Judging is a craft. Like any other, it is learned by observing more experienced craftsmen, imitating them, and ultimately identifying the discrete skills at the root of their discipline and endeavoring to achieve them. In the early Sixties when I began practicing law, I knew I eventually wanted to become a judge. I clerked for two judges before serving for a brief time as a prosecutor and then as a public defender. I listened to the tales of older lawyers and found role models to emulate. I spent a lot of time in court and in judges’ chambers, watching, asking questions and practicing newfound skills. Always I imagined what I would do in a case if I were the judge.

As I gained experience, I became more critical. I saw the routines judges followed and how some judges were better at some things than others. Each had a style of judging that included some practices I wanted to adopt and others I would reject. Preparedness was essential, but candor was priceless. I greatly admired the judge who admitted he had not had time to read the briefs before oral argument and proceeded to do so while we waited. When he finally looked up, we knew we had his full attention. I also saw some judges elevate form over substance. Punctuality is the keystone to the efficient administration of a docket, but life holds the trump card. I watched a judge excoriate a lawyer for being a few minutes late for a hearing without taking the time to learn that he had just experienced a death in his family. For other judges, whipping lawyers into shape was not simply a prerogative, but a mission. Nor were litigants exempt from being berated for their role in inconveniencing the court or otherwise gumming up the works.

Most revealing, however, was how judges sentenced in criminal cases. Indeed, sentencing loomed over the entire process. It is one thing to rule on a civil case, no matter how complex, but sentencing—that’s deeply visceral. I have never met a judge who enjoyed sentencing. I have known many who loathe it. No judge of my acquaintance is indifferent or even objective about it. The best description of the judicial experience of sentencing was put simply and directly by a colleague of mine: It is stark.

After sixteen years of practicing law, I was appointed to the federal bench. I soon learned that no two sentencings are alike. They might have common threads and themes, and policies and protocols are designed to channel the process toward uniformity, but uniform sentencing is a myth. In each instance a unique individual is at the focal point and what is just for one is not necessarily just for another.

Looking back on my thirty years on the bench, I know I have meted out sentences that have approached justice. I sentenced a man to 325 years in prison rather than life so that he would never be eligible for parole. I have no regrets about it. He went on to kill another inmate behind bars and avoided the death penalty that time around by an eleven-to-one verdict. There are other occasions, however, when I missed by a mile.

I approached sentencing as I had learned from observing judges when I was a lawyer. If a defendant was heading to prison, the judge would say little before imposing the sentence. If, however, the defendant was to receive probation, the crustier judges felt called upon to deliver a stern lecture. The standard spiel was, “You are the luckiest mutt in the kennel, but if I ever see you in here again, I’ll put you so far in the pokey the warden will have to pipe air to you.”
point, I assume, was to drive home the fact that probation was not to be trivialized and could indeed be revoked if the probationer did not comply strictly with its terms. It was just such a case that made me realize how callow my apprenticeship was and that much of what I had learned was wrong. In my fourth year on the bench, I discovered how stark sentencing can be.

In the last century, the small towns and farms of the plains states have offered less and less for the young. Farms have been consolidated by corporations and products are transported long distances to processing and distribution centers. As the population dwindles, Main Street’s stores and banks disappear and prospects for employment grow increasingly dim. Ever since the dust bowl days of the Great Depression, many of these young people have migrated to Denver filled with hope, looking for a brighter future and an even more exciting present.

One such young woman came to Denver from a small town in western Nebraska, took a course at a business school and found a job through an employment agency as a teller in one of Denver’s large downtown banks. Along with newfound friends, she rented an apartment in a large complex filled with other young singles. The rent was high, but so was the occupancy, and expenses were shared. Most of these young people found their life’s companion and moved on. This young woman was not so lucky. She ended up in court.

Starting salaries at the banks were low, but working conditions were good and there were many opportunities to meet successful people. The bank advised new tellers that they were professionals who were fortunate to work at such a prestigious institution. In orientation these young people were told they must meet grooming and dress standards. Tickets to bank-sponsored promotional events were handed out. No one was required to attend, but who would want to miss out on the excitement and the chance to rub shoulders with celebrities, and possibly some rising young executives?

After a few months, when the employment agency’s commission was fully paid from salary deductions, the bank advised that because of its very special relationship with a preferred corporate client, low-interest auto loans were available to employees. The down payment was minimal, and a call home to Nebraska with a promise of more frequent visits was all it took for this young woman to get that brand new car. She could not resist, and her parents could not say no to her dream.

