

CONTEMPT CITATION AS EVIDENCE OF UNFITNESS TO PRACTICE LAW

I. INTRODUCTION

This comment discusses the relationship between a court's exercise of the contempt power against an attorney and subsequent state bar disciplinary proceedings against the attorney for ethical breaches occurring in the contempt matter. The basic problem is balancing the court's right to exercise its contempt powers against the attorney's right and duty to use vigorous advocacy in the effective representation of the client.

II. THE RELATIONSHIP BETWEEN THE JUDICIAL EXERCISE OF CONTEMPT POWER AND STATE BAR DISCIPLINARY ACTIONS

The recent case of *Matthews v. Virginia State Bar*,¹ held that an attorney's conduct which could be punishable as contempt of court may also be considered as evidence that the attorney is unfit to practice law.² The attorney in *Matthews* had neglected the client's case for two years and had disobeyed a court order to furnish answers to interrogatories within ten days, which justified the state disciplinary board in suspending his license to practice law for two months.³ The holding is in conformity with Federal Rule of Evidence 405(b), which allows proof by specific instances of conduct in cases where a person's character is an essential element of a claim, charge, or defense. However, the rules of evidence are not strictly applicable because disbarment proceedings are not lawsuits between litigants, but rather are in the nature of an inquest into the conduct of an attorney.⁴ It has been held that it is not necessary to show that the attorney's conduct has prejudiced the client's legal rights.⁵ Affidavits of the attorney's good reputation within his or her community have little probative value⁶ because the effect of

1. 231 Va. 308, 343 S.E.2d 79 (1986).

2. *Id.* at 80.

3. *Id.*

4. *Maddy v. First Dist. Comm.*, 205 Va. App. 652, 139 S.E.2d 56 (Va. Ct. App. 1964).

5. *Id.* at 653.

6. *Id.*

disciplinary action is considered primarily to be a deterrent to others.⁷ Tough disciplinary measures indicate that the courts will mandate maintenance of the ethics of the legal profession.⁸

Some authority exists to support the proposition that the two concepts of punishment for contempt of court, and bar disciplinary action should not be interrelated since the two concepts have different purposes. Since punishment is not the purpose of disbarment from the practice of law,⁹ any punishment of an attorney is to be determined in a separate proceeding.¹⁰ On the other hand, the purpose of suspending or disbaring an attorney is to remove from the profession one whose conduct has proven him unfit to be entrusted with the duties belonging to his office.¹¹ In *Ex parte Robinson*,¹² the court recognized that a double punishment for the same conduct was justified only under exceptional circumstances.¹³ Because a prosecution for contempt is entirely distinct from a prosecution for disbarment, the two actions will not be tried together.¹⁴ Some jurisdictions have held that an attorney's suspension from the practice of law in a particular court is not among the court's available punishments for contempt.¹⁵ In *In re Damron*,¹⁶ the court noted that a proceeding to punish for contempt is distinct from a common law proceeding to disbar an attorney from practicing in the particular court in which disbarment is sought. That court also found contempt proceedings distinct from a proceeding under a state statute to suspend or annul the attorney's license to practice law.¹⁷ Where the same act formed the basis for both types of proceedings, the *Damron* court stated that an attorney may not ordinarily be disbarred for committing contempt unless his act or course of con-

7. *Id.*

8. *Matthews v. Virginia State Bar*, 231 Va. 308, 309, 343 S.E.2d 79, 80 (1986).

9. *Leimer v. Hulse*, 352 Mo. 451, 463, 178 S.W.2d 335, 339 (1944), *cert. denied*, 323 U.S. 744.

10. *Id.*

11. *Id.*

12. 86 U.S. 505 (1873).

13. *Id.* (exceptional circumstances were that the lawyer had stabbed a bailiff when the bailiff tried to remove the lawyer's wife from the courtroom as she disrupted the proceedings).

14. *State v. Fisher*, 103 Neb. 763, 174 N.W. 320 (1919).

15. *McQueen v. State*, 396 N.E.2d 903 (Ind. 1979). *Accord* *Andrews v. Hassakis*, 6 Ill. 2d 463, 129 N.E.2d 9 (1948). See *Adams v. Gardner*, 176 Ky. 252, 195 S.W. 412 (1917).

