**Memorandum**

To: Andy

From: Sav Arguello

Date: 23 July 2021

Re: Judicial Questioning as Bias or Constructive Denial of Right to Counsel

**Questions Presented:**

1. Can excessive or improper judicial questioning of a witness result in a finding of judicial bias?
2. Can judicial questioning constitute a deprivation of the right to counsel by preventing the attorney from making strategic decisions with respect to eliciting information from witnesses?
3. How should a trial attorney address and preserve for appeal the issue of excessive or improper judicial questioning of witnesses at trial?

**Brief Answers:**

1. Yes, the volume and nature of judicial questioning of witnesses may reflect both an appearance of bias as well as the presence of bias. A finding of judicial bias is warranted where the questioning is shown to have prejudiced the parent.
2. Probably yes. Judicial questioning that interferes with counsel’s ability to effectively and strategically question witnesses may constitute a constructive denial of counsel.
3. To preserve issues of potential judicial bias for appeal, trial attorneys should be clear and detailed in their objections for the record. While generally trial attorneys must object to judicial questions just like questions from counsel, in some cases that might not be necessary. Further, because the transcript may not show a judge’s hostile tone or improper demeanor when asking questions, counsel should preserve such bias claims by noting specific impressions of tone and demeanor in their objections or obtaining recordings of the trial to present on appeal.

**Facts:**

During a termination of parental rights trial, counsel for Mother made seven objections to questions put to witnesses by Judge Doe, and four objections to Judge Doe’s lines of questions. Mother’s counsel eventually refrained from making objections after Judge Doe remarked that he “was not showing bias” and “could ask whatever he wanted.” Over the course of the trial, Judge Doe asked more than 750 questions to witnesses compared to a total of 560 questions asked by counsel for DCF, Mother, and Jane combined. More than two-thirds of the judge’s questions were posed to witnesses for the Mother, even though she only called three witnesses to DCF’s ten.

During Mother’s direct examination of her group facilitator and key witness, Ellen Smith, Judge Doe interrupted frequently and asked Ms. Smith questions which directly questioned her credibility. Counsel for Mother objected, arguing that Judge Doe appeared to be hostilely cross-examining the witness. While Mother was on the stand, Judge Doe asked her more than 200 questions. Mother’s counsel objected and noted that the language and tone of Judge Doe towards Mother was “aggressive” and “hostile.”

 During Mother’s cross-examination of DCF social worker Jack Morrison, Judge Doe interrupted counsel’s questioning and appeared to rehabilitate Mr. Morrison’s credibility. Counsel for Mother asked for a sidebar, then explained that he was going to impeach Mr. Morrison in a specific way and then call other witnesses for Mother building on that impeachment. Judge Doe became harsh with Mother’s counsel, told him that this was taking too long (the entire examination had only lasted for 30 minutes, most of which were the judge’s questions), and told him to move on. Mother’s counsel objected, stating, “Judge, I can’t do my job as Mother’s lawyer if you take over my questioning.” The judge simply repeated, “Move on, counsel.” As a result of the judge’s questioning and treatment of Mother’s counsel, Mother’s counsel did a poor job at trial (poorly rebutted DCF’s weak case and poorly presented strong evidence in Mother’s favor).

 The judge found Mother unfit and terminated her parental rights. The basis of the termination was Mother’s answers to the questions the judge posed to her. In Judge Doe’s termination findings, he expressly found Ms. Smith (Mother’s group facilitator) not credible and expressly found Mr. Morrison credible despite Mother’s impeachment. That is, the objected-to questions directly prejudiced Mother.

**Discussion:**

1. **Judicial questioning may constitute bias if the questioning is both improper and prejudices the parent.**

Judges have a right to question witnesses at trial. *Commonwealth v. Festa*, 369 Mass. 419, 422 (1976). Questioning witnesses is within a judge’s responsibility to preside over trial proceedings. *See* *id.* A judge may question a witness in order to clarify evidence, eradicate inconsistencies in testimony, avert possible perjury, and generally develop trustworthy testimony. *Id.* at 423; *Commonwealth v. Hassey*, 40 Mass. App. Ct. 806, 810 (1996).

