

February 2017

American College of Trial Lawyers Report and Recommendation on Disruption of the Judicial Process

Follow this and additional works at: <http://scholarship.law.stjohns.edu/tcl>

 Part of the [Judges Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

(2017) "American College of Trial Lawyers Report and Recommendation on Disruption of the Judicial Process," *The Catholic Lawyer*: Vol. 16 : No. 3 , Article 6.

Available at: <http://scholarship.law.stjohns.edu/tcl/vol16/iss3/6>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.

AMERICAN COLLEGE OF TRIAL LAWYERS REPORT AND RECOMMENDATION ON DISRUPTION OF THE JUDICIAL PROCESS[†]

PREAMBLE

THE MEMBERS of the American College of Trial Lawyers are deeply concerned by the tactics of trial disruption which on occasion have converted trials into spectacles of disorder and even violence.

These tactics, involving contemptuous and obscene language and other techniques deliberately designed to break the judge and frustrate the judicial process, have been employed by defendants and tolerated and encouraged by some of their counsel. Indeed, some counsel appear to have been active participants in the disruption.

Prosecutors also from time to time have been guilty of courtroom misconduct.

In some instances judges have overreacted to these tactics.

The cure for such aberrations lies within the judicial system itself. The courts of this country have sustained and enforced the Constitution

[†] This article is a reprint of the report issued by the Committee on Disruption of the Judicial Process of the American College of Trial Lawyers. Members of the committee included Messrs. Hicks Epton, Lewis F. Powell, Jr., C. Brewster Rhoads, Simon H. Rifkind, Whitney North Seymour, Edward Bennett Williams, and Delmar Karlen. Following the Preamble, those principles which are recommended to be applied to avert threatened disruption of the judicial process are printed in bold face type, followed in each case by a brief commentary. Minor adaptations have been made to conform the Report to the uniform system of citation.

and the Bill of Rights, and their record—especially in times of stress and turmoil—is proof that the rule of law affords the best hope for the protection and extension of individual rights.

These rights—which include the most basic constitutional rights of all citizens—will be endangered if the judicial process of this country is not safeguarded against those who would defile and destroy it.

The foregoing considerations led to the creation and appointment of a committee to study and report on measures which should be taken to guard against such disruptions in the future. The Supreme Court's recent decision in the *Illinois v. Allen*¹ case is a substantial step in this direction. But there remain problems involving the duties of lawyers and judges which need to be dealt with. The Committee's recommendations, appended hereto, have been approved by the Regents of the American College of Trial Lawyers.

It is appropriate that these recommendations be made known now. Although disruptive tactics have occurred occasionally in the past, they now threaten to become systematized and popularized among small but militant segments of the profession and the general public. Recently lawyers responsible for courtroom disruption have been warmly welcomed by university students—even law students—as if, somehow, their conduct was responsible and heroic. Little thought seems to have been given to the fact that aside from the violation of traditional standards of professional duty,

such conduct prejudices the interests of the clients, however much they may encourage and participate in it. Furthermore, it prejudices others who may be tried in the future, because members of the public are revolted by this degradation of the courts and the precious right of fair trial.

Those who can take a long, reflective view of the ultimate consequences of such activities must be aware that such courtroom tactics not only demean the judicial process, but also are extremely prejudicial to the rights of minorities and of unpopular persons and causes generally.

I

EQUAL JUSTICE FOR ALL

Courts exist to administer equal justice to the rich and the poor, the good and the bad, the strong and the weak, the native born and the foreign born of every race, color, nationality and religion, to men and women of every shade of political belief, to those who enjoy popular favor and to those who are popularly despised, feared or hated.

All persons who come before the courts are entitled to vigorous and zealous representation within the law by qualified counsel—representation which is sanctioned, encouraged and protected by the judiciary and the organized bar.

COMMENTARY

The first paragraph is a paraphrase and expansion of a statement in the majority opinion in *Illinois v. Allen*.² The expansion

¹ 397 U.S. 337 (1970).

² *Id.*

is predicated on cases too numerous to mention which spell out the concepts of due process and equal protection under the fifth and fourteenth amendments to the United States Constitution.