16. 131 W. Va. 66, 45 S.E.2d 741 (1947).

17. *Id.* at 747.

duct amounts to "base and aggravated contempt."¹⁸ The attorney in *Matthews* relied on the argument and authority of the *Damron* decision as part of his defense in his disbarment proceeding.¹⁹ The *Matthews* court found *Damron* not to stand for the proposition asserted by the defendant.²⁰ *Damron* rested merely upon the insufficiency of the evidence presented,²¹ since the prosecution did not meet the clear and preponderant standard applicable for disbarment proceedings in West Virginia.²²

The majority view is that being held in contempt of court, even once, can become grounds for an attorney's suspension or disbarment.²³ The fact that professional misconduct may also be contempt does not bring disciplinary proceedings within the rule that one court will not punish an attorney for a contempt of another tribunal.²⁴ Judicial exercise of contempt powers, while distinct from disciplinary actions, does not exclude the use of the latter.²⁵ Attorneys as officers of the court have a duty of respectful subordination to the court.²⁶ An attorney's duty as an officer of the court to maintain respect for the tribunal and its other officers had been held to be a fundamental duty.²⁷ Enforcement of that fundamental duty through sanctions by professional associations serves a deterrent purpose in helping to guard the administration of justice²⁸ when the attorney's conduct is potentially destructive of the judicial process.²⁹ However, a contempt citation specifying only that the lawyer violated the ethics code by failing to fulfill his obligation as an officer of the court was found not to be sufficient for prosecution³⁰ under the federal contempt statute.³¹

18. *Id.*

19. *Matthews v. Virginia State Bar*, 231 Va. 308, 309, 343 S.E.2d 79, 80 (1986).

20. *Id.*

21. *Id.*

22. *In re Damron*, 131 W. Va. 66, 78, 45 S.E.2d 741, 747 (1947).

23. See *Matthews v. Virginia State Bar*, 231 Va. 308, 343 S.E.2d 79 (1986); *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983); *In re Daly*, 291 Minn. 488, 189 N.W.2d 176 (1971).

24. *In re Schofield*, 362 Pa. 201, 206, 66 A.2d 675, 682 (1949).

25. *In re Isserman*, 9 N.J. 269, 271, 87 A.2d 903, 905 (1952), *cert. denied*, 345 U.S. 927 (1953).

26. *In re Schofield*, 362 Pa. 201, 203, 66 A.2d 675, 679 (1949).

27. *In re Ades*, 6 F. Supp. 467 (D.C. Md. 1943).

28. *Pettiford v. State*, 235 Ga. 622, 221 S.E.2d 43 (1975).

29. See *In re Isserman*, 9 N.J. 271, 87 A.2d 905 (1952).

30. *United States v. Meyer*, 346 F. Supp. 973, 976 (D.D.C. 1972). *Contra Johnson v. State*, 152 Ala. 93, 44 So. 671 (1907) (oath given attorneys by statute requires that they shall not violate any duties enjoined on them by law).

31. 18 U.S.C. § 401. See *Edmunds v. Chang*, 365 F. Supp. 941 (D. Hawaii 1975)

In *In re Daly*,³² the court noted that a willful violation of a single court order may alone justify disbarment. Actually the attorney, Daly, had persistently disobeyed both state and federal court orders such that the court did not have to rely on the one violation principle espoused.³³ The *Daly* court went on to state that a contempt violation can cause disbarment proceedings to be initiated³⁴ in which professional ethical standards will be applied.³⁵

Disciplinary proceedings usually begin upon the reference or recommendation of the trial judge who made the contempt finding. In *Eisenberg v. Boardman*,³⁶ a judge was publicly insulted by lawyers who were not participating in a trial before him. The judge's cause was taken up by the state bar authorities who brought a disciplinary proceeding against the lawyers because they had issued news releases to solicit public complaints against the judge for malfeasance in office.³⁷ In addition, the lawyers forced the judge to publicly appoint them as advisors concerning the proper administration of his traffic court in order to negate their attempts to remove him from the bench.³⁸ Seeking an injunction to the disciplinary action, the lawyers contended that the Wisconsin statute requiring all attorneys to take an oath of office and solemnly swear to maintain respect toward the courts and judicial officers was unconstitutional when applied to discipline for out-of-court speech.³⁹ The Federal District court agreed with the lawyer's contention,⁴⁰ but denied the injunctive relief because the state bar's claim requested punishment for unprofessional conduct rather than attempted punishment of protected speech.⁴¹ The court held that where a state can properly regulate the attorney's conduct as a whole, the fact that speech is intermingled with conduct does not automatically provide the conduct with constitutional protection.⁴²

(noting that several United States Supreme Court decisions adopted the federal statute as marking the limits of a state court's contempt powers).

