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YOU'RE OBJECTING TO ME?: CHALLENGING JUDICIAL QUESTIONING

*Matthew E. Christoph & Benjamin K. Golden**

INTRODUCTION

You represent a young man who was attacked by a black bear in a state park. After finishing your client's direct examination, opposing counsel's cross-examination proves ineffective. You rise to rest your case, and the fatal moment occurs. The judge leans in:

JUDGE: You were celebrating at the park by yourself?

WITNESS: Yes. I'd just been accepted to graduate school.

The judge's question seems like a harmless point of clarification, but you sense it is not over. Fear overcomes you as you remain seated. Your client looks at you, confused.

JUDGE: Were you drinking?

WITNESS: No, not that evening.

JUDGE: How often do you drink? Were you prescribed any psychiatric medications?

WITNESS: Um . . .

JUDGE: Answer the question.

You recognize a number of possible objections here. But do you dare ruffle the judge's feathers when you feel like the jury is on your side? After all, you want to show that your client has nothing to hide.

So, what do you do?

In this Article, we examine the often seen and routinely unchallenged practice of judicial questioning. In Part I, we discuss the fundamental concept of judicial impartiality and the power of judges to question witnesses. In Part II, we will illustrate varied examples from

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both civil and criminal trials where judges crossed (or may have crossed) the line in questioning witnesses. In Part III, we consider what trial counsel should do in the face of improper judicial questioning. In Part IV, we explain how the failure to object to questioning significantly diminishes the likelihood of success on appeal. In the Conclusion, we urge counsel to object whenever a judge's questions appear likely to endanger their clients' rights.

I. JUDICIAL IMPARTIALITY AND THE POWER OF JUDGES TO QUESTION WITNESSES

A fundamental tenet of the law is the concept of judicial impartiality.¹ The promise of an unbiased judge rests at the heart of the very notion of a fair trial for any party walking into a courthouse's ominous halls. Indeed, the Constitution of the Commonwealth of Massachusetts emphatically guarantees "the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."² The Supreme Judicial Court has held that "rigid adherence to [this] principle is essential to the maintenance of free institutions."³

1. See *Offutt v. United States*, 348 U.S. 11, 13 (1954) ("[J]ustice must satisfy the appearance of justice."); see also Aharon Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 54 (2002) ("Independence of the judiciary means, first and foremost, that in judging, the judge is subject to nothing other than the law."); L. Wildhaber, *Judicial Impartiality Under the European Convention on Human Rights*, CONST. COURT REPUBLIC ARM., http://www.concourt.am/armenian/con_right/2.12-2001/wildhaber-eng.htm [<https://perma.cc/MSE2-BAZD>] ("Impartiality lies at the very heart of the notion of justice and fair trial."); Richard 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, 426 (2004) ("Without such [judicial] neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, fall[s]."). See generally Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493 (2013) (providing comprehensive discussion of judicial impartiality).

2. MASS. CONST. pt. I, art. XXIX; see also *King v. Grace*, 200 N.E. 346, 348 (Mass. 1936) (quoting MASS. CONST. pt. I, art. XI).

[Article 29] is essential to the end that "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

Id.; *Whitney v. Wellesley & Boston St. Ry. Co.*, 84 N.E. 95, 95-96 (Mass. 1908) ("[T]he judge who discharges the functions of his office, is under the statute, as well as at common law, the directing and controlling mind at the trial, and not a mere functionary to preserve order, and lend ceremonial dignity to the proceedings.")

3. *Commonwealth v. Leventhal*, 307 N.E.2d 839, 841 (Mass. 1974) (quoting *Thomajanian v. Odabshian*, 172 N.E. 232, 233 (Mass. 1930)).

Importantly, it is also undisputed that judges—in both civil and criminal trials, in and out of the presence of juries—may play an active role in the proceedings.⁴ “A trial judge ‘need take no vow of silence. He is there to see that justice is done or at least to see that the jury have a fair chance to do justice.’”⁵ As “the guiding spirit and controlling mind at a trial,” there is no doubt that a judge has the power to question witnesses.⁶ In *Commonwealth v. Festa*, the Supreme Judicial Court acknowledged that trial judges may question witnesses to clarify evidence, eradicate inconsistencies, avert possible perjury, and develop