The second paragraph is a reaffirmation of the legal right and moral duty of lawyers to represent unpopular, oppressed, poor or otherwise handicapped clients with the same zeal and vigor that they represent those who are more fortunate. That right and duty is strongly supported by the judiciary and the organized bar.³

II

COURTROOM ATMOSPHERE AND THE RIGHT TO A FAIR TRIAL

In administering justice, courts are required to perform two difficult tasks: discovering where the truth lies between conflicting versions of the facts, and applying to the facts so found the relevant legal principles. These tasks are as demanding and delicate as a surgical operation, and, like such an operation, they cannot be performed in an atmosphere of bedlam.

Unless order is maintained in the courtroom and disruption prevented, reason cannot prevail and constitutional rights to liberty, freedom and equality under law cannot be protected. The dignity, decorum and courtesy which have traditionally characterized the courts of civilized nations are

not empty formalities. They are essential to an atmosphere in which justice can be done.

The right to a fair trial is the most basic of all constitutional guarantees, underlying and conditioning all other legal rights, constitutional or otherwise.

COMMENTARY

The proposed A.B.A. Standards for Criminal Justice Relating to the Prosecution and Defense Functions make these observations:

Human experience with deliberative and judicial processes demonstrates that certain rules or standards of conduct are needed to ensure that, notwithstanding differences in their objectives, contending advocates will work in harmony for what is their common cause, the administration of justice. They must not allow themselves to be diverted by irrelevant, extraneous or disrupting factors. Basic to an efficient and fair functioning of our adversary system of justice is that at all times there be an atmosphere manifesting mutual respect by all participants. This can be achieved only by strict adherence to firm standards of what may be called, for want of better terms, professional etiquette and deportment. There is no place and no occasion for rudeness or overbearing, oppressive conduct. The control of courtroom decorum lies in the advocates' acceptance of standards of elementary courtesy and politeness in human relations, but ultimately the presiding judge has the responsibility to govern the conduct of all persons in the courtroom, and especially the conduct of the advocates who, as officers of the court, are subject to the court's control.

The objective of such standards is to keep the understandably contentious spirit of the opposing advocates within appro-

³ See A.B.A. Code of Professional Responsibility, EC 2-27; Code of Trial Conduct of the American College of Trial Lawyers, Rule 3; Proposed A.B.A. Standards for Criminal Justice Relating to the Defense Function, Standard 1.5.

priate bounds and constructive channels so that the issues may be resolved on the merits and the proceedings not be diverted by the intrusion of factors such as personality or acrimonious exchanges between the advocates or between advocates and the witnesses, or play-acting in an effort to sway jurors by other than legitimate evidence. 'Baiting' of witnesses of the other side, or of the trial judge, blurs and confuses the very issues which the trial is intended to sharpen and clarify. Lawyers must expect that every intrusion of bad manners or other rudeness into a trial will be dealt with swiftly and sternly by the presiding judge. Necessarily, the 'ground rules' of professional conduct must be known by counsel and violations of the rules made the subject of disciplinary action by the courts and bar associations.

The same considerations which call for certain standards of conduct for advocates require that the judge should at all times maintain a scrupulously neutral and fair attitude; deviations from standards of appropriate judicial conduct should be made part of the record so as to be brought to the attention of reviewing courts.⁴

The relative importance of the right to a fair and orderly trial as compared to other legal rights has long been recognized. It was well stated by Lord Justice Salmon in a recent English case involving the disruption of a London courtroom by Welsh university students singing Welsh songs, shouting slogans and distributing pamphlets. He said:

Every member of the public has an inalienable right that our courts shall be left free to administer justice without ob-

struction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty.⁵

III

THE LAWYER'S OBLIGATIONS

A lawyer has these professional obligations:

- (a) to represent every client courageously, vigorously, diligently and with all the skill and knowledge he possesses;**
- (b) to do so according to law and the standards of professional conduct as defined in codes and canons of the legal profession;**
- (c) to conduct himself in such a way as to avoid disorder or disruption in the courtroom;**
- (d) to advise any client appearing in a courtroom of the kind of behavior expected and required of him there, and to prevent him, so far as lies within the lawyer's power, from creating disorder or disruption in the courtroom.**

A lawyer is not relieved of these obligations by any shortcomings on the part of the judge, nor is he relieved of them by the legal, moral, political, social or ideological merits of the cause of any client.

