

## **Judicial Misconduct: When the Judge Bullies the Client, the Jury, and You**

**By Joe Doyle**

I started my legal career as a public defender in Staten Island. Most of my early cases were misdemeanors, and all of them were handled by the same stressed-out judge in a small, hot, and overcrowded courtroom in a run-down, soon-to-be-replaced courthouse in the middle of Staten Island. I traveled an hour and a half every morning by subway, ferry, and bus to get from my apartment in Brooklyn to the courthouse in Staten Island, and once I got there, I had to squeeze into a packed bench of unhappy attorneys who all grumbled about the commute while we waited for our cases to be called.

And wait we did. New York City, like most places in California, has always had jammed-up criminal dockets, and on that score, Staten Island is no different than 100 Centre Street in Manhattan or the Hall of Justice in San Jose. So every day, hundreds of people would pack into the tiny courtroom and wait for their cases to be called. And because courts in Staten Island refused to use sign-up sheets or lists or any method by which people could reliably tell when they would have to get up in front of the judge, clients and attorneys alike would have to anxiously wait and wait for the bailiff to call out their cases. This meant that every day, people waiting on their cases would, over the course of the morning, grow nervous and impatient, and eventually they would begin to whisper in the gallery or text on their phones or fidget in their seats, and every day, the court officers would interrupt the proceedings so they could yell at these people for talking or texting or standing up or sitting down or doing anything besides being as still and as quiet as porcelain dolls. This back and forth would only further prolong the calendar, and as the clock crept closer to noon, the judge would only grow more and more irritable.

The worst position one could be in, therefore, was that of a young public defender telling the judge, just before noon, that no, you did not have a disposition in your case; yes, your client was turning down the prosecution's generous offer; and could the court please accommodate a jury trial in the middle of its hectic schedule? This information coming from a young public defender would precipitate a game whereby the judge would attempt to find any way possible to avoid the setting of a trial: Was there perhaps a way for the judge to

remand your out-of-custody client? Was there a fine your client had not paid or a class he had not attended? Was your client even eligible for court-appointed representation in the first place? It was a nice shirt your client was wearing, after all. Maybe he could afford to hire his own lawyer.

“And either way, Mr. Doyle,” the judge would say to the young public defender. “I think you and your client should stick around until later this afternoon, and we’ll see if we can’t find a resolution to this matter.”

But what if the young public defender were to protest that his client had to work in the afternoon?

“Well,” the judge would say. “There *is* a nice offer on the table. Perhaps we could just resolve this now...”

I exaggerate only slightly here. The judges I appeared in front of in Staten Island all tried these tricks to get my clients to plead: they would threaten remand for a failure to pay a minimal fine or question whether my client could hire private counsel or otherwise make them stay all afternoon just to talk about whether the case would resolve. It would be rare for a judge to try all of these at once, but the reality is that, in Staten Island, just as in most of California, judges are absolutely swamped. The court system is overloaded for them, too, and they are desperate for ways to deal with the congestion. They are working under tremendous pressure, so it’s unsurprising that, even when acting conscientiously and with consideration for your client’s rights, some judges will step over the line and try to use their power to pressure a client to plead or to pressure a jury to convict or to otherwise make the system move a little faster than it should.

That’s what this article is about. It’s about judges going a little too far in trying to work out a resolution or being a little too pushy in getting the jury to reach a verdict. Our clients have a right to be free from duress when deciding whether to enter a plea just as they have a right jurors who will decide their cases without some judge breathing down their necks. Below I’ll explain how judges at times coerce both our clients and their juries as well as how counsel should litigate these issues on appeal. And because these two areas hardly exhaust the breadth of judicial misconduct that occasionally arises in our courts, I will, at the end of

this article, go through a handful of other kinds of judicial misconduct that appellate counsel should look out for.

I'll start with judges coercing pleas.

## **1. Judicial coercion of guilty pleas**

### **a. So the judge told your guy to plead...**

Here's a hypothetical scenario: In the trial court, your client was facing child-molestation charges with multiple complaining witnesses. The prosecutor offered your client a lengthy stipulated prison term (sadly, not a terrible offer given the facts and exposure). But your client said he was innocent, and he didn't want to plead. On the record, the prosecutor told the judge your guy wouldn't take the deal, and the judge said, "That's fine. Though, you know, I had another case like this where the defendant turned down eight years and after trial was sentenced to 25 to life." The judge noted your client's exposure after trial (which was somewhere in the neighborhood of a million years to life). He called your client's alleged actions predatory, and he said that he was worried about the young witnesses who would have to testify at trial.

That said, the judge also worked the prosecutor. After hearing that the cops had found child pornography on your client's computer, the judge said that it looked like your client was a pedophile, and the judge meant this in a mitigating sort of way (if you can imagine): as in, your client only did what he did because of a mental disorder. So, the judge said, maybe something less than what the prosecutor wanted would be appropriate. Still, the judge emphasized, either way, the trial wasn't going to be pretty: "As soon as the first little girl in the pink dress sits down, you know, then you're going to see the real victim. You'll see the real impact."

At a later hearing, the judge said that he would hate to try this case if he were the defense attorney, but he wouldn't mind trying it as a prosecutor. That said, he wouldn't want to put "these little girls through this stuff," so he hoped everyone could "put an end to this one if we can."

As the case got closer to trial, the judge said the images found on your client's computer were "lethal." Those images, he said, combined with your client's conduct, showed that your

client was a pedophile, and on the eve of trial, the judge said to your client, “You’re not going to resolve [the case], and that’s fine. So we’re going to get the monster by the tail, bring it into the courtroom and put him on that table and let him puke all over the place and crap all over the place. It’s going to be ugly. This is going to be ugly.”

The evidence against your client was “damning,” the judge said, “overwhelming” even. “Four little victims are going to parade in here and say, ‘The man touched me,’ ” he told your client. “If we were talking about [an insufficient funds] check case,” he continued, “there wouldn’t be any emotion here. It would be a matter of numbers on paper, ink on paper, dollars. But what we’re talking about here is a crime against the person. Murders aren’t pretty. Rapes aren’t pretty. Child molests aren’t pretty. And that’s what we’re dealing with.”

