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Francis G. Homan Jr.

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## *Abuse of Attorneys by Judges*

*Francis G. Homan, Jr.\**

**P**OPULAR NOTIONS HAVE IT that almost all misconduct in the courtroom is attributable to attorneys. Yet many practitioners before the bar have suffered abuse by members of the judiciary. How frequently this occurs is not known, but sometimes incidents of non-judicial conduct are revealed in other than case reports. Recently the House Judiciary Committee was holding hearings on an appointee to the federal bench. One witness testified that the judge under consideration had a violent temper, apt to flare up at the slightest provocation. The judge had denounced her as "just a crummy little lawyer from the crummy little Legal Aid Society." Other lawyer witnesses testified to being "cooperized"—i.e., excoriated and publicly humiliated for smiling or rustling papers. New York City's Association of the Bar opposed him, but the account doesn't mention if he was appointed.<sup>1</sup>

Most biographical accounts of attorneys contain at least one anecdote about mistreatment by a judge. For example, a famous West Coast attorney when just entering practice was asked by another lawyer to go to court and ask for a continuance. The judge had a reputation for intolerance and a cantankerous disposition. When the young attorney made his request, the judge snapped, "I'm amazed at Mr. Christiansen's imprudence in sending a mere beardless youth." The onlookers in the courtroom snickered and the young attorney angrily retorted, "Your Honor, if Mr. Christiansen had known you attached so much importance to whiskers, I'm sure he would have sent a billy goat." The judge promptly denied the continuance and fined the attorney \$20.00 for contempt.<sup>2</sup>

A well-known Supreme Court Justice of a large eastern state narrates a classic case of judicial abuse. When he was a young lawyer trying a trespass case, it became evident before long that the judge was biased in favor of the opposing side. The judge began to badger the attorney by interrupting con-

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<sup>1</sup> Day in Court; Controversial Figure, Time, Mar. 30, 1962, p. 16.

<sup>2</sup> Noble & Averbuch, Never Plead Guilty, 23 (1955).

tinuously, insinuating he had a very weak case and that the attorney was immature in his handling of the case. At the conclusion of the trial the judge turned to the jury and ordered them to bring a verdict for the defendants. (The attorney had the plaintiffs.) However, the jury ignored instructions and returned a verdict for the plaintiffs. The judge exploded with an angry, "What do you mean with such an outlandish verdict?" The foreman replied that the jurors thought the plaintiffs were entitled to everything they asked for. The judge ignored the finding of the jury and ordered the clerk to change the verdict so that it read, "For the defendants." The changed verdict was reversed on appeal.<sup>3</sup>

Ironically, the same attorney, when he was serving on the bench of the Court of Common Pleas many years later, was himself guilty of abusing an attorney. He asked counsel in a trespass suit if he had ever been a member of the Communist Party or whether he had ever advocated the overthrow of the government of the United States by force and violence. Counsel objected that the court was without jurisdiction to ask those questions and made a motion for a mistrial. The judge ignored the motion and when counsel attempted to leave the courtroom he was restrained by court officers upon order of the judge. Counsel was then castigated as being morally unfit to appear in the United States Court because he allegedly did not bear allegiance to the United States. Counsel objected to this treatment and was found in contempt and then barred from the practice of law in that county.<sup>4</sup> Counsel then petitioned for a writ of prohibition from the state Supreme Court. That court issued a writ vacating the orders of the judge and restraining him from enforcing his order forbidding the petitioner to practice law or from any further action in contempt proceedings. The appeals judges stated their own opposition to Communism but opined that the judge in his zealotry had adopted the very methods of that system by acting in an arbitrary and unjudicial way.<sup>5</sup>

### Abuse as Grounds for Reversal

The all-time record for judicial abuse would seem to go to a judge of the California Superior Court, Judge Charles S. Burnell, who "served" the people of Los Angeles County for at

<sup>3</sup> Musmanno, *Verdict*, 57 (1958).

<sup>4</sup> *Schlesinger v. Musmanno*, 367 Pa. 476, 81 A. 2d 316 (1951).