⁴ Commentary to Standard 7.1, at 257-58.

⁵ *Morris v. Master of the Crown Office*, [1970] 2 W.L.R. 792, 800-01 (C.A.).

COMMENTARY

The prosecuting attorney and the defense counsel have distinct although closely related functions and obligations. As the Introduction to the proposed A.B.A. Standard for Criminal Justice Relating to the Defense Function states:

There is no responsible challenge to the view that the basic ethics of defense and prosecution advocates are the same, even though the roles and functions of the two differ, and that each must perform his role as a professional advocate within the rules of law and standards of professional ethics. Defense counsel and prosecution alike have duties higher than "winning the case. . . ."⁶

Defense Counsel

The commentary in support of Standard 1.1(b) of the proposed A.B.A. Standards for Criminal Justice Relating to the Defense Function is a restatement of long standing traditions of the Anglo-American legal profession. It states:

Advocacy is not for the timid, the meek or the retiring. Our system of justice is inherently contentious in nature, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer have the urge for vigorous contest. Nor can a lawyer be halfhearted in the application of his energies to a case. Once he has undertaken the case, he is obliged not to omit any essential honorable step in the defense, without regard to his compensation or the nature of his appointment. . . .⁷

The same thought is expressed in the

⁶ Proposed A.B.A. Standards for Criminal Justice Relating to the Defense Function, at 145.

⁷ *Id.* at 174.

English Guide to Conduct and Etiquette at the Bar in this language:

According to the best traditions of the Bar, a barrister should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person.

There are limits to what lawyers may do in representing their clients which have long been recognized and respected by virtually all members of the legal profession.⁸

The proper role of a defense lawyer is stated in the proposed A.B.A. Standards for Criminal Justice Relating to the Defense Function as follows:

From time to time over the past one hundred years or more, in both England and America, an occasional voice is raised advocating what has come to be known as the 'alter ego' theory of advocacy. The thesis depicts defense counsel as an agent permitted, and perhaps even obliged, to do for the accused everything he would do for himself if only he possessed the necessary skills and training in the law; in short, that the lawyer is always to execute the directives of the client. *This spurious view has been totally and unequivocally rejected for over one hundred years under canons governing English barristers and is similarly rejected by canons of the American Bar Association and other reputable professional organizations.* (Italics sup-

⁸ See A.B.A. Code of Professional Responsibility, DR 7-102(A) (7) & (8), EC 7-5, 7-10, 7-17, 7-19, 7-22; Code of Trial Conduct of American College of Trial Lawyers, Preamble, Rules 16 & 18; Proposed A.B.A. Standards for Criminal Justice Relating to the Defense Function, 1.1(c) & (e), 1.2(c), 1.3, 3.7(6), 7.1(c) & (d), 7.5(b).

plied) It would be difficult to imagine anything which would more gravely demean the advocate or undermine the integrity of our system of justice than the idea that a defense lawyer should be simply a conduit for his client's desires. As intermediary, counsel expresses to the court objectively, in measured words and forceful tone, what a particular defendant may be incapable of expressing himself simply because he lacks the education and training. . . .

As in other contexts of human endeavor, the intermediary brings to the controversy an emotional detachment which permits him to make a more dispassionate appraisal. He translates the desired course of action into those steps which the form and procedure of the system permit and professional judgment dictates. He channels the controversy into the established mode of legal procedure and deals with the other participants in the process—the prosecutor, the judge—on the level of professional understanding of the rules and their respective roles. When the lawyer loses that detachment by too closely identifying with his client, a large measure of the lawyer's value is lost; indeed he then suffers some of the same disabilities as an accused acting as his own counsel.⁹

The proposed Standards also make it clear that the lawyer, not his client, is master of trial strategy and tactics:

The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.¹⁰

The Prosecuting Attorney

Prosecuting attorneys are held to courtroom standards at least as high, perhaps higher, than those which govern defense counsel. The role of the prosecutor is succinctly summarized in the Code of Professional Responsibility as follows: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. . . ."¹¹

Expanding on this theme, a commentary to the proposed A.B.A. Standards for Criminal Justice Relating to the Prosecution Function states:

Although the prosecutor operates within the adversary system, it is fundamental that his obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. ABA Code EC 7-13. One of the great traditions of the profession is exemplified in the conduct of the late Homer Cummings while a Connecticut prosecutor. Upon discovery of facts which cast grave doubt on the guilt of the accused, he brought all the details to the attention of the jury. The resulting acquittal of an innocent accused vindicated the processes of justice. . . .¹²

and further:

The legal profession must develop a new and acute awareness of the importance of a vigorous, fair and efficient prosecution system and give a high priority to sponsorship and support of those measures necessary to implement this objective. For his

⁹ Proposed A.B.A. Standards for Criminal Justice Relating to the Defense Function, at 146-47.

¹⁰ *Id.* Standard 5.2(b).

¹¹ A.B.A. Code of Professional Responsibility, EC 7-13.

¹² Proposed A.B.A. Standards for Criminal Justice Relating to the Prosecution Function, at 44.

part, it is the duty of the prosecutor to become intimately familiar with and adhere to the legal and ethical standards governing the performance of his official duties. Like other lawyers, he is subject to disciplinary sanctions for conduct prohibited by applicable codes and canons. . . .¹³

The proposed Standards 5.2(a), (b) and (c) spell out the restrictions on the courtroom conduct of the prosecutor in these terms:

The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom.

When court is in session the prosecutor should address the court, not opposing counsel, on all matters relating to the case.

It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel.

IV

THE JUDGE'S OBLIGATIONS

A judge has these professional obligations:

- (a) to consider objectively any challenge of his right to preside; to deny it courageously if the challenge is unfounded; to allow it if it is well founded; and to disqualify himself without challenge if he is biased or plausibly may be suspected of bias;**

- (b) to recognize the obligation of every lawyer to represent his clients courageously and vigorously, and to treat every lawyer with the courtesy and respect due one performing an essential role in the trial process;**

- (c) to avoid becoming personally involved in any case before him, to preside firmly and impartially, and to conduct himself and the trial in such a way as to prevent, if possible, disorder or disruption in the courtroom.**

He is not relieved of these obligations by any shortcomings on the part of any lawyer, or by the legal, moral, political, social or ideological deficiencies of the cause of any litigant.

COMMENTARY

That a judge has reciprocal obligations, paralleling and complementing those of the lawyers is beyond question. Rule 18(a) of the Code of Trial Conduct of the American College of Trial Lawyers states:

During the trial, a lawyer should always display a courteous, dignified and respectful attitude toward the judge presiding, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. The judge, to render effective such conduct, has reciprocal responsibilities of courtesy to and respect for the lawyer, who is also an officer of the court. . . .

Similarly, Canon 10 of the A.B.A. Canons of Judicial Ethics provides:

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appear-

¹³ *Id.* at 45.

ing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

And Canon 15 further provides:

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

V

CONTEMPT POWER

The power of a judge to punish contempt committed in his presence is not designed to protect his own dignity or person, but to protect the rights of litigants and the public by ensuring that the administration of justice shall not be thwarted or obstructed.

A trial judge has power to punish summarily for contempt any lawyer who in his presence willfully contributes to disorder or disruption in the courtroom. The judge may exercise this power without a jury, without making a new record and without referring the matter to another judge. He may do so at any stage of the proceedings without waiting for their conclusion, and he may do

so as many times as appears necessary to ensure fair and orderly proceedings.

COMMENTARY

In the recent English case mentioned earlier, Mr. Justice Salmon said:

The archaic description of these proceedings as "contempt of court" is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented. . . .¹⁴

This puts the contempt power into proper perspective.

Some persons are troubled by the thought of a judge acting not only in that capacity but also as accuser and prosecutor in dealing with contempts committed in his presence. They think he may be too much involved personally to be able to act fairly. They would prefer to see a courtroom contempt handled in a later, separate proceeding before another judge, and possibly a jury as well. Failing that, they would prefer the judge in whose presence the contempt was committed to defer action until the main trial was concluded.