4. See *Commonwealth v. Jackson*, 647 N.E.2d 401, 405 (Mass. 1995) (concluding trial judge’s interruptions did not prejudice defendant where they were an attempt to assist the defendant by explaining how to show that witness made a prior inconsistent statement, and judge correctly excluded or curtailed repetitive, argumentative, and improperly phrased questions); *Commonwealth v. Dias*, 367 N.E.2d 623, 626 (Mass. 1977) (finding no error because the trial judge’s questioning was meant to draw out additional material facts, not coerce a retraction by the witness); *Commonwealth v. Haley*, 296 N.E.2d 207, 210–11 (Mass. 1973) (noting judge may exclude evidence sua sponte); *Commonwealth v. Oates*, 99 N.E.2d 460, 461 (Mass. 1951) (affirming rape conviction where judge’s examination was done merely to clarify the purpose of admitting the defendant’s jacket into evidence); *Adoption of Seth*, 560 N.E.2d 708, 712 (Mass. App. Ct. 1990) (reasoning that the judge’s “extraordinary” questioning was not prompted by bias, but rather his impatience with counsel’s inability to properly pose questions); *Griffith v. Griffith*, 509 N.E.2d 38, 39–40 (Mass. App. Ct. 1987) (finding that, where self-represented litigant tended to stray into considerations not legally relevant, judge was warranted in attempting to narrow the issues, asking questions, and directing the course of trial).

5. *Dias*, 367 N.E.2d at 626 (quoting *Haley*, 296 N.E.2d at 211); cf. *Gauntlett v. Med. Parameters, Inc.*, 405 N.E.2d 1003, 1003–04 (Mass. App. Ct. 1980) (reversing lower court’s decision and holding judge’s comments were inconsistent with the judge’s role as an impartial magistrate and that the judge’s discretion is not unbridled); Francis Bacon, *Of Judicature*, in *ESSAYS, CIVIL AND MORAL: THE HARVARD CLASSICS* 130 (Charles W. Eliot, ed., 1909) (“Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar.”). Compare *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States analogizing a judge to a baseball umpire), with *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997) (“It is well-established that a judge is not a mere umpire; he is ‘the governor of the trial for the purpose of assuring its proper conduct,’ and has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper.”) (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)).

6. See *Commonwealth v. Campbell*, 353 N.E.2d 740, 744–45 (Mass. 1976) (quoting *Goldman v. Ashkins*, 165 N.E. 513, 516 (1929)); *Whitney*, 84 N.E. at 96 (“the judge [is] . . . the directing and controlling mind at the trial”); see also *Commonwealth v. Festa*, 341 N.E.2d 276, 279 (Mass. 1975) (“There is no doubt that a judge can properly question a witness, albeit some of the answers may tend to reinforce the Commonwealth’s case, so long as the examination is not partisan in nature, biased, or a display of belief in the defendant’s guilt.”).

trustworthy testimony.⁷

Trial judges are not required to remain silent, but are tasked with shepherding the proceedings to ensure justice is done with efficiency and expediency.⁸ Judges may even order parties to take depositions or call any witness as the “court’s witness,” even when no party has called them.⁹ Claims of judicial error are evaluated under a “rule of reason,” and “[m]uch depends on the nature of the proceeding.”¹⁰ But there are

7. See 341 N.E.2d at 279; see also *Dias*, 367 N.E.2d at 626–27; MASS. G. EVID. § 614(a) (2017) (providing judicial right to call witnesses); *United States v. McColgin*, 535 F.2d 471, 474–75 (8th Cir. 1976) (finding no prejudice where trial court attempted to clarify witness testimony); *United States v. Burch*, 471 F.2d 1314, 1317–18 (6th Cir. 1973) (finding no abuse of discretion where judicial question is to elicit more information and clarify questions); *Oates*, 99 N.E.2d at 461 (finding no error where judicial question was not bias); *Seth*, 560 N.E.2d at 712 (finding no prejudice where judicial examination was to expedite and clarify); *Griffith*, 509 N.E.2d at 39–40 (finding that judicial examination was warranted to narrow the triable issues).

8. See *Dias*, 367 N.E.2d at 626 (finding that judge’s questioning was intended to elicit additional material facts); *Oates*, 99 N.E.2d at 460–61 (noting judge’s examination done merely to clarify evidence); *Seth*, 560 N.E.2d at 712 (noting judge’s “extraordinary” questioning not prompted by bias, but rather his impatience with counsel’s inability to properly pose questions); *Griffith*, 509 N.E.2d at 39–40 (finding judge warranted in attempting to narrow the issues, ask questions, and direct the course of trial).

9. MASS. G. EVID. § 614(a) (2017) (“When necessary in the interest of justice, the court may call a witness on its own or at a party’s request. Each party is entitled to cross-examine the witness.”); 9 WIGMORE, EVIDENCE § 2484, at 276 (Chadbourn ed. 1981) (“[T]he general judicial power . . . implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses.”); see also *Quincy Trust Co. v. Taylor*, 57 N.E.2d 573, 575 (Mass. 1944).

