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Comments: A Pragmatic Look at Criminal Contempt and the Trial Attorney

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A PRAGMATIC LOOK AT CRIMINAL CONTEMPT AND THE TRIAL ATTORNEY

The judicial sanction of contempt threatens the trial attorney in all facets of his professional life, yet it is ill-defined and often inconsistently applied. This article analyzes contempt case law, pinpoints the few general rules existing in this area and stresses the need for clear cut guidelines and uniformity in the use of this powerful weapon.

I. INTRODUCTION

Contempt of court is any act calculated to embarrass, hinder or obstruct a court in its administration of justice.[1] The power to punish contempt originated at common law, and according to the United States Supreme Court, rests upon a rule of "almost immemorial antiquity."[2] It is an inherent right necessary to preserve the dignity and authority of the courts and, ultimately, the integrity of the judicial system.[3]

Although the common law power to punish contempt has been greatly restricted by legislation,[4] it remains a powerful and often unpre-

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1. BLACK'S LAW DICTIONARY 288 (rev. 5th ed. 1979).
2. *Ex parte* Terry, 128 U.S. 289, 307 (1888). *But see* Comment, *Counsel and Contempt: A Suggestion that the Summary Power be Eliminated,* 18 DUQ. L. REV. 289, 289-90 (1980) (discusses the theory that the contempt power may not have been an inherent power at common law) [hereinafter cited as *Counsel and Contempt*]; Comment, *The Application of Criminal Contempt Procedures to Attorneys,* 64 J. CRIM. L. & CRIMINOLOGY, 300, 300-01 (1973) (same) [hereinafter cited as *Application of Criminal Contempt*]. *See generally* Goldfarb, *The Constitution and Contempt of Court,* 61 MICH. L. REV. 283, 283-84 (1962) [hereinafter cited as Goldfarb]; Nelles, *The Summary Power to Punish for Contempt,* 31 COLUM. L. REV. 956, 958-59 (1931).
3. *See Ex parte* Terry, 128 U.S. 289, 303 (1888). *But see Counsel and Contempt, supra* note 2, at 289-91 (argues against the use and necessity of the contempt sanction); Note, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process,* 5 DUKE B.J. 155, 155-60 (1956) (same); Comment, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts — A Study in Separation of Powers,* 37 HARV. L. REV. 1010, 1010-12 (1924) (same); Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney,* 63 KY. L.J. 945, 947-52 (1975) (same); Note, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal,* 39 S. CAL. L. REV. 463, 467 (1966) (same). *See generally* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 184 (1971) (while disputing the origin of the contempt sanction, agrees that, in limited areas, it is necessary) [hereinafter cited as Dobbs]; Comment, *Attorneys and the Summary Contempt Sanction,* 25 ME. L. REV. 89, 89-90 (1973) (same) [hereinafter cited as *Summary Contempt Sanction*]; Note, *Criminal Law — Contempt — Conduct of Attorney During Course of Trial,* 1971 WIS. L. REV. 329, 329-30 (same) [hereinafter cited as *Conduct of Attorney*].
4. *See Application of Criminal Contempt, supra* note 2, at 301. After federal Judge James Peck disbarred and imprisoned an attorney for contempt resulting from his publication of a criticism of Peck's handling of a case in which appeal was pending, Congress enacted the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83, and The Act of March 2, 1831, ch. 98, 4 Stat. 487-88, which curtailed the summary disposi-

dictable sanction resting primarily within the trial judge's discretion.[5] An analysis of the case law reveals that this power, albeit necessary, is sometimes wielded in a capricious, erratic, almost whimsical manner.[6] It is this haphazard application of the contempt sanction which forces the attorney to walk a fine line between zealous advocacy and contemptuous conduct.[7]

The trial attorney must be aware of both the types and the degree of conduct likely to result in an adjudication of contempt. While there are no clearly defined legislative or precedential guidelines for an attorney to follow, a few general patterns are discernable in the confusing and often conflicting decisions. This comment focuses upon those patterns.

Contempt of court is a very broad subject, encompassing both direct and constructive civil and criminal contempt.[8] This comment, however, deals solely with direct and constructive criminal contempt as applied to trial attorneys.[9] As the title indicates, the approach taken is a practical one; the emphasis is upon the elements of contempt as established by the Supreme Court, the conflicting interpretations and applications of these elements by lower courts, the areas where trial

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tion of contempt. Peck was impeached but subsequently acquitted. A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833). Current federal statutory authority for the contempt sanction may be found in 18 U.S.C. § 401 (1976 & Supp. I 1977) and FED. R. CRIM. P. 42(a). In Maryland, see MD. R. CRIM. P. P1-P5, § a (1977) and MD. CTS. & JUD. PROC. CODE ANN. § 1-202 (1974).

5. *See generally* Goldfarb, *supra* note 2; *Counsel and Contempt, supra* note 2; Note, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process,* 5 DUKE B.J. 155 (1956). The trial judge's discretion is, however, not absolute. The judge must excuse himself from adjudicating the contempt charge when there is a likelihood or appearance of bias. Taylor v. Hayes, 418 U.S. 488, 501 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971); Offutt v. United States, 348 U.S. 11, 14 (1954).

6. *Compare* Maness v. Meyers, 419 U.S. 449 (1975) (trial court held attorney in contempt when client pleaded fifth amendment right against self-incrimination and refused to comply with a *subpoena duces tecum*) *with In re* McConnell, 370 U.S. 230 (1962) (trial court held attorney in contempt for attempting to comply with the Federal Rules of Civil Procedure after attorney was erroneously ordered to desist) *and* Fisher v. Pace, 336 U.S. 155 (1949) (trial court held attorney in contempt for repeatedly referring to issues which court had ruled to be outside of the issues for the jury to consider). For a general discussion of the problems inherent in the contempt sanction, see Dobbs, *supra* note 3, at 282-84 and Goldfarb, *supra* note 2, at 283-87.

7. *See generally* Dobbs, *supra* note 3, at 282-84; *Counsel and Contempt, supra* note 2, at 299-302.