Nevertheless, there are strong reasons and ample precedents for allowing and encouraging a judge to act directly and immediately. He has the responsibility to keep

¹⁴ *Morris v. Master of the Crown Office*, [1970] 2 W.L.R. 792, 801 (C.A.).

a case moving and not allow it to terminate prematurely. He has the further responsibility to keep it under control at all times, not allowing it to degenerate into a brawl. A rational inquiry into the facts of a contested case and the application of legal principles to the facts found cannot be carried on in an atmosphere of wild disorder. If a judge allows contempts to accumulate while he strives vainly to maintain order in the courtroom and to move the case forward, he is not discharging his full responsibility to the public or the litigants to ensure a fair and expeditious trial.

A separate, later trial for contempt, even before the same judge, is not an effective way to control a situation when control is needed, but merely an inquiry into whether punishment for past wrongs is merited. It may also raise unnecessary legal problems as to accumulating punishments beyond the limits permitted by summary procedure for a series of contemptuous acts. Finally, it deprives the judge of the ability to increase gradually the pressure on a lawyer to behave himself in court, starting with a warning, then a suspended sentence, then a light but unsuspended sentence, then a heavier and unsuspended sentence.

If a separate, later contempt proceeding is conducted by another judge, it can be extremely wasteful and dilatory. There is no need for a second judicial investigation of what one judge has already witnessed directly. Months may elapse before the contempt trial begins. Then more months may elapse while virtually the whole first trial is reenacted. Not only what was said in the courtroom, but how it was said—the tone of voice, the gestures, the facial expressions of all who participated—may

come into question. Hence it may be impossible to restrict the proceeding to an examination of the trial record alone. Furthermore, if the original trial was disrupted, it is by no means inconceivable that a second trial may be disrupted in much the same way. If the first trial took two or three months, it is unrealistic to expect that the contempt proceedings can be concluded in less time.

Impartial, disinterested protection against the abuse of judicial power can and should be provided by appellate review, not by an automatic new trial before another judge (who in all probability would be a colleague of the judge in whose courtroom the disruption took place). An appellate court has power not only to decide whether any contempt was committed, but also whether the sentence imposed was within the bounds of judicial discretion.¹⁵ It also has power in an appropriate case to remand the proceeding for trial before a different judge.¹⁶

The suggestion has been made that whenever trial disruption is anticipated, another judge should be brought into the courtroom with the sole duty of either observing or handling contempt proceedings. This is a novel idea, calling for a great departure from existing practice and creating substantial difficulties in judicial administration.

¹⁵ See, e.g., *Brown v. United States*, 359 U.S. 41, 52, *reh'g denied*, 359 U.S. 976 (1959); *Green v. United States*, 356 U.S. 165, 188 (1958); *State v. Alexander*, 257 A.2d 778, 781-83 (Me. 1969); *Neering v. State*, 155 So. 2d 874 (Fla. 1963); *People v. DeStefano*, 64 Ill. App. 2d 172, 174, 183, 212 N.E.2d 368, 370, 379 (1965).

¹⁶ See *Offutt v. United States*, 348 U.S. 11, 14-15 (1954); *Cooke v. United States*, 267 U.S. 517, 539-40 (1925).

It might be worth pursuing if there were no other fair and expeditious way of controlling courtroom disruption. But there is such a way: the traditional way, involving summary procedure by the judge in whose presence the contempt was committed, followed by prompt and impartial review. It has been used for centuries and sanctioned by the highest authority.¹⁷

VI

SANCTIONS

In lieu of imposing a traditional fine or imprisonment (for not more than six months), a judge, if permitted by law, may impose any of the following lesser sanctions, which are necessarily implicit in the power to impose imprisonment:

- (a) Termination of the lawyer's right to continue as counsel in the case in which the contempt was committed;**
- (b) Suspension for 6 months or less of his right to appear in any case in the particular court where the contempt was committed; or**
- (c) Suspension for 6 months or less of his right to appear in any court of the jurisdiction where the contempt was committed.**

The judge may stay the execution of any contempt sentence pending appeal.

¹⁷ See *Sacher v. United States*, 343 U.S. 1 (1952); *United States v. Schiffer*, 351 F.2d 91 (6th Cir. 1965); *Morris v. Master of the Crown Office*, [1970] 2 W.L.R. 792 (C.A.).