Where a court has once taken jurisdiction and has become responsible to the public for the exercise of its judicial power so as to do justice, it is sometimes the right and even the duty of the court to act in some particular sua sponte. . . . A judge may call a witness, put questions to a witness, or refresh his judicial knowledge of a fact, even against the protest of the parties.

Id.; *McLaughlin v. Mun. Ct. of Roxbury*, 32 N.E.2d 266, 268, 270–72 (Mass. 1941) (affirming decision of judge who ordered defendant to testify during small claims proceeding); *Morgan v. Jozus*, 851 N.E.2d 1080, 1084–87 (Mass. App. Ct. 2006) (noting trial judge may sua sponte vacate ambiguous interlocutory decree).

10. *Campbell*, 353 N.E.2d at 744 (“We discern no error in the action of the judge in this instance and suggest only that the rule of reason on how much a judge should move into the interrogation of witnesses in the light of the foregoing stated law will undoubtedly be followed by most judges.”). Unfortunately, “there is no quantitative test [to] determin[e] whether a judge has gone beyond the bounds [] the law imposes.” *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants*, in BEST PRACTICES IN MANAGING SELF-REPRESENTED LITIGATION: GUIDELINES, STRATEGIES, AND BENCH SKILLS Tab 1, 14 (Mar. 30, 2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_atj_best_practices_in_managing_srl_toc.authcheckdam.pdf [<https://perma.cc/2CLF-VTK6>].

still lines a trial judge may not cross.¹¹ A judge may not engage in questioning that is “partisan in nature, biased, or [that demonstrates] belief in the defendant’s guilt.”¹² Moreover, it is well established that in Massachusetts, “[a] judge who takes a case that he does not understand out of the hands of competent counsel who do understand it, is a nuisance.”¹³ These are the types of transgressions that are the focus of this Article.

II. EXAMPLES OF (POSSIBLE) IMPROPER QUESTIONING

A. Commonwealth v. Ragonesi

In *Commonwealth v. Ragonesi*, during a pre-trial hearing, the judge “took the bit in his teeth” and cross-examined an alleged sexual assault victim for twenty-three pages of transcript.¹⁴ The judge’s inquiry delved into the most trivial details of the alleged sexual acts.¹⁵

The Appeals Court described the judge’s questioning as “both excessive and inexcusable,” resulting in a “thoroughly coerced witness who would be understandably reluctant to go back on the sworn testimony she had given to a judge of the Superior Court.”¹⁶ Noting that the questioning occurred at a pre-trial hearing, the court concluded that “there was no practical way in which the trial judge could alleviate the hidden damage by curative instructions such as are customarily given whenever there is a possibility that he (the trial judge) may have gone

11. See MASS. G. EVID. § 614 (2017); FED. R. EVID. 614(b); *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997) (“It is well-established that a judge is not a mere umpire; he is ‘the governor of the trial for the purpose of assuring its proper conduct,’ and has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper.”); *Commonwealth v. Haley*, 296 N.E.2d 207, 211 (Mass. 1973) (“A judge who takes a case that he does not understand out of the hands of competent counsel who do understand it, is a nuisance. The judge must never become or appear to be a partisan.”).

12. *Commonwealth v. Festa*, 341 N.E.2d 276, 279 (Mass. 1975); see SUPREME JUDICIAL COURT RULE 3:09: CODE OF JUDICIAL CONDUCT Preamble (2015); see also *Commonwealth v. Hassey*, 668 N.E.2d 357, 357–58 (Mass. App. Ct. 1996) (finding that judge exceeded the limits on judicial questioning and it was too partisan); *Commonwealth v. Ragonesi*, 493 N.E.2d 527, 529–30 (Mass. App. Ct. 1986) (noting judicial questioning “excessive and inexcusable” where judicial question consumed twenty-three pages of transcript).

13. *Haley*, 296 N.E.2d at 211.

14. 493 N.E.2d at 529.

15. For more details on the questions asked, see *id.* at 531–33. Please note, the transcript includes triggering topics such as violence against women and sexually graphic language.

16. *Id.* at 530.

too far in questioning a witness.”¹⁷ Given the motion judge’s inexcusable questioning, the Appeals Court reversed the defendant’s convictions.¹⁸

B. Adoption of Norbert

In *Adoption of Norbert*, the court discussed a case where the trial judge asked more than 1000 questions during a termination of parental rights trial—nearly 300 more than the total number of questions asked by all trial counsel combined.¹⁹ While child welfare cases are tried before a sole trier of fact in the judge, such questioning and counsel’s conduct surrounding the same remain essential to their client’s case on appeal. Below is but a small portion of the judge’s cross-examination of the mother:

THE COURT: So you missed eight visits with the child? . . . Do you think that had any impact on the child?

THE WITNESS: I’m sure it did at that point.

THE COURT: What kind of impact—do you think that it had a lasting impact?