32. 291 Minn. 488, 189 N.W.2d 176 (1971).

33. *Id.* at 180.

34. *Id.* at 178.

35. *Id.* at 179.

36. 302 F. Supp. 1360 (W.D. Wis. 1969).

37. *Id.* at 1361.

38. *Id.*

39. *Id.* at 1363.

40. *Id.* at 1364.

41. *Id.*

42. *Id.* at 1365.

After the judge initiates the investigation, the burden is then on the state bar to establish a violation of the appropriate ethics rule.⁴³ Ethical standards against disruptive or offensive conduct are often invoked by state disciplinary agencies⁴⁴ because ethics rules establish the outermost limits of allowable attorney conduct.⁴⁵ The disciplinary body in *Matthews* invoked DR 6-101(A)(3) of the American Bar Association's Code of Professional Responsibility, regarding the attorney's negligence toward the client's case⁴⁶ rather than a rule regarding the fact that Matthews had violated the court order, which would be grounds for a contempt citation. Upon the same principles, however, state disciplinary committees could in the future invoke the jurisdiction's version of DR 7-106(C)(6), (7) which, as stated in the Model Code of Professional Responsibility, provides: "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . engage in undignified or discourteous conduct which is degrading to a tribunal . . . nor intentionally or habitually violate any established rule of procedure or of evidence." When read together with the *Matthews* holding, state bar ethics committees could exert substantial power in a modern effort to clean up the public image of the legal profession and apply that power against an attorney upon his first receipt of a contempt citation.

In *United States v. Thoreen*,⁴⁷ the court acknowledged that judicial power to disbar an attorney proceeds upon very different grounds than judicial power to punish for contempt.⁴⁸ The court went on to state, however, it would consider and apply ethical standards when determining whether an attorney's conduct in a contempt violation was appropriate to his professional role.⁴⁹ Defense counsel had seated a person, whose appearance and dress were similar to the defendant's, at the counsel table in order to confuse the prosecution's sole eye witness into an identification of the wrong person. The trial judge held the defense attorney in contempt of a court rule which allowed only parties and lawyers to advance beyond the bar and into the well of the court.⁵⁰ The *Thoreen* court began its analysis of the attorney's court-

43. See *Matthews v. Virginia State Bar*, 231 Va. 308, 343 S.E.2d 79 (1986).

44. See *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982).

45. *Id.* at 1340 (citing 18 U.S.C. § 401(1)).

46. *Matthews v. Virginia State Bar*, 231 Va. 308, 309, 343 S.E.2d 79, 80 (1986).

47. 653 F.2d 1332 (9th Cir. 1981), cert. denied, 455 U.S. 938 (1982).

48. *Id.* at 1340 (quoting *Ex parte Robinson*, 86 U.S. 505 (1874)).

49. *Id.*

50. *Id.*

room conduct by noting that a similar act had been considered unethical behavior⁵¹ by the American Bar Association's Committee on Professional Ethics in an informal opinion.⁵² In *Leimer v. Hulse*,⁵³ the court noted that contemptuous conduct alone might not be grounds to disbar an attorney.⁵⁴ However, in disciplinary actions all the relevant evidence⁵⁵ of attorney conduct must be considered. A contempt violation can be considered in connection with an ethics violation to determine whether the entire course of conduct shows an unfitness to practice law.⁵⁶

