

# Loyola University Chicago Law Journal

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Volume 50  
Issue 4 Summer 2019

Article 9

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2019

## Judges' Misuse of Contempt in Criminal Cases and Limits of Advocacy

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# Judges’ Misuse of Contempt in Criminal Cases and Limits of Advocacy

Peter A. Joy\*

*“Use of the contempt power threatens attorneys’ individual rights and security, especially when contempt charges are tried summarily. More importantly, the exercise of the contempt power, and even the potential for its exercise, can have a serious chilling effect on the vigor of advocacy. Indeed, the greatest danger of this kind of Sword of Damocles ‘is that it hangs—not that it drops.’”*<sup>1</sup>

*“The arguments of a lawyer in presenting his client’s case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.”*<sup>2</sup>

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\* Henry Hitchcock Professor of Law, Washington University in St. Louis School of Law. The inspiration for this Article came from a memorable lecture by Leonard Wineglass that I heard while I was in law school, which I discuss in the Conclusion. He explained how to advocate for a client zealously without being held in contempt of court, and his presentation was based in large part on his experience as defense counsel in the Chicago Eight Trial. I thank the members of the Southeastern Association of American Law Schools (SEALS) participants on “Judging: Fifty Years After the Chicago 7 Trial” for their comments on an earlier draft of this Article.

1. Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 481–82 (1990). Louis Raveson’s quote about the Sword of Damocles comes from a dissent by Justice Douglas discussing the chilling effect of a statute that limits a public employee’s speech that is overbroad or vague. *Arnett v. Kennedy*, 416 U.S. 134, 230–31 (1974) (Douglas, J., dissenting). Justice Douglas described the danger of such restrictions on speech:

The dismissal standard hangs over their heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the “efficiency of the service.”

That this Court will ultimately vindicate an employee if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all.

*Id.* at 231.

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

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#### INTRODUCTION

It is critical for judges and criminal defense lawyers to understand the limits of a judge's contempt authority and the line between a lawyer's effective advocacy on behalf of a client and contempt of court. The judge is charged with maintaining order in the court,<sup>3</sup> but the judge must also respect, and should protect, the accused's right to receive the effective assistance of counsel.<sup>4</sup> At the same time, the defense lawyer is an advocate responsible for ensuring the due process rights of the accused,<sup>5</sup> but, as an officer of the court, "shall not . . . engage in conduct intended to disrupt a tribunal."<sup>6</sup> Judges and defense lawyers need to balance their

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3. "Courts must have the power to enforce order and to compel compliance with their authority. Orderly proceedings and obedience to the courts' commands are essential to the proper administration of justice." Raveson, *supra* note 1, at 482.

4. "In criminal cases, a judge's duty to do justice must include ensuring that the accused has a meaningful Sixth Amendment right to the effective assistance of counsel, because effective legal representation is essential to a fair trial." Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 HOFSTRA L. REV. 139, 140 (2017). See also *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("[J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.").

5. See, e.g., *United States v. Cronin*, 466 U.S. 648, 653 (1984) ("Without counsel, the right to a trial itself would be 'of little avail' . . ."); Joy, *supra* note 4, at 155 ("The right to the effective assistance of counsel is the cornerstone of a fair and just criminal trial or plea, and necessary for the accused to receive due process.").

6. MODEL RULES OF PROF'L CONDUCT r. 3.5(d) (AM. BAR ASS'N 2018).

respective obligations for the criminal justice system to operate effectively. Rather than achieving balance, these obligations clashed in the Chicago Eight Trial, which became known as the Chicago Seven Trial after Judge Julius Hoffman declared a mistrial for the eighth defendant, Bobby Seale, and severed Seale's case for a separate trial.<sup>7</sup>

A week before declaring the mistrial, though, Judge Hoffman had Seale bound and gagged after Seale persisted in asserting his Sixth Amendment right to have his counsel of choice present or to proceed pro se.<sup>8</sup> After declaring the mistrial, Judge Hoffman summarily convicted and sentenced Seale on sixteen counts of contempt.<sup>9</sup> As explained later in this Article, Judge Hoffman also extensively interfered with the due process and effective assistance of counsel rights of the remaining seven defendants, and Judge Hoffman made more than 150 contempt findings against the remaining seven defendants and their two lawyers.<sup>10</sup>

The federal statute upon which Judge Hoffman exercised his contempt power required four elements.<sup>11</sup> First, the conduct must be "misbehavior," which the court defined as inappropriate for the role of a party or counsel.<sup>12</sup> Second, the misbehavior must "rise to the level of an 'obstruct[ion] of the administration of justice.'"<sup>13</sup> Third, the misbehavior

7. *United States v. Seale*, 461 F.2d 345, 350 (7th Cir. 1972). Once Judge Hoffman severed Seal from the trial, the trial generally became known as the Chicago Seven Trial.