<sup>5</sup> *Ibid.*

least twenty years. His conduct on the bench was the subject of acidulous comment by the Appeals Court in at least eight appeals decisions where he was reversed.<sup>6</sup> Here is what the appellate court said about Judge Burnell:

"In the ordinary case we would be constrained to reprimand Judge Burnell for his flagrant disregard of the canons of judicial ethics and for his non-judicial and outrageous conduct. However, we refrain from doing so for the reason that the reported cases show that from time to time the appellate courts have directed Judge Burnell's attention to the impropriety of conduct similar to that which occurred in the present case—all to no avail."<sup>7</sup>

The attorney had made a proper objection to certain testimony being entered and the judge had remarked "if you don't want the jury to know the truth, I will sustain your objection." The appeals court noted, after castigating the judge, that this would indicate to the jury that evidence was being suppressed and create prejudice against the appellant's case.<sup>8</sup>

In all fairness, it must be said that the trial judge was impartial as the other cases show that he abused plaintiff and defense attorneys, as well as the parties to the suits, equally.

An indication that a judge is favoring one side or the other could well bias the jury. In Illinois, a remark by the judge to plaintiff's counsel that it wasn't permissible to manufacture anything in the case promptly had the attorney excepting on the ground of prejudicing the jury against his client's cause. The appeals court held this was reversible error in that the trial judge failed to exhibit the fair and impartial demeanor expected of him.<sup>9</sup> An Iowa judge was reversed for advising an attorney, "You better try this lawsuit like a lawyer would try it."<sup>10</sup> An Illinois reviewing tribunal found it reversible error for the trial judge to constantly interrupt counsel during examination of the defendant with disparaging remarks relative to the ability of

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<sup>6</sup> *People v. Mahoney*, 201 Cal. 618, 258 P. 607 (1927); *People v. Earle*, 10 Cal. App. 2d 163, 51 P. 2d 147 (1935); *People v. Johnson*, 11 Cal. App. 2d 22, 52 P. 2d 964 (1935); *People v. McNeer*, 8 Cal. App. 2d 676, 47 P. 2d 813 (1935); *People v. Williams*, 55 Cal. App. 2d 696, 131 P. 2d 85 (1942); *Podalsky v. Price*, 87 Cal. App. 2d 151, 196 P. 2d 608 (1948); *Murr v. Murr*, 197 P. 2d 369, 87 Cal. App. 2d 511 (1948).

<sup>7</sup> *Etzel v. Rosenbloom*, 83 Cal. App. 2d 758, 189 P. 2d 848 (1951).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Foster v. Shepard*, 258 Ill. 164, 110 N. E. 411 (1913).

<sup>10</sup> *Pickerell v. Griffith*, 238 Iowa 1151, 29 N. W. 2d 588 (1947).

counsel, charging him with ignorance of the rules of evidence, asking what law book he studied on evidence, telling counsel he, the judge, was not running a law school and belittling the defense in general.<sup>11</sup>

In another Illinois case defense attorneys challenged the jury array and made a motion to quash the entire venire. Instead of passing on the motion the judge severely criticized and denounced counsel, accusing them of improper and unethical practices, poor sportsmanship and stating "their word wasn't any good." The remarks were not made in front of the jury, but were printed in the newspapers. The jury going out into the community could hear and read them. On appeal it was held that the remarks were calculated to prejudice the jury against the defendants and deprive them of a fair trial.<sup>12</sup>

A judge was reversed when during the course of the trial he characterized a courteous request by defense counsel as an unethical tactic: "Wait a minute. We will try this lawsuit the way it should be tried and there will be no more of this shyster stuff." The appeals court deplored the coupling of the word "shyster" with "stuff." The comments were so inflammatory and prejudicial to the rights of the accused as to require a mistrial.<sup>13</sup>

A Tennessee judge became unreasonably angry at the defense attorney because of a minor error in pleading. He charged her with legal ignorance, said she wasn't playing with dolls, and described her conduct as intolerable. The defendant's conviction was reversed, the appeals court feeling that the judge's intemperance was disproportionate to the offense.<sup>14</sup>

A New York appellate division held that the plaintiff had been deprived of a "fair and impartial trial" when the trial judge repeatedly interrupted plaintiff's counsel during examination of his witnesses and undertook to gratuitously aid the defense by his interrogation and comments.<sup>15</sup>

A Pennsylvania case was reversed on the definition given to a word used by the trial court. He used the word "harangue" several times in describing defense counsel's jury summation.

