is simply to underscore the reason why this literature both has it right yet is unduly limited in its call for action. An “engaged”

judge is an effective judge because they do not simply react to what they hear—they are actively involved in both how the case proceeds, both substantively and procedurally, and how it can be “resolved” in the broad sense discussed above. In doing so, the judge is constantly problem-solving, shifting rules and procedures and rulings to accommodate what needs to be done, consistent of course with the relevant legal rules and the overriding requirement both to be impartial and to appear to be impartial. This is a far more complex—and fulfilling—task than simply calling balls and strikes.



*Judge Eric Smith (J.D. Yale Law School (1979); B.A. Swarthmore College (1975)) was appointed as a Superior Court judge in Palmer, Alaska in 1996 and retired in 2016, with a caseload that covered criminal cases, civil cases, child protective cases, juvenile cases, and probate cases. He served as Vice Chair of the Fairness, Diversity and Equality Committee, Administrative Head of the Three Judge Sentencing Panel and as a mentor judge and a training judge; he also was a member of the Alaska Commission on Judicial Conduct. Judge Smith received the Community Outreach Award from the Alaska Supreme Court in 2016.*

43. See Engler, *supra* note 3, at 386: “As long as the judge is prepared to help all sides, as needed, the problem is not one of impartiality, but the appearance of impartiality. The solution is to provide clear guidelines and explanations, not to require judges to sit back passively

regardless of the unfairness that follows in terms of process or outcome.” Cf. Carpenter, *supra* note 3, at 701-02, 708 (noting complexities inherent in a judge’s efforts to be fair, to elicit facts, and to apply the burden of proof where the parties are self-represented).

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