After hearing this, your client finally caved and took the plea.

Was the plea the product of judicial coercion? You bet.

These facts come from *People v. Weaver* (2004) 118 Cal.App.4th 131. The Court of Appeal in *Weaver* called the trial court’s changing of “hats” during the hearings “head spinning.” (*Id.* at p. 149.) At any given time, the judge “seemed to fill the role of judge, jury, defense counsel, prosecutor, psychiatrist, social worker and victims’ advocate.” (*Ibid.*) The court said:

“The judge’s histrionic monologues were not the stuff of mediation or facilitation. They were the stuff of advocacy. His understandable and often expressed concern that the victims not be victimized again could reasonably be taken by appellant and others viewing the proceeding as a comment that the judge would not look favorably on those who would, to no end, harm the children the defendant already harmed. The level and manner of the judge’s interest and involvement in the negotiation process, particularly that of record and in appellant’s presence, colored every aspect of the proceeding.”

(*Ibid.*) While, of course, judges can “play a useful part” in plea bargaining, the judge here overstepped and “overcame appellant’s free judgment.” (*Id.* at p. 150.)

As a general matter, criminal defendants have a federal and state constitutional right to be free of duress when pleading to a criminal charge. (U.S. Const., 5th, 6th, 14th Amends.; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; Cal. Const., art. I, § 15; *People v. Williams* (1969) 269 Cal.App.2d 879, 885-886.) And “guilty pleas obtained through ‘coercion, terror, inducements, subtle or blatant threats’ are involuntary and violative of due process.” (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 124.) So while “[t]here is no rule in California

forbidding judicial involvement in plea negotiations . . . courts have expressed strong reservation about the practice.” (*Weaver, supra*, 118 Cal.App.4th at p. 148.)

The *Weaver* court gave three reasons for judges to stay out of plea negotiations: First, a judge’s mere involvement in plea negotiations heightens the risk of coercion. Second, a judge who gets too involved in plea negotiations may take it personally if the plea is rejected. And third, a judge’s involvement in plea negotiations may sow confusion about the judge’s true role as a neutral arbiter, not as an advocate for either side. (*Weaver, supra*, 118 Cal.App.4th at p. 146-147.)

All three of these are good reasons for judges to stay out of plea negotiations, but the first reason is the most significant. When “the trial court abandons its judicial role and thrusts itself into the center of the negotiation process and makes repeated comments that suggest a less-than-neutral attitude about the case or the defendant, then great pressure exists for the defendant to accede to the court’s wishes.” (*Weaver, supra*, at p. 150.) Even where a trial court means to do justice and knows what is best for the parties, it is the role of the attorneys, not the court, to advocate on behalf of the parties. (*Ibid.*)

### **b. But what about when the pressure comes from all sides...**

Criminal defendants face tremendous pressure to plead guilty. Much of the pressure stems from the draconian sentences that defendants face after trial. Courts are all too willing to accept that kind of pressure. (See *In re Ibarra* (1983) 34 Cal.3d 277, 287.) But some of the pressure comes from sources unrelated to the case. And judges are not allowed to exploit those extraneous considerations to coerce criminal defendants into pleading guilty. In *People v. Sandoval* (2006) 140 Cal. App. 4th 111, however, the trial judge did just that.

Sandoval was facing homicide charges, and the prosecution had offered a package-deal plea bargain to him and his three co-defendants. (*Sandoval, supra*, 140 Cal.App.4th at pp. 116-117.) Under the terms of the deal, two of the co-defendants would have received 16 years in prison (they were facing 71 years to life), and Sandoval and the third co-defendant would have received 27 years in prison (they were facing 110 years to life). (*Ibid.*) Sandoval didn’t want the deal. (*Ibid.*) The others did. (*Ibid.*) But because Sandoval was refusing to accept the

offer, everyone had to go to trial. (*Ibid.*) No one wanted this but Sandoval, so the plea negotiations continued through motions in limine and the start of jury selection. (*Ibid.*)

Because a resolution looked unlikely, the prosecutor requested an *Alvernez* waiver, a procedure whereby the judge effectively says to each defendant, “Hey, you sure you want to go to trial?” (See *Sandoval, supra*, 140 Cal.App.4th at p. 116, fn. 4.) Such a waiver would preclude a later claim that defense counsel had withheld the terms of the plea bargain from the defendant and forced him out to trial. (*Ibid.*)

The court allowed the prosecutor to tell each defendant what the offer was and what they were facing after trial. (*Sandoval, supra*, 140 Cal.App.4th at p. 117.) All the defense attorneys said their clients wanted to take the deal, all except Sandoval’s. (*Ibid.*) One of the attorneys suggested that the judge ask the defendants personally whether they wanted to take the deal. (*Ibid.*) The court did, and again, each defendant said he was willing to plead. (*Ibid.*) All except for Sandoval. (*Ibid.*)

The court said, “Okay. We’ll go to trial. The record should be clear this is an offer that I think on the face of it is real clear that it is a very good offer. So, we go to trial. Okay. Thank you, very much. Anything else we can do? I can’t twist Mr. Sandoval’s arm. I don’t think anybody should or could.” (*Sandoval, supra*, 140 Cal.App.4th at p. 117.)

One of the co-defendant’s attorneys said, “The only problem is [Sandoval is] drawing three other people in who do want to take the deal . . . So that the record is clear, that when a person dies, there’s a homicide case, the offer, when the determinate sentence is in the 20’s, it is not a good deal, it is a very, very good deal.” (*Sandoval, supra*, 140 Cal.App.4th at p. 117.)

The court responded, “Oh, yes. But the catch is, I mean, assuming for the moment—I’m going to assume, based on the transcript, this is gang activity. They’re choosing to stick together in the sense of that’s the culture.” (*Sandoval, supra*, 140 Cal.App.4th at pp. 117-118.)