<sup>11</sup> *People v. Wilson*, 343 Ill. 412, 166 N. E. 40 (1945).

<sup>12</sup> *Day v. Thomson*, 305 Ill. App. 29, 26 N. E. 2d 429 (1940).

<sup>13</sup> *Moore v. State*, 147 Neb. 390, 23 N. W. 2d 552 (1946).

<sup>14</sup> *Brooks v. State*, 187 Tenn. 67, 213 S. W. 2d 7 (1948).

<sup>15</sup> *Whitehead v. Mutual Life Ins. Co. of N. Y.*, 26 App. Div. 247, 37 N. Y. S. 2d 261 (1942).

The reviewing court found that *Webster's* defined "harangue" as a "noisy, bombastic, ranting speech." This tended to discredit counsel's argument by giving it a contemptuous characterization. The court went on to say that the use of any language which tends to discredit any party to a dispute in court is an error of law for which any verdict would be properly set aside.<sup>16</sup>

A Missouri trial judge had made remarks in front of the jury which showed he doubted the word of defense attorneys. Also his general remarks and the questions he asked the witnesses indicated he had made up his mind that the plaintiffs should recover. The upper court reversed on the ground it was error for a trial judge to adopt a belligerent attitude toward either party or show bias.<sup>17</sup>

Michigan had a trial judge showing his antagonism toward defense counsel by stating, "You may be able to fool some, but you can't fool me on this . . . You better go ahead and behave yourself . . . Let me tell you something! You are close to the danger line." The judge added to the indignity by continually addressing the attorney by his last name only. This was reversible error as holding counsel up to ridicule.<sup>18</sup>

Oklahoma has an unusual ruling on abuse where the appellate court may in a criminal case reduce the sentence, but will not order a new trial. The assessment of moderate punishment by the jury was held to show that the jury had not been affected by the judge's brusque interruptions and harsh directions to the defendant's lawyer.<sup>19</sup> Nothing was said in the opinion about the possibility of the jury finding him not guilty if there had been a fair and impartial judge on the bench.

Another Oklahoma case had the judge, without apparent justification, insinuate in the hearing of the jury that the defendant's attorney was guilty of improper practice. The appeals court felt no doubt concerning the defendant's guilt. Since no verdict other than guilty could have resulted, the only prejudice was in the imposition of the penalty by the jury. So giving the defendant the benefit of the doubt, the error was corrected by reducing his sentence.<sup>20</sup>

<sup>16</sup> *Commonwealth v. Brown*, 39 Pa. 515, 164 A. 726 (1933).

<sup>17</sup> *Fleetwood v. Milwaukee Mechanics Ins. Co.*, Mo. 220 S. W. 2d 614 (1949).

<sup>18</sup> *Parkside Housing Project v. Vandenbroker*, 290 Mich. 582, 287 N. W. 571 (1939).

<sup>19</sup> *Stacey v. State*, 79 Okla. Crim. 417, 155 P. 2d 736 (1945).

<sup>20</sup> *McMahon v. State*, 96 Okla. Crim. 76, 251 P. 2d 204 (1952).

Yet every instance of judicial abuse of attorneys is not always automatically corrected on appeal. A statement by the trial court that counsel was attempting to indicate that the court had ruled arbitrarily out of thin air and that any more reference to any ruling would be considered close to contempt of court, was ill-advised but not prejudicial to warrant a new trial.<sup>21</sup>

In another case the attorney contended that in his listing of certain events during the trial the trial judge demonstrated a persistent hostility toward the attorney and his client. The appeals court noted that while on occasion the trial judge was irascible and made several comments that could well have been left unsaid, the record did not show "persistent" hostility. Hence not reversible error.<sup>22</sup>

A Texas judge's repeated comment "Let's get along" was not prejudicial error as he was only expediting the trial. Neither was it error to lecture counsel and tell him that further violation of its rulings would result in dismissal of the action.<sup>23</sup>