8. *Id.* at 350–51. Judge Hoffman had denied the request of Charles Garry, Seale's lawyer, for a trial continuance due to Garry's gall bladder operation. *Id.* at 349. Seale renewed the request for a continuance until Garry could represent him prior to the start of evidence, and Judge Hoffman denied the request. Seale made it clear to Judge Hoffman that he was not represented by William Kunstler, and, if he could not be represented by Garry, Seale wanted to represent himself. Judge Hoffman would not permit Seale to proceed pro se. *Id.* at 350–51. The right of a defendant to refuse counsel and to represent him- or herself was later recognized by the United States Supreme Court in 1975, six years after Judge Hoffman denied Seale this right. *See Faretta v. California*, 422 U.S. 806, 852 (1975).

9. *Seale*, 461 F.2d at 350–51. The Seventh Circuit Court of Appeals reversed Judge Hoffman's contempt findings against Seale and remanded them for trial before a new judge. *See infra* notes 53–55 and accompanying text. The government ultimately abandoned the contempt charges. *Infra* notes 53–55 and accompanying text.

10. *See infra* notes 17–33.

11. The Seventh Circuit Court of Appeals cited to 18 U.S.C. § 401 in *Seale*, 461 F.2d at 366, which provides:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (2012).

12. *Seale*, 461 F.2d at 366.

13. *Id.* at 367 (brackets in original) (quoting *In re McConnell*, 370 U.S. 230, 234 (1962)).

“must be in the court’s presence or so proximate that it obstructs the administration of justice.”<sup>14</sup> And, fourth, there must be *intent* to obstruct the administration of justice,<sup>15</sup> which the Seventh Circuit Court of Appeals held must be proven beyond a reasonable doubt.<sup>16</sup>

While Judge Hoffman wielded his judicial contempt power in an unrestrained fashion, as would later be determined by subsequent court proceedings,<sup>17</sup> throughout the trial he was also condescending, belittling, and insulting to defense counsel, William Kunstler and Leonard Weinglass. There are too many instances to recount here, but some examples of Judge Hoffman’s tone and attitude, and his attempts to undermine the defense, are instructive.

Judge Hoffman repeatedly stated or implied that defense counsel were not truthful by making comments such as the following:

“Your representations to the Court don’t mean very much.” “That is a falsehood.” “When you begin to keep your word around here . . .” “I wouldn’t take your assurances because you have violated it on so many occasions.” “That is a falsehood . . . and I shall deal appropriately with it.” . . . He told counsel “Your credit isn’t very good.” Whenever the prosecutors accused defense counsel of misrepresenting the record or making misstatements, the judge refused the request of defense counsel that the record be read, to disprove the charge. Even when defense counsel had the transcript before them and were able to disprove prosecution charges that misstatements were made, the judge refused to admonish the prosecutors.<sup>18</sup>

Another theme was Judge Hoffman repeatedly referring to defense counsel as not being from Illinois, in an apparent attempt to cast them as outsiders before the jury.<sup>19</sup> He made statements such as:

“I don’t need someone to come here from New York . . . to tell me that there is a constitution.” “You are only a temporary officer of this Court.” The judge referred to “Newark” (residence of defense counsel Weinglass). “You are thinking of Newark, Mr. Weinglass. You don’t practice here regularly.” . . . The court referred to “where you come from, Mr. Kunstler.” [To which counsel replied: “are you going to add that now? In the eyes of the jury I am a foreigner . . .”]. . . . Defense witnesses too were treated with derision. For example, Cora Weiss was referred to as “this lady from the Bronx.”<sup>20</sup>

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14. *Id.*

15. *Id.*

16. *Id.* at 367–68.

17. *See id.* at 350; *In re Dellinger*, 461 F.2d 389, 403 (7th Cir. 1972); *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972).

18. Brief of Appellants at 48 n.56, *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) (No. 18294) (citations omitted).

19. *Id.* at 44 n.50.

20. *Id.* (citations omitted).

Judge Hoffman also referred to defense counsel in other derogatory and demeaning ways, again most likely to undermine their credibility with the jury. Here are a few examples of the many ways Judge Hoffman belittled Kunstler and Weinglass:

The judge accused defense counsel of “play(ing) horse” with the Court. He referred to counsel as a “TV actor” and the defendants as “your clan.” He called counsel a “phrasemaker,” “unprofessional”. . . .

. . . .

He indicated a total lack of respect for counsel by the way he distorted and forgot their names. He called Mr. Weinglass: “Feinglass”; “Feinstein, Weinstein”; “Fein-Weinstein”; “Weinstein”; “Weinrob”; “Weinwrass” . . . . He called Mr. Kunstler “Charles” Kunstler and forgot his name.<sup>21</sup>

In reviewing Judge Hoffman’s actions throughout the Chicago Eight Trial on appeal, the Seventh Circuit stated: “The district judge’s deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning. It appears in remarks and actions both in the presence and absence of the jury.”<sup>22</sup> The court of appeals stated that Judge Hoffman’s remarks in the presence of the jury were “deprecatory of defense counsel and their case,” and his “comments were often touched with sarcasm, implying rather than saying outright that defense counsel was inept, bumptious, or untrustworthy, or that his case lacked merit.”<sup>23</sup> The court of appeals further found that “cumulatively, [Judge Hoffman’s remarks] must have telegraphed to the jury the judge’s contempt for the defense.”<sup>24</sup>