THE WITNESS: Yes.

THE COURT: What kind of impact do you think it had on the child?

THE WITNESS: Not a very good one. I felt bad for him every day, you know.

THE COURT: So do you acknowledge, then, that it was harmful for the child not to see you for those eight months?²⁰

On appeal, the mother argued that the judge had “impermissibly interfered with the conduct of the trial” and thus “denied her the impartial justice to which she [was] entitled.”²¹ Although the Appeals Court rejected the mother’s argument, it agreed that “the judge’s questioning went beyond clarification and delved into substantive areas that would have best been left to the attorneys to develop.”²² In her dissent, Justice Hanlon explained that while “it is often necessary for a

17. *Id.*

18. *Id.* at 531.

19. 986 N.E.2d 886, 891 (Mass. App. Ct. 2013). The court noted the same trial judge had previously engaged in extensive questioning of witnesses and specifically cited *Adoption of Nurit*, No. 07-P-8161104, 2008 WL 170389 (Mass. App. Ct. Jan. 18, 2008).

20. *Id.* at 893 (Hanlon J., dissenting). The judge proceeded to cross-examine the mother, “*virtually uninterrupted*, for [another] twelve pages of transcript.” *Id.* (Hanlon J., dissenting) (emphasis added).

21. *Id.* at 891.

22. *Id.*

trial judge to ask questions in order to elicit crucial information”—a point that is “particularly true in a case where the safety of children is at stake”—the judge’s questioning of the mother was improper because it did “not seem designed to seek information.”²³ Rather, the judge’s questioning displayed the character of “an effective cross-examination by a skillful adversary.”²⁴ As discussed below, each improper question should have been meaningfully objected to and counsel should have preserved the record for appeal.

The United States Supreme Court has stated that “[j]ustice must satisfy the appearance of justice,” mandating that attorneys and judges mutually keep each other in check.²⁵ As explained in Part IV below, Massachusetts courts have warned that, in civil cases, issues not raised by a losing party in the trial court generally will not be considered on appeal, absent exceptional circumstances.²⁶ In *Norbert*, despite the judge’s extensive questioning, the Appeals Court affirmed the lower court’s decision, in part due to counsel’s silence.²⁷

III. HOW TO RESPOND TO IMPROPER JUDICIAL QUESTIONING

Some readers may understandably ask whether objecting to a trial judge’s questions may do their clients more harm than good. What if the judge interprets the objection as an ad hominem attack? What if the judge subconsciously rules against the client because of animosity toward the attorney? These concerns—whatever their merit—do not excuse counsel’s failure to object in the face of improper judicial

23. *Id.* at 892 (Hanlon J., dissenting).

24. *Id.*

25. *Offutt v. United States*, 348 U.S. 11, 13 (1954) (“The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice.”). *See generally* JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* (1980) (providing comprehensive analysis of judicial behavior); Peter David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887 (1996) (offering a careful study examining the notion of the appearance of justice throughout American history).

26. *See, e.g.*, *McNamara v. Honeyman*, 546 N.E.2d 139, 145 (Mass. 1989) (finding that where unlawful constitutional Fourth Amendment argument was not raised at trial, appeals court will not hear); *Palmer v. Murphy*, 677 N.E.2d 247, 251 (Mass. App. Ct. 1997) (“Objections, issues, or claims—however meritorious—that have not been raised at the trial level are deemed generally to have been waived on appeal.”); *Darling v. Pinkham*, 402 N.E.2d 115, 116 (Mass. App. Ct. 1980) (holding that appeals court will not hear claim brought for first time in appellate court); *see also infra* Part IV and cases cited.

27. *See Norbert*, 986 N.E.2d at 891–92.

questioning.²⁸ While “[m]uch depends on the nature of the proceeding,”²⁹ the Supreme Judicial Court has recognized that an attorney’s duty to protect a client’s rights will *sometimes* require an attorney to object to a judge’s questions.³⁰ The Appeals Court has explained that “[o]bjections posed to the trial judge do not reflect personal disagreement, but are manifestations of respect.”³¹ Finally, an attorney owes their client an undivided and unflinching duty of loyalty, which necessarily includes the obligation to object to questioning that may harm their client’s interest.³²

However, there are certain key principles for counsel to remember when deciding whether and how to object to a judge’s questions. First, counsel’s “obligation” to make timely objections is the same in both jury and jury-waived trials.³³ Second, while courts have suggested that