Interestingly, there have been examples of misconduct by judges toward prosecuting attorneys as well. Some years ago a county attorney in Kentucky was a candidate against the incumbent for nomination for county judge. The judge, however, was engaged with three police officers in stopping travelers on the highway and charging them with alleged violations of traffic laws. The alleged violators would appear before the judge, be fined and then a portion of the fines "kicked back" to the arresting officers. The county attorney prosecuted the officers, and they were held over to the grand jury. In retaliation the officers induced a woman who was living with one of them to swear in the presence of the judge that she had been detained against her will by the county attorney. Although the judge knew she was falsely swearing, he issued a warrant for the county attorney's arrest. Since the charges were subsequently found to be false, proceedings were instituted against the judge for malfeasance. Section 277 of the Constitution of Kentucky provides that a judge of a county court shall be subject to indictment for malfeasance in office. The judge was found guilty under the above, fined \$100.00 and removed from office.<sup>24</sup>

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<sup>21</sup> Borchelt v. Wentz, 123 N. W. 2d 831 (S. Dak. 1963).

<sup>22</sup> Wilson v. Kopp, 250 P. 2d 166 (Cal. 1962).

<sup>23</sup> Runyon v. City of Brownsville, 371 S. W. 2d 924 (Tex. 1963).

<sup>24</sup> Robbins v. Commonwealth, 232 Ky. 115, 22 S. W. 2d 440 (1929).

In a Pennsylvania case, the district attorney and his assistant were busy in another court room when a judge sent a message to the district attorney that his presence was required. The district attorney replied he would come as soon as possible, but he was busy at the moment. When he finally did appear the trial judge greeted him with some caustic remarks. This led to a heated exchange with the district attorney being called into chambers and offered in the alternative—either appear in open court for a public rebuke or be cited for contempt. The district attorney refused to choose whereupon he was cited for contempt. The Pennsylvania court upheld this conviction.<sup>25</sup> An interesting sidelight to this case is that one of the appeals judges who had been rebuked in a prior case for unjudicial behavior as a trial judge<sup>26</sup> wrote a strong dissent. He pointed out that the record was devoid of any record showing the district attorney being rude or insolent to the court. The district attorney was convicted solely on the unsupported word of the judge. He cited his own case asking why the trial court there (*i.e.*, himself) had been overruled and here the trial judge was supported?

In Pennsylvania it is even possible to have a case remanded for the judge's failure to prevent abuse by the Attorney General. In a trial for revocation of a non-profit corporate charter, the judge permitted the Deputy Attorney General to indulge in violent diatribes against the defendants and their attorneys, accusing them of subversive activities. The trial court reversed on other grounds but rebuked the trial judge for permitting the abuse.<sup>27</sup>

If an attorney feels the judge has shown bias or prejudice against him during the trial he must object then or move for a mistrial.<sup>28</sup> The majority of appellate courts hold that when a party does not object during the course of a trial such party cannot thereafter complain.<sup>29</sup> However, any misconduct by a

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<sup>25</sup> Appeal of Levine, 372 Pa. 612, 95 A. 2d 222 (1953).

<sup>26</sup> *Supra*, n. 4.

<sup>27</sup> Commonwealth v. Yiddisher Kultur Farband, 382 Pa. 553, 116 A. 2d 555 (1955).

<sup>28</sup> Freedman v. Housing Authority of City of Atlanta, 136 S. E. 2d 544 (Ga. 1963).

<sup>29</sup> Starks v. Starks, 220 Minn. 313, 11 N. W. 2d 741 (1943); Giraney v. Oregon Short Line R. R., 54 Idaho 535, 33 P. 2d 359 (1934); Payne v. Clark, 117 Neb. 238, 220 N. W. 262 (1938); Zaikaner v. Small, 256 Minn. 275, 98 N. W. 2d 247 (1959).



trial judge from which an influencing of the jury and denial of the rights of the parties might be inferred usually constitutes prejudicial error.<sup>30</sup>