To be sure, defense counsel also engaged in conduct that the court of appeals found unacceptable. The Court noted that both Kunstler and Weinglass insulted Judge Hoffman, especially by questioning his honesty and integrity.<sup>25</sup> For example, Kunstler stated that Judge Hoffman “violated every principle of fair play” by excluding a witness for the defense, that “this is not a fair trial,” and “there is no law in this court.”<sup>26</sup> Weinglass “referred to the trial judge as ‘inhumane,’ called the judge’s action ‘disgraceful,’ and possibly accused the judge of ‘dishonesty.’”<sup>27</sup>

In appealing their contempt convictions, Kunstler and Weinglass argued that their conduct responded to Judge Hoffman’s treatment of them and Judge Hoffman’s claims that they were engaging in

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21. *Id.* at 47–48 n.55 (citations omitted).

22. *Dellinger*, 472 F.2d at 386.

23. *Id.* at 387.

24. *Id.*

25. *In re Dellinger*, 461 F.2d at 396.

26. *Id.*

27. *Id.*

unprofessional conduct.<sup>28</sup> Addressing this argument, the court of appeals stated, “Even if the judge’s accusation be unfounded or ill-tempered, it does not protect counter-misbehavior . . . ‘[T]wo wrongs do not make a right, and misconduct cannot obliterate other misconduct.’”<sup>29</sup>

Judge Hoffman’s personal contempt for the defense extended to both the defendants and defense counsel, and he misused his judicial contempt authority to punish them. At the conclusion of the trial, while the jury was deliberating, Judge Hoffman summarily convicted the defendants and their trial counsel, Kunstler and Weinglass, of 159 specifications of contempt of court.<sup>30</sup> Of those contempt findings, Judge Hoffman found Kunstler guilty of twenty-four separate instances of contempt and sentenced him separately on each from a few days to several months to run concurrently for a total of a four-year and thirteen-day sentence.<sup>31</sup> Judge Hoffman found Weinglass guilty of fourteen charges of contempt and sentenced him separately on each from a few days to several months to run concurrently for a total of a one-year, eight-month, and five-day sentence.<sup>32</sup> The Seventh Circuit Court of Appeals reversed all of Judge Hoffman’s contempt findings, and only some of these contempt charges were retried before a different judge.<sup>33</sup>

In this Article, I examine the conduct of Judge Julius Hoffman and the defense lawyers, William Kunstler and Leonard Weinglass. I draw out some lessons about the limits of a judge’s contempt authority against defense lawyers in criminal matters, and how far a defense lawyer may go in advocating for a client without being liable for contempt of court. The balance of this Article consists of four parts. Part I discusses the events leading up to and provides context for the Chicago Eight Trial. Part II discusses how some judges misuse their contempt power, and especially how they misuse it against defense lawyers in criminal cases. Part III analyzes the basics of the law of contempt as it applied in the Chicago Eight Trial, and as it applies in federal courts, and some state courts, today. Part IV sets out lessons learned from the Chicago Eight Trial about how a defense lawyer may zealously advocate for a client without being found in contempt, and what a lawyer may not do.

## I. BACKGROUND FOR THE CHICAGO EIGHT TRIAL

To understand Judge Hoffman’s use of contempt and the actions of

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28. *Id.* at 399.

29. *Id.* (alteration in original) (quoting *United States v. Offutt*, 145 F. Supp. 111, 114 (D.D.C. 1956)).

30. *In re Dellinger*, 370 F. Supp. 1304, 1307 (N.D. Ill. 1973).

31. *In re Dellinger*, 461 F.2d at 403.

32. *Id.* at 403.

33. *See infra* Part IV.B.

Kunstler and Weinglass, one must understand some of the background and context of the Chicago Eight Trial, which is rooted in the Vietnam War and the student protest movement of the late 1960s and early 1970s. In the fall of 1967, the Democratic Party designated Chicago as the site of its 1968 national convention, and members of the National Mobilization Committee to End the War in Vietnam began planning for a “massive anti-war demonstration” outside of the Democratic Convention.<sup>34</sup>

The day before the convention, Chicago Mayor Richard Daley put 12,000 members of the Chicago Police Department on twelve-hour shifts, asked the governor to activate the National Guard, and the U.S. Army sent 6,000 troops to face approximately 10,000 demonstrators.<sup>35</sup> After protestors had been denied permits to assemble and camp in city parks, they took to the streets to protest.<sup>36</sup> The Chicago police met protestors and bystanders alike, including members of the media, with clubs, rifles, and tear gas.<sup>37</sup> “Television cameras recorded indiscriminate police brutality while demonstrators chanted ‘The whole world is watching.’”<sup>38</sup> At the convention, “Senator Abraham Ribicoff of Connecticut condemned the ‘Gestapo tactics on the streets of Chicago,’ while Mayor Daley, in full view of television cameras, shouted obscenities and anti-Semitic slurs.”<sup>39</sup>