8. The distinction between civil and criminal contempt is the purpose for which punishment is imposed. In the former, punishment is imposed to compel compliance with a court order, while in the latter, the punishment is strictly punitive. For a thorough analysis, see Note, *Distinction Between Civil and Criminal Contempt*, 12 MD. L. REV. 241 (1951).

9. The scope of this comment does not extend to esoteric constitutional arguments. For an analysis of the constitutional infirmities of the contempt sanction, see the sources cited *supra* note 5.

judges are most prone to find conduct contemptuous, and the rights and remedies available to the convicted contemnor.

II. DIRECT VERSUS CONSTRUCTIVE CONTEMPT

Direct contempt is misbehavior which occurs directly "in the face of the court."[10] Constructive contempt, on the other hand, is misbehavior occurring beyond the court's vision and immediate cognition.[11] Therefore, the distinguishing feature is not the act but the place where it occurs. This distinction is often crucial because direct contempt may be disposed of summarily, "without trial or issue" in any form,[12] while a finding of constructive contempt entitles the attorney to traditional due process protection.[13]

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10. *Ex parte* Terry, 128 U.S. 289, 307 (1888); *see In re* Lee, 170 Md. 43, 47, 183 A. 560, 562, *cert. denied,* 298 U.S. 680 (1936).
11. *See* cases cited *supra* note 10.
12. *Ex parte* Terry, 128 U.S. 289, 313 (1888). The Federal Rules of Criminal Procedure state:

> Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

FED. R. CRIM. P. 42(a). The Supreme Court in Sacher v. United States, 343 U.S. 1 (1952) interpreted summary disposition to be: "A procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial." *Id.* at 9. The trial judge must, however, invoke the summary contempt power immediately upon the occurrence of the contempt. If he delays punishment until the trial is completed, ordinary due process requirements come into play. The contemnor is still not entitled to a full-scale trial, but must be informed of the charges and given an opportunity to present a defense. *See* Taylor v. Hayes, 418 U.S. 488, 496-98 (1974); Groppi v. Leslie, 404 U.S. 496, 504 (1972); Mayberry v. Pennsylvania, 400 U.S. 455, 463-64 (1971); *Summary Contempt Sanction, supra* note 3, at 91-92. The direct contemnor does today, however, have a limited right to trial by jury. *See infra* notes 129-39 and accompanying text.
13. The Federal Rules of Criminal Procedure state:

> A criminal contempt except as provided in subdivision (a) [Summary Disposition] of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

FED. R. CRIM. P. 42(b). Judicial interpretation of rule 42(b) has expanded the requirement of a reasonable opportunity to present a defense to include: "the

The requirement that direct contempt be committed in the presence of the court is a seemingly unequivocal statement of the law, yet the issue is frequently litigated.[14] The discord lies in the definition of "presence" and is clearly depicted in cases dealing with an attorney's most frequent encounter with judicial displeasure, absence from the courtroom.[15]

There are two diametrically opposed schools of thought as to whether attorney absence constitutes misbehavior in the court's presence. The majority rule,[16] that absence is punishable only as constructive contempt, is based upon the rationale that absence is the antithesis of presence. While conceding that the attorney's failure to appear is obvious to the trial judge, the majority rule maintains that a direct contempt conviction cannot stand because, unless aware of the attorney's reasons, the court lacks sufficient first-hand knowledge of the contemptuous act.[17] Equally sound logic supports the minority rule: the essence of the contempt, the attorney's absence, occurs in the court's presence and is immediately cognizable by the judge.[18] Summary disposition is considered necessary because the attorney plays such an integral role in the judicial process that the administration of justice "grind[s] to a halt" in his absence.[19]

These two rules, while irreconcilable in approach and effect, are not mutually exclusive within jurisdictions. Illustrative of this intra-jurisdictional conflict are two cases, *In re Rosen*[20] and *In re Brown*,[21] decided in the same year by the same court. In *Rosen*, Sol Rosen, as defense attorney, was permitted to leave a criminal trial in order to appear for a brief hearing in another court on the stipulation that he return by ten o'clock. Rosen, however, returned thirty minutes late.

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assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." Cooke v. United States, 267 U.S. 517, 537 (1925).

14. *See, e.g.,* Annot., 97 A.L.R.2d 431 (1964); Annot., 59 A.L.R. 1272 (1929) and cases cited therein.
15. *See, e.g.,* United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973); *In re* Brown, 320 A.2d 92 (D.C. 1974); *In re* Rosen, 315 A.2d 151 (D.C. 1974); Murphy v. State, 46 Md. App. 138, 416 A.2d 748 (1980); *Ex parte* Hill, 122 Tex. 80, 52 S.W.2d 367 (1932); State v. Winthrop, 148 Wash. 526, 269 P. 793 (1928); *see also infra* notes 59-68 and accompanying text. *See generally* Annot., 97 A.L.R.2d 431 (1964); Annot., 59 A.L.R. 1272 (1929) and cases cited therein.
16. *See, e.g.,* Klein v. United States, 151 F.2d 286 (D.C. Cir. 1945); Lee v. Bauer, 79 So.2d 792 (Fla. 1954); *In re* Clark, 208 Mo. 121, 106 S.W. 990 (1907); *Ex parte* Hill, 122 Tex. 80, 52 S.W.2d 367 (1932); State v. Winthrop, 148 Wash. 526, 269 P. 793 (1928). *See generally* Annot., 97 A.L.R.2d 431 (1964).
17. *See* cases cited *supra* note 16.
18. *See, e.g.,* Chula v. Superior Court, 57 Cal. 2d 199, 368 P.2d 107, 18 Cal. Rptr. 507 (1962); *In re* Brown, 320 A.2d 92 (D.C. 1974); *In re* Clawans, 69 N.J. Super. 373, 174 A.2d 367 (1961). *See generally* Annot., 97 A.L.R.2d 431 (1964).
19. Murphy v. State, 46 Md. App. 138, 146-47, 416 A.2d 748, 753-54 (1980).
20. 315 A.2d 151 (D.C. 1974).
21. 320 A.2d 92 (D.C. 1974).