Yet many times when it would appear that the judge overstepped the bounds of judicial propriety the appeals court will state that no substantial harm was shown. If the abuse falls on attorneys for both sides or even if a little more heavily on one side than the other this does not constitute reversible error.<sup>31</sup> Another case had slighting remarks apparently addressed to counsel on both sides. The judge stated to the jury on opening day of court that there were "tricks to all trades and the legal profession is the trade of all tricks," that there were "smart young lawyers" entering the elevators with jurors. They would be talking about the case for the jurors' benefit in order to influence them. The trial court, although deprecating the trial judge's remarks, did not feel the judge to be more prejudiced toward one side than the other. Also there had been no motion to strike out the remarks during the trial. So on the basis that counsel for both sides were equally denigrated and no exception raised during the trial, there was no reversible error.<sup>32</sup>

An appeals court has also failed to reverse when the judge was not substantially derogatory or belittling since he treated the law fully in his charge to the jury.<sup>33</sup> And a motion termed "silly" by the trial judge was held on appeal to be an overly harsh characterization but the conviction was not reversed since the judge had told the jury to disregard his statements.<sup>34</sup>

### Weapon on Contempt of Court

The weapon of contempt in the hands of an unprincipled judge is deadly. It is generally recognized that an attorney may be disbarred, suspended, or otherwise disciplined for misconduct. This is peculiarly a power belonging to the Common Law tradition and not found in the countries under the Civil Law. For instance, courts in France lack the power of their Anglo-Ameri-

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<sup>30</sup> *People v. Frank*, 71 Cal. App. 575, 236 P. 189 (1925); *Abbott v. Coronado Beach Co.*, 55 Cal. App. 179, 203 P. 145 (1921).

<sup>31</sup> *Germ v. City and County of San Francisco*, 99 Cal. App. 404, 222 P. 2d 122 (1950).

<sup>32</sup> *Forest Preserve Dist. of Cook County v. Mike*, 3 Ill. 2d 49, 119 N. E. 2d 734 (1954).

<sup>33</sup> *Simcoe v. Pope*, 123 N. W. 2d 311 (Minn. 1963).

<sup>34</sup> *People v. Houtman*, 138 Cal. App. 2d 448, 242 P. 2d 71 (1956).

can counterparts because the sanction of contempt of court is non-existent.<sup>35</sup> The power of American courts to punish for alleged contempt of their authority, although undoubted, is in its nature arbitrary, and appeals courts are often reluctant to uphold it except under the circumstances and manner prescribed by law.<sup>36</sup> Still this does not prevent some judges from acting arbitrarily and even capriciously in finding counsel in contempt. It is a well known fact, even if difficult to document, that the fearsome reputation of some judges causes many attorneys to do what is euphemistically called "judge shopping," i.e., seeking a postponement in hopes that when the case is again called for trial a judge of a more bland temperament will hear it.

There are numerous cases of the arbitrary use of the contempt power ranging from the state to the federal courts.

### Contempt in the State Courts

A California judge thought the defense attorney was taking too much time questioning a witness, interrupted and ordered counsel to speed things up. When counsel objected rather strenuously, stating that he thought the interests of his client demanded a painstaking questioning, the court found him in contempt. The appeals court ruled that an attorney has the right to protect the interests of a client and if in discharging his duty he happens to be persistent or vehement he is well within his legitimate rights. The court also noted that quarreling and bickering with opposing counsel does not constitute contempt.<sup>37</sup>

Occasionally sympathy for maligned counsel creeps through the pontifical intonations of the appeals court opinion. A defense attorney in a garnishee case with a finance company stated in open court that the judge, "perhaps unwittingly" because of a prior connection as attorney for a finance company, tended to discount all defense raised by borrowers from finance companies. Counsel also pointed out that it was the general feeling that it was hopeless to try such cases in front of this judge and asked that he disqualify himself. The judge took umbrage at these remarks, feeling they tended to impair the court's dignity and

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<sup>35</sup> David & deVries, *The French Legal System*, 102 (1958).

<sup>36</sup> *Bennett v. Superior Court in and for San Diego County*, 99 Cal. App. 585, 222 P. 2d 276 (1950).