After the Democratic Convention, Mayor Daley’s administration “blam[ed] the violence on ‘outside agitators.’”<sup>40</sup> In contrast, a Department of Justice report found no grounds to prosecute the demonstrators, “and Attorney General Ramsey Clark asked the U.S. attorney in Chicago to investigate possible civil rights violations by Chicago police.”<sup>41</sup> A few days after the Daley administration released its report, a federal grand jury was convened to investigate possible federal law violations by the demonstration organizers and possible civil rights violations by the police.<sup>42</sup>

Richard Nixon won the 1968 presidential election, and he appointed John Mitchell as the new U.S. Attorney General, who worked with the

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34. BRUCE A. RAGSDALE, *THE CHICAGO SEVEN: 1960S RADICALISM IN THE FEDERAL COURTS* 1–2 (2008), <https://www.fjc.gov/sites/default/files/trials/chicago7.pdf>.

35. *Id.* at 2.

36. JASON EPSTEIN, *THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY AND THE CONSTITUTION* 75 (1970).

37. *Id.* at 75–76.

38. RAGSDALE, *supra* note 34, at 3.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*



Chicago U.S. Attorney's Office to draft indictments against the Chicago Eight,<sup>43</sup> whom the government charged with federal anti-riot violations and conspiracy to violate the anti-riot statute.<sup>44</sup>

The trial of the Chicago Eight, including the mistrial of Bobby Seale, lasted five months.<sup>45</sup> After deliberating for four days, the jury acquitted two of the remaining seven defendants of all charges, and it acquitted all seven of the conspiracy charges.<sup>46</sup> The jury convicted five defendants of crossing state lines to incite a riot.<sup>47</sup> As mentioned previously, Judge Hoffman summarily convicted the remaining seven defendants and their two lawyers for a total of 159 specifications of contempt.<sup>48</sup>

In the aftermath of the trial, verdicts against the Chicago Seven and the underlying anti-riot charges against Seale were dismissed on the government's motion.<sup>49</sup> The five defendants convicted of violating the anti-rioting law had their convictions overturned on appeal,<sup>50</sup> and the government did not refile charges against them.<sup>51</sup> One of the issues leading to the reversal was the fact that Judge Hoffman communicated with the jury during the trial without defense counsel's knowledge,<sup>52</sup> which was in blatant disregard of the defendants' due process rights to a fair trial.

Seale prevailed in his appeal of the contempt charges, which the court of appeals remanded for trial before a new judge.<sup>53</sup> Seale argued that because Judge Hoffman sentenced him to three-month terms for each of sixteen alleged acts of contempt to run consecutively, the resulting four-year prison term was longer than 180 days, which is the length of sentence when the right to a trial by jury attached.<sup>54</sup> Rather than taking Seale to trial a second time, the government dropped the contempt charges against Seale when the new judge ordered the government to produce a log of illegal wiretapping conducted against Seale before proceeding on the

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43. *Id.* at 4.

44. *See* United States v. Seale, 461 F.2d 345, 349 (7th Cir. 1972). Congress enacted the Anti-Riot Act the previous year. Federal Anti-Riot Act of 1968, 18 U.S.C. §§ 2101-2102 (1970).

45. *See In re* Dellinger, 461 F.2d 389, 391 (7th Cir. 1972).

46. United States v. Dellinger, 472 F.2d 340, 348, 409 (7th Cir. 1972).

47. *Id.* at 348.

48. *In re* Dellinger, 370 F. Supp. 1304, 1307 (N.D. Ill. 1973).

49. *Dellinger*, 472 F.2d at 348 n.3.

50. *Id.* at 409.

51. Stephanie B. Goldberg, *Lessons of the '60s: "We'd Do It Again," Say the Chicago Seven's Lawyers*, A.B.A. J., May 15, 1987, at 32, 35.

52. *Dellinger*, 472 F.2d at 377.

53. United States v. Seale, 461 F.2d 345, 356 (7th Cir. 1972).

54. *See id.* at 356 ("Seale contends . . . we must look to the aggregate sentence . . . and not to each three-month sentence separately.").

remanded contempt charges.<sup>55</sup>

The Seventh Circuit also reversed all of Judge Hoffman's contempt findings against the Chicago Seven and their lawyers, and remanded for hearing before a different judge 141 of the original 159 contempt findings against the seven defendants, Kunstler, and Weinglass.<sup>56</sup> In doing so, the appellate court dismissed as legally insufficient seven of the fourteen contempt citations against Weinglass, nine of the twenty-four contempt citations against Kunstler, and partially dismissed three other citations against Kunstler.<sup>57</sup>

On remand, the government proceeded with only fifty-two of the remaining 141 contempt citations against the Chicago Seven and their lawyers, and the government stipulated that the maximum sentence it would seek would be a total of 177 days against any one person in order to avoid a jury trial.<sup>58</sup> At the end of the government's case, which consisted solely of the trial transcript, the new judge, Judge Edward Gignoux, acquitted two of the seven defendants of all of the contempt charges and dismissed several other of the contempt charges against the other defendants.<sup>59</sup>

