Thanks, Mike

By Hon. Kenneth L. Tacoma

Judges are hidebound beasts. I look around the various courts in which I have spent the majority of my professional life, approaching 30 years, and I see some practices with no basis in statute or court rule that sages who have been here even longer than I tell me were instituted in the 60s.[1] And so it was that when I became a judge, I, for the most part, adopted the practices of my predecessor. One of these practices was to hold pretrial conferences in the judge's chambers, off the record, in all kinds of cases, including child abuse and neglect cases. That's just the way it had been done, not only in this county, but in all the counties where I had practiced generally. And it was in this setting, thanks to a perceptive and courageous defense attorney named Mike, that I received a valuable lesson that helped shape and redefine procedures in my court in this narrow area and my view of fundamental fairness, due process of law, and judicial conduct generally.

The story takes place in 1994 in a child protection case in which both parents had been summoned into court. Mike filed his formal appearance on behalf of the father of the children; the children and their mother had court-appointed attorneys. On the day set for a pretrial conference, the attorneys were all invited into the judge's chambers, as had been the practice since before time began. The lawyer for the children;[2] the lawyer for the mother; the assistant prosecuting attorney, Mike; and the Department of Social Services[3] caseworker all entered and took a seat.

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Mike looked at the caseworker and said: "What's he doing here?"

Thinking that Mike had failed to recognize him, the caseworker replied: "I'm _____, and it's my case."

This brought the following responses from Mike: "I know who you are," and then to the assistant prosecuting attorney, "Unless he goes, I want my client in here."

The assistant prosecuting attorney, caught completely off-guard and not used to having protocol questioned, tried to intercede: "He's here to help me with the details of the case—he's more familiar with it than I am."

This left him wide open for Mike's next shot: "I know my case without having my client here; you should do your homework."

At this point the caseworker, who was no shrinking violet and also had a bit of a temper, jumped up and said, "I'm not going to be kicked out of a pretrial conference on my own case!"

The rookie judge (me), fearing fisticuffs were about to break out, finally interjected this weak-kneed contribution: "Let's all sit down and calm down."

Remarkably, the antagonists did so, and after a few minutes discussion, I did ask the caseworker to leave—an insult for which he never forgave Mike or me.

After the conference, I reflected on what had happened, and it came as a complete shock to me how entirely right Mike was. I thought of all the cases in which I had participated in my various professional roles up to that point—as a public defender, retained counsel, prosecuting attorney, and now judge—and had an epiphany. Look at this through the eyes of the parent accused of child abuse: Your lawyer gathers with the other lawyers. They go behind closed doors with the judge. Sometimes the social worker who took your child away goes in; sometimes it's the social worker that has given you a list of 15 things to do and meetings to attend. Then a half hour later, your lawyer comes out and tells you that they have decided what is best for you and your child, and now all we have to do is go put it on the record. Especially when your lawyer is a public defender who you know is being paid (poorly) by the state, is it any wonder that you feel the fix is in? Is it any wonder that you think that the judge is just another bureaucrat (the Big Cheese Bureaucrat) who just enforces what the social workers say? Do you have the backbone to say "No" to all these important people? And is the perception improved other than at the margin when the patent impropriety of having the caseworker, clearly a party and witness, is removed? Is not the taint of the "dirty deal done behind closed doors" still overwhelming?

That marked the last pretrial conference I held in chambers, and, for that matter, the last conference in any other kind of proceeding that was not held on the record, in open court. I have heard all the arguments about the utility of "in-chambers" practice and find none of them persuasive. In fact, when closely examined, they actually reinforce my opinion that nothing in a legal proceeding should take place other than in open court, on the record. Take, for example, the argument I have frequently heard that the lawyers like this practice because they can have an open and frank discussion about the case. Fine, let them do it in one of their offices, not in my chambers where they can try to slip in poisonous and prejudicial comments that would be clearly inadmissible in a formal hearing. And, even worse, I remember some of the derogatory things some lawyers would say about their own clients in those conferences. Or the argument that the lawyers can get some "guidance" on how to proceed from the judge. Why shouldn't their clients be privy to the "guidance" in open court? Also, from the judge's point of view, this is very dangerous. How do you know how the lawyer will "spin" your comments to his or her client?

Judges, and the lawyers who are officers of the court, must never forget that the adversary system works only because most litigants accept it as a contest that is presided over by a totally impartial judge. The perception that the judge is somehow outside and above the fray is absolutely essential to the credibility of the system. It is especially necessary in cases in which the litigants are unsophisticated, poor, and vulnerable, because they certainly can't be expected to stand up to the system and their own lawyers when they feel they are being treated unfairly. This is also why I get very nervous when I see fawning puff pieces written about judges who are there "to help people." The best help a judge can extend is to try to ensure that the structure is in place for the advocates do their jobs well, that the process is transparent, and that the judge is completely fair and impartial in applying the law, both in perception and in reality. Helping one side or the other should never be part of the judge's job description.

What is even more important, in my opinion, is that the perception and reality of impartiality is the judiciary's last fig leaf of legitimacy in our culture. No one seriously accepts the claim that judges are nonpolitical anymore. At both the state and federal level, almost every appointment or election of a judge now drips with political disputes, often

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every bit as nasty, venomous, and destructive in tone as in the selection of leaders in the legislative and executive branches. Further, since the triumph of legal positivism and the collapse of any claim to a connection between the law and moral philosophy, judges cannot claim any basis for their decisions other than what the positive law provides, augmented from time to time with the ephemeral claims of "social policy" based on the quicksand of prevailing current popular opinion. In the last 20 years, I have heard only a handful of arguments based on some higher claim, and from what I hear, courses in jurisprudence are hardly taught in law schools anymore. Finally, even a cursory reading of a randomly selected current appellate opinion and a comparison of it with a similarly selected opinion written 75 years ago belies the idea that the legal profession is a high intellectual exercise. Opinions are now almost without exception dry, mechanical tomes about the application of sentencing or other guidelines, three-pronged tests, the parsing of the meaning of words using the most recent incarnation of Webster's, or picayune procedural points. All these reasons lead me to worry that if the perception is lost that the judge is at least impartial in the particular case, the emperor will be left with no clothes.[4]

And so, belatedly, I extend this paean to an excellent attorney who probably never intended or realized that he was playing an important part in the education of a young judge. Thanks, Mike. ■

Author's note: In a sad and poignant irony, I wrote this article in July 2007, and I learned in August 2007 that the subject of my story, Michael P. Matthews, Esq., of Big Rapids, Michigan, had died on August 19, 2007. His life was tragically cut short and our profession robbed of a gallant advocate by sudden, aggressive illnesses, which took him in a very short time at the age of 56. Mike had developed an active and well-regarded practice concentrating in criminal defense work over the years following his admission to the Bar in 1982.

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FOOTNOTES

1. As in the 1960s, for the ever-growing number of our professional colleagues who are too young to remember the Age of Aquarius.
2. In 1994, MCR 5.965(B)(2) required the appointment of an attorney for the child, unlike the current lawyer/guardian-ad-litem requirement of MCR 3.915(B)(2)(a).
3. The predecessor to the Family Independence Agency, which in turn became the Department of Human Services.
4. As noted in the debates leading to the adoption of the United States Constitution and subsequently from time to time, the judiciary, possessing the power of neither the purse nor the sword, is the least dangerous branch of government. See, e.g., Hamilton, Federalist No. 78. It follows from that, however, that the courts must guard their legitimacy carefully, lest those who do have the power of the purse and the sword no longer accept and enforce the courts' edicts.