<sup>37</sup> *Ibid.*

authority, found the attorney to be in contempt, and ordered him to pay a fine of \$250.00 or be imprisoned. On appeal the conviction was reversed on the ground that a statement which might impair respect for a trial judge cannot be contemptuous if made in good faith to protect the interests of a client and in the honest belief that is relevant and without reckless disregard for the truth. The court noted in closing that the attorney should have been given the opportunity to present evidence which might indicate justification for the statement.<sup>38</sup> If the last is to be taken literally, in New York an attorney may make a statement about a judge if it can be proved.

A New Jersey case points out to what extremes some judges will pursue their resentment at a petty annoyance. The plaintiff's counsel interrupted the judge to answer a rhetorical question. Found in contempt, he was ordered to pay a fine to the sheriff. That official informed counsel he would have to be photographed and fingerprinted like any other criminal. The attorney refused to subject himself to this humiliation, and the judge had him pay the fine to the clerk. The appeals court failed to find that the record showed any conduct on the part of the attorney which was in the slightest disrespectful to the court. The finding of contempt was reversed.<sup>39</sup>

The attorney in a Pennsylvania case sought to have his client's trial moved to the United States District Court. In the hearing to show cause he stated the county judges were so prejudiced his client could not possibly get a fair trial. The Court of Common Pleas ordered his name stricken from the role of attorneys for six months. The Pennsylvania Supreme Court felt he had used bad taste, but what he said was in the course of a judicial proceeding and was relevant and pertinent to the cause of the inquiry. "The appellant (attorney) was within his privilege in making a disrespectful criticism of the learned and upright court below."<sup>40</sup>

Mere expression by an attorney on motion for a new trial that a prior order of the court "defeated the ends of justice" did not constitute contempt in the absence of any showing that the opinion was not advanced in good faith. The appeals court

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<sup>38</sup> *In Re Rotwein*, 293 N. Y. 116, 51 N. E. 2d 669 (1943).

<sup>39</sup> *Marino v. Cocuzzo*, 14 N. J. Super. 16, 81 A. 2d 181 (1951).

<sup>40</sup> *In Re Sherwood*, 259 Pa. 254, 103 A. 42 (1918).

opinion was that an attorney is not guilty of contempt in pointing out "inadequacies in the court's actions."<sup>41</sup>

There is a strong suspicion that use of contempt as a weapon to badger attorneys occurs far more often as a threat than might appear in the court records. There is no way of determining how many attorneys pay their fines or else abjectly apologize for some fancied grievance on the part of the judge. To expunge the record of such a finding means, of course, an appeal sometimes to the highest tribunal with its concurrent expenses and time-consuming efforts. Attorneys are probably just like any other litigant, reluctant to invest the time, money and energy into an appeal. And the reviewing courts will support a contempt citation only under the most glaring and flagrant abuses of the courtroom's dignity and decorum.

### Contempt in the Federal Courts

Nothing said so far should indicate that appeals courts turn a blind eye to all contemptuous behavior by attorneys. The courts will and have sustained such convictions when the violation was flagrantly obvious from the record. The United States Supreme Court sustained the contempt conviction of defense counsel for conduct at the trial which culminated in the affirmation of *Dennis v. United States*,<sup>42</sup> where a Communist Party official was convicted of contempt of Congress. Defense counsel argued that since the trial judge had waited for the completion of the nine months trial his power to punish for contempt had expired. The Supreme Court rejected this by noting that the trial judge had waited until after the trial was over in order to give counsel's clients as fair a trial as possible and to deny the court the power to punish at the end of the trial was to deny the power altogether.<sup>43</sup>

The landmark case supporting the power of the federal courts to punish an attorney for contempt dates back to the late 1800's. During the trial the attorney's wife apparently rose from her seat in the courtroom to address the court. The judge ordered her to be quiet and remain seated. When this failed to stop her, the United States marshal was ordered to remove her from the courtroom. When the marshal started to eject her the

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<sup>41</sup> *Ridan v. Superior Court for Los Angeles County*, 34 Cal. 2d 83, 206 P. 2d 1081 (1949).

<sup>42</sup> 339 U. S. 162, 70 S. Ct. 519, 94 L. Ed. 734 (1950).