The trial court held Rosen in direct contempt and he appealed his conviction, contending that summary disposition was inappropriate because the occurrence was not in the court's presence.[22] The appellate court affirmed the conviction and explicitly adopted the rule that, when an attorney fails to appear in court, "the offensive conduct, to wit, the absence, occurs in the presence of the court."[23]

A contradictory result was reached in *In re Brown*[24] when James Brown, defense counsel in a criminal case, was ten minutes late appearing for trial due to alleged traffic problems. The next day he was thirteen minutes late returning from a short recess which he claimed to have misunderstood to be the luncheon recess. The trial judge, finding Brown's actions to constitute "gross callousness and gross indifference as to what was going on in [the] Court," summarily cited him in direct contempt and imposed a fifty dollar fine.[25] Brown appealed, arguing that he was entitled to a hearing before such an adjudication was made.[26] The appellate court reversed the conviction on the ground that summary disposition was inappropriate since Brown's intent had not been clearly established.[27] The court distinguished *Rosen,* in one sentence, as counsel tardiness resulting from involvement in other court proceedings.[28] This distinction, premised on the court's knowledge of the attorney's whereabouts, is not analytically sound. Knowledge of the attorney's location is not knowledge of his reason for failing to appear in court at the appointed time and is, therefore, not sufficient to sustain a direct contempt conviction.[29]

The line between direct and constructive contempt is indistinct at best. Nevertheless, the trial attorney should apprise himself of the rule generally followed in his jurisdiction. The constructive contemnor's right to an impartial hearing[30] is an important one. An attorney must be given a reasonable opportunity to present a defense which includes the right to assistance of counsel and the right to call witnesses. Direct contempt, on the other hand, is generally disposed of summarily without hearing, evidence, or argument.[31] On appeal, the reviewing court, forced to rely on the trial court transcript, will give great deference to the judge's evaluation of the attorney's conduct and surrounding circumstances.[32]

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22. *In re* Rosen, 315 A.2d 151 (D.C. 1974).
23. *Id.* at 153.
24. 320 A.2d 92 (D.C. 1974).
25. *Id.* at 94.
26. *Id.* at 92.
27. *Id.* at 94-95.
28. *Id.* at 95.
29. *See generally* Annot., 97 A.L.R.2d 431 (1964); Annot., 59 A.L.R. 1272 (1929).
30. *See supra* note 13.
31. *See supra* note 12.
32. *See, e.g.,* Fisher v. Pace, 336 U.S. 155, 161 (1949).

III. ELEMENTS OF CONTEMPT

Both direct and constructive contempt convictions will be reversed on appeal unless the elements of criminal contempt are established beyond a reasonable doubt by the trial court.[33] The record must reflect attorney misconduct constituting an actual obstruction to court business.[34] Further, the misconduct must be intentional or in reckless disregard of the court's authority.[35] Obstruction, as an element of contempt, was first addressed by the United States Supreme Court in 1919.[36] The Court held then that "[a]n obstruction to the performance of judicial duty . . . is . . . the characteristic upon which the power to punish for contempt must rest" and must, therefore, "clearly be shown in every case where the power to punish for contempt is exerted . . . ."[37] The Supreme Court has not retreated from that position. Today, there must be a showing of an actual obstruction which immediately imperils the administration of justice:[38] the mere threat or probability of an obstruction is insufficient.[39]

Justice Black's opinion in *In re McConnell*[40] reflects this strict position. In that case, Thomas McConnell and his co-counsel, Lee Freeman, were summarily found guilty of contempt for statements made while representing their client in an antitrust suit for treble damages. The heart of the antitrust case was the issue of conspiracy, yet at the very outset of the trial the district judge, on his own motion, erroneously refused to permit any attempt to prove the conspiracy charge, holding that an economic injury to the public would have to be proved first in a separate trial.[41] McConnell requested counsel for the defend-

33. *See, e.g., In re* Little, 404 U.S. 553, 554-56 (1972); *In re* McConnell, 370 U.S. 230, 234 (1962); *Ex parte* Hudgings, 249 U.S. 378, 383 (1919); Goldfarb, *supra* note 2, at 330. *But see* Cooke v. United States, 267 U.S. 517, 531 (1925).
34. *See* sources cited *supra* note 33.
35. *See* DORSEN & FRIEDMAN, DISORDER IN THE COURT 106 (1973); Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney*, 63 KY. L. J. 945, 965-69 (1975). See Dobbs, *supra* note 3, at 261-65 for a thorough analysis of the intent element and the difficulties inherent in its application.
36. *Ex parte* Hudgings, 249 U.S. 378 (1919).
37. *Id.* at 383, *cited in In re* McConnell, 370 U.S. 230, 234 (1962).
38. Craig v. Harney, 331 U.S. 367, 376 (1947), *cited in In re* Little, 404 U.S. 553, 554-55 (1972); *see* Dobbs, *supra* note 3, at 209. *But see* Fisher v. Pace, 336 U.S. 155 (1949).
39. Craig v. Harney, 331 U.S. 367, 376 (1947), *cited in In re* Little, 404 U.S. 553, 554-55 (1972). For an example of the strict construction this element has received, see United States v. Sopher, 347 F.2d 415, 417-18 (7th Cir. 1965), where counsel, during his closing argument to the jury, made certain statements which the judge held to be misstatements of material facts, and because previously ruled upon, knowingly made. However, because the opposition promptly objected and the judge made an immediate ruling and comment to the jury, the contempt conviction was reversed on appeal. The appellate court held that the attorney had created no actual obstruction. *Id.* at 418.
40. 370 U.S. 230 (1962).
41. *Id.* at 231.

ants to stipulate that the plaintiffs would have introduced certain evidence of conspiracy had they been allowed to do so, in order to preserve the issue for appeal. Defense counsel, however, refused to stipulate, insisting that before an offer of proof was made questions upon which the offer was based must first be asked in the presence of the jury[42] as required by the Federal Rules of Civil Procedure.[43] McConnell, therefore, proceeded to produce and question witnesses in order to lay the proper foundation for offers of proof of conspiracy. The trial judge ordered this questioning stopped and directed that any further offers be made without questioning witnesses in the jury's presence.