COMMENTARY

If a judge has inherent power to remove a disruptive defendant from the courtroom,¹⁸ he should have inherent power to deal with a disruptive lawyer in much the same way—by excluding him from further participation in the case. That, in any event, would be the consequence of sending him to jail—a sanction clearly within the power of the judge. The greater sanction of imprisonment necessarily includes the lesser sanction of a restriction upon his right to practice law.

Sending a lawyer to jail would not only prevent his participation in the particular case where the contempt was committed; it would prevent him from appearing in any case in any court while the sentence was in effect. Logically, therefore, a judge should be able to suspend a lawyer's right to appear in any court in the nation, state or federal, for as long a period as he could imprison the lawyer (not more than 6 months without a jury trial, according to *Bloom v. Illinois*).¹⁹

Nevertheless, the foregoing principle does not go that far, because such a recommendation would raise too many difficult problems of comity and reciprocity between jurisdictions. Instead the recommendation is that the judge have authority to suspend the lawyer's right to appear only in the particular court where the contempt was committed, or only in any court of the jurisdiction (the state or the Federal District) where the contempt was committed. Thus a lawyer indulging in disruptive be-

¹⁸ See *Illinois v. Allen*, 397 U.S. 337 (1970).

¹⁹ 391 U.S. 194 (1968).

havior in the Superior Court of California for Los Angeles County could be suspended from appearing only in that court, while remaining free to appear in the Municipal Court there or the Federal District Court there or in any other California court or in any other state or federal court; or he could be suspended from appearing in any California state court while remaining free to appear in the court of any other state or in any federal court, including one in California. In short, the judge's power in contempt proceedings to restrict a lawyer's right to practice law is carefully limited in the foregoing principle.

Even so limited, the idea of giving a judge power to limit a lawyer's right to practice may seem to some a wide departure from existing practice. It is less so than it seems. Some aspects of bar discipline, although traditionally entrusted in the first instance to bar associations or committees, are subject to ultimate control by the courts through a review of disciplinary proceedings. Other aspects of bar discipline are accomplished through contempt proceedings handled directly by the courts at both trial and appellate levels. Since the right to practice is ultimately subject to court control there is no valid reason why such control cannot be exercised in a limited area of professional misconduct more directly than has been traditional in the past.

Shortly before he became Chief Justice of the United States, the Honorable Warren E. Burger made this observation in a case involving courtroom misconduct by a lawyer:

all members of the bar are on notice that disciplinary mechanisms are available to

the trial court to deal with unlaywerlike behavior. Lawyers who fail to learn or remember the rules of courtroom conduct may need the forcible reminders which will tend to upgrade the courtroom performance of lawyers generally.²⁰

Suspension of the right to appear in court is not disbarment. It would not prohibit other types of law practice, nor would it be permanent. Disbarment would continue to be the function of traditional disciplinary proceedings in appropriate situations. While they were getting under way, however, suspension of the right to appear in court would prevent an evil from continuing or spreading.

In many, perhaps most, circumstances, restricting a lawyer's right to appear in court is a better method of handling disruptive conduct than imprisonment for several reasons. First, it is less drastic. Second, it is more responsive to the type of conduct involved. Third, it makes possible greater gradations of punishment than now exist to fit the offender and his offense.

Unfortunately, in some jurisdictions there are legislative restrictions on the punishments which may be imposed for contempt, limiting them to the traditional penalties of fines and imprisonment, and leaving any restrictions upon a lawyer's right to practice law to traditional disciplinary proceedings.²¹ Where necessary, statutes should be changed to authorize the sanctions for contempt recommended above.

²⁰ *Harris v. United States*, 402 F.2d 656, 659 (D.C. Cir. 1968) .

²¹ *See, e.g.*, 18 U.S.C. § 401 (1964); *Ex parte Robinson*, 86 U.S. 505 (1873); *Phelan v. Guam*, 394 F.2d 293, 296-97 (9th Cir. 1968).

Bar discipline is a matter peculiarly within the province of the judicial branch of government. Indeed, the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement, headed by retired Supreme Court Justice Tom C. Clark, goes so far as to say, after reviewing the authorities:

This Committee strongly urges courts having disciplinary jurisdiction to exercise their inherent power to strike down any attempt by the legislature to interfere with their exclusive jurisdiction over the discipline of attorneys. There are ample precedents to support this position.²²

VII

CONTINUANCE OR MISTRIAL

In the event any contempt sentence prevents a lawyer from continuing to represent his clients in the case, the judge may grant such continuance as may be necessary to secure new counsel, or, if that is not practicable, may declare a mistrial.