At the end of the trial for the remaining five defendants, Kunstler, and Weinglass, Judge Gignoux dismissed all of the contempt charges against two more of the defendants and Weinglass.<sup>60</sup> Judge Gignoux convicted one of the defendants of seven specifications of criminal contempt, convicted each of the two remaining defendants of two specifications of criminal contempt, and convicted Kunstler of two specifications of contempt.<sup>61</sup> The judge directed that no fine or sentence of incarceration be imposed on any of those convicted.<sup>62</sup> While the resulting contempt convictions partially vindicated a small portion of Judge Hoffman's exercise of his contempt authority, Judge Hoffman's misuse of his contempt authority and his injudicious handling of the trial most likely led Judge Gignoux to drastically reduce the number of contempt findings and to refrain from imposing any punishment on the three remaining Chicago Seven defendants or Kunstler.<sup>63</sup>

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55. Goldberg, *supra* note 51, at 35.

56. *In re Dellinger*, 370 F. Supp. 1304, 1304, 1307 (N.D. Ill. 1973).

57. *In re Dellinger*, 461 F.2d 389, 400–01, 403 (7th Cir. 1972).

58. *In re Dellinger*, 370 F. Supp. at 1307 n.5. A jury trial would be required if the maximum sentence was more than 180 days (six months). *In re Dellinger*, 461 F.2d at 397.

59. *In re Dellinger*, 370 F. Supp. at 1307.

60. *See id.* at 1323 (stating the judgments for each defendant).

61. *Id.* at 1323–24.

62. *Id.*

63. This interpretation of the resulting contempt convictions is confirmed in part by the Seventh Circuit's interpretation of Judge Gignoux's findings. *See infra* note 72 and accompanying text.

Several years after the remanded trial on the contempt charges, documents secured through a Freedom of Information Act request and from civil discovery in an unrelated lawsuit revealed other improprieties on the part of Judge Hoffman and the government in the Chicago Seven Trial.<sup>64</sup> These documents served as the basis for a motion to vacate and expunge the criminal contempt convictions against three Chicago Seven defendants and Kunstler.<sup>65</sup> The official wrongdoing included a FBI memorandum suggesting that Judge Hoffman had *ex parte* conversations with the prosecutor during the trial concerning, among other things, possible contempt citations against the defendants.<sup>66</sup> Prior to and during the trial, the prosecutor requested the FBI to monitor the activities of the defendants and to record any statements that “would be invaluable to prove contempt actions.”<sup>67</sup> No less than three other documents indicated that “the Chicago Police and possibly the FBI had surreptitiously attended and/or surveilled several meetings of the defendants and their counsel.”<sup>68</sup> The information gathered included trial strategies and potential arguments for appeal, and the information was shared with one of the prosecutors in the conspiracy trial.<sup>69</sup>

The trial judge hearing the motion denied the relief requested, and the court of appeals affirmed the district court’s order.<sup>70</sup> The court of appeals acknowledged that the prosecutorial and judicial misconduct were sufficient to require reversal of the convictions in the conspiracy trial, if any convictions had still remained.<sup>71</sup> The court of appeals also reasoned that Judge Gignoux had considered the prosecutorial and judicial misconduct known at the time of the remanded contempt trial in the “radical reductions and nullifications of the earlier sanctions in this proceeding.”<sup>72</sup>

The balance of this Article discusses how judges misuse their contempt power, analyzes the basics of the law of contempt as it applied in the Chicago Eight Trial, and sets out lessons learned from the Chicago Eight

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64. United States v. Dellinger, 657 F.2d 140, 141–42 (7th Cir. 1981).

65. See *id.* at 143 (“Defendants maintain that their contempt convictions should be vacated because the newly discovered evidence . . . demonstrates the existence of judicial and prosecutorial misconduct during the 1969 conspiracy trial . . .”).

66. *Id.* at 142.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 146.

71. *Id.* at 146 n.15.

72. *Id.* at 146. In addition, in its decision remanding the contempt trial, the court of appeals also stated that “judicial (or prosecutorial) provocation is to be considered by the new hearing judge in extenuation of the offense and in mitigation of any penalty to be imposed.” *In re Dellinger*, 461 F.2d 389, 401 (7th Cir. 1972).

Trial about how a defense lawyer may zealously advocate for a client without being held in contempt. The lessons learned include both what a lawyer may and may not do and help to define when a lawyer may cross the line into contemptuous conduct.