 A judge who questions witnesses must remain impartial both in fact and in appearance. *See Hassey*, 40 Mass. App. Ct. at 810; *see also Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008) (holding that an appearance of bias is as important as the presence of actual bias). Judicial questioning must remain neutral and fact-eliciting. *See Festa*, 369 Mass. at 422 (judge’s questions cannot be “partisan in nature”). Further, judges should refrain from asking excessive questions. *Commonwealth v. Campbell*, 371 Mass. 40, 45 (1976) (“[W]e have not favored except in extenuating circumstances the takeover of questioning by a judge during the course of trial.”); *Hassey*, 40 Mass. App. Ct. at 810 (“Extensive examination of witnesses by the judge during trial is not to be encouraged”). Finally, judges may not limit an attorney’s questioning of a witness. *See Adoption of Norbert*, 83 Mass. App. Ct. 542, 547 (2013) (holding that the judge’s extensive questioning of witnesses at trial did not violate the mother’s due process rights because the attorney was not limited in asking questions of witnesses); *cf*. *In re D.C.*, 200 A.3d 576, 591 (Pa. Super. Ct. 2018) (holding that the trial court “violated the children’s Due Process rights by preventing counsel from questioning witnesses and presenting their case, and by referencing the late hour as justification for curtailing testimony”).

In *Norbert*, the court held that judicial questioning that moves beyond clarification and delves into substantive areas constitutes improper conduct by a judge. 83 Mass. App. Ct. 542, 547 (2013). Further, the extensiveness of a judge’s questioning is a factor in determining bias. *See id.* at 547–48 (“There is no question that the judge assumed an active role and extensively questioned all the witnesses…. [asking] over 1,000 questions as compared to the approximately 725 questions asked by counsel for the department, the mother, and the children combined.”). The tone and demeanor of a judge during questioning may also inform a determination of bias. *See id.* at 547 (Hanlon, J., dissenting) (noting that even from the bare transcript, the trial judge’s questioning was fairly characterized as “aggressive,” and that some of the judge’s questions seemed “at least in hindsight [] particularly unfair”).

However, improper questioning by judges does not, by itself, constitute reversible bias. In *Norbert*, the court held that, although the judge’s questions were excessive and some were improper, there was no bias because the judge’s questioning did not affect the outcome of trial or prejudice the losing party. *Id.* at 547–48. The ultimate question in determining bias is whether a parent is denied “impartial justice” through judicial questioning that affected the ultimate outcome of trial. *See id.* at 548. Accordingly, the Appeals Court will find judicial bias if it determines that a judge’s questioning of witnesses was excessive or improper *and* that it prejudiced the losing party. *See id.*; *see also Adoption of Seth*, 29 Mass. App. Ct. 343, 351 (1990) (holding that if the judge was “overzealous” in the questioning of the psychiatrist, the error was harmless because no prejudice resulted).

Here, Judge Doe’s questions were biased and prosecutorial, if not in fact then at least in appearance. *See Tia*, 73 Mass. App. Ct. at 122. They moved beyond clarification into an insistence that one of Mother’s witnesses was not credible. *See Norbert*, 83 Mass. App. Ct. at 547. Furthermore, the disproportionate number of questions asked by the judge—750 questions compared to 560 total questions from Mother’s counsel, counsel for DCF, and child’s counsel—also suggests improper judicial takeover of questioning. *See Norbert*, 83 Mass. App. Ct. at 547; *see also Campbell*, 371 Mass. at 45. Finally, the judge’s termination findings were based on his discrediting of Ms. Smith (Mother’s group facilitator), answers he elicited from Mother, and his rehabilitation of Mr. Morrison (the DCF social worker). These findings prejudiced Mother. There is, therefore, a strong argument that the judge’s questioning here constituted reversible bias. *See id.*

1. **Judicial questioning constructively denies a parent her right to counsel if it interferes with counsel’s trial strategy such that counsel cannot provide reasonably competent representation.**

Indigent parents and children in child welfare cases have a right to counsel. *Dep’t of Public Welfare v. J.K.B.*, 379 Mass. 1, 6 (1979); *Adoption of Meaghan*, 461 Mass. 1006, 1007 (2012); G.L. c. 119, § 29. The right to counsel means the right to the effective assistance of counsel. *Care and Protection of Stephen*, 401 Mass. 144, 149 (1987) (“The right to counsel is of little value unless there is an expectation that counsel’s assistance will be effective”).