COMMENTARY

If disruption reaches the point where it is impossible to carry on the proceeding without removing counsel, and if no other counsel is available to carry on after a reasonable continuance, the only solution which is fair to the litigants is to declare a mistrial. Such an occurrence should be regarded as a breakdown of the judicial machinery, just as if the judge had died or

²² A.B.A. Special Committee on Evaluation of Disciplinary Enforcement, Final Draft, June 1970, at 13 [hereinafter *Clark Report*].

become physically incapable of presiding. In such circumstances a retrial is possible without danger of a successful claim of double jeopardy.²³ If a mistrial were to be granted when there was no necessity to terminate the proceedings, or if it were deliberately caused by the prosecution, a claim of double jeopardy would have merit.²⁴

VIII

WARNING

In any case where there is reason to anticipate disorder or disruption, the judge should make known in open court the type of behavior required in his courtroom and the nature and extent of his contempt powers. He should do so at the outset of the proceeding if possible, and should repeat the warning as often as he deems necessary.

COMMENTARY

Judges ordinarily give ample advance warning to those likely to be cited for contempt arising out of courtroom disorders. Indeed, they are probably required to do so in order to satisfy the requirements of due process.²⁵ The warnings should be early and frequent whenever there is reason to anticipate disruption or disorder.

²³ See *Gori v. United States*, 367 U.S. 364, *reh'g denied*, 368 U.S. 870 (1961); see also *United States ex rel. Montgomery v. Brierley*, 414 F.2d 552, 557-58 (3rd Cir. 1969).

²⁴ *United States v. Whitlow*, 110 F. Supp. 871 (D.D.C. 1953); *McCabe v. Bronx County Court*, 24 Misc. 2d 477, 199 N.Y.S.2d 247 (Sup. Ct. Bronx County 1960).

²⁵ See *Illinois v. Allen*, 397 U.S. 337, 347-51 (1970) (Brennan, J., concurring).

IX

APPELLATE REVIEW

The rules of appellate procedure should provide that an appeal from any contempt sentence imposed on a lawyer for courtroom disorder or disruption shall receive a preference over all other pending appeals; that the reviewing court may dispense with written briefs at its discretion, may specify the record it requires, and may order the trial court and the court reporter to expedite its preparation; that it shall possess all powers it has in other cases, including the power to consider the judge's conduct of the case in relation to the lawyer's behavior, to modify any sentence imposed, to suspend its execution pending final determination of the appeal and to remand the proceeding for a new trial of the contempt on some or all issues before the original or another judge.

COMMENTARY

Just as a trial judge should deal promptly with disruptive tactics, so also should an appellate court in reviewing any contempt sentence imposed by him. Delay is unfair to the lawyer who has been sentenced and detrimental to the administration of fair and orderly justice. If uncertainty is allowed to persist in the minds of lawyers and the general public as to what conduct is permissible in a courtroom, the evil aimed at may spread like a cancer until it gets out of control and public confidence in the courts is lost.

Appellate courts act speedily in election cases and others where necessity dictates. They should regard contempt proceedings growing out of disruptive tactics as being in

the same category, justifying a position of priority over other pending appeals. In the English case mentioned earlier, where Welsh students disrupted a trial, the contempt occurred and the sentences were imposed on February 4, 1970. The appeal was decided on February 11, 1970, exactly one week later. There is no legitimate reason why American courts cannot do as well.