The attorney's intent is an important factor in the disposition of the disciplinary proceeding.⁵⁷ In *In re Frerichs*,⁵⁸ a defense attorney faced disciplinary charges because he had asserted in a petition for a rehearing of his client's criminal appeal that the Iowa Supreme Court had willfully avoided constitutional questions raised for the court's initial review of the case.⁵⁹ The court dismissed all charges and merely admonished the attorney when he maintained that he did not intend any disrespect or defiance to the court.⁶⁰ The attorney also expressed the belief that he was acting in good faith under a duty as an advocate for his client.⁶¹ In *In re Daly*,⁶² the Supreme Court of Minnesota issued a declaratory judgment that the attorney, Daly, should desist from further unlawful detainer proceedings before a Justice of the Peace who had no jurisdiction over that type of action.⁶³ Daly ignored the judgment. In the following disciplinary proceeding, the court appointed a referee to hold an evidentiary hearing regarding charges against Daly which were broader than mere violation of the declaratory judgment.⁶⁴ Daly was charged with persistently using the position of a licensed attorney to

51. *Id.*

52. A.B.A. COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Informal Op. 914 (1966) (decided under the former A.B.A. Code).

53. 352 Mo. 451, 178 S.W.2d 335 (1944), *cert. denied*, 323 U.S. 744 (1944).

54. *Id.* at 463.

55. *Id.*

56. *Id.*

57. *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976).

58. *Id.* at 765.

59. *Id.*

60. *Id.* at 770.

61. *Id.*

62. 291 Minn. 488, 189 N.W.2d 176 (1971).

63. *Id.* at 177.

64. *Id.* at 180.

subvert the process of justice by:⁶⁵ (1) initiating numerous unfounded lawsuits to harass banking institutions and to avoid legal obligations for both his clients and himself; (2) continually advancing his personal theory that the United States' monetary system was unconstitutional despite repeated state court rulings that his contention was invalid, and despite a federal district court order restraining Daly from further litigating the issue which he disregarded without seeking an appeal; (3) use of dilatory tactics to interfere with timely disposition of cases and abusive assertion of the attorney-client privilege; (4) concealment and diversion of court controlled assets.⁶⁶ After an eight-day hearing and submission of an eight hundred page transcript of the testimony, the referee recommended that Daly be disbarred.⁶⁷ Representing himself at oral argument before the court, Daly declared his intention to continue to disobey any court orders or rules governing his professional conduct, which he regarded as oppressive or unconstitutional.⁶⁸ The court held that the only solution was to disbar Daly due to his defiant rejection of any judicial authority to control his professional activities.⁶⁹ The court noted that Daly's continuing attacks on the national monetary system could hardly be regarded as zealous advocacy or as a good faith attempt to test the validity of repeated state and federal court decisions.⁷⁰ Similarly, a South Dakota attorney's willful violation of a court order suspending him was held sufficient alone to authorize disbarment regardless of the facts leading to his initial suspension.⁷¹

Sometimes disciplinary proceedings are discharged due to the attorney's good faith attempt to protect a client's privilege.⁷² Contempt sanctions may not be imposed where the attorney in good faith advises the client not to comply with an unconstitutional court order if ordinary methods of challenge and review would not sufficiently protect the cli-

65. *Id.*

66. *Id.*

67. *Id.* at 177.

68. *Id.* at 179.

69. *Id.*

70. *Id.* at 182.

71. *In re Hosford*, 62 S.D. 374, 252 N.W. 83 (1934) (attorney's indulgence in the practice of law during his suspension period justified disbarment).

72. *In re Sherwood*, 259 Pa. 254, 103 A. 42 (1918). *Accord In re Bull*, 123 F. Supp. 389 (D.C. Nev. 1949) (a private communication by an attorney advising his client, who was in custody on a criminal charge, about the conduct of his defense, if intercepted by prison officials, cannot properly be made the basis of disciplinary action against the attorney even where the letter discussed the deficiencies of the trial court).

ent's constitutional rights.⁷³ The United States Supreme Court stated that such advised refusal must be based on a good faith claim of the fifth amendment privilege.⁷⁴ Some courts have also discharged disciplinary proceedings upon receipt of the attorney's formal apology.⁷⁵ Apology or retraction of the offensive conduct does not always serve to purge the contempt or save the offending lawyer.⁷⁶ Apology is not a defense, but is often the most effective preventative or mitigating factor.⁷⁷ Some courts have included a good faith requirement to dismiss disciplinary actions.⁷⁸ One attorney's reference to a judge as an "arrogant jackass"⁷⁹ in a letter to a state representative did not warrant suspension from practice absent some evidence that the attorney had intended the letter to be circulated.⁸⁰ The Seventh Circuit explained that good faith is not an absolute defense to every contempt citation,⁸¹ however, the issue of good faith may be relevant to the question of intent in a disciplinary proceeding.