<sup>43</sup> *Sacher v. United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952).

attorney-husband drew a knife and assaulted the marshal. After a scuffle the attorney was disarmed, and he left the courtroom. The court in the meantime found the attorney to be in contempt for obstructing the administration of justice. He was not arrested until late in the day. The attorney's argument was that the court's power to hold him in contempt was a nullity as soon as he left the confines of the courtroom. The United States Supreme Court rejected this argument by stating that the power of the court to punish for contempt was virtually unlimited. An order of commitment may be made without notice to the offender and without giving him an opportunity to be heard.<sup>44</sup> The case resulted in a change in the statute to affirm the right of the federal courts to punish contempt.<sup>45</sup> It gives the court the statutory power to arrest and imprison the offender at the discretion of the court without further proof or examination.

The United States Supreme Court for many years was reluctant to overrule the contempt citations of a trial court. An attorney trying a workman's compensation case had the Texas trial judge rule that a certain line of argument was inadmissible under the special issues. The attorney in attempting to explain to the court why he thought the ruling was erroneous was found to be in contempt. The conviction was upheld by the Texas Supreme Court and then appealed to the United States Supreme Court which upheld the trial judge by a 5 to 4 decision.

The transcript couldn't convey the expression, manner of speaking, bearing and attitude of petitioner. Also mildly provocative language from the bench does not put constitutional protection around an attorney.

The obvious inference to be gained is that the attorney is expected to be more restrained than the judge. Justice Douglas in a stinging dissent pointed out that the judge did not purport to fine and imprison the petitioner for the manner of making the objection, for the tone of his voice or his facial expression. The dispute was merely over the bounds of permissible comment before a jury, and the attorney was acting the role of the resourceful lawyer. Justice Douglas thought the transcript clearly indicated the judge picked a quarrel with the attorney and used his high position to wreak vengeance on him.<sup>46</sup>

<sup>44</sup> *Ex Parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 30 L. Ed. 405 (1888).

<sup>45</sup> Fed. Rules Crim. Proc., Rule 42(a), 18 U. S. C. A. Const. Amends. 1-10.

<sup>46</sup> *Fisher v. Pace*, 336 U. S. 928, 69 S. Ct. 425, 93 L. Ed. 569 (1949).

The United States Supreme Court in another case excused the trial judge's unjustified treatment of the defendant's attorney on the ground that the lapse was "human."<sup>47</sup> The tendency to excuse the judge's lapses as only "human" tends to ignore the fact that they are supposed to be "humane" as well.

In cases involving injudicious and abusive comments by the trial judge the federal appeals courts lately have been more critical. This may be due to the fact that the United States Supreme Court has shown itself to be increasingly concerned with individual rights and the circuit court level has adopted the view as well.

A few years ago, a district judge displayed an attitude of impatience and annoyance at proper objections as if they were captious, absurd and unnecessary and made occasional remarks disparaging defense counsel. The circuit court ordered a new trial as the defense's case was seriously prejudiced in the eyes of the jury.<sup>48</sup> Another case was also reversed about the same time by another circuit court of appeals when the judge charged the defense counsel with "pettifoggery."<sup>49</sup>

A recent United States Supreme Court case involved an attorney faced with an erroneous ruling from the district judge which cut off the basic issue of the trial. Wishing to provide a record which would allow the ruling to be reviewed, counsel proceeded to produce evidence and call witnesses on this issue. The judge stopped him. This put the attorney in a dilemma for he had no way of knowing if the appeals court would treat the trial court's ruling as appealable. Counsel insisted upon the right to continue, stating, "We propose to do so unless some bailiff stops us." The judge then allowed the trial to continue, but afterwards he charged the attorney with contempt. The Supreme Court in its opinion reversing the contempt finding noted it was interested in the "exercise of self-restraint of the summary power of contempt by the district judges." The court felt that lawyers should be able to make honest, good-faith efforts to present their case.<sup>50</sup>

<sup>47</sup> *United States v. Leviton*, 93 F. 2d 848, 343 U. S. 946, 72 S. Ct. 860, 96 L. Ed. 1350, reh. den. 343 U. S. 988, 72 S. Ct. 1079, 96 L. Ed. 1375.

<sup>48</sup> *United States v. Ah Kee Eng*, 241 F. 2d 157 (2d Cir. 1957).