This ruling placed McConnell in a dilemma because he could not be certain that the appellate court would consider the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the Federal Rules of Civil Procedure. McConnell forcefully disputed the judge's ruling, and when the trial judge steadfastly refused to permit him to continue, stated "we have a right to ask the questions, and we propose to do so unless some bailiff stops us."[44] Freeman then requested a short recess, and when the court reconvened, McConnell did not resume the disputed line of questioning. After the trial, the judge charged McConnell and Freeman with contempt and imposed jail sentences. Both appealed their convictions, but while Freeman's conviction was reversed, McConnell's was sustained.[45]

On writ of certiorari, the Supreme Court reversed McConnell's conviction because he ceased his line of questioning and the bailiff was never required to interrupt the trial by arresting him.[46] Justice Black, speaking for the Court, stated that "a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him . . ." does not amount to an obstruction of justice.[47] Because McConnell's actions did not create an actual obstruction, he could not be held in contempt for defying the trial judge's order by strenuously and persistently presenting his client's case.

In addition to an actual obstruction, the record must reveal that the attorney possessed the intent to obstruct.[48] Intent is established when the circumstances are such that the attorney knows or reasonably should know that his conduct is exceeding the limits of his proper role and "hindering rather than facilitating the search for truth."[49] How-

42. *Id.*
43. The rule involved was FED. R. CIV. P. 43(c).
44. *In re* McConnell, 370 U.S. 230, 235 (1962).
45. *Id.* at 233 (McConnell's jail sentence was reduced to a fine of $100).
46. *Id.* at 235-36.
47. *Id.* at 236.
48. *See In re* Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).
49. *In re* Dellinger, 461 F.2d 389, 400 (7th Cir. 1972). Yet, the Seventh Circuit states that "[A]ttorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's be-

ever, the heat of controversy during which the misconduct occurs must be taken into consideration as a mitigating factor because the attorney "fired with a desire to win"[50] may cross the line of acceptable courtroom conduct without realizing that he is creating an obstruction.[51]

Courts have also indicated a reluctance to infer intent when the attorney's contemptuous acts are occasioned by a reasonable but mistaken view of the law.[52] *Sprinkle v. Davis*[53] exemplifies this policy of restraint. The facts in *Sprinkle* are sparse but it appears that defense counsel, on retrial, attempted to offer into evidence a page of the first trial record to show a prior admission by the plaintiff.[54] The judge, on his own motion, ruled the evidence to be inadmissible. Counsel, believing the judge to be in error, strongly disputed the ruling and was held in direct contempt. The Fourth Circuit reversed, holding that, absent persistence contrary to a court's ruling, a reasonable mistake as to the law will not constitute contempt.[55]

The trial attorney should not, however, rely upon good faith as an absolute defense to contempt.[56] If the contemptuous conduct is wrongful or unlawful per se, as when the attorney acts in open defiance or persists to an obstructive excess, the contempt conviction will be upheld.[57] Although, in this situation, a showing of the attorney's good faith may still serve to mitigate his punishment.[58]

IV. MAJOR PROBLEM AREAS

As the foregoing cases have indicated, the line between zealous advocacy and contemptuous conduct is often narrow and ill-defined. An analysis of the case law indicates that the state and federal district courts are largely responsible for the lack of precision and uniformity in contempt law. The reported opinions tend to be result oriented with little or no attempt made to reconcile past decisions with present ones.

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half." *Id.; see* Sprinkle v. Davis, 111 F.2d 925, 930 (4th Cir. 1940); Dobbs, *supra* note 3, at 261.

50. Sacher v. United States, 343 U.S. 1, 12 (1952).
51. *Id.*
52. Sprinkle v. Davis, 111 F.2d 925 (4th Cir. 1940); *see, e.g.,* Gallagher v. Municipal Court, 31 Cal. 2d 784, 192 P.2d 905 (1948); Muskus v. State, 14 Md. App. 348, 286 A.2d 783 (1972).
53. 111 F.2d 925 (4th Cir. 1940).
54. *Id.* at 930.
55. *Id.* When an attorney is approaching the limits of proper advocacy, the judge should warn the attorney, out of the jury's presence, that his conduct is bordering on contempt. *See, e.g.,* Ungar v. Sarafite, 376 U.S. 575, 578 (1964); Sacher v. United States, 343 U.S. 1, 5 (1952); Gallagher v. Municipal Court, 31 Cal. 2d 784, 795, 192 P.2d 905, 913-14 (1948).
56. *See, e.g., In re* Dellinger, 461 F.2d 389, 398 (7th Cir. 1972); United States v. Seale, 461 F.2d 345, 363 (7th Cir. 1972) ("where there is open defiance or obstructive excess of persistence, belief in the necessity to register objections may reduce the degree of culpability but does not exonerate").
57. *See In re* Dellinger, 461 F.2d 389, 398 (7th Cir. 1972).
58. *Id.*

Also, the cases, frequently only one or two pages in length, contain inadequate analysis. The following sections, however, deal with specific types of attorney misconduct occurring so often that an analysis of the voluminous case law reveals distinct patterns. The trial attorney should acquaint himself with these patterns as they represent the few guides available in the area of contempt law.

A. Attorney Absence

It is well accepted that an attorney is in contempt when he knowingly and intentionally fails to appear at trial to represent his client.[59] Yet, the profuse litigation in the area of attorney absence suggests that it is the most recurrent instance of attorney misconduct. An analysis of the case law indicates that the primary reason for this is that attorneys do not appreciate the almost painfully simple theme created and adhered to by the judiciary. An attorney who does not have a reputation for tardiness or absence and who does have a reasonably valid excuse has little cause to worry about a contempt conviction.[60] On the other hand, the attorney with a reputation for abusing the courtesy of the court or with an unsubstantiated excuse has a strong chance of a contempt conviction and of having that conviction upheld on appeal.[61] The following discussion reflects this judicial policy of discouraging attorney tardiness and absence.