One of the co-defendant’s attorneys suggested that, perhaps, if the co-defendants were willing to testify against Sandoval, the prosecutor would break up the package deal. (*Sandoval, supra*, 140 Cal.App.4th at p. 118.) The prosecutor said he might be willing to do that, so the court held chambers conferences with each of the defendants. (*Ibid.*) In the chambers

conferences, the judge pondered whether there was anything anyone could do convince Sandoval to plead, and the court reiterated that, in her mind, the offers were “amazing.” (*Ibid.*)

After the chambers conferences, the court said, “So, I’m just not sure there’s a whole lot we can do,” and she put a deadline of 5:00 p.m. the next day for the defendants to take the “amazingly good offer.” (*Sandoval, supra*, 140 Cal.App.4th at p. 119.) She continued to say that the “offer is exceptionally good” and “really low” considering the evidence. (*Ibid.*) She added, “[T]here’s more than sufficient evidence for the jury to convict each and every one of the defendants.” (*Ibid.*)

The judge also expressed sympathy for Sandoval’s three co-defendants. She said that it’s “sort of a sad situation that you’re looking at spending your entire life in state prison,” and added that Sandoval was letting down his fellow gang members by refusing to plead:

“I think maybe the three who were willing to plead are learning that maybe the gang isn’t all it was cracked up to be, if someone’s willing to take you down with them and you stand behind them. So despite all the voir dire about gangs having good things, they have their down sides, and 70 years in state prison, I feel for you if you’re going to be spending your whole life in state prison. That’s a decision that each of you have made during the course of your life. As I’ve said, there’s nothing I can do.”

(*Sandoval, supra*, 140 Cal.App.4th at pp. 119-120.) One of the co-defendant’s attorneys asked for a five-minute recess, which the court agreed to. (*Id.* at p. 120.) Over the course of the recess, one of the co-defendant’s physically threatened Sandoval (though this fact did not come to light until afterwards). (*Id.* at p. 121.) Unsurprisingly, after the recess, Sandoval accepted the deal. (*Id.* at p. 120.)

Was this coercive?

Big time. Physical threats are obviously a problem, but the judge’s comments also coerced Sandoval into pleading. The *Sandoval* court noted, “special problems are presented when the judge participates in plea negotiations. Experience suggests that such judicial activity risks more, in terms of unintentional coercion of defendants, than it gains in promoting understanding and voluntary pleas, and thus most authorities recommend that it be kept to a minimum [citations].” (*Sandoval, supra*, 140 Cal.App.4th at p. 124, citing *Weaver, supra*, 118 Cal.App.4th at p. 148.) Indeed, the California Judges Benchbook says that, if a

judge decides to become involved in plea negotiations, “[t]he judge should maintain total neutrality and at the same time probe continually for a common meeting ground.” (*Ibid.*)

In *Sandoval*, the judge did not “maintain total neutrality.” (*Sandoval, supra*, 140 Cal.App.4th at p. 127.) Rather, she repeated over and again that the deal being offered was “amazing” and “exceptionally good.” (*Id.* at p. 119.) Moreover, package-deal pleas can be coercive by their very nature. (*Id.* at p. 125.) A package-deal plea forces the defendant to consider not just his own interests, but the interests of his co-defendants. (*Ibid.*) So when confronted with a package-deal plea, “the nature and degree of coerciveness should be carefully examined.” (*Ibid.*) The judge here didn’t just fail to examine the coercive nature of the plea; she exploited it: “The trial judge’s remarks served to increase the psychological pressure on Sandoval stemming from his relationship with the codefendants.” (*Id.* at p. 126.) Accordingly, the Court of Appeal found that Sandoval’s plea was the result of judicial coercion. (*Id.* at p. 127.)

### **c. How do you litigate a coerced plea post-conviction?**

There are two ways to litigate coerced pleas post-conviction. The first is when the defendant has already moved to withdraw his plea in the trial court, which is what happened *Sandoval* and *Weaver*. The denial of a motion to withdraw a plea is cognizable on appeal from a guilty plea, provided the notice of appeal includes a certificate of probable cause. (*In re Chavez* (2003) 30 Cal.4th 643, 650–651.) And the law on motions to withdraw a plea is relatively straight forward: A defendant who seeks to withdraw his guilty plea may do so before judgment has been entered upon a showing of good cause. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142; *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616–1617.) Good cause can include coercion or duress, and it must be shown by clear and convincing evidence. (*Sandoval, supra*, 140 Cal.App.4th at p. 123.) The trial court’s denial is reviewed for an abuse of discretion. (*Ibid.*)

The second way to challenge a coerced plea is to file a habeas petition arguing that the plea was the result of improper coercion. In *Ibarra, supra*, 34 Cal.3d 277, the defendant did just that. *Ibarra* involved three-codefendants all charged with robbery. (*Id.* at p. 282.) Ibarra’s two codefendants had held up a store at gunpoint and led the police on a high-speed chase, during which one of the codefendants fired shots at the police in pursuit. (*Ibid.*) The officers

saw Ibarra, who was in the back seat, pull the shooter back into the car by his belt buckle. (*Ibid.*) Like in *Sandoval*, the prosecutor offered a package deal: Ibarra could have five years, but only if everyone pleaded guilty together. Ibarra agreed to take the deal. (*Ibid.*)

The case then proceeded like many seemingly hopeless cases: Ibarra was not advised about his limited appellate rights at sentencing. (*Ibarra, supra*, 34 Cal.3d at p. 283.) Indeed, he didn't learn of those rights until after 60 days had elapsed, but he filed a notice of appeal anyway. (*Ibid.*) It was received by the Superior Court but not filed. (*Ibid.*) Ibarra then filed a petition for habeas corpus in the Court of Appeal. (*Ibid.*) He claimed that he wasn't guilty—that he had been passed out drunk in the car before his codefendants decided to rob the store and that he only woke up during the chase. (*Id.* at p. 282.) Further, he said that he only pleaded guilty because he felt pressured to do so by the package-deal plea bargain and that even though he told the judge that he had read the plea form, he hadn't. (*Ibid.*) He only told the judge that he had because he thought that was what he was supposed to say. The Court of Appeal denied the petition. (*Ibid.*)