The trial judge's error in rulings or conduct is irrelevant as to the attorney's misconduct.⁸² The Ohio Supreme Court recently held that an attorney's trial conduct of responding repeatedly to rulings with profane or obscene statements warranted his suspension regardless of the fact that the judge had used vulgarities and profanities on the record.⁸³ The attorney's attempted defense of provocation by the judge was deemed irrelevant to the ethical standard an attorney must maintain during a trial.⁸⁴ An attorney may not be subjected to disciplinary pro-

73. *Maness v. Meyers*, 419 U.S. 449 (1975) (the client was advised not to produce documents where the client's privilege against self-incrimination could not otherwise be fully protected).

74. *Id.*

75. *In re Minnis*, 56 S. Ct. 504 (omitted in U.S. reports, 1936).

76. *In re Snow*, 27 Utah 265, 75 P. 741 (1904) (use of language reflecting negatively on the character of the judge cannot be excused by the attorney's filing a disclaimer that any such meaning was intended). *Accord In re Rockmore*, 111 N.Y.S. 879, 127 A.D. 499 (N.Y. App. Div. 1908).

77. *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976).

78. *In re Dore*, 165 Wash. 225, 4 P.2d 1107 (1931) (attorney's conduct in informing client that restraining order preventing disposition of stock pending a divorce trial was void, did not merit disciplinary action without a showing of bad faith).

79. *In re Huppe*, 92 Mont. 211, 11 P.2d 793 (1932).

80. *Id.*

81. *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972).

82. *Johnson v. State*, 152 Ala. 93, 44 So. 671 (1907). *See also In re Schofield*, 362 Pa. 201, 66 A.2d 675 (1949).

83. *Bar Ass'n of Cleveland v. Carlin*, 67 Ohio St. 2d 311, 423 N.E.2d 477 (1981).

84. *Id.*

ceedings where the court had no jurisdiction to issue the order under which he has been held in contempt.⁸⁵ However, the invalidity or the unconstitutionality of a disobeyed court order is not in itself a defense to contempt⁸⁶ since lawyers are expected, even under formal protest, to raise the issue of the validity of the order upon appeal.⁸⁷ The attorney is not free to disregard an order which he personally considers to be invalid,⁸⁸ nor is he free to advise clients to disregard court orders,⁸⁹ nor be a party to such disobedience.⁹⁰ Ethics codes usually contain provisions to support these principles. DR 7-106(A) of the Model Code of Professional Responsibility provides: "A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling." Attacking the character of state judges upon the removal of the case to federal court or avoiding a court order by bringing a suit for a declaratory judgment are not appropriate tactics either.⁹¹ Moreover, an attorney cannot refuse a court's request to represent an indigent client without substantial justifiable excuse.⁹²

A lawyer's criticism of the court is always subject to the contempt power. Whether particular criticism amounts to contempt will be judged by a number of factors depending on the views of the particular court. An attorney may criticize court decisions in a fair and respectful manner⁹³ but improper language used, even in motions, could be held as a contempt justifying suspension.⁹⁴ Criticism that is respectfully delivered and serves some relevant purpose may escape punishment. Criticism that serves only to help the lawyer express his feelings of anger or frustration may incur punishment that is upheld. A minority of states have allowed criticism of judicial officers when the criticism was

85. *People v. A'Brunswick*, 315 Ill. 442, 146 N.E. 483 (1925) (attorney's refusal to abide by an invalid court order fixing his fee was not cause for disbarment).

86. *Eisenberg v. Boardman*, 302 F. Supp. 1360 (W.D. Wis. 1969).

87. *Sacher v. United States*, 343 U.S. 1 (1952). See also *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

88. *In re Closterman*, 276 Or. 261, 554 P.2d 467 (1976).

89. *State Bar Ass'n v. Niklaus*, 149 Neb. 859, 33 N.W.2d 145 (1947).