Shortly after she bought the car, inflation hit Denver hard. Apartment rental rates went up. Gasoline prices skyrocketed, but tellers’ salaries remained steady. Other expenses were mounting. A roommate left and the young woman’s share of the monthly rent increased. She began to falsify entries to reflect payments on her auto loan. Because banks watch carefully for that sort of activity, her embezzlement was quickly discovered. She was arrested and accused of a multitude of offenses. She readily confessed. Bank officials were indignant at the betrayal by a trusted employee for whom they had done so much and cared so greatly. They demanded prosecution. Her car was repossessed and a deficiency declared.

A public defender was appointed and made the best deal for her that he could. A bank officer was present at the arraignment, but the young woman sat alone as she waited for her public defender to handle another case on the docket. In the days before sentencing guidelines, when a young person with no prior record appeared in federal court and only a modest amount of money was involved, the custom was to place the defendant on probation and order restitution. The felony conviction would automatically bar her from ever again working in a bank.

A detailed probation report was prepared and on the day set for sentencing the young woman appeared. The courtroom spectator section was filled with her parents, brother and sisters, aunts, uncles, and other relatives and friends from home. All had driven from Nebraska to be with her. No one from the bank was present.

“Have you anything to say before I pronounce sentence?” I asked. After listening to her tearful response, I descended upon her. “Look around you,” I thundered. “Do you see what shame you have brought on your family and yourself? People trusted you and you have thrown that trust away. Now you will have to earn that which before was freely given to you. I never want to see you in this courtroom again, and if you do come back it will be just a short stop on your way to prison. I’m placing you on probation for three years and ordering you to pay full restitution to the bank before you are discharged. Do you understand?”

With that, she let out a bleat like a wounded rabbit. Her parents rose to meet her, murmuring “Thank you, Judge, thank you.” As I declared a recess I looked down on the well of the court and saw a small puddle. The young woman had urinated on the floor.

I left the courtroom and returned to my chambers. I slammed the door behind me. I looked at the black robe I was wearing. I had disgraced it. I knew the factors that had merged to bring that young woman before me. I knew her remorse was genuine. I knew her family’s worst fears when she had left home for the big city had been realized, and I knew full well that none of the bankers would ever understand just how complicit they had been in this sorry episode. Yet it was I who had committed the gravest injustice.

I look back on this incident with deep shame. It taught me that justice is never simple, nor is it ever one-sided. Law is not synonymous with justice, and craft has little to do with it either. Indeed, the law sometimes works against the possibility of achieving justice. The obligation of a trial judge is to effect some degree of compassion in the processes of the law, recognizing always that the law seldom provides a complete answer. It is not the defendant who should be humbled by the imposition of a sentence. It is the judge.

A few years after this experience, I was one of the first district judges to declare the U.S. Sentencing Reform Act of 1984 unconstitutional on grounds that sentencing according to the oxymoronic mandatory guidelines was not a judicial act, but a clerical one. Muddled language invites bad logic, but the Supreme Court thought otherwise. By an unrelated circumstance not long afterwards, I became a senior judge with the prerogative to decline criminal case assignments. As a consequence I never sentenced a defendant pursuant to the guidelines. Last year when the Supreme Court ruled the guidelines advisory rather than mandatory, sentencing again became a judicial act and I returned to the criminal docket. I brought with me a new understanding of the meaning of the robe.

The robe is black and unadorned to subordinate the personality of the person wearing it. It is not just a symbol of authority; it is a uniform of anonymity.

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Federal Hearsay Rule

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The line between proper application of Rule 703 and the impermissible, substantive use of out-of-court declarations is often not easy to draw. But the consequences of not recognizing the issue can be fatal. If the expert adds nothing to the out-of-court statements on which he purports to be basing his opinion other than repeating them to the jury, the hearsay rule comes into play. In that event, the underlying declarations are really playing no role in the opinion, and the only purpose they can serve is to bring before the jury inadmissible hearsay. United States v. Dukagjini, 326 F.3d 45, 57-59 (2d Cir. 2003). See generally 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6273 (1997); Ryan v. Miller, 303 F.3d 231, 248 (2d Cir. 2002); Mike’s Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398 (6th Cir. 2006)(impermissible for expert to testify as to degree of similarity between his conclusions and those of a non-testifying expert); United States v. Lee, 502 F.3d 691 (7th Cir. 2007)(same); Hutchinson v. Groskin, 927 F.2d 722 (2d Cir. 1991)(expert testimony that letters from other experts were “consistent” with his opinion was an impermissible “tactic” to evade the hearsay rule).