And was that the end of it? No! Ibarra petitioned the Supreme Court, and the Supreme Court issued an order to show cause. (*Ibarra, supra*, 34 Cal.3d at p. 283.) Package-deal plea bargains, the Court said, "may approach the line of unreasonableness." (*Id.* at p. 287.) Normal, single-defendant plea bargains involve some degree of pressure. (*Ibid.*) The defendant must weigh the certainty of the sentence offered in the plea against the risk of going to trial. (*Ibid.*) But that calculation relates to the case: the evidence against the defendant and the sentences permitted by the charges. (*Ibid.*) In package-deal plea bargains, on the other hand, the pressure comes from "extraneous factors": fear of a co-defendant, like in *Sandoval*, or a desire to protect a potential co-defendant, such as a family member, from prosecution. (*Ibid.*) Because these factors do not relate to the case against the defendant, they make the package-deal plea potentially coercive. (*Ibid.*) Accordingly, courts must be careful in accepting package-deal pleas and must ensure that they are being entered into freely. (*Id.* at pp. 287-188.)

Ultimately, the *Ibarra* Court found that Ibarra had not pleaded sufficient facts and denied the petition, though it did so without prejudice to him filing another. (*Ibarra, supra*, 34 Cal.3d

at p. 283.) Still, *Ibarra* shows that you can still raise these issues in a habeas (provided, of course, that the facts bear out the claim).

#### **d. But what if the judge made your client a good offer?**

Unfortunately, judges can't make plea offers. While judges may take some part in the plea process, there are limits. Those limits were delineated in *People v. Clancey* (2013) 56 Cal.4th 562. There, the trial court told Clancey that if he pleaded guilty as charged, the court would strike an out-on-bail enhancement, grant Clancey's *Romero* motion, and sentence him to five years in prison. (*Id.* at pp. 570-571.) Given that the maximum was almost 16 years, Clancey jumped on it and accepted the offer over the prosecution's objection. (*Ibid.*) The prosecution appealed. (*Id.* at p. 569.)

When the case reached the Supreme Court, the court said that it could not rule: The record was unclear on whether the trial judge had offered the defendant an unlawful inducement to plead or had simply given a lawful indicated sentence. (*Clancey, supra*, 56 Cal.4th at p. 568.) In deferring, however, the court specified when and how a court may properly indicate a sentence. First, the court should avoid indicating a sentence while the prosecution and defense are still negotiating. (*Id.* at p. 575.) Negotiation between the parties is a routine part of criminal trial practice, and the court should let the parties see that process through. (*Ibid.*) Second, the court should make sure the record contains enough information to assess the proper sentence. (*Ibid.*) Third, the court may not induce the defendant to plead guilty; that is, it may not treat a defendant more leniently for having taken a plea. (*Ibid.*) And fourth, the court must not bargain with the defendant. (*Id.* at pp. 175-176, citing *People v. Labora* (2010) 190 Cal.App.4th 907, 915–916.) Once the court indicates a sentence, it should not reduce the sentence further to induce the defendant to plead. (*Ibid.*)

*Clancey* itself was in the context of a prosecution appeal, but there are instances where the court improperly adds terms or conditions to the plea agreement that the parties did not agree to. *Clancey* shows that the court cannot improperly insert itself into negotiations for either side. For instance, while courts have the authority under Penal Code section 1192.5 to accept or reject a plea, they may not unilaterally impose their own terms and conditions on a plea, as the court did in *People v. Jensen* (1992) 4 Cal.App.4th 978. There, the defendant had

negotiated a deal for probation, and the prosecutor had agreed that the defendant could be released pending sentencing. (*Id.* at pp. 980-981.) The court, however, told the defendant that it had a policy of imposing a prison sentence for defendants who fail to appear for sentencing, and after Jensen failed to show, the court sentenced him to prison. (*Ibid.*)

The Court of Appeal found that this was a due process violation because it was not a part of the original plea bargain. (*Jensen, supra*, 4 Cal.App.4th at p. 984.) Jensen had worked out his deal with the prosecutor, and rather than reject the deal, the court imposed its own terms. (*Ibid.*) This was improper.<sup>1</sup> (*Ibid.*)

But why was this improper if the court could have rejected the plea outright? Courts are, of course, permitted to reject pleas. The process of plea negotiation “contemplates an agreement negotiated by the People and the defendant and approved by the court.” (*People v. Segura* (2008) 44 Cal. 4th 921, 929-930, citing Pen. Code §§ 1192.1, 1192.2, 1192.4, 1192.5; *People v. West* (1970) 3 Cal.3d 595, 604–608.) But in rejecting a plea bargain, the court must state its reasons. (*People v. Loya* (2016) 1 Cal.App.5th 932, 949.) In *Loya*, for instance, the court engaged in a “mutually frustrating” discussion with the defendant on the morning of trial about whether he was going to accept the prosecution’s plea offer. (*Id.* at p. 935.) As the defendant dithered about whether he would plead, the court grew frustrated and said it would no longer accept any plea. (*Ibid.*) But the court failed to explain why. (*Ibid.*) While they could have been reasons to put a deadline on a plea deal, a fit of pique was not one of them: accordingly, the court abused its discretion in refusing to accept the deal. (*Id.* at p. 936.)

Could a court reject a plea that did not require a return provision? Probably. As noted above, appellate courts have no problem permitting bargained-for return provisions. (See *Vargas, supra*, 148 Cal. App. 4th 644.) That said, there are limits to the grounds on which a court could reject a plea. If you see the court adding terms unilaterally or rejecting pleas for flimsy reasons, you should consider litigating the issue.