In the 1980 Maryland case of *Murphy v. State,*[62] William Murphy was cited in contempt and fined one thousand dollars for failing to appear in court as defense counsel.[63] Murphy's excuse was that a criminal trial he was involved in had been carried over. However, he failed to inform the court of his predicament until forty minutes prior to the scheduled start of the trial. In addition, the record revealed that Murphy had a lengthy history of unexcused absences and that this particular trial had been scheduled on a date and time of his choosing.[64] Maryland's intermediate appellate court affirmed his conviction holding that intent could be inferred from Murphy's conduct which disclosed a reckless disregard for his professional duty.[65]

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59. For a general discussion of this problem and the numerous cases attesting to this proposition see Annot., 68 A.L.R.3d 273 (1976); Annot., 97 A.L.R.2d 431 (1964); Annot., 59 A.L.R. 1272 (1929).
60. *See* sources cited *supra* note 59.
61. *See generally* sources cited *supra* note 59.
62. 46 Md. App. 138, 416 A.2d 748 (1980).
63. *Id.* at 139, 416 A.2d at 748.
64. *Id.* at 141, 416 A.2d at 750-51.
65. *Id.* at 153, 416 A.2d at 762. *But cf.* A.V. Laurins v. Prince George's County, 46 Md. App. 548, 563, 420 A.2d 982, 992 (1980) (the Maryland Court of Special Appeals held that an *unexcused* absence is not a direct contempt). The two cases can be reconciled only on the basis that in *Murphy* the court order contained sufficient evidence to establish the court's knowledge of the reasons for Murphy's absence while in *Laurins* the chancellor stated only conclusions and not specific facts giving rise to the contempt.

United States v. Delahanty[66] is representative of attorney absence cases in which the attorney has no reputation for tardiness and an acceptable excuse. In that case, Delahanty arrived ten minutes late for a conference in the judge's chambers. His excuse was that he was unfamiliar with the city, had encountered unforeseeable parking problems and was unfamiliar with the courthouse.[67] The reported case is extremely brief in its recitation of the facts but it appears that the trial judge did not inquire into the reasons for Delahanty's tardiness nor into his reputation, but summarily held him in contempt. The appellate court, finding no history of absence or tardiness and his excuse valid, reversed the contempt conviction.[68]

While the judicial policy of leniency toward infrequent offenders who, because of unavoidable and unforeseeable circumstances, arrive a few minutes late is both reasonable and necessary, as is the policy of allowing little latitude to those attorneys who repeatedly abuse the judicial system, the courts' reliance upon reputation is misplaced. There are no standards for determining the admissibility or weight to be given to an attorney's reputation for absence or tardiness in a contempt proceeding. Also, the cases do not indicate the source of knowledge concerning reputation: whether it is general reputation in the legal community, a history of tardiness or failure to appear before the convicting judge, or mere rumor that will result in a contempt conviction for the late or absent attorney. When absence or tardiness is habitual or occasioned by circumstances within the attorney's control, these facts could be brought out during questioning, and once adequately established, relied upon as a factor determining the element of intent.

B. Conduct During Trial

It is essential to the fair administration of justice that lawyers be able to make honest, good faith efforts to present their clients' cases.[69] It is also essential that the attorney, as an officer of the court, be respectful and courteous in his dealings with the trial judge.[70] This creates a conflict for the trial attorney because, while he has a duty to his client to forcefully object when he believes the judge has made an erroneous ruling, the force of this objection must be tempered by his duty of respect owed to the court. The case law contains numerous examples of contempt convictions based upon an attorney's persistent arguing with the trial judge, yet the point at which persistence ceases to be zealous advocacy and becomes contemptuous conduct is unclear. This confusion is readily apparent in two Supreme Court cases, *In re Mc-*

66. 488 F.2d 396 (6th Cir. 1973).
67. *Id.* at 399.
68. *Id.* at 400.
69. *See In re* McConnell, 370 U.S. 230, 236 (1962).
70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-36 (1981). For a general discussion and review of relevant cases, see Annot., 68 A.L.R.3d 273 (1976).

Connell[71] and *Fisher v. Pace.*[72]

The attorney in *Fisher* persisted in referring to matters which the judge had ruled to be outside the issues for the jury, a factual setting analogous to *McConnell,* and was held in contempt.[73] The Supreme Court affirmed the conviction, holding that it is the duty and power of the trial judge to determine the type, manner and character of the argument before the jury.[74] The Court further held that the only remedy available was by exception and appeal, because permitting the attorney to debate the judge's ruling would result in a mockery of the trial courts.[75]

In *In re McConnell*,[76] as noted earlier,[77] McConnell persisted in a line of inquiry after the trial judge had repeatedly ruled against it, and although he eventually acquiesced to the court's order, was held in contempt.[78] On appeal, the Supreme Court focused upon the obstruction element of contempt and held that an attorney may persist in a line of questioning and debate with the court over its rulings, provided he does not create an actual obstruction to the proceedings.[79] The Court went so far as to imply that, unless McConnell's behavior was so extreme as to require removal from the courtroom, an actual obstruction could not be found.[80] This opinion would have had greater precedential value were it not in direct conflict with the Court's earlier decision in *Fisher v. Pace*.[81]

Justice Black, in *McConnell*, did not address the Court's harsh position taken in *Fisher*, nor did he attempt to reconcile the two cases. However, an attempt at reconciliation was made by the Court of Special Appeals of Maryland in *Muskus v. State*.[82] In reversing a contempt conviction on facts similar to those in *Fisher* and *McConnell*, the court held that, while it is the duty of counsel to abide by the court's rulings, even if erroneous, it is also essential that the lawyer be able to make a good faith effort to present his client's case.[83] Therefore, the lawyer may strenuously and persistently present his client's case provided he does not create an obstruction which blocks the judge in the perform-

71. 370 U.S. 230 (1962).
72. 336 U.S. 155 (1949).
73. *Id.* at 156-59.
74. *Id.* at 162.
75. *Id.*
76. 370 U.S. 230 (1962).
77. *See supra* notes 40-47 and accompanying text.
78. *In re* McConnell, 370 U.S. 230, 234-36 (1962).
79. *Id.* at 235.
80. *Id.* at 234-36. This should not be construed as indicating that an attorney will never be held in contempt unless his behavior is so opprobrious as to require removal. The *McConnell* decision requires a reading between the lines and appears to be premised primarily upon the trial judge's erroneous ruling.
81. 336 U.S. 155 (1949).
82. 14 Md. App. 348, 286 A.2d 783 (1972).
83. *Id.* at 360, 286 A.2d at 789 (citing *In re* McConnell, 370 U.S. 230, 236 (1962)).