In some cases, the circumstances surrounding a trial may warrant a presumption of ineffective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 659–60 (1984) (holding that where the likelihood that an attorney could perform competent representation is remote, the trial itself is inherently unfair). “Constructive denial of counsel” occurs where “the defendant essentially is denied the assistance of any qualified attorney who could theoretically represent him in a way that does not undermine our trust in the adversary system.” *Commonwealth v. Valentin*, 470 Mass. 186, 197 (2014). This concept is applicable in the child welfare setting. *See Adoption of Valentina*, 97 Mass. App. Ct. 130, 134 (2020) (holding mother was not constructively denied counsel when the trial court refused to allow the fifth attorney appointed to withdraw per mother’s request on the date of trial); *Adoption of Hermione*, 95 Mass. App. Ct. 1123, \*1 n. 3 (Mass. App. Ct. Rule 23.0) (disagreeing with father’s claim that he was constructively denied counsel; “[c]onstructive denial of counsel occurs when counsel has a conflict of interests; is completely unprepared for the entire trial; or is sleeping or absent. None of these occurred here.”) (citations omitted); *Adoption of Calista*, 98 Mass. App. Ct. 1121, \*4 (Mass. App. Ct. Rule 23.0) (holding that father failed to demonstrate that counsels’ conduct fell so far below standard of acceptable representation as to constitute constructive denial of counsel).

The government constructively denies a person counsel when it interferes with counsel’s ability to make independent decisions about how to represent their client. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Supreme Court has found such interference where a court bars direct examination of a defendant, *see* *Ferguson v. Georgia*, 365 U.S. 570, 593–96 (1961), bars summation at a bench trial, *see* *Herring v. New York*, 422 U.S. 853, 865 (1975), and restricts attorney-client consultations during overnight recesses, *see Geders v. United States*, 425 U.S. 80 (1986). Other kinds of judicial interference at trial, such as actively discouraging competent advocacy, may also render counsel’s assistance presumptively ineffective. “If the state is not a passive spectator of an inept defense, but a *cause* of the inept defense, the burden of showing prejudice is lifted.” (emphasis added)“It is enough that Judge Seraphim by his threats to Clark appreciably reduced the likelihood that Clark would conduct a vigorous defense”).

 Improper or excessive judicial questioning could create circumstances that warrant a presumption of ineffective assistance and, therefore, constitute constructive denial of counsel. *See Cronic*, 466 U.S. at 659–61. Excessive or improper judicial questioning might interfere with counsel’s strategic decisions about how to represent the client. *See* *Strickland*, 466 U.S. at 686 (“Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”). It may interfere with counsel’s strategy or more generally preclude counsel from vigorously conducting a defense at trial. *See Walberg*, 766 F.2d at 1076.

Further, appellate courts are very protective of counsel’s strategic decision-making regarding how, and whether, to question witnesses. *See United States v. Martinez*, 883 F.2d 750, 757 (9th Cir. 1989) (holding that it is primarily the responsibility of counsel, not the judge, to advise a defendant on whether or not to testify); *United States v. Joelson*, 7 F.3d 174, 178 (9th Cir. 1993) (holding that judicial interference with counsel’s strategic decision not to have defendant testify poses a danger to the fundamental fairness of the judicial process). The content and manner of conducting examinations is left to counsel’s tactical discretion, and challenges to counsel’s examination strategies are rarely successful. *See, e.g.*, *Adoption of Ina*, 88 Mass. App. Ct. 1115, \*7 (Mass. App. Ct. Rule 23.0) (2015) (finding that father’s counsel “rigorously” cross-examined witnesses, and no evidence was presented that counsel’s strategy at trial prejudiced father); *see also Valentin*, 470 Mass. at 191 (counsel not ineffective for failing to cross-examine witness concerning particular statement where counsel otherwise conducted thorough impeachment of witness on cross); *Commonwealth v. Key*, 381 Mass. 19, 33 (1980) (“Trial counsel should not be forced to pursue cross-examination of relatively innocuous witnesses in order to avoid later accusations of incompetence”). Finally, except to exclude repetitive or irrelevant testimony, judicial interference with counsel’s strategy for examining witnesses is disfavored. *See United States v. Nobel*, 422 U.S. 225, 241 (1975) (holding that a trial judge has the right to control the scope of witness examinations); *see also* *Commonwealth v. Sylvester*, 388 Mass. 749, 751–52 (1983) (holding that the judge’s conduct interfered with counsel’s ability to put on a full defense where the judge excluded questions put by defense counsel on redirect examination).