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<sup>1</sup> The situation is different when the prosecutor requires a return provision or a *Cruz* waiver as part of the original plea bargain. In that case, the provision is valid. (*People v. Vargas* (2007) 148 Cal. App. 4th 644.)

## **2. Judicial coercion of the jury**

As noted above, judges are under tremendous pressure to resolve the cases before them. Trials take time and resources and can thus frustrate the efficient movement of a court's calendar. Mistrials therefore represent an enormous waste of resources—not just the waste in the first trial but also the prospective waste of a second. So judges are under a certain amount of pressure to prevent them. And while judicial efficiency is an appropriate goal for trial judges, occasionally it can lead to judicial coercion of the jury, particularly when the jury comes back deadlocked.

### **a. How should a judge handle holdout jurors?**

Imagine this scenario: in the trial court, your client was facing an indecent exposure charge under Penal Code section 314. Unfortunately, your client already had two strikes under his belt, both of which were for violations of Penal Code section 288, which meant your client was a 290 registrant. It also meant that, for your client, the indecent exposure charge that ordinarily would have been a misdemeanor was instead charged as a felony. And because your client was a 290 registrant with two prior strikes, it was a third-strike felony, meaning your client was facing 25 to life.

At trial, the evidence was that your client was sitting in his van near a playground masturbating. Defense counsel argued alibi, a regrettable choice given the GPS evidence and the two civilian witnesses who said they saw your client in the van, near the playground, and without a doubt masturbating. Fortunately, however, one astute juror spotted the real issue in the case: Section 314 requires that the defendant intend to draw public attention to his genitals. (*People v. Honan* (2010) 186 Cal.App.4th 175, 181-182.) Incidental public exposure is not enough. (*Ibid.*) At this juror's behest, the jury submitted questions to the court on this very issue. Alas, neither the lawyers nor the judges answered this question correctly. The judge simply repeated the instructions on intent that it had already given. The jury could make no progress, and eventually, it began sending notes containing words like "impasse," "stalemate," and "eleven to one." The judge intervened.

The judge brought the jury out and asked who the holdout was. The holdout identified himself. The court asked if the holdout was deliberating, and the foreperson confirmed that he was. The judge told the jury to resume deliberations the next day and said she would provide further guidance then. The next day the jury continued to send notes saying they were deadlocked. Eventually, the court brought the jury back out. She asked the holdout if there was anything she could do to “assist you in reaching a verdict.” The holdout juror again asked for clarification on the required intent. The court said it would provide more guidance. It never did. Eventually, after hours more of deliberations, the juror caved, and the jury convicted.

This happened in *People v. Christian*, 2019 Cal.App.Unpub. LEXIS 7296, an unpublished decision, but one in which SDAP’s own Anna Stuart got her client’s 25-to-life sentence reversed.<sup>2</sup> The Court of Appeal reversed Mr. Christian’s conviction based on both trial counsel’s failure to request a mistrial and the trial court’s abuse of discretion in requiring further deliberations after the second deadlock announcement. (*Id.* at pp. \*24-\*25.) The court emphasized that, in singling out the holdout juror, the trial court conveyed that its request to continue deliberating was actually a request to reach a verdict. (*Id.* at p. \*24.) (Indeed, in oral argument, Justice Elia said he could not fathom a trial judge singling out a holdout juror). While *Christian* is unpublished and thus not citable, it illustrates the kind of improper behavior appellate counsel needs to look out for when a jury initially comes back deadlocked.

Indeed, the law provides limits on how judges can address a deadlocked jury. A trial court, of course, cannot discharge a deadlocked jury unless “it satisfactorily appears that there is no reasonable probability that the jury can agree.” (Pen. Code § 1140.) And the determination of whether the jury might still be able to reach a verdict rests in the judge’s discretion. (*People v. Rojas* (1975) 15 Cal.3d 540, 546.) But still, a judge cannot coerce a jury into reaching a verdict: that is, the judge may not suggest the jurors displace their independent judgment “in favor of considerations of compromise and expediency.” (*People v. Carter* (1968) 68 Cal.2d 810, 817.) Courts may not “inject illegitimate considerations into the

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<sup>2</sup> Seriously, talk to Anna about this case. It was crazy even beyond the judicial misconduct.

jury debates” or “appeal to dissenting jurors to abandon their own independent judgment.” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 461 (*Bryant*).) The court must not put “excessive pressure on the dissenting jurors to acquiesce in a verdict.” (*Ibid.*)

When confronted with a deadlocked jury, a trial court may ask the jurors about their numerical division, but it should not try to elicit the number of jurors in favor of acquittal and how many are for conviction. (*People v. Carter* (1968) 68 Cal.2d 810.) The court may also question individual jurors as to the probability of agreement. (*Id.* at p. 815.) If the court believes the jury might still reach a verdict, it may try to promote consensus. But it must be careful not to coerce the jurors. (*Id.* at pp. 815-816.) “Any intervention must be conducted with care so as to minimize pressure on legitimate minority jurors.” (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753; see also, *People v. Haskett* (1990) 52 Cal.3d 210, 238.)

Whether a trial court’s statements to the jury amount to coercion of the verdict is “peculiarly dependent upon the facts of each case” (*People v. Burton* (1961) 55 Cal.2d 328, 356) viewed against the “totality of applicable circumstances.” (*Carter, supra*, 68 Cal.2d at p. 817.) If the trial is short, the issues are simple, and the jury doesn’t seem to need further instructions to understand the issues, an instruction to continue deliberating may be coercive insofar as it would suggest the minority jurors must change their minds to reach the verdict. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) In litigating a potentially coerced verdict, appellate counsel should focus on whether the court’s statements could be interpreted as exerting undue pressure on any juror, particularly those in the minority. (*People v. Breaux* (1991) 1 Cal.4th 281, 320.) In particular, courts have found coercion where the trial court, by insisting on further deliberations, expressed an opinion that a verdict should be reached. (*People v. Crossland* (1960) 182 Cal.App.2d 117, 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) Threats to lock up the jury, or to prolong its deliberations indefinitely also constitute coercion. (See *Carter, supra*, 68 Cal.2d at pp. 817-819; *People v. Talkington* (1935) 8 Cal.App.2d 75, 85.)