Appellate courts are charged with supervisory powers over the courts below them. They have an interest in seeing that those courts act properly. Not being personally involved in the contempt proceedings under review, they provide disinterested protection against possible abuses of judicial office.²⁶

X

ADMISSION PRO HAC VICE

A judge to whom an application is made on behalf of a lawyer not licensed to practice in his court for permission to appear in a particular case may deny such application if it is established that the lawyer has willfully engaged in disorderly or disruptive tactics in any other court. He may grant permission conditioned on proper behavior, and in any event:

- (a) shall advise the lawyer of the kind of behavior expected of him;**
- (b) may require him to promise proper conduct;**
- (c) may require him to disclose all courts**

²⁶ See also commentary to principle V (contempt power) *supra*.

in which he is authorized to practice; and

- (d) may require local counsel to be appointed as well, with responsibility to be prepared to step in and assume control of the client's case if primary counsel is removed.**

COMMENTARY

Permission for a lawyer not admitted to practice before a particular court to appear in a single case should not be granted indiscriminately. If the court has good reason to believe that the lawyer, based on his past performance, is likely to engage in trial disruption, permission may be denied. If the issue is doubtful, the court should condition its permission on assurances of proper behavior, and in addition insist upon the appointment of local counsel to take over control of the case if it should become necessary to remove the primary counsel. A court is likely to be able to maintain more effective discipline over a member of the local bar than over a lawyer based in another state.

XI

DISCIPLINARY PROCEEDINGS

Court rules should provide that the trial judge and the appellate court, respectively, shall without delay certify the record and result of any contempt proceeding for courtroom disorder or disruption involving any lawyer to the body having authority to disbar, suspend or impose other disciplinary sanctions on him in any state where he has been admitted to the bar.

Disciplinary proceedings involving dis-

ruptive tactics should receive a preference over all other disciplinary proceedings, and should be commenced and concluded as expeditiously as possible.

Rules of appellate procedure should provide that if any appellate court reviewing a contempt sentence imposed on a lawyer for disruptive conduct believes that the trial judge was himself guilty of serious courtroom misconduct beyond the appellate court's own power to correct, it shall certify that fact, along with its own opinion and the trial record, to any official body having authority to impose disciplinary sanctions against the judge or to express censure or admonition with respect to his conduct.

Disciplinary proceedings against judges for courtroom misconduct should receive a preference over all other disciplinary proceedings against judges, and should be commenced and concluded as expeditiously as possible.

COMMENTARY

The same reasons which justify priority in appellate review for contempt proceedings arising out of courtroom disruptions also justify priority in disciplinary proceedings arising from them. Too often disciplinary proceedings are slow in getting started and slow in being terminated. Prompt judicial reports of courtroom misconduct will expedite the initiation of proceedings.²⁷ Giving them priority for hearing will hasten their termination.

In addition, attention should be given to

²⁷ Reports as to misconduct by lawyers are now required by Canon 11 of the Canons of Judicial Ethics.

strengthening the procedures for enforcing judicial and professional discipline. A major overhaul of the machinery of enforcement of bar discipline is long overdue, along the general lines recommended and documented in the *Clark Report*. Furthermore, in some judicial systems (including the federal), the only procedure for enforcing judicial discipline is the seldom-used, slow, costly, cumbersome and generally ineffective method of impeachment. Consideration should be given to supplementing that method through the creation, by constitutional amendment if necessary, of a body similar to California's Commission on Judicial Qualifications.²⁸

XII

LITIGANTS AND SPECTATORS— OTHER TYPES OF CONTEMPT

Nothing in the foregoing is intended to curtail a judge's power and duty to deal with disorderly litigants in one of the manners specified in *Illinois v. Allen*; or with disorderly spectators by traditional contempt powers; or with other contempts (including those committed by lawyers) which

²⁸ CAL. CONST. art. 6, §§ 8 & 18; Cal. Rules of Court 909-19.

do not involve courtroom disruption or disorder.

COMMENTARY

This emphasizes the narrow scope of the foregoing principles. They deal only with courtroom disruption involving lawyers and judges, not with courtroom disruption by litigants or spectators acting independently, and not with out-of-court contempts, whether committed by lawyers or others. Such contempts, not being entirely novel, do not pose the same, new, direct, jugular threat to the judicial process that is posed by disruptive tactics practiced by lawyers in the courtroom. They can be handled, more or less adequately, by traditional contempt and disciplinary procedures. If traditional methods need strengthening, that should be the subject of separate consideration.

Neither do the principles deal with substantive and procedural rules which may contribute to courtroom disruption, such as the use of conspiracy charges and the practice of trying numerous defendants jointly. Such problems again require separate consideration.

The principles, although aimed primarily at criminal cases, are also applicable to civil cases.