Another area of confusion involving the hearsay rule is the admissibility of prior out-of-court statements that are consistent with a witness’s direct testimony. Diaries, letters and reports of varying kinds have long been a popular form of prior consistent statements that lawyers were fond of using on the theory that a statement that is consistent with a witness’s direct testimony enhances the credibility of the witness. The argument used to avoid the hearsay rule was that the testimony was not offered for the truth of the matters asserted. Most courts refused to allow this corroborative use of prior consistent statements on the ground that the mere repetition of a statement at some earlier time did not make it more likely true. Where, however, the cross-examiner charged or suggested that the witness’ trial testimony resulted from recent fabrication or improper influence or motive, it was permissible on redirect to introduce an out-of-court statement that was consistent with the direct examination so long as it antedated the suggested motive to falsify. The prior consistent statement was admitted not for the truth of the matter asserted, but solely to rebut the charge of recent fabrication. United States v. DeLaMotte, 434 F.2d 289, 293 (2d Cir. 1971); IV J. Wigmore, Evidence §1122 (Chadbourn rev. 1972). Of course, it was generally acknowledged to be a fiction that the jury could use the evidence for anything other than its truth.

Recognizing this, the Federal Rules of Evidence treated prior consistencies differently from the way in which the common law treated it. While retaining the common law’s timing requirement, which prohibits prior consistencies on direct examination, Rule 801(d)(1)(B) treats such statements as non-hearsay where the declarant testifies at the trial and is subject to cross-examination concerning the statement. A consistent statement meeting the requirements of the Rule is thus placed in the same category as a declarant’s inconsistent statement made under oath in another proceeding, or prior identification testimony, or admissions by a party opponent and certain kinds of co-conspirator’s statements. See Rule 801(d); Tome, 513 U.S. at 157.

Prior consistencies may be used for rehabilitative, non-substantive purposes where the impeachment is on a basis other than a suggestion of recent fabrication or improper influence or motive, but only if the statements have some rebutting force beyond the mere fact that the witness has previously made a statement consistent with his trial testimony. Cf. Tome, 513 U.S. at 157 (“prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because he has been discredited”). Prior consistent statements carry little rebuttal force with character impeachment by showing misconduct involving dishonesty (Rule 608(b)), prior convictions (Rule 609), or bad reputation for truthfulness (Rule 608(a)). In those cases, it may properly be said that “the defense does not meet the assault.” Tome, 513 U.S. at 158. Where the witness is impeached with a prior inconsistent statement, a prior consistent statement may be admissible if it possesses some rebutting force beyond the fact that the statement was made. Gauthier v. Mekusker, 186 Fed.Appx. 903 (11th Cir. 2006); 5Weinstein’s Evidence §801.22[2]-[3]. Prior consistent statements for rehabilitation should be allowed where they bear upon whether, “looking at the whole picture, there was any real inconsistency.” United States v. Rubin, 609 F.2d 51, 70 (2d Cir. 1979)(Friendly, J., concurring).

Properly analyzed, hearsay questions are generally not as difficult as they first appear. At bottom, they involve the same basic inquiries: what is the out-of-court statement offered to prove; is the claimed purpose really relevant or is it merely a subterfuge to dodge the hearsay rule and get prejudicial evidence before the jury; is there an alternative and less potentially prejudicial method of proof; and perhaps most important, can the jury discriminate between the impermissible hearsay and the non-hearsay purpose for which the evidence is admitted. Approaching hearsay problems from this common sense vantage point will demystify the hearsay rule and will help you persuade a judge to reach the right result.

From the Bench

(Continued from page 4)

At the moment of sentencing, it is the judge’s moral accountability that is on trial, not the defendant’s. When a judge is fulfilling the oath of office, the thought that must be foremost in mind is that authority is easily abused. It is most often abused when it is exercised without restraint. It is not the job of a judge to shame litigants into being better persons, nor to scold litigators into being better lawyers, nor to make either grateful for the small mercies extended to them. We judges acquire our office as a result of circumstance, fortune and training. We do not serve by divine right.

I wish I could say that each time I don the robe I remember that young woman and the humiliation and degradation I foisted on her, but I do not always think of it. It is simply too painful. I can say, however, that I make my best decisions when I resolve to keep my personal gloss out of it. I owe that young woman this confession—and much more.