### **b. What about a dynamite charge?**

When the jury comes back deadlocked, judges may be tempted to give something akin to a dynamite or *Allen* charge. This is inappropriate. A dynamite or *Allen* charge is an instruction that the court gives to a deadlocked jury in the hopes of breaking the deadlock. Originally approved in *Allen v. United States* (1896) 164 U.S. 492, the charge usually involves the court telling the jury that the trial has been expensive, that if this jury doesn't reach a verdict, the court will need to try the case again, and that it's unlikely a different jury could do better at deciding the case than this one. (See *People v. Gainer* (1977) 19 Cal.3d 835, 841-842, disapproved of in part by *People v. Valdez* (2012) 55 Cal.4th 82.) The court then suggests that the minority jurors—whether for or against conviction—reconsider their verdicts in light of the majority's opinion. (*Ibid.*)

California rejected the *Allen* charge in *Gainer*, *supra*, 19 Cal.3d at p. 852. The court said: “[B]oth controversial features of the *Allen*-type charge discussed herein inject extraneous and improper considerations into the jury’s debates. We therefore hold it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.” (*Ibid.*) The court noted that the latter improper component of an *Allen*-type instruction was not specifically approved in *Allen* itself and that these types of instructions had been developed through “[d]ecades of judicial improvisation.” (*Id.* at p. 845.) The court also observed: “A third common feature of *Allen*-type instructions is a reference to the expense and inconvenience of a retrial. While such language was absent from the charge in this case, it is equally irrelevant to the issue of defendant’s guilt or innocence, and hence similarly impermissible.” (*Id.* at p. 852, fn. 16.)

That said, the Supreme Court has approved an instruction requesting both sides—majority and minority jurors—to reconsider their views and disapproved *Gainer* to the extent it said otherwise. (*Valdez*, *supra*, 55 Cal.4th at p. 163.) Moreover, CALCRIM No. 3551, while subject to attack from the defense bar, has not yet successfully been challenged. That said, *Gainer* is still good law on at least certain points, and if you find a trial judge referencing the

expense of trial or suggesting the minority reconsider its views, you should consider challenging that instruction.

### **c. How else might the judge interfere with the jury?**

Try this one: Your client was charged with *Watson* murder. He was driving a Corvette while drunk—very drunk—and he was driving way too fast—90 miles per hour in a 35 mile-per-hour zone. He ended up hopping a curb and crashing into a family party, killing a young mother and her one-year-old daughter.

Yikes.

At trial, defense counsel didn't contest that your client was the driver, that he was drunk, or that he was grossly negligent in how he drove. Rather, the defense was just that he did not have the mental state required for murder: he did not exhibit a conscious disregard for human life. And the defense went pretty well for a while. Defense counsel somehow kept out the client's prior DUI. And in the jury room, the jurors spent a lot time debating about whether your client knew he was likely to kill someone. At least one juror was having serious problems with this aspect of the charge, and it looked like things were heading towards a hung jury. That is, until one of the jurors who had done some internet sleuthing told the potential holdout, "You know this guy has a prior DUI, right?"

The other jurors immediately alerted the judge to the improper comments. But the potential holdout said she was especially upset about the information because she believed it had been revealed to coerce her into convicting. She agreed with the court that it was "fair to say" that it would be very difficult for her to continue deliberating.

So what did the trial court do? Declare a mistrial because the jury was irreparably tainted by juror misconduct? Nope. The judge removed both the juror who revealed the information as well as the potential holdout. And then the rest of the jury convicted.

This happened in *People v. Jones* (2020) 50 Cal.App.5th 694, and on appeal, the court reversed based on the trial court's removal of the potential holdout juror without sufficient reason. (*Id.* at p. 696.) A trial court may dismiss a juror if the court finds the juror is "unable to perform his or her duty." (Pen. Code § 1089; *People v. Armstrong* (2016) 1 Cal.5th 432, 450.) Dismissal may be appropriate, for example, when a juror is emotionally unable to continue

or expresses a fixed conclusion at the beginning of deliberations and refuses to engage with other jurors. (See *People v. Cleveland* (2001) 25 Cal.4th 466, 474, 485.) But “[g]reat caution is required when deciding to excuse a sitting juror.” (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71.) If a juror’s willingness or ability to continue deliberating is unclear, the court must inquire further before dismissing the juror. (*Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 551-557.) The inquiry must be sufficient to determine the facts that demonstrate a juror’s ability or inability to deliberate (*People v. Burgener* (1986) 41 Cal.3d 505, 519, overruled on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753) and may not assume the worst about a juror without giving her an opportunity to explain herself. (*People v. Compton* (1971) 6 Cal.3d 55, 60; *Shanks, supra*, 9 Cal.App.5th at p. 556.)

When reviewing the dismissal of a juror, the Supreme Court has adopted a heightened standard of review that protects the defendant’s fundamental rights to due process and a fair trial. (*Armstrong, supra*, 1 Cal.5th at p. 450; Cal. Const., art. I, § 16 [trial by jury is an “inviolable right”].) The juror’s inability to perform his or her duty must appear in the record as a “demonstrable reality.” (*Id.* at p. 450.) The Supreme Court has emphasized that this test is “more comprehensive and less deferential” than the substantial evidence test. (*Id.* at p. 451.) Under both tests, the appellate court reviews the entire record and does not reweigh the evidence. (*Id.* at pp. 450-451.) However, under the substantial evidence test, the court reviews the record in the light most favorable to the judgment and upholds it if there is credible evidence that could reasonably support the trial court’s decision to remove a juror. (*Id.* at p. 450.) Under the demonstrable reality test, by contrast, the reviewing court must determine whether the trial court actually did rely on evidence that supports removing the juror. (*Id.* at p. 451.) The court must therefore review the “record of reasons that the trial court provided, identify the evidence on which the court actually relied, and determine whether the evidence manifestly supports the court’s reasons.” (*Ibid.*)