ance of his judicial duties.[84]

Unfortunately, the Maryland court did not define the point at which attorney persistence crosses the boundary of acceptable courtroom behavior and creates an actual obstruction.[85] The court reasoned that, while Muskus may have been tedious, he was, at most, "mildly persistent" in debating the court's rulings and, therefore, as the record did not suggest that Muskus was "in any sense boisterous, . . . hostile, defiant or disrespectful," the contempt conviction could not stand.[86] The court appears to have held that mild persistence alone will never sustain a contempt conviction,[87] yet there is no general rule that an attorney's conduct must be in some degree or combination, boisterous, hostile, defiant or disrespectful to be contemptuous. In fact, the Supreme Court in *Fisher*, where the record did not reflect this degree of misbehavior but on "mild persistence," indicated that no such rule could be formulated. The Court stated that, as a transcript of the record does not convey a complete picture or depict such elements of misbehavior as "expression, manner of speaking, bearing, and attitude, . . . [r]eliance must be placed upon the fairness and objectivity of the presiding judge."[88]

Despite the Supreme Court's failure to establish a line of demarcation between persistence and contempt, state appellate courts have, with a high degree of uniformity, given priority to the protection of client interests, not to the dignity of the trial judge.[89] An example of this "pro-client" attitude is *Gallagher v. Municipal Court*[90] where Gallagher was held in contempt for his behavior while attempting to represent his client during a judicial investigation of alleged jury tampering. The trial judge refused to grant Gallagher's persistent requests to ques-

84. Muskus v. State, 14 Md. App. 348, 360, 286 A.2d 783, 789 (1972).
85. Admittedly, no definitive rule can be formulated since the situations in which contempts occur are many and varied; however, it is posited that standards and minimum requirements could be established.
86. Muskus v. State, 14 Md. App. 348, 360-61, 286 A.2d 783, 789-90 (1972).
87. *See id.*
88. Fisher v. Pace, 336 U.S. 155, 161 (1949).
89. *See* Annot., 68 A.L.R.3d § 3[b], at 327-38 (1976); Annot., 14 L.Ed. 2d 934 (1966) (discussion of Holt v. Virginia, 381 U.S. 131 (1964)); *see also In re* Schwartz, 391 A.2d 278 (D.C. 1978) where attorney Schwartz was precluded from pursuing a line of inquiry on the ground that it was irrelevant. Schwartz attempted to state his grounds for the inquiry but was informed by the trial judge that he did not "have the time" to listen. The judge then ordered Schwartz to proceed questioning the witness along relevant lines and, at the same time, directed the bailiff to call the marshall so that Schwartz was put in a position of having to proceed under pain of removal. When he objected, he was summarily held in contempt. The court of appeals reversed, holding that an attorney has the right, if not the obligation, to preserve an issue for appeal. *Id.* at 281-82. Further, counsel should be afforded an opportunity to state briefly and respectfully his legal argument. Schwartz was deprived of this procedure, and while his cross-examination may have been tedious, it could not be characterized as a willful attempt to obstruct or delay the judicial proceedings. *Id.* at 282.
90. 31 Cal. 2d 784, 192 P.2d 905 (1948).

tion witnesses, stating that, as it was an investigation and not a trial, Gallagher had no such right.[91] When the investigation was completed, the client was placed in the District Attorney's custody and Gallagher was cited in contempt for his persistence, tone of voice, and for demanding to know the purpose for placing his client in custody.[92]

The California appellate court reversed on three grounds. First, when there is nothing contemptuous in the language used and the judge fails to warn that tone and facial expressions are offensive, a contempt conviction cannot stand.[93] Second, a contempt conviction cannot rest on an attorney's requesting a privilege to question witnesses during an investigation even though he has no right to so question; a mere mistaken act by counsel cannot render him in contempt.[94] Finally, and perhaps most importantly, Gallagher would have been guilty of a dereliction of duty had he not attempted to discover the reason for placing his client in custody.[95]

While reasonable persistence in debating a court order is generally considered within the realm of acceptable courtroom conduct, the trial attorney should be aware that this area of contempt law has jurisdictional exceptions.[96] For example, the United States Court of Appeals for the Second Circuit adheres to a general rule that, despite counsel's duty to zealously protect his client's interest, he has a "paramount" obligation to the orderly administration of justice and the maintenance of the authority and dignity of the court.[97]

The debate over a court ruling may become heated and, therefore, it is not unusual for the attorney to behave in a somewhat less than respectful manner. The heat of controversy is, however, a mitigating factor which must be taken into consideration and will generally excuse a passing insult.[98] Nevertheless, while excessive zeal is rarely mistaken for contemptuous conduct,[99] attorneys should also be aware that insolence and defiance will rarely be mistaken for excessive zeal. There are strong policy reasons for allowing attorneys wide latitude in the forceful representation of their clients,[100] but these policies do not extend to flagrant abuse of the trial judge or derogation of the judicial system. An example of behavior which will not be tolerated is found in a case

91. *Id.* at 786, 192 P.2d at 907-09.
92. *Id.* at 787, 192 P.2d at 907-08.
93. *Id.* at 796-97, 192 P.2d at 913-14. It is suggested that the uncertainty in contempt cases could be abolished in large degree by requiring the trial judge to warn the attorney prior to holding him in contempt.
94. *Id.* at 789-90, 192 P.2d at 908-10.
95. *Id.* at 790, 192 P.2d at 909.
96. *See, e.g.,* Annot., 68 A.L.R.3d 273 (1976); Annot., 14 L.Ed. 2d 934, 948 (1966); *Counsel and Contempt, supra* note 2, at 299. *See generally* Dobbs, *supra* note 3.
97. United States v. Landes, 97 F.2d 378 (2d Cir. 1938).
98. Craig v. Harney, 331 U.S. 367, 376 (1947), *cited in In re* Little, 404 U.S. 553, 554-55 (1972).
99. *See* Sacher v. United States, 343 U.S. 1, 12 (1952).
100. *See generally* Dobbs, *supra* note 3; Annot., 68 A.L.R.3d 273 (1976).