Here, the volume and nature of Judge Doe’s questioning of witnesses appears to have affected defense counsel’s ability to competently represent Mother. Judge Doe’s questioning of DCF social worker Morrison, which rehabilitated his credibility, interfered with Mother’s counsel’s strategy for questioning him. *See Strickland*, 466 U.S. at 686; *see also Martinez*, 883 F.2d at 757. The recurring nature of Judge Doe’s interruptions, predominantly during Mother’s cross-examination of DCF witnesses, created circumstances where no attorney could reasonably provide effective assistance of counsel. *See Cronic*, 466 U.S. at 659–61; *Valentin*, 470 Mass. at 197. After a certain point, counsel for Mother no longer felt comfortable raising objections to Judge Doe’s questions, suggesting that the judicial interference impeded his ability to vigorously defend Mother. *See* *Walberg*, 766 F.2d at 1076.

 Furthermore, Judge Doe’s other limitations on questioning created circumstances under which no attorney could perform effectively. Judge Doe’s comment that defense counsel’s questioning of Morrison had been going on “too long” was an imposition of an arbitrary time restraint. *See In Re D.C.*, 200 A.3d at 591*.* Judge Doe’s comments and arbitrary time constraints constructively prevented Mother’s counsel from conducting his examinations in a manner that would allow him to perform as competent counsel. *See id*; *Snow*, 65 P.3d at 768; *see also Sylvester*, 388 Mass. at 752.

Finally, due process requires that parents and children have a right to rebut the state’s adverse allegations regarding parenting. *See* *Adoption of Mary*, 414 Mass. 705, 710 (1993); *see also Adoption of Edmund*, 50 Mass. App. Ct. 526, 530 (2000) (holding that trial judges have a responsibility to ensure that parents have a meaningful opportunity to respond to evidence presented at trial). Judge Doe’s questioning and arbitrary time restraints prevented Mother’s counsel from meaningfully rebutting DCF’s adverse allegations against her. In this regard, the judge deprived Mother of due process.

Mother’s counsel did a poor job at trial, and that poor job prejudiced her case. Judge Doe did not sit idly by while Mother’s counsel was ineffective; he was the *cause* of that ineffectiveness. That is constructive denial of counsel. *See* *Walberg v. Israel*, 766 F.2d at 1076.

1. **To preserve issues of bias or constructive denial of counsel, attorneys must object at trial or otherwise make and present a record of the judicial misconduct.**
	1. **Attorneys should object to improper judicial questioning at trial.**

 To preserve most issues for appeal, counsel must object at trial. *Mary*, 414 Mass. at 711 (citing *Petition of the Dep’t of Social Servs. to Dispense with Consent to Adoption*, 392 Mass. 696, 701 (1984)). Attorneys should object to all improper questions asked by a judge. *Commonwealth v. Watkins*, 63 Mass. App. Ct. 69, 73–74 (2005) (holding that counsel’s failure to make timely objections at trial to judicial questioning may limit appellate review for error); *see also* *United States v. Wilson*, No. 98-4094, 1999 U.S. App. LEXIS 2608, at \*5–6 (4th Cir. Feb. 19, 1999) (“The failure of counsel to object during the trial to judicial questioning of a witness precludes appellate review, … , unless the judge’s comments are so prejudicial that they deny a litigant a fair and impartial trial”) (citations omitted). Where the objection concerns the judge’s tone or demeanor, attorneys must note the problem explicitly for the record. *Norbert*, 83 Mass. App. Ct. at 547 (“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 … claim that the judge acted aggressively…. Thus, we view the lack of an objection by counsel as particularly significant…”).

