Off The Bench

Judicial Roles

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The term “Proactive” when talking about judges often gets people into wide ranging arguments/discussions about whether it is a good thing or a bad thing. We see in the process of who will be appointed to the Supreme Court of the United States that someone is too “Liberal” or too “Conservative” and whether they will be a “Proactive” justice or a “Constitutional” one. Even Chief Justice Roberts has told us that judges are just meant to “call balls and strikes”. We see too often, especially now, that it used to be bad to be a “Proactive” and “Liberal” judge but now it is ok to be a “Proactive” and “Conservative” judge.

I agree with Chief Justice Roberts that trial judges in all of the courts need to be people that call the balls and strikes. That is their first responsibility; however, it is difficult to put into practice in every case. When there are lawyers on both sides of the case that are knowledgeable and skilled, that clearly is what the judge can and should do. I remember a lawyer friend of mine who told a long serving Federal Judge in Alexandria that he did not mind the judge interfering with his case so long as the judge did not lose it for him. The judge did not take the comment very well, but a good lawyer will do what he or she needs to do as a skilled advocate to represent his or her client, and an unskilled one may well not be able to do it as well.

I had the pleasure to appear before the Honorable Albert V. Bryan, Jr in different cases. He was a Circuit Court Judge in Fairfax, Virginia and then a U.S. District Court Judge in Alexandria. He was excellent and called the balls and strikes as the Chief Justice suggested. He also helped train me through my experiences before him to be a better, though certainly not perfect, lawyer. He was a no-nonsense judge and conservative in his manner, mannerisms, and rulings.

He also asked one question and made one observation in a case that I was litigating as young lawyer in Federal Court that I should have done. I didn’t because I was inexperienced and was not very observant. It saved my client from years of incarceration. Was Judge Bryant being proactive when he interrupted me in presenting my case to ask the most important question? The Assistant U.S. Attorney thought so. I certainly did not.

I was trying a petition in the U.S. District Court in Alexandria to set aside a state court conviction of my client for a robbery that had taken place in the Norfolk area. My client was African American and had been convicted primarily on eye-witness testimony. He had the brightest and greenest eyes that I did not notice prior to trial. I did not meet him until shortly before trial, as he was incarcerated and not brought to Alexandria until just before our hearing. As I put on the evidence of why his conviction should be set aside, which did not include any evidence about his eye color, Judge Bryan stopped me and asked about my client’s eye color. I not only had not noticed it but had not noticed from the state court records and the trial transcript that none of the “eye” witnesses had mentioned anything about the unique eye color of the person that had perpetrated the robbery. Judge Bryan commented that he could not stop looking at my client because of his unique eye color and that the failure of any witness at the original trial to testify about the perpetrator’s eye color or to comment about it to the police made him believe that my client was unfairly and unlawfully convicted. He overturned the conviction and gave the Commonwealth of Virginia 60 days to refile the criminal case or dismiss it. It was dismissed.

Most of the litigation in the United States does not involve one skilled lawyer against another. It may be lawyers of unequal skills, such as in my situation, or one lawyer against a pro se party that has no lawyer, or two people neither of whom have lawyers. In the juvenile and family law courts, it can be people that are arguing over the custody and support of children while having no knowledge of the law or what facts are important for the judge to hear. It can be a case where a decision has to be made about the best interests of a child who may not be represented at all or not old enough or mature enough to tell the judge what he or she wants. Judges in those cases have to develop what information they can in order to make the best decision possible. Litigants often have different views of how the judge hears and decides those cases.

In the juvenile and family law area, there are multiple times where the judge can be and should be proactive. If it involves a case in front of her and she sees that agencies are not doing their job in educating or providing services to children, they need to know it. If it involves “Off the Bench” matters such as the need to have more collaboration and cooperation amongst the child serving agencies, he needs to work with them, lawyers representing groups, and groups such as CASA that appear before the court and do so in an open process that is permitted by most, if not all, state Canons of Judicial Conduct.

Under the Federal Law with regard to the abuse and neglect of children, judges are required to make decisions about whether the child welfare agency made “Reasonable Efforts” to prevent the removal of the child from the custody of the parent or provide services to a youth in care and its parents otherwise the state has to pay for the costs of the child while he or she is in the custody of the state. The judge has to explain his or her reasoning in the court order.

In Virginia when I was asked to find that a child was truant, before doing so, I needed to be sure that the school system had done everything it needed to do to provide appropriate services to benefit the child and prevent truancy. If they hadn’t, I was not about to let them off the hook. Now some might say in that kind of an instance that I was being “Proactive” and not just calling the “Balls and Strikes”. But if the law requires the school system to provide services first to help address the truancy problem and if they fail to do that, it is the job of the judge to hold them accountable just as an older child or a parent of a younger child should be held accountable if the school system has done what it is supposed to do first and the child still fails to attend school.

The other reason for a judge to be proactive is that he sees cases coming to court for decisions that could have been diverted into programming that would help the child or family sooner and without the delay of court involvement and would probably have obtained better results than would a trial and decision by the judge. Where the judge makes a decision, unless it is to dismiss a case, services are going to be ordered in most cases. In the delinquency area, the benefits in doing this proactive work are numerous.

Courts have fewer cases to hear, which means they can spend more time to make better decisions on the ones that they have to hear. Services can be provided to the youth that reduce the number delinquent offenses coming to court . That means there were fewer victims of criminal or delinquent behavior, which has collateral consequences on the victims.

With fewer cases to hear, more time can be spent off the bench helping the community to understand the benefits of effective prevention and early intervention services. With that, more children and families benefit from those services, and that helps them have a greater opportunity to be successful. It allows parents to work to build a better life for themselves and their families and their communities.

Thanks for reading. Please be in touch.

Steve