where the trial judge asked the attorney for his authority to enter a not guilty plea on behalf of his client.[101] The attorney responded with a tirade accusing the judge of racial prejudice and stated that he had not come before the court "to listen to a whole lot of stuff"; that he was not in the mood "for a whole lot of stuff" from the court, and that he wanted "to be treated like a man . . . ."[102] As is, unfortunately, the frequent situation, the facts are briefly reported but it appears that there were no extenuating circumstances to justify the outburst and, therefore, the reviewing court affirmed the contempt conviction.[103]

Another example of inexcusable attorney behavior occurred in the jury tampering trial of James Hoffa, *United States v. Schiffer.*[104] In that case, Schiffer, defense counsel, accused the trial judge of acting as an affiliate of the prosecution and of suppressing important defense evidence. Schiffer referred to a "drum head court martial" and a "star chamber proceeding," saying "justice is finished in America."[105] The court held this to be contemptuous.[106]

Cases such as these are not rare and provide strong support for retaining the contempt power of the courts. As one commentator said: "At some point there is more involved than insult; there is a demeanor that converts serious search for truth and justice into a rally run on rhetoric. And it is this, not insult, that justifies the contempt sentence in such cases."[107]

C. Language in a Motion Charging Bias

It is not only the actions and words of an attorney in the courtroom which may result in a contempt conviction, but also the language he uses in papers filed with the court. Pleadings which are most apt to contain language incurring a trial judge's wrath are those charging the judge with bias or prejudice. A lawyer who believes that he is faced with a prejudiced or biased judge is under a duty to take such reasonable steps as are necessary to ensure his client a fair trial.[108] The Supreme Court recognizes this duty and permits attorneys great latitude in this area.[109]

Illustrative of the Court's liberal attitude is its holding in *Holt v.*

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101. *In re* Gates, 248 A.2d 671, 673 (D.C. 1968).
102. *Id.* at 673-74.
103. *Id.* at 677; *see* Farmer v. Strickland, 652 F.2d 427, 430-33 (5th Cir. 1981) (an attorney, who ignored court warnings and accused both the prosecutor and presiding judge of racism, was convicted of contempt).
104. 351 F.2d 91 (6th Cir. 1965).
105. *Id.* at 93-94.
106. *Id.* at 95-96.
107. Dobbs, *supra* note 3, at 206.
108. *See generally* 28 U.S.C. § 144 (1976); Annot., 70 A.L.R.3d 797 (1976); Annot., 14 L.Ed. 2d 934 (1966).
109. *See, e.g.,* Holt v. Virginia, 381 U.S. 131 (1964); Annot., 70 A.L.R.3d 797 (1976); Annot., 14 L.Ed. 2d 934 (1966).

Virginia.[110] In *Holt,* a state trial judge denied petitioner Dawley's motion that the judge disqualify himself for bias from trying Dawley for contempt arising from his conduct as a lawyer in a libel case. Dawley then filed a change of venue motion which was read to the judge by another lawyer, petitioner Holt. The motion charged the judge with acting as "police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge" and with intimidating and harassing Holt in his efforts to defend Dawley.[111] The trial judge summarily cited both attorneys in contempt. The state supreme court affirmed, holding the language in the motion to be "vile, contemptuous [and] insulting."[112] The Supreme Court granted certiorari and reversed, holding that "[a] fair trial in a fair tribunal is a basic requirement of due process," and, therefore, motions made to escape bias or prejudice are proper unless the language used is abusive.[113] Although the language appeared strong, the *Holt* Court found it to be plain English, unoffensive in itself and, therefore, wholly appropriate to charge bias.[114]

D. Advising a Client to Disobey a Court Order

Another example of out-of-court conduct which results in attorney contempt convictions is when an attorney advises a client to disobey a court order.[115] The Supreme Court has consistently held that the necessity of expediting the administration of justice warrants a finding of contempt when a clear court order is violated.[116] When an attorney advises his client to resist a court order, however, there is some dispute as to whether the attorney may be cited with contempt. The key factor is good faith on the part of the attorney in advising his client.[117]

An early example of this situation is found in *In re Watts & Sachs.*[118] In *Watts*, lawyers erroneously advised their clients, in good faith, that state courts had bankruptcy jurisdiction over certain property in the hands of a state receiver. This advice led the client to disobey a federal court order, and resulted in contempt citations for the lawyers.[119] Although the Supreme Court held that the advice was incorrect, it refused to allow the convictions to stand because there was no evidence that the advice was given in bad faith.[120] Chief Justice

110. 381 U.S. 131 (1964).
111. *Id.* at 133.
112. *Id.* at 135.
113. *Id.* at 136 (citations omitted).
114. *Id.* at 137.
115. *See, e.g.,* Maness v. Meyers, 419 U.S. 449 (1975); *In re* Watts & Sachs, 190 U.S. 1 (1903).
116. Maness v. Meyers, 419 U.S. 449, 460 (1975).
117. *See, e.g., id.* at 467.
118. 190 U.S. 1 (1903).
119. *Id.* at 10-11.
120. *Id.* at 27-30.

Fuller, speaking for the Court, said:

> In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded . . . , he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.[121]

A 1975 case, *Maness v. Meyers,*[122] involved a similar situation. Maness' client, Michael McKelva, was convicted of selling seven obscene magazines in violation of a local ordinance. Six days after his conviction, McKelva was served with a *subpoena duces tecum* directing him to produce fifty-two magazines before the local district court. Maness filed a motion to quash, claiming the subpoena to be in violation of his client's constitutional right not to incriminate himself. The motion was denied, but McKelva refused to produce the magazines. During a subsequent hearing, testimony was elicited from McKelva making it clear that, but for advice of counsel, he would have produced the subpoenaed material. After a short recess, the court held Maness in contempt and fixed punishment at ten days confinement and a two hundred dollar fine.[123]

The Supreme Court granted certiorari and held that a lawyer in a civil proceeding, who in good faith counsels his client to refuse to produce materials on the ground that the materials may tend to incriminate him, may not be held in contempt.[124] The client, once advised of his rights, can choose for himself whether to risk contempt in order to exercise and test the privilege.[125]