In some cases, the judge’s words themselves may reveal hostility or bias. *See People v. Cole*, 349 Mich. 175, 197–200 (1957) (noting that several interjections by trial judge tended “to belittle defendant’s lawyer in the presence of the jury” or exhibited “rather more emotion on the part of the trial judge than the records seem to warrant”); *see also Alley v. State*, 619 So.2d 1013, 1015 (Fla. Dist. Ct. App. 4th Dist. 1993) (finding that the record contained multiple exchanges suggesting hostility between the trial judge and defense counsel). Counsel may also use available audio or visual recordings at trial to showcase a trial judge’s improper conduct or demeanor. *United States v. Nobel*, 696 F.2d 231, 237 (3rd Cir. 1982) (“Where a videotape or sound recording of the trial is in the appellate record, it may be used to support the claim that a defendant was denied a fair trial by the judge’s actions”).

To preserve the issue of judicial bias, counsel may also be required to move for a judge’s recusal during trial. *See Demoulas v. Demoulas Super Mkts.*, 428 Mass. 543, 547–48 (1998) (holding that recusal motions filed after trial are presumptively untimely absent a showing of good cause for tardiness); *see also Feeney v. Feeney*, 81 Mass. App. Ct. 1118, \*2 (2012) (Mass. App. Ct. Rule 23.0) (holding that husband’s claim of judicial bias was moot because husband did not move for recusal until after the issuance of the decisions challenged in his appeal); *Meyer v. Daniels*, 90 Mass. App. Ct. 1106, \*2 (2016) (Mass. App. Ct. Rule 23.0) (holding appellant’s claim of judicial bias as untimely for failure to move for recusal where there was ample opportunity to do so). One must seek disqualification of a judge at the earliest moment after becoming aware of facts demonstrating the basis for the disqualification. *Demoulas Super Mkts.*, 428 Mass. at 548 (citing *United States v. Kelly*, 519 F. Supp. 1029, 1050 (D. Mass. 1981)).

 Here, counsel for Mother properly objected to a number of improper questions made by Judge Doe. Counsel also timely objected to several lines of questions put to witnesses by the judge, and objected at one point that he could not do his job if the judge persisted in interfering with his questioning strategy. Therefore, the issues of judicial bias and constructive denial of counsel were likely fully preserved for appeal. *See Mary*, 414 Mass. at 711. Furthermore, counsel for Mother, during his objections, referred to Judge Doe’s negative tone and demeanor at trial. *See Norbert*, 83 Mass. App. Ct. at 547. While these recorded impressions may be sufficient to preserve objections to tone, appellate counsel could also request audio/visual recordings of the trial to show Judge Doe’s hostile and aggressive demeanor and tone of questioning. *See Nobel*, 696 F.2d at 237.

However, because counsel for Mother did not move for Judge Doe’s recusal immediately after Judge Doe’s improper questioning/conduct, counsel likely waived the argument that the judge should have recused himself. *See Demoulas*, 428 Mass. at 548.

* 1. **In exceptional circumstances, an appellant can raise issues of judicial bias even if counsel did not object at trial.**

An otherwise unpreserved issue in a child custody case may be considered on appeal where the court finds that an error committed at trial was “inconsistent with substantial justice.” *White v. White*, 40 Mass. App. Ct. 132, 133–34 (1996) (despite lack of objection, overruling based on improper judicial conduct; judge’s decisions on custody and visitation were based in large part on information received during improper in camera interview of adult child of litigants). Massachusetts appellate courts may reach an issue of judicial bias despite a lack of objection at trial where there are “exceptional circumstances,” *see Adoption of Mary,* 414 Mass. at 712, where counsel can show a “substantial risk of a miscarriage of justice,” *see Adoption of Vince*, 86 Mass. App. Ct. 1113, \*4 (2014) (Mass. App. Ct. Rule 23.0),or where a meritorious due process argument might otherwise escape review. *Norbert*, 83 Mass. App. Ct. at 545 (“[G]iven the serious nature of the case, coupled with the fact that *due process governs these proceedings*, we believe that it is appropriate to consider the issue even though the claim [of bias] is untimely”) (emphasis added); *Adoption of Iliana*, 96 Mass. App. Ct. 397, 406 n. 26 (2019) (considering Mother’s argument on appeal that she was denied a fair trial because of judge’s partiality despite issue not being raised below).