28. See *Commonwealth v. Fitzgerald*, 406 N.E.2d 389, 396 (Mass. 1980) (noting “the delicate problem that objections to a judge’s actions present to defense counsel”); *Commonwealth v. Watkins*, 823 N.E.2d 404, 406–07 (Mass. App. Ct. 2005) (affirming counsel has the same duty to object to improper questions from a judge as when questions are asked by opposing counsel). Generally, counsel should make an objection to a question before the answer is given. See also *Commonwealth v. Marshall*, 749 N.E.2d 147, 155 (Mass. 2001) (“When objecting, counsel should state the specific ground of the objection unless it is apparent from the context.”) (internal citation omitted); *Mains v. Commonwealth*, 739 N.E.2d 1125, 1129–30 (Mass. 2000) (noting self-represented litigants are bound by the same rules of procedure as litigants with counsel). Examples of attorneys suffering before judges who have lost their patience are often comedic, but only when viewed from the safe security of the periphery. For instance, one Nevada-based attorney arrived fifteen minutes late to court and the judge’s opinion was unsparing: “Were there ever a time to use ‘fail,’ as the contemporary vernacular permits, it is now, and in reference to this deplorable display of legal representation: it was an *epic fail*.” *In re Spickelmier*, 469 B.R. 903, 906 (Bankr. D. Nev. 2012) (emphasis added).

29. *Commonwealth v. Campbell*, 353 N.E.2d 740, 744 (Mass. 1976).

30. *Fitzgerald*, 406 N.E.2d at 395; see also *supra* note 28 and cases cited.

31. See *Watkins*, 823 N.E.2d at 407.

32. See *Bartle v. Berry*, 953 N.E.2d 243, 249 (Mass. App. Ct. 2011) (“There is no question that an attorney owes a duty of undivided loyalty to his client.”); see also *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 539–41 (Mass. 2003); *Pollock v. Marshall*, 462 N.E.2d 312, 319–20 (Mass. 1984) (“That ‘[u]nflinching fidelity to their genuine interests is the duty of every attorney to his clients’ is beyond question.”) (quoting *Berman v. Coakley*, 137 N.E. 667, 670 (Mass. 1923)); MASS. R. PROF’L. CONDUCT r. 1.2–1.3, cmt. 1 (2015).

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.

MASS. R. PROF’L. CONDUCT r. 1.3, cmt. 1 (2015).

33. See *Watkins*, 823 N.E.2d at 406–08 (noting obligation to make timely objections is the same in jury-waived and jury trials, but objections to judicial questioning in jury trials

counsel need not make “repeated objections,”³⁴ best practice dictates that counsel should be steadfast in standing *each time* an objection is warranted.³⁵ Third, counsel must be sure to “state the specific ground of the objection unless it is apparent from the context.”³⁶ Fourth, counsel should describe the judge’s tone and manner of asking questions.³⁷ Finally, counsel should ask the judge to explain the reason for the questioning that counsel finds objectionable. In many cases, the judge

should be made outside the jury’s hearing); *see also* William D. Kuester, Comment, *Waiver of Objection by Trial Conduct*, 42 NEB. L. REV. 807, 808–10 (1963) (noting that lawyers must object “to all technically inadmissible evidence” or run the risk of having similarly inadmissible evidence admitted and have a cumulative adverse effect to his case).

34. *Compare* Kuczynski v. Alfano, 520 N.E.2d 150, 150 (Mass. 1988) (“The plaintiff’s failure to make repeated objections to the judge’s conduct is not fatal on appeal. A litigant is not forced to choose between minimizing the effect of improper judicial conduct at trial and preserving full and thorough review.”), *and* Commonwealth v. Ragonesi, 493 N.E.2d 527, 529 n.4 (Mass. App. Ct. 1986) (“[T]he judge would not have tolerated any further objection from the defendant. . . . If there were any question about the failure to object, we would overlook it.”), *with* Fitzgerald, 406 N.E.2d at 396 (“[T]he total absence of any objection from experienced defense counsel cannot be ignored in our attempt to determine the collective effect of comments and questions from the judge.”).

35. If a timely objection is not made, the evidence is properly admitted, and the fact finder is entitled to give it such probative effect as it deems appropriate. But any statement at trial “is only worth what it is worth.” Commonwealth v. Drapaniotis, 48 N.E.3d 45, 50–51 (Mass. App. Ct. 2016); Commonwealth v. Miskel, 308 N.E.2d 547, 553–54 (Mass. 1974) (holding reliance on “continuous objection” improper; “[t]he objection and exception to the earlier question do not carry over to the later one to which there was no objection.”); *see also* Commonwealth v. Grady, 54 N.E.3d 22, 28–29 (Mass. 2016) (“Where the better practice is for a defendant to object at trial regardless of a motion in limine, any implication that a defendant’s rights are being ‘preserved’ may inadvertently lead to just the opposite.”); Freyermuth v. Lutfy, 382 N.E.2d 1059, 1063 (Mass. 1978) (“The consequence of the failure to object is to waive the objection to the testimony.”); Commonwealth v. Julien, 797 N.E.2d 470, 477 (Mass. App. Ct. 2003) (noting in absence of objection, hearsay testimony is properly admitted, and the jury is “entitled to give [the statement] such probative effect as they deem[] appropriate.”); CBI Partners Ltd. P’ship v. Town of Chatham, 671 N.E.2d 523, 526 (Mass. App. Ct. 1996) (illustrating pitfalls of a “continuing objection” where objection lacked specificity “to raise squarely any possible infirmities in the foundation for testimony at trial,” thus appellant “may not raise this issue for the first time on appeal.”).