## II. JUDGES' MISUSING THEIR CONTEMPT POWER

Commentators have written about judges as bullies, and in their accounts one of the main judicial bullying weapons is the threat of contempt directed toward criminal defense lawyers.<sup>73</sup> For example, Abbe Smith describes a D.C. Superior Court judge who “threatened a young public defender with contempt and had her shackled and put in a holding cell for not obeying his order to sit down and be quiet.”<sup>74</sup> The judge had the public defender held in a cell near the courtroom for forty-five minutes, though the judge did not follow through with filing contempt charges.<sup>75</sup> Her offense? The public defender did not immediately obey the judge’s order to sit down and be quiet, but rather tried to explain that she had to go to her next court hearing.<sup>76</sup>

In an article on the constitutional limitations of judicial contempt power, Louis Raveson notes that there are no statistics on contempt citations, but the existing “anecdotal data suggests that the threat and use of contempt against [criminal defense] attorneys . . . is at an all time high and increasing.”<sup>77</sup> Raveson states that “[i]n Los Angeles County alone, one public defender is held in contempt or threatened with contempt every week.”<sup>78</sup> Although Raveson wrote about contempt in 1990, there is no indication that judges are using threats of contempt and contempt more sparingly today. In a comprehensive study of appeals of contempt cases from 1826, when the study’s author found the first case involving contempt,<sup>79</sup> through mid-August 2016, which was selected as the cutoff date for the study,<sup>80</sup> a commentator found that the number of contempt

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73. See, e.g., Stephen Lubet, *Bullying from the Bench*, 5 GREEN BAG 2d 11, 12 (2001); Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325 (2012); Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253 (2017).

74. Smith, *supra* note 73, at 260.

75. See Keith L. Alexander, *Colleagues Back Lawyer Detained in Dispute with Judge*, WASH. POST (Sept. 5, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/04/AR2007090402065.html>.

76. *Id.*

77. Raveson, *supra* note 1, at 480–81. The anecdotal data was derived from conversations that Raveson and students assisting him had with public defender offices in every state that had such offices, and from conversations with lawyers throughout the country. *Id.* at 481 n.13.

78. *Id.* at 480.

79. Timothy Davis Fox, *Right Back “In Facie Curiae”—A Statistical Analysis of Appellate Affirmance Rates in Court-Initiated Attorney-Contempt Proceedings*, 38 U. MEM. L. REV. 1 (2007).

80. *Id.* at 9.

cases has been relatively level since the 1980s.<sup>81</sup> A few examples illustrate judges' misusing their contempt power in recent years.

In 2012, a judge held a defense attorney in contempt of court after the lawyer advised his client of his Fifth Amendment right against self-incrimination when a judge asked his client if he would be able to pass a drug test.<sup>82</sup> The judge insisted on the defendant answering his question, "telling the attorney 'be quiet,' 'sit down' and that [the judge] did not 'give a rat's tail' whether the client was on bond or not."<sup>83</sup> When the defense lawyer did not change his advice to his client, the judge held him in contempt and sentenced him to jail, where he was incarcerated for four hours before another judge granted an emergency stay.<sup>84</sup> On appeal, the contempt finding was reversed with the court saying that the contempt was "outside the range of principled outcomes and 'should not stand because the incident giving rise to it was based on such a fundamental error and the abuse of the contempt power that it is unseemly to sanction it.'"<sup>85</sup>

In 2016, a judge in Las Vegas held a public defender in contempt while she was advocating on behalf of a client in a probation violation matter.<sup>86</sup> The judge told her to "be quiet," and when she tried to interject, he said, "Now. Not another word."<sup>87</sup> She replied, "Judge, you're," and the judge turned to the marshal in the courtroom and ordered the marshal to cuff the public defender and place her in the jury box along with inmates awaiting their hearings.<sup>88</sup> The judge proceeded to sentence the public

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81. *Id.* at 16. Timothy Davis Fox found that while the number of contempt cases climbed each decade from the 1940s through the 1970s, the number of cases has been relatively stable for each decade from the 1980s and projected through the 2000s. *Id.*

82. Cynthia Price, *Attorney Appeals Contempt Ruling with Help from Legal Community*, LEGALNEWS (Jan. 13, 2012), <http://legalnews.com/grandrapids/1172742>.

83. *Id.*

84. *Id.*

85. Barton Deiters, *Circuit Court Judge Tosses Out Contempt of Court Charges Against Attorney*, MLIVE: GRAND RAPIDS (Jan. 16, 2012), [https://www.mlive.com/news/grand-rapids/2012/01/circuit\\_court\\_judge\\_tosses\\_out.html](https://www.mlive.com/news/grand-rapids/2012/01/circuit_court_judge_tosses_out.html). Two years later, the Michigan Supreme Court publicly censured and suspended for thirty days without pay the judge who issued the contempt finding against the defense lawyer. Debra Cassens Weiss, *Judge Is Suspended for Jailing Lawyer Who Advised His Client to Plead the 5th*, A.B.A. J. (May 2, 2013, 12:09 PM), [http://www.abajournal.com/news/article/judge\\_is\\_suspended\\_for\\_jailing\\_lawyer\\_who\\_advised\\_his\\_client\\_not\\_to\\_answer](http://www.abajournal.com/news/article/judge_is_suspended_for_jailing_lawyer_who_advised_his_client_not_to_answer). The Michigan Supreme Court ruled that the judge "had a 'failure to be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary,'" and a "failure to avoid a controversial manner or tone in addressing counsel." *Id.* Based on my research, it is extremely rare for a judge to be punished for misuse of her contempt power.

86. David Ferrara, *Las Vegas Judge Handcuffs Public Defender in Courtroom*, LAS VEGAS REV.-J. (May 23, 2016, 6:49 PM), <https://www.reviewjournal.com/local/local-las-vegas/las-vegas-judge-handcuffs-public-defender-in-courtroom/>.