90. *State Bar Ass'n v. Crary*, 245 N.W.2d 298 (Iowa 1976) (a lawyer has an obligation to advise clients as to proper courtroom decorum, but is not responsible, absent encouragement or participation, if such advice goes unheeded).

91. *In re Whiteside*, 386 F.2d 805 (2d Cir. 1967), cert. denied, 391 U.S. 920 (1968).

92. *Smith v. State*, 118 N.H. 764, 394 A.2d 834 (1978).

93. *In re Ades*, 6 F. Supp. 467 (D.C. Md. 1943).

94. *In re Dunn*, 85 Neb. 606, 124 N.W. 120 (1909).

made after the termination of the case.⁹⁵ Other states have found criticism of the judicial system or judges improper even if it was not done during a pending legal proceeding.⁹⁶ In *In re Breen*,⁹⁷ the attorney, while acting in his capacity as a district judge, criticized a decision of the Nevada Supreme Court. The criticism was not made in any judicial proceeding pending before him. He called the decision "reprehensible if the court knew what it was doing and pitiful if it did not."⁹⁸ The disciplinary proceeding which followed this conduct held this statement was not in the province of legitimate criticism, but was an unwarranted attack on the court.⁹⁹ Breen was disbarred even though he claimed that he intended no disrespect toward the court.¹⁰⁰ Likewise, in *State Board of Examiners v. Hart*,¹⁰¹ the attorney wrote a personal letter to the Chief Justice of the Minnesota Supreme Court which discredited both the intelligence and the integrity of the justice and his associates. The attorney had represented the defeated litigants in an appeal which the court had decided. In the following disciplinary action the attorney was found guilty of misconduct and suspended from practice.¹⁰² In *Johnson v. State*,¹⁰³ after the defendant's unsuccessful trial was over, his attorney mailed a letter to the judge at his residence. The letter stated that the attorney had been informed that the judge had visited the defendant in jail at night during the trial. The judge had expressed sorrow for the defendant and had stated that his conduct during the trial was because of the judge's dislike for the attorney.¹⁰⁴ The writer expressed no patience or respect for a judge who would act in such a manner. The subsequent disciplinary action held that the letter referred to the judge in his official capacity and constituted grounds for the attorney's disbarment.¹⁰⁵

Some decisions recognize first amendment rights in allowing the attorney to publish criticism of the court or the judicial system. A Rhode Island court stated that because one is a member of the bar the

95. *In re Egan*, 24 S.D. 301, 123 N.W. 478 (1909).

96. *State Bar Ass'n v. Grimes*, 436 P.2d 40 (Okl. 1967).

97. 30 Nev. 164, 93 P. 997 (1908).

98. *Id.* at 998.

99. *Id.*

100. *Id.*

101. 104 Minn. 88, 116 N.W. 212 (1908).

102. *Id.* at 214.

103. *Johnson v. State*, 152 Ala. 93, 44 So. 671 (1907).

104. *Id.*

105. *Id.* at 673.

court will not under the guise of disciplinary proceedings deprive him of that freedom of speech which he possesses as a citizen.¹⁰⁶ A Tennessee attorney who criticized the court was not found guilty of unprofessional conduct.¹⁰⁷ All jurisdictions are not in accord with that position. Some courts have explained that the lawyer in the courtroom has fewer first amendment rights than the ordinary citizen has.¹⁰⁸ A Utah court recognized that an attorney may publicly criticize court decisions, but even under his constitutional right of free speech may not go so far as to slander or defame the court.¹⁰⁹ In *In re Sawyer*,¹¹⁰ the attorney who represented a litigant in a pending case had given an out-of-court speech that allegedly reflected on the judicial process of the trial. The fact that she did not refer to the trial judge by name did not exempt her from disciplinary proceedings.¹¹¹ The right to criticize a court opinion has been held not to justify an attorney's failure to give accurate facts and a fair discussion of the law when writing a newspaper article.¹¹² An attorney criticizing a court opinion in a newspaper should confine the comment to the facts and a fair deduction from the adjudicated cases.¹¹³

III. RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION

The law of courtroom conduct is, to a great extent, the law of contempt. Ethics codes address the subject of courtroom behavior only briefly, as do statutes within the various jurisdictions. A court's exercise of its contempt power is an effective constraint on the lawyer's courtroom actions. Consideration of a contempt citation as a matter for bar discipline under the applicable conduct code creates a possibility that a second punishment could be exacted for the same conduct. One of the American Bar Association's Standards Relating to the Function of the Trial Judge recommends that judges deal with attorney misconduct

106. *In re Troy*, 63 R.I. 279, 111 A. 723 (1920).