36. Commonwealth v. Marshall, 749 N.E.2d 147, 155 (Mass. 2001) (quoting P.J. LIACOS, MASSACHUSETTS EVIDENCE § 3.8.3, at 85 (7th ed. 1999)); Commonwealth v. Perryman, 770 N.E.2d 1, 5 (Mass. App. Ct. 2002) (“[O]bjections to evidence, or to any challenged order or ruling of the trial judge, are not preserved for appeal unless made in a precise and timely fashion, as soon as the claimed error is apparent.”); *see also* MASS. R. CIV. P. 46; MASS. R. CRIM. P. 22.

37. *See* Fitzgerald, 406 N.E.2d at 395 (“Because the transcript cannot disclose the tone of a judge’s voice or his manner in making comments or asking questions, appellate judges are not always able to assess the impact of a judge’s action.”); *In re* Adoption of Norbert, 986 N.E.2d 886, 891 (Mass. App. Ct. 2013) (“Because the transcript cannot disclose the tone of the judge’s voice or his manner in asking questions, it is difficult for us to assess the mother’s claim that the judge acted aggressively toward her.”).

may not realize why counsel would have cause to object, and counsel may not realize why the judge believes the questioning is necessary or proper. Honest dialogue—at sidebar if a jury is present—is the best way to ensure that both the judge and counsel’s motivations are recorded and understood, and that the judge has a fair opportunity to cure the error that counsel finds objectionable.

We believe counsel who abides by these principles will gain the respect of the judges they appear in front of, and will fulfill their obligation to defend and protect the rights of their clients.

IV. LIKELIHOOD OF SUCCESS ON APPEAL

When a judge commits error in the questioning of a witness, the likelihood of success on appeal depends heavily on whether a timely objection was made at trial.³⁸ In many cases, the presence or absence of an objection may be outcome-determinative.

Where counsel properly objects at trial, the appellate court will review to determine whether the error was “harmless” or “prejudicial.”³⁹ An error is non-prejudicial if it “did not influence the jury, or had but very slight effect.”⁴⁰ Where counsel fails to properly object at trial, the appropriate standard of review depends on whether the error occurred in a civil or criminal case. In a civil case, the appellate court generally will deem the error waived, but may review to determine whether the error was harmless.⁴¹ In a criminal case, the appellate court will review the

38. See *supra* note 28 and cases cited.

39. See *Commonwealth v. Sylvester*, 448 N.E.2d 1106, 1107 (Mass. 1983) (holding “judge’s comments” were not “so prejudicial as to deny the defendant a fair trial.”); *Commonwealth v. Sneed*, 383 N.E.2d 843, 846 (Mass. 1978) (concluding “words of the judge, in total, could hardly have had anything other than a prejudicial effect on the jury”); *Commonwealth v. Festa*, 341 N.E.2d 276, 279–80 (Mass. 1976) (“[E]ven if the judge was overzealous in the manner in which he interrogated the witness,” the judge’s questioning was “at most harmless error” and “not comparable to judicial interventions which have been held to be so prejudicial to the defendant as to constitute reversible error.”).

It was error on the part of the judge to have conducted the examination because an insufficient basis had been established for it and because the examination exceeded what are generally the limits for judicial intervention in the questioning of witnesses. In the context of the entire record of the trial, we do not think the error was harmless and we, therefore, reverse the defendant’s conviction of rape. *Commonwealth v. Hassey*, 668 N.E.2d 357, 357–58 (Mass. App. Ct. 1996).

40. *Commonwealth v. Flebotte*, 630 N.E.2d 265, 268 (Mass. 1994). The Supreme Judicial Court has noted that the “possibility of prejudice [from improper judicial questioning] arises especially in a criminal case where the judge’s questions may unintentionally have the effect of impeaching the defendant or defense witnesses.” *Fitzgerald*, 406 N.E.2d at 389.