This opinion, however, should not be construed too broadly. The Court placed great emphasis on three factors: (1) there was a substantial risk of self-incrimination and, therefore, good faith on the part of Maness in advising his client to exercise his fifth amendment right;[126] (2) the record clearly reflected that Maness had only advised his client of his rights, he had not instructed him to refuse to produce the subpoenaed materials;[127] and (3) the right in question was a basic and substantial constitutional right, the violation of which could cause irreparable injury.[128]

V. RIGHTS AND REMEDIES

When an attorney is convicted of criminal contempt, whether for

121. *Id.* at 29.
122. 419 U.S. 449 (1975).
123. *Id.* at 454-55.
124. *Id.* at 465-66.
125. *Id.* at 467.
126. *Id.* at 455, 468.
127. *Id.* at 457.
128. *Id.* at 460.

in-court or out-of-court misconduct, there are various options he may exercise. Both direct and constructive contemnors have an absolute right to appeal their convictions,[129] and under certain circumstances, the right to trial by jury.

Recognition of the contemnor's right to trial by an impartial jury is a relatively recent development in constitutional law.[130] It was not until 1968 that the Supreme Court acknowledged that such a right exists, and even then the Court restricted the right to instances where an undefined "excessive" penalty was imposed.[131] Since then, however, the Supreme Court has clarified the issue and the contemptuous attorney's right to a jury trial is now well defined. A statutory maximum sentence in excess of six months will automatically trigger the right, regardless of the sentence actually imposed.[132] If, however, the state legislature has not specified a maximum sentence for contempt, the contemnor may invoke this right only if the actual sentence imposed exceeds six months.[133]

The right to a jury trial may or may not attach when the contemnor receives consecutive sentences which in the aggregate exceed six months. In this instance, the judge's timing in imposing sentencing is the crucial factor.[134] If each individual act of contempt is dealt with as a discrete and separate matter as it occurs during the course of trial, the aggregate sentence may exceed six months imprisonment with no attendant jury trial right.[135] However, when the trial judge postpones final conviction and punishment until after the trial and the aggregate sentence is in excess of six months, the contemnor is entitled to this due process right.[136] This six month sentence requirement makes the right to trial by jury less vital to contemptuous attorneys than to other contemnors because attorneys rarely, if ever, receive such lengthy sentences.[137] Nevertheless, it is a fundamental due process right of which the practicing attorney should be aware.

Regardless of the sentence imposed, the convicted contemnor may appeal on law and fact prior to punishment taking effect.[138] This is in

129. Sacher v. United States, 343 U.S. 1, 12-13 (1952). *But see Conduct of Attorney, supra* note 3, at 350-51 (remedy of appeal inadequate).
130. *See* Dobbs, *supra* note 3, at 230-34.
131. Bloom v. Illinois, 391 U.S. 194 (1968).
132. *See, e.g.,* Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); Baldwin v. New York, 399 U.S. 66, 69 (1970); Cheff v. Schnackenberger, 384 U.S. 373, 380 (1966); Note, *Constitutional Law: The Supreme Court Constructs A Limited Right to Trial by Jury for Federal Criminal Contemnors,* 1967 DUKE L.J. 632.
133. *See* sources cited *supra* note 132.
134. *See* Taylor v. Hayes, 418 U.S. 488 (1974).
135. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 515-17 (1974); Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971).
136. *See* sources cited *supra* note 135.
137. A survey of the case law did not reveal any attorney contempt case in which the attorney received a sentence in excess of six months.
138. *See* Sacher v. United States, 343 U.S. 1, 12-13 (1952). *But see Conduct of Attorney, supra* note 3, at 350-51.

derogation of the common law when the trial court was the sole judge of contempts against its authority and its judgment was final and conclusive and not reviewable by any other tribunal.[139]

VI. CONCLUSION

As the amorphous mass of case law attests, the contempt sanction is broad enough to encompass all aspects of an attorney's professional life. Yet, this all-pervasive power is ill-defined and often inconsistently applied. This frequently places the trial attorney in an untenable position. An attorney is faced with two concurrent but potentially conflicting duties: to zealously present his client's case, and as an officer of the court, to maintain the order and dignity of the court.

The contempt convictions resulting from this conflict are frequently avoidable. An analysis of the case law reveals several patterns of which the trial attorney should be aware. First, an attorney with a history or reputation for abusing the court's courtesy and patience will have a much more difficult burden in establishing his lack of intent. Second, an attorney may reasonably dispute the trial judge's rulings provided he does not persist to the extent that he creates an obstruction to the court's business. When an attorney believes the judge to be in error and the judge refuses to be swayed by his initial argument, the wiser course is to forego further argument and to take an exception for appeal. Third, the trial attorney should not allow himself to be drawn into a heated controversy with the trial judge. In the event this does occur, the attorney should take care not to make personally derogatory statements to the judge nor statements demeaning the judicial system. Finally, failure to comply with a direct court order will always involve a high risk of contempt. These patterns, while serving to impart some degree of uniformity into contempt law, do not rise to the level of judicially accepted rules. In the final analysis, the question of whether the attorney has overstepped the bounds of proper advocacy turns upon the facts presented in each case, with the intent of the attorney being ascertained from all the acts, words, and circumstances surrounding the occurrence.

That the contempt sanction is capable of abuse is certain. Trial judges, like all men, "sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."[140] Most judges, however, recognize and respect forthright advocacy. They rarely mistake the excessive zeal or heated words of a man fired with a desire to win for contemptuous conduct which vents personal spleens, defies rulings, and deserves punishment. The legal profession is necessarily a contentious one and the lawyer who makes a strenuous,

139. Annot., 28 A.L.R. 33, 37 (1924).
140. Sacher v. United States, 343 U.S. 1, 12 (1952).

good faith effort for his client will generally be respected.[141] In the event an attorney oversteps the line of acceptable behavior, whether by intent or in unheeding enthusiasm, he is not at the mercy of a single trial judge. Before punishment takes effect, he may appeal on both law and fact.

Rosalind Anderson

141. *Id.*