Further, counsel may not need to object at trial where objecting would have been difficult or would not have been tolerated by a judge. *See Norbert*, 83 Mass. App. Ct. at 551 (Hanlon, J., dissenting) (“[F]ailure to object to the *judge’s* questions, or to the manner in which he conducted the trial, cannot carry the same implication of acquiescence as a failure to object to the questions of opposing counsel”) (emphasis in original) (citing *Commonwealth v. Ragonesi*, Mass. App. Ct. 320, 322 n.4 (1986) (“It should be apparent to anyone who reads the transcript that the judge would not have tolerated any further objection.”)); *see also People v. Roby*, 145 Mich. App. 138, 144 (1985) (“When the court engages in extensive interrogation of witnesses, the probability of asking questions improper in form or scope increases; yet, the attorneys are almost certainly more reluctant to object to the court’s improper questions than to an adversary’s”); *In re Dependency of B.W.K.*, No. 76675-9-I, 2018 Wash. App. LEXIS 2460, at \*15–16 (Oct. 29, 2018) (“When a judge in a bench trial engages in this type of argumentative questioning, it puts counsel in an extremely difficult position—object to the inappropriate questions and risk angering the trier of fact, or remain silent to minimize the risk of an adverse outcome”).

Here, counsel eventually refrained from objecting after being admonished by Judge Doe. As such, issues of judicial bias arising in the later parts of trial may not have been preserved. *See Mary*, 414 Mass. at 711.However, Judge Doe’s comment—made while overruling an objection from Mother’s counsel—that he was not biased and could “ask whatever he wanted” provides a reasonable argument that any further objections to his questions would not have been tolerated or would have prejudiced Mother. *See Norbert*, 83 Mass. App. Ct. at 551*.* Appellate counsel can strengthen this argument by pointing to trial counsel’s earlier objections referencing Judge Doe’s tone and demeanor; counsel should also move to include audio of the trial. *See id. at 547*; *Nobel*, 696 F.2d at 237.

**Conclusion:**

Although judges can question witnesses at trial, this power is not unlimited. Judicial questioning is permissible only to the extent that it clarifies confusing testimony and does not devolve into judicial takeover. Judicial questioning shows bias where a judge improperly interrogates witnesses in a partisan manner, which creates the appearance of bias even where there is no actual bias. Biased questioning alone, however, is not enough to warrant reversal; the judge’s improper questioning must prejudice the parent or child by affecting the outcome of the trial. In this case, Mother was probably prejudiced by the judge’s improper questionings, as the termination findings were based on facts elicited from witnesses by Judge Doe’s questions.

Further, even if the judge’s questions are not biased or improper, excessive questioning may constructively deny a parent or child the right to counsel by unduly interfering with counsel’s examination strategy. Here, the judge’s questions may well have constructively denied Mother counsel. Her counsel did a poor job *because* the judge prevented her from strategically eliciting testimony and effectively questioning witnesses during trial. Trial counsel even objected to the judge, “I can’t do my job as Mother’s lawyer if you take over my questioning.”

In order to ensure that issues of judicial bias are preserved for appeal, counsel must object in a timely manner to a judge’s improper questions. To preserve the issue of bias, counsel must also move to recuse as soon as the judge exhibits bias. There may be extraordinary cases where counsel is justifiably apprehensive about objecting. In such cases, judicial bias may be raised on appeal even absent an objection if counsel can also show that objections were discouraged by the judge or fruitless. Objection also may not be necessary where the judge’s conduct presented a “substantial risk of miscarriage of justice” or substantial injustice to the parent. As a transcript may not fully capture a judge’s tone or demeanor, counsel should raise the issue in detail in their objections; better yet, counsel should include in the record any audio/visual recordings that demonstrate the judge’s hostility. Here, counsel made timely and detailed objections, but never moved for Judge Doe’s recusal. This failure may have waived the issue of bias. To raise the issue on appeal, counsel must therefore argue that Judge Doe’s actions violated Mother’s due process rights and created a substantial risk of injustice against Mother.