41. *Palmer v. Murphy*, 677 N.E.2d 247, 251 (Mass. App. Ct. 1997); *Adoption of Seth*,

error to determine whether it created a “substantial risk of a miscarriage of justice”⁴² (or a “substantial likelihood of a miscarriage of justice” in a first-degree murder case⁴³). A substantial risk of a miscarriage of justice exists when there is “serious doubt whether the result of the trial might have been different had the error not been made,” i.e., there is uncertainty about whether the defendant’s guilt was fairly adjudicated.⁴⁴ “Errors of this magnitude are extraordinary events and relief is seldom granted.”⁴⁵

A. *Commonwealth v. Hassey*

In *Commonwealth v. Hassey*, the defendant was convicted of rape after the trial judge launched into a “penetrating examination” of a defense witness who had not immediately gone to the police with exculpatory information about the defendant.⁴⁶ Over defense counsel’s objection, the judge questioned the witness as follows:

THE COURT: I have a couple of questions, Mr. Spurrell. You have been friendly with this defendant for ten or twelve years; is that right?

THE WITNESS: Yes.

THE COURT: He’s one of your best friends?

THE WITNESS: Yes.

THE COURT: When you learned he was accused of—when did you learn he was accused of rape?

THE WITNESS: I think it was August. I hadn’t seen him for a while.

THE COURT: Did you go to see him right away after that?

THE WITNESS: He was in prison.

THE COURT: Well, did you get in any contact with him?

560 N.E.2d 708, 712 (Mass. App. Ct. 1990) (stating that, despite counsel’s failure to object, even if the judge was “overzealous in becoming so involved [in questioning the psychiatrist], the error was harmless in view of our conclusion, set forth below, that no prejudice resulted from the testimony of the psychiatrist.”).

42. *Commonwealth v. Gomes*, 763 N.E.2d 83, 86 (Mass. App. Ct. 2002). For a comprehensive discussion of the substantial risk of a miscarriage of justice standard, compare the majority and concurring opinions in *Commonwealth v. Alphas*, 712 N.E.2d 575, 579–81, (Mass. 1999).

43. *Commonwealth v. Paradise*, 539 N.E.2d 1006, 1016 (Mass. 1989).

44. *Commonwealth v. Randolph*, 780 N.E.2d 58, 66 (Mass. 2002) (quoting *Commonwealth v. Azar*, 760 N.E.2d 1224, 1234 (Mass. 2002)).

45. *Id.* at 67. Compare *Commonwealth v. Smith*, 951 N.E.2d 322, 327 n.2 (Mass. 2011) (“The substantial likelihood of a miscarriage of justice standard . . . we have said is more forgiving to a defendant than the substantial risk of a miscarriage of justice standard applicable in other criminal cases.”).

46. 668 N.E.2d 357, 359 (Mass. App. Ct. 1996).

THE WITNESS: No, I didn't.

[DEFENSE COUNSEL]: Judge, may we be heard.

THE COURT: Have you been in contact with him since that time?

THE WITNESS: Yes.

THE COURT: When did you get in contact with him for the first time?

THE WITNESS: Probably two or three weeks after he was released on bail.

THE COURT: And when was that?

THE WITNESS: I don't recall the date.

THE COURT: Well, did you talk with him about this serious charge?

THE WITNESS: He told me what he was being charged with here.

THE COURT: You heard about what he was being charged with before he told you?

THE WITNESS: Yes.

THE COURT: And what did you do when you heard about that charge?

[DEFENSE COUNSEL]: Objection, your Honor.

THE WITNESS: Nothing.

THE COURT: You didn't do a thing?

THE WITNESS: No, I didn't.

THE COURT: You didn't go down to the Hull Police Department and say, My [sic] friend is wrongfully charged with rape and the woman that's charged him with rape has said she wants to get even with him?

THE WITNESS: No.

THE COURT: Objection is noted.⁴⁷

The appeals court concluded that the judge's "examination exceeded what are generally the limits for judicial intervention in the questioning of witnesses."⁴⁸ The court reasoned that, although the judge's examination was less egregious than *Ragonesi*, it went well beyond clarification and caused the witness' credibility to "unravel"; that the unraveling was "doubly effective because jurors are likely to pick up signs from the judge about what the judge thinks of the credibility of a witness or a party"; and that the judge did not dull the "sting" of his examination in his instructions to the jury.⁴⁹ Taken together, the court

47. *Id.* at 358–59.

48. *Id.* at 357–58.

49. *Id.* at 359–60; *see also* *Kuczynski v. Alfano*, 520 N.E.2d 150, 151 (Mass. 1988) ("The form and apparent manner [of the judge's questions] demonstrated an insensitivity on

concluded that the judge's questioning was "a too partisan entry on the side of the prosecution."⁵⁰

B. Commonwealth v. Gomes

In *Commonwealth v. Gomes*, the defendant appealed his convictions on the ground that the trial judge's questioning of a witness had resulted in an "unnecessarily suggestive in-court identification of the defendant as her assailant."⁵¹ Specifically, the judge questioned the witness as follows:

THE COURT: One question. You participated in a lineup this morning. Did you pick anybody out of that lineup?