Here, the court did not conduct a proper inquiry into whether the juror could remain on the jury. (*Jones, supra*, 50 Cal.App.5th at pp. 703-705.) While she said that she was “very upset” and that it would be “very difficult” to continue deliberating, that wasn’t enough to

remove her. (*Ibid.*) She didn't say categorically that she couldn't continue to deliberate. (*Ibid.*) Thus her inability to perform her duties was not a "demonstrable reality." (*Ibid.*)

**d. Can the judge tell the jury what she thinks about the evidence?**

As crazy as it sounds, yes. Judicial comments on the evidence are enshrined in Article VI, section 10 of the California Constitution, and certain trial judges have had no problem taking advantage of this provision. In *People v. Proctor* (1992) 4 Cal. 4th 499, for instance—a death penalty case—there was one holdout juror on guilt. (*Id.* at p. 539.) The juror, in fact, sought to be removed because she was the only vote for not guilty. (*Ibid.*) Rather than discharge the juror, however, the court delivered a closing argument of sorts. (*Id.* at pp. 539-540.) The judge said the killing was certainly unlawful and that the only question was whether the defendant had committed the killing. (*Id.* at p. 540.) The judge said that the defendant's out-of-court statements were inconsistent with both his in-court testimony and other evidence. (*Ibid.*) The judge then pointed to the defendant's failure to explain some of the forensic evidence and concluded, "I have difficulty in believing the testimony of the defendant." (*Id.* at p. 541.) The juror went on to convict. (*Id.* at p. 542.)

And this was upheld! A trial court's "comments on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*Proctor, supra*, 4 Cal.4th at p. 542.) "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made." (*People v. Melton* (1988) 44 Cal.3d 713, 735.) Here, the Supreme Court evidently thought that telling a holdout juror that the defendant was lying was entirely proper, and it upheld the verdict. (*Proctor, supra*, 4 Cal.4th at p. 542.)

All is not lost, however. If you find that the judge told the jury that your guy was guilty, you can point to *People v. Anderson* (1990) 52 Cal. 3d 453 for an example of a trial court "effectively directing a verdict." (*Id.* at p. 469.) There, the trial court said, before deliberations had even begun, said it was "very likely" a special-circumstances verdict would be returned in two to three hours and that the defendant's "intent to kill" was a fairly simple

question. (*Ibid.*) The court found these comments improperly coercive. It cited *People v. Keenan* (1988) 46 Cal.3d 478, 534 to say, “A trial judge should refrain from placing specific time pressure on a deliberating jury and should never imply that the case warrants only desultory deliberation. Such comments risk persuading legitimate dissidents, whatever their views, that the court considers their position unreasonable.”<sup>3</sup> (*Ibid.*)

### **3. Are there any other areas of judicial misconduct?**

Sure, there are plenty. What are you interested in?

#### **a. What about a trial tax?**

A trial tax is where the judge punishes your client for going to trial. Your client had a sweet offer before trial. He made the state waste all that money trying his obviously hopeless case, and now he’s going to get hammered for it.

But to punish a person for exercising a constitutional right is “a due process violation of the most basic sort.” (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.) Consistent with this principle, the California Supreme Court held in *In re Lewallen* (1979) 23 Cal.3d 274 that the fact a conviction is based on a not guilty plea is “completely irrelevant at sentencing; if a judge bases a sentence, or any aspect thereof, on the fact that such a plea is entered, error has been committed and the sentence cannot stand.” (*Id.* at p. 279; *People v. Collins* (2001) 26 Cal.4th 297, 306-307.) In sentencing the defendant in *Lewallen*, the trial court had stated: “[A]s far as I’m concerned, if a defendant wants a jury trial and he’s convicted, he’s not going to be penalized with that, but on the other hand he’s not going to have the consideration he would have had if there was a plea.” (*Id.* at p. 277.) The Supreme Court

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<sup>3</sup> If you want a good chuckle, spend an afternoon reviewing cases from the Commission on Judicial Performance. You’ll find things like a judge telling jurors in a bicycling-while-intoxicated trial, “Ladies and gentlemen, I want you to go in that room and find the defendant guilty.” (*McCullough v. Commission on Judicial Performance*, 49 Cal. 3d 186, 191-192.) When the jurors took a whole five minutes to fill out the verdict form, the judge said, “For a while there, ladies and gentlemen, I thought you were not going to follow my instructions.” (*Ibid.*) The Supreme Court found this was improper. Judge McCullough’s defense: he thought he was allowed to direct a verdict. Ignorance of the law, however, is no excuse. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal. 3d 359, 369 [“Petitioner’s patent misunderstanding of the nature of his judicial responsibility serves not to mitigate but to aggravate the severity of his misconduct.”].)

concluded that the court had penalized the defendant for exercising his constitutional right to a jury trial, and it vacated his sentence. (*Id.* at pp. 279-281.)

But what about acceptance of responsibility? Can't that factor into sentencing? It depends. On the one hand, California Rules of Court, rule 4.423, subdivision (b)(3) recognizes early acknowledgment of wrongdoing as a factor in mitigation, so acceptance of responsibility obviously can play some role in a court's sentencing decision. But on other hand, in *People v. Avignone* (2017) 16 Cal.App.5th 1233, the court may have engaged in unlawful plea-bargaining by saying "there's certainly no benefit for acceptance of responsibility if [sentencing] comes after a trial." (*Id.* at p. 1245.) If you think your client was punished for going to trial, you should look carefully at the factors the court cited in its sentencing decision. There's a fine line between simply not crediting an early acceptance of responsibility and punishing your client for going to trial.