87. *Id.*

88. *Id.*

defender's client without the public defender or another attorney representing the client, and then told the marshal to uncuff the public defender saying, "I think she's learned a lesson."<sup>89</sup> A week later, the judge filed a contempt order against the public defender, but another judge overturned the order.<sup>90</sup>

Some judges use or threaten to use their contempt power not only in an attempt to control how defense attorneys advocate, but also to complicate public defenders' efforts to cope with excessive caseloads. Two recent cases illustrate this use of contempt.

In 2017, a judge in Ramsey County, Minnesota, held a public defender and her supervisor in contempt after a scheduling conflict, due to the public defender's caseload that prevented her from being present when the judge commanded her presence.<sup>91</sup> The judge had notified the public defender on a Friday that he wanted her to start a trial in his courtroom the following Monday. When she explained that she had hearings already scheduled for other clients that conflicted with the trial date the judge had set, the judge told her "to make it work and to be present at a hearing in the case Monday morning."<sup>92</sup> She consulted with her supervisor, who advised her to attend to her previously scheduled client matters. When her supervisor showed up in her place to explain the scheduling conflict, the judge held both public defenders in contempt and ordered them both to appear the next day.<sup>93</sup> At the hearing on the contempt the next day, the judge rescinded the first lawyer's contempt and stayed the contempt against her supervisor.<sup>94</sup> A month later, the judge rescinded the contempt finding against the supervisor.<sup>95</sup>

Recently in Missouri, where public defenders have been working with excessive caseloads, some judges have threatened public defenders with contempt of court if they refuse to take on more new cases.<sup>96</sup> These

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89. *Id.*

90. Matt Ferner, *Public Defender Who Was Handcuffed in Court Has Contempt Order Overturned*, HUFFPOST (Aug. 2, 2016, 5:51 PM), [https://www.huffpost.com/entry/zohra-bakhtary-las-vegas\\_n\\_57a0f81ae4b0e2e15eb7a152](https://www.huffpost.com/entry/zohra-bakhtary-las-vegas_n_57a0f81ae4b0e2e15eb7a152).

91. Sarah Horner, *Ramsey County Judge Held 2 Public Defenders in Contempt in Clash Over Caseloads*, TWIN CITIES PIONEER PRESS (Nov. 7, 2017, 7:01 PM), <https://www.twincities.com/2017/11/07/ramsey-county-public-defenders-clash-with-court-system-over-caseloads/>.

92. *Id.*

93. *Id.*

94. Chao Xiong, *Contempt Finding Rescinded for Ramsey County Public Defender Who Challenged Court*, STARTRIBUNE (Dec. 14, 2017, 10:01 PM), <http://www.startribune.com/contempt-finding-rescinded-for-ramsey-county-public-defender-who-challenged-court/464220723/>.

95. *Id.*

96. Lucas Geisler, *Public Defenders, Judge Call for Meeting with Missouri Supreme Court*, ABC 17 (Oct. 13, 2017, 9:53 PM), <https://www.abc17news.com/news/public-defenders-judge-call->

threats came after one public defender faced ethics discipline and was placed on probation for neglect of client matters due in large part to his heavy caseload.<sup>97</sup> The head of the state-wide public defender stated that threat of contempt “puts attorneys in an untenable position—refuse the case and go to jail, or take the case and possibly lose your ability to work.”<sup>98</sup> Meanwhile, the American Civil Liberties Union (ACLU) is suing the Missouri State Public Defender System, which ranks forty-ninth in the United States in terms of its funding, alleging that state public defenders are not adequately representing their clients due to large caseloads.<sup>99</sup>

As these examples of recent contempt cases illustrate, a trial judge may threaten to hold, or hold, a defense lawyer in contempt of court for a variety of alleged transgressions ranging from advocacy on behalf of a client to scheduling issues and caseload matters. The focus of this Article, though, is on contempt and threats of contempt when a defense lawyer is advocating on behalf of a client. The balance of this Article will confine itself to an analysis of the law of contempt and to identifying lessons learned about the limits of advocacy and contempt from the Chicago Eight Trial.

### III. THE LAW OF CONTEMPT

The contempt power of a judge is an inherent power that permits a judge to punish “individuals who defy their authority or interfere with the administration of justice.”<sup>100</sup> The history of the contempt power has been traced at least as far back to English law in the twelfth century, and there

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for-meeting-with-missouri-supreme-court/637645820.

97. Annika Merrilees, *Missouri Supreme Court Gives Probation to Columbia Public Defender*, MISSOURIAN (Sept. 13, 2017), [https://www.columbiamissourian.com/news/state\\_news/missouri-supreme-court-gives-probation-to-columbia-public-defender/article\\_da19a6e4-98c7-11e7-a553-6f2c15700578.html](https://www.columbiamissourian.com/news/state_news/missouri-supreme-court-gives-probation-to-columbia-public-defender/article_da19a6e4-98c7-11e7-a553-6f2c15700578.html). His defense also cited to his health problems. *Id.*

98. Geisler, *supra* note 96.

99. Rachel Lippmann, *ACLU Sues State of Missouri, Alleges High Caseloads in Public Defenders' Office Unconstitutional*, ST. LOUIS PUB. RADIO (Mar. 9, 2017), <https://news.stlpublicradio.org/post/aclu-sues-state-missouri-alleges-high-caseloads-public-defenders-office-unconstitutional#stream/0>.