THE WITNESS: Yes, I did. With hesitation—

THE COURT: Just [did you] pick someone out of the lineup?

THE WITNESS: Yes, I did.

THE COURT: Do you see that person here in court today?

THE WITNESS: No, I don't.

THE COURT: Do you see the person in court here today who was with you on the night that you described to us?

THE WITNESS: Do I see the person?

THE COURT: Can you recognize anyone in court?

THE WITNESS: Now that I see the person in front of me, I can recognize him. I seen [sic] him walking by me in the hallway, and I recognized him, and it came to me, but it's because I pieced everything together after a long time.

THE COURT: What's your answer to my question?

THE WITNESS: Do I recognize him now?

THE COURT: Do you recognize anybody in this courtroom today who was with you that night?

the judge's part toward the possible effect his demeanor would have on the jury and their deliberations."); *Commonwealth v. Hanscomb*, 328 N.E.2d 880, 885 (Mass. 1975) (Hennessey, J., concurring) ("The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.") (quoting *Quercia v. United States*, 289 U.S. 466, 470 (1933)). For a more comprehensive review of judicial effects on juries, see Angela M. Laughlin, *Learning from the Past? Or Destined to Repeat Past Mistakes?: Lessons from the English Legal System and Its Impact on How We View the Role of Judges and Juries Today*, 14 WIDENER L. REV. 357, 358 (2009) ("Research shows that jurors may be sensitive to a trial judge's demeanor and are more likely to be influenced if the judge's demeanor suggests her view of a witness's credibility or of a litigant's position.").

50. *Hassey*, 668 N.E.2d at 360.

51. *Commonwealth v. Gomes*, 763 N.E.2d 83, 84 (Mass. App. Ct. 2002).

THE WITNESS: Yes.

THE COURT: Where is that person?

THE WITNESS: That person's sitting right over there sitting next to the defense attorney.⁵²

Because the defendant had failed to object to this questioning at trial, the Appeals Court reviewed the alleged error to determine whether it created a substantial risk of a miscarriage of justice.⁵³ Under this standard, the defendant's claim had little chance of success.⁵⁴

First, the court determined that the trial judge had committed no error because the judge's motive appeared to be to clarify the earlier testimony, defense counsel had the opportunity to conduct a thorough cross-examination of the witness, and the judge's jury instructions "addressed the issue of a suggestive one-on-one identification."⁵⁵ Second, the court concluded that, "[e]ven if the judge's questioning of the witness was error, it did not create a substantial risk of a miscarriage of justice" because "the evidence against the defendant was overwhelming," and the judge's questioning, therefore, did not "materially influence the guilty verdict."⁵⁶ Thus, as noted above, succeeding under a substantial risk of a miscarriage of justice standard is a Sisyphean task for appellate counsel.

CONCLUSION

We recognize that "[i]t is not always easy for a judge to see his duty clearly" and that "a first-rate trial judge will find and tread the narrow path that lies between meddlesomeness on the one hand and ineffectiveness and impotence on the other."⁵⁷ We are also mindful of the echo of many tried and true trial attorneys, in and out of court each

52. *Id.* at 84–85. This occurred after the witness had identified another individual from the lineup as her assailant.

53. *Id.*

54. See Windy Rosebush, *Trial Counsel's Acts Today Could Affect a Client's Appeal Tomorrow: Massachusetts and New Hampshire Take Differing Positions on Appellate Review of Unpreserved Issues*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 123, 128 n.31 (1997) (noting only five of fifty-three Massachusetts cases applying the substantial risk of miscarriage of justice standard between 1962 and 1997 found such a risk).

55. *Gomes*, 763 N.E.2d at 86 (internal citations and quotations omitted). The trial court advised the jury that in considering an identification, you "may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness." *Id.*

56. *Id.*

57. HENRY T. LUMMUS, *THE TRIAL JUDGE* 21 (1937).

day, that the act of objecting to a judge's questions is a foolhardy endeavor, especially for counsel slated to appear before the same judges time and time again.

But the "natural reluctance" of counsel to object in the face of improper judicial questioning is no excuse for silence.⁵⁸ Counsel have an obligation to stand up, speak up, and object when a judge's questions endanger their clients' rights. This requirement is not aspirational for trial counsel; we must ensure it is a necessity for attorneys walking into court each day. Finally, importantly, it is time that law schools begin training advocates not only to object to the improper questions of opposing counsel, but also to those of judges who exceed the bounds of what the law requires.

58. See *Commonwealth v. Fitzgerald*, 406 N.E.2d 389, 395 (Mass. 1980).