### **b. Is there anything to look for in a bench trial?**

In a bench trial, the judge cannot make up his or her mind before hearing the defense case. In *People v. Barquera* (1957) 154 Cal.App.2d 513, for instance, the matter was submitted under a stipulation that the court could rely on the transcript from the preliminary hearing but that both sides reserved the right to produce additional evidence. (*Id.* at p. 515.) The court repeatedly said the defendant had no defense at all and told defense counsel, "I don't have to let you offer any [defense evidence]." (*Id.* at p. 517.) This was improper. "When a judge becomes a trier of fact as well as of the law, the defendant is entitled to the same presumption of innocence and the same right to present a defense that he would have if he were being tried by a jury." (*Id.* at p. 519.)

### **c. Can a trial judge present evidence at a trial?**

Sort of? "The right, and even the duty, of a trial court to call its own witnesses and to ask questions of witnesses has been repeatedly sanctioned both by legislative and court action as a fundamental component of our judicial system." (*People v. Hancock* (1983) 145 Cal.App.3d Supp. 25, 29.) "The right to call and question witnesses, however, is not unlimited, nor subject only to the whim or caprice of the trial judge. Extreme care must be observed by the

court so as not to shift the balance of the case either for or against a party, merely because of the manner in which the court participates in the presentation of evidence.” (*Ibid.*) In *Handcock*, the court went too far. (*Ibid.*) The defendant was literally on the stand when the judge started calling his own witnesses. (*Id.* at p. 31.) The judge also had given no notice to either side that he intended to present his own evidence or that he had done his own investigation. (*Ibid.*) “Unilateral investigation by a trial court, although consistent with the role of an advocate, appears contrary to the primary responsibilities of a neutral judicial officer, and, once started, invites abuse.” (*Id.* at p. 32.)

#### **d. What about interfering with the attorney-client relationship?**

Judges shouldn’t do it! While courts may (and perhaps at times must) remove incompetent counsel (*Magana v. Superior Court* (2018) 22 Cal.App.5th 840, 863), criminal defendants have a constitutional right to choose their own counsel, and the courts must be careful not to infringe of the independence of the defense bar. (*Smith v. Superior Court of Los Angeles County* (1968) 68 Cal.2d 547, 559.) A trial judge faced with potentially incompetent counsel—but counsel who was chosen by the accused—“is placed in a difficult dilemma: If a . . . court agrees to the . . . representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance. On the other hand, a . . . court’s refusal to accede to the . . . representation may result in a challenge” based on the court’s denial of the defendant’s right to counsel of choice. (*People v. Jones* (2004) 33 Cal.4th 234, 241.) The court must find a way to balance the requirement of a competent advocate for the accused who is ready to proceed to trial against the accused’s right to counsel of choice. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1124.)

Courts must also—at least to a certain extent—permit the accused to retain his or her counsel of choice. (*People v. Ramirez* (2006) 39 Cal. 4th 398, 422.) An element of a defendant’s right to counsel “is the right of a defendant who does not require appointed counsel to choose who will represent him.” (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144.) A criminal defendant has a qualified right to retain counsel of his choice, and the trial court can deny a defendant’s timely request to substitute counsel only if it “will result in significant prejudice to the defendant.” (*People v. Gzikowski* (1982) 32 Cal.3d 580, 587.) The right to the

effective assistance of counsel “encompasses the right to retain counsel of one’s choice. Though entitlement to representation by a particular attorney is not absolute, the state should keep to a necessary minimum its interference with the individual’s desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and . . . that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.” (*Id.* at pp. 586–587.)

Finally, the court should of course never accept a guilty plea from a represented defendant in counsel’s absence. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 849.) Nor should the court tell counsel that his client is a “puke” and a “psychopath” and that counsel will likely “never again practice before [the judge] and probably not in western El Dorado County” again if he continues representing his client. (*Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 633.)<sup>4</sup>

**e. And judges shouldn’t have ex parte communications with the parties or the jurors, right?**

Right. Courts should definitely avoid ex parte communications. The court may not respond to a juror’s question without first advising the parties and their attorneys, at least if the inquiry relates to disputed testimony or a point of law. (See Pen. Code §1138; *People v. Neufer* (1994) 30 Cal.App.4th 244, 251-253.) Courts may not engage in ex parte communications with the jury outside the presence of counsel during deliberations. (*People v. Bradford* (2007) 154 CA4th 1390, 1411–1415.)

Similarly, judges must not have ex parte conversations with the prosecution. The defendant “has a due process right to an impartial trial judge under the state and federal Constitutions. The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case.” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) The California Code of Judicial Ethics sets forth ethical rules applicable to judges, and includes a rule that addresses ex parte communications: “A judge shall not initiate, permit, or consider ex parte

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<sup>4</sup> What’d I tell you about Commission opinions?

communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending . . . proceeding . . . except [listing situations inapplicable here].” (Cal. Code Jud. Ethics, canon 3B(7).) Further, “[i]f a judge receives an unauthorized ex parte communication, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.” (Cal. Code Jud. Ethics, canon 3B(7)(d).)

That said, even if the trial court has an ex parte conversation with the prosecutor, “no case authority holds that a violation of a judicial ethical rule, *per se*, automatically requires reversal of the ensuing judgment.” (*People v. Thompson* (2016) 1 Cal.5th 1043, 1100.) The reviewing court’s role “is not to determine whether the trial judge’s conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, [the court] must determine whether the judge’s behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.” (*People v. Abel* (2012) 53 Cal.4th 891, 914.) Courts decide this on “a case-by-case basis, examining the context of the court’s comments and the circumstances under which they occurred.” (*Ibid.*) Still, appellate counsel should be on the lookout for ex parte communications.

#### **4. Conclusion**

Judges have tremendous power over our clients’ lives, and while most judges are fair, smart, and compassionate people who truly are looking to do justice, everyone makes mistakes sometimes. Everyone at times succumbs to the pressures of working in a criminal justice system designed to ensure speedy convictions. As appellate counsel, it’s our job to make sure our clients’ rights don’t get trampled in the process. So pay attention to those times when the judge seems to throw his weight around a little too much or abandons her role as a neutral arbiter in favor of the role of advocate. It may ultimately result in a win for your client.