<sup>49</sup> *Kraft v. United States*, 238 F. 2d 794 (8th Cir. 1956).

<sup>50</sup> *In Re McConnell*, 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 437 (1962).

### Curbing Judicial Abuse

The preceding cases show that contempt citations can be appealed and abuse of counsel can be reversible error. But what action lies against a judge who slanders or libels counsel during the course of a trial, or unjustly finds him guilty of contempt? The answer is—not very much. In most states a judge has an absolute privilege as to anything he might say or do during a trial.<sup>51</sup> The reason for the rule rests on public policy; it being of supreme importance that judicial officers be encouraged to speak their honest convictions freely and without fear of the consequences.

What if anything can be done to curb judicial abuse? The problem of selection of men to sit on the bench and the old argument of election versus selection does not properly lie within the scope of this article. Nonetheless, it is obvious that the quality of man elevated to the bench has a great deal to do with the quality of justice. But once on the bench a judge is extremely difficult to dislodge.

The problem of good behavior as far as the federal judiciary is concerned has some attention from the popular press. One writer suggests that every justice could come before Congress periodically for "reconfirmation."<sup>52</sup> However, every time a judge made an unpopular decision he might have a substantial portion of Congress looking for a scapegoat. The result might hamstring an independent judiciary.

At the state level where the constitution of a state sets forth the ground for discipline of a judge and the procedure to be followed, the legislature has no power to provide other bases for discipline. The Constitution of Ohio, for example, provides as follows:

Judges may be removed from office by concurrent resolutions of both houses of the General Assembly if two-thirds of the members elected to each house concur.<sup>53</sup>

The problem might be eased if a distinction could be made between supervision and discipline. Some states provide for the general supervision of the work of judges by either a judiciary committee or by the state's highest tribunal. The Administrative

<sup>51</sup> 42 A. L. R. 2d 825 (Anno.), 33 Am. Jur., "Libel & Slander," sec. 170.

<sup>52</sup> Good Behavior of Judges, Who Defines It?, U. S. News & World Report, p. 104, July 5, 1957.

<sup>53</sup> Ohio Constitution IV:17—Page's Ohio Rev. Code Anno.

Office of the United States Courts does a certain amount of supervision; for instance, although it cannot discipline a judge, it can make certain recommendations such as to the type of case heard or the case load of individual judges. New Jersey instituted certain judicial reforms some years ago among which was the supervision and power to discipline given the state Supreme Court.<sup>54</sup>

Yet turning over the discipline of judges to other judges is somewhat akin to setting the cat to watch the cream. This was admitted very frankly by a judge in an opinion discussing the problem.

Judges naturally give high value to the claims and qualities of their group. It is indeed a difficult matter for a member of one group to resolve with complete fairness the conflict between their own group and other groups. But there are no special tribunals for such conflicts and courts must resolve them as best they can.<sup>55</sup>

The American Bar Association adopted a series of canons of judicial ethics some years ago. Canons 4 and 5 deal with the judge's official conduct and set forth the standards of propriety.<sup>56</sup> But progress in their adoption in the various states has been unsatisfactory. Among the twenty-five states having integrated bar associations, fifteen have no judicial code of ethics nor do thirteen where the bar is organized on a voluntary basis.<sup>57</sup>

Curbing judicial abuse is perhaps even more important to the bench and the bar than it is to the public at large. If the legal profession fails to take effective steps, we may be sure that the public will; and the result could well be a weakened judiciary and a captive profession.

<sup>54</sup> Miller, *Discipline of Judges*, 50 Mich. L. R. 737-40 (1952).

<sup>55</sup> *Merrick v. Security & Trust Co.*, 107 F. 2d 271 (App. D. C. 1939).

<sup>56</sup> *Canons of Judicial Ethics—American Bar Association* (1924).

Canon 4—"Avoidance of Impropriety"—A judge's official conduct should be free from impropriety; he should avoid infractions of the law; his personal behavior not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

Canon 5—"Essential Conduct"—A judge should be temperate, attentive, patient, impartial and since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

<sup>57</sup> Blaustein & Porter, *The American Lawyer* (1960).