107. *In re Hickey*, 149 Tenn. 344, 258 S.W. 417 (1924).

108. *In re Frerichs*, 238 N.W.2d 764, 769 (Iowa 1976). See also *In re Sawyer*, 360 U.S. 622 (1959).

109. *In re Hilton*, 48 Utah 172, 158 P. 691 (1916) (attorney was found guilty of moral turpitude warranting his disbarment due to a funeral oration given over the body of his friend who was a convicted murderer).

110. 360 U.S. 622 (1959).

111. *Id.*

112. *State v. Breckenridge*, 126 Okl. 86, 258 P. 744 (1927).

113. *Id.*

by informing a state disciplinary body. The ABA committee that drafted these standards noted that courts appear to be reluctant to disbar an attorney for misconduct in a single case, although such power exists.¹¹⁴ A partial reason for this position relates to the fact that contempt is an arbitrary judicial power subject to abuse.¹¹⁵ Further, the discretion which a judge exercises in summarily punishing contempts occurring in his presence is not likely to be reversed on appeal.¹¹⁶ Disciplinary actions often require more than a single contempt violation.¹¹⁷ On the other hand, frequent and repeated punishment for contempt of court has been held to indicate that a lawyer is not fit to practice law.¹¹⁸ In one example, an attorney was disbarred after he had undergone two suspensions and continued to practice law in violation of court orders.¹¹⁹ The American Bar Association acknowledges¹²⁰ that even if it has no official status in the local grievance process, the judge's recommendation for discipline may have considerable weight in the initiation of disciplinary proceedings. However, it is clear that a judge's failure to recommend bar disciplinary action is no defense to such discipline.¹²¹

IV. RELATIONSHIP TO AN ATTORNEY'S DUTY TO USE VIGOROUS ADVOCACY

Canon 7 of the present Model Code of Professional Responsibility requires that a lawyer represent the client zealously within the bounds of the law. The meaning of this requirement, when examined in relation to the appropriate exercise of the judicial contempt power, is less than clear. Certainly, a lawyer should not violate laws or court rules in providing representation. However, there are situations in which vigorous representation of the client requires challenging existing, but unwarranted rules. The American Bar Association's Standards on the Defense Function emphasize that while a lawyer should comply promptly with

114. A.B.A., PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, 145-53 (1970).

115. *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972).

116. *Fisher v. Pace*, 366 U.S. 155 (1949) (upheld the discretion of the trial judge, pointing out that the written record could not convey such elements of the attorney's conduct as expression, manner of speaking, and attitude).

117. *State Bar Ass'n v. Taylor*, 482 S.W.2d 574 (Ky. 1972).

118. *Id.*

119. *State Bar Ass'n v. Illman*, 48 Ohio St. 2d 159, 342 N.E.2d 688 (1976).

120. A.B.A., PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 145-53 (1970).

121. *In re Schofield*, 362 Pa. 201, 66 A.2d 675 (1949).

all orders and directives of the court¹²² he also has a duty to have the record reflect adverse rulings or conduct,¹²³ and a right to make respectful requests for the reconsideration of adverse rulings.¹²⁴ A delicate issue is the good faith persistence on the part of a lawyer to obtain a ruling on a disputed point that could be the subject of appellate relief. The contempt power has been used effectively to keep counsel from making a record for appeal. A judge's command to sit down and be quiet can be enforced by contempt even if the substantive point the lawyer is making is a valid one. Ability to appeal obviously depends on the trial judge's issuing a ruling. The judge may imprecisely ask the attorney to move on to something else, or may instruct an opposing attorney to proceed. Neither response is a definite ruling. Whether the attorney is the objecting or the offering party, he has the right to receive an explicit ruling and a statement of the underlying grounds for such ruling. Persistence in seeking a ruling is crucial as there will be no logical point available for any appellate review without the trial court's ruling on the record.¹²⁵ It has been held that a lawyer's obligation to represent a client's interests combined with the client's right to such representation are at least as important as the judge's right and duty to have an orderly courtroom.¹²⁶ The United States Supreme Court in *In re McConnell*,¹²⁷ stated that "the arguments of a lawyer in presenting his client's case persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction that blocks the judge in the performance of his judicial duty."¹²⁸ The court in *Sacher v. United States*,¹²⁹ discussed the right of counsel to press his client's claim in order to obtain a ruling, even if it appears farfetched and the full enjoyment of that right will be protected by the appellate courts.¹³⁰ *Edmunds v. Chang*¹³¹ added that "if a lawyer can be denied the opportunity even to address the court on the subject of what he

122. STANDARDS ON THE DEFENSE FUNCTION, standard 7.1(d).

123. *Id.*

124. *Id.*

125. Under Federal Rule of Evid. 103, no evidentiary ruling excluding evidence can be the subject of an appeal unless its content was apparent from the context or an offer of proof was made setting forth its substance on the record.

126. *Edmunds v. Chang*, 365 F. Supp. 941 (D. Hawaii 1975), *rev'd on other grounds*, 509 F.2d 39 (9th Cir. 1973).

127. 370 U.S. 230 (1962).

128. *Id.* at 236.

129. 343 U.S. 1 (1952).

130. *Id.* at 9. *Accord* *Maness v. Meyers*, 419 U.S. 449 (1975).

131. 365 F. Supp. 941 (D. Hawaii 1975).

conceives to be a valid objection, it is hard to imagine what part of his function as advocate is left to him."¹³² That case drew a careful distinction between cases concerning the limits to which an attorney can go in protesting an adverse ruling,¹³³ and cases concerning appropriate limits on an attorney who is attempting to make the initial record or to obtain a ruling from the court.¹³⁴ A lawyer can persistently seek a ruling and build a record, but continued argument over a point that has been definitely ruled upon, continued mention of inadmissible evidence, and continued presentation to the jury of a forbidden argument can be validly punished as contempt of court. Any request for the court's reconsideration of a ruling must be made in respectful language and manner.¹³⁵ The judicial standard remains the obstruction of justice.¹³⁶ The threat must be an open and immediate threat to orderly procedure or destruction of court business.¹³⁷ In most cases, it should be possible for the attorney to raise a challenge in such an orderly and respectful manner that neither courtroom rules nor ethical canons will be violated.¹³⁸

V. CONCLUSION

An attorney's being held in contempt can provide evidence of grounds for his or her suspension or disbarment. Although actions to punish contempt and ethical breaches require separate proceedings, evidence of the attorney's entire course of conduct is scrutinized in the disciplinary action and measured against ethical standards. Since the disciplinary action examines conduct, a defense of freedom of speech is usually irrelevant. The American Bar Association recommends that judges report contempt citations to the state disciplinary body. Frequent and repeated punishment for contempt is substantial evidence of unfitness to practice law. State bar ethics committees could discipline an attorney for receipt of only one contempt citation where the conduct involved violates professional canons.

The attorney's duty to represent the client zealously within the bounds of the law gives rise to potential conflict with the exercise of

132. *Id.* at 948.

133. *Fisher v. Pace*, 336 U.S. 155 (1949) (lawyer held in contempt for disobeying a court order to desist from exceeding proper bounds of jury argument).

134. *Edmunds v. Chang*, 365 F. Supp. 941, 947 (D. Hawaii 1975).

135. *Id. Accord Sacher v. United States*, 343 U.S. 1 (1952).

136. *In re McConnell*, 370 U.S. 230, 236 (1962).

137. *Edmunds v. Chang*, 365 F. Supp. 941, 942 (D. Hawaii 1975).

138. A.B.A., PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 145-53 (1970).

judicial contempt powers. Attorneys have a duty to have the trial record reflect adverse rulings and a right to make respectful requests for the court's reconsideration of them. Good faith persistence to obtain a ruling or create a record will be protected by appellate courts as long as the attorney does not create an obstruction that blocks the judge's performance of his judicial duty. Continued argument over a point already ruled upon receives less protection. In most cases, conflict can be avoided provided that the attorney presents the appropriate challenge in an orderly manner which substantially conforms to the rules of court.

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