100. Raveson, *supra* note 1, at 485. The U.S. Supreme Court has recognized the inherent contempt power of judges in *Anderson v. Dunn*, 19 U.S. 204, 217 (1821), when it stated: “At common law, the power to punish contempt is incident to Courts.” In another decision, the Court explained:

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

*Ex parte Robinson*, 86 U.S. 505, 510 (1873).

is some evidence that power similar to contempt is found in the writings of the Roman Emperor Justinian.<sup>101</sup> While contempt is an inherent power of a judge, that power has been defined and limited through legislation and court decisions.<sup>102</sup>

In the United States, the contempt power of a judge went essentially unchecked until the early 1800s, and, while unrestrained, some judges used their contempt power “to censor dissent and to command any level of respect or decorum desired by an individual judge.”<sup>103</sup> One commentator surveying articles about the history of the inherent power of contempt noted that it was “overbroad and vague, subject to abuse, and chills legitimate advocacy.”<sup>104</sup>

In 1826, a federal judge relied on his inherent contempt power and summarily imprisoned a lawyer for publicly criticizing one of the judge’s opinions.<sup>105</sup> The negative public reaction to the judge’s use of contempt prompted Congress to start impeachment proceedings against the judge.<sup>106</sup> The central issue of the impeachment proceedings was “concerns for the protection of vigorous advocates and their clients facing an unrestrained judicial power.”<sup>107</sup> The impeachment proceedings also illustrated how, under the existing common law at the time, whether contempt was committed depended primarily on the judge’s own feelings.<sup>108</sup> Congress narrowly acquitted the judge, but soon after enacted a law limiting a judge’s summary contempt authority to conduct that “obstruct[s] the administration of justice.”<sup>109</sup>

This early act of Congress limiting a federal judge’s contempt power was later codified and amended, and it now provides, in pertinent part: “A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as— (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . .”<sup>110</sup> This

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101. Luis Kutner, *Contempt Power:—The Black Robe: A Proposal for Due Process*, 39 TENN. L. REV. 1, 3–4 (1971).

102. See *infra* notes 110–15 and accompanying text (discussing the federal statute governing judges’ contempt power as well as subsequent case law and states’ utilization of the statute).

103. Raveson, *supra* note 1, at 486–87.

104. Fox, *supra* note 79, at 6 (footnotes omitted).

105. Raveson, *supra* note 1, at 487.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 488 (alteration in original); Act of March 2, 1831, ch. 99, 4 Stat. 487, 488.

110. 18 U.S.C. § 401 (2012). The law also prohibits: “(2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.” *Id.* The focus of this Article is only on contempt that allegedly obstructs the administration of justice.



provision, which prohibits behavior that obstructs the administration of justice, is the provision of the contempt statute under which Judge Hoffman originally cited Seale, the Chicago Seven defendants, and their lawyers, Kunstler and Weinglass.<sup>111</sup>

Some state courts enacted legislation based on the federal law restricting a state judge's contempt power to threats or actual obstruction of the administration of justice,<sup>112</sup> but a majority of states have not restricted the judiciary's contempt power.<sup>113</sup> In those states that have not limited a judge's contempt power, they have either given a judge vast authority or defined contempt broadly.<sup>114</sup> Raveson argues, and I agree, that the lack of specificity in defining contempt poses constitutional issues of overbreadth and vagueness.<sup>115</sup>

There is great variation among state laws defining contempt, and many states do not follow the federal contempt law that Judge Hoffman relied upon in issuing his contempt citations.<sup>116</sup> The next section confines itself to the lessons learned from the contempt citations against Kunstler and Weinglass for their advocacy on behalf of the Chicago Seven, and these lessons are applicable to federal court proceedings and to those state court jurisdictions with analogous contempt laws or that have interpreted contempt similarly through court decisions.

#### IV. HOW TO ZEALOUSLY ADVOCATE WITHOUT BEING LIABLE FOR CONTEMPT

In deciding the contempt citations against Kunstler and Weinglass, the appellate opinion, reversing and remanding some of the contempt citations, combined with the trial court's opinion on remand provide several useful lessons for judges and defense lawyers. The starting point for these lessons, though, is a defense lawyer's obligation to represent clients ethically and effectively.

##### *A. Counsel Has the Ethical Obligation and Legal Right to Represent a Client Zealously*

Ethically, a lawyer has the obligation to "take whatever lawful and ethical measures are required to vindicate a client's cause or

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111. See *supra* note 11 and accompanying text.

112. Louis S. Raveson, *Advocacy and Contempt—Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 WASH. L. REV. 743, 748–49 (1990).

113. *Id.*

114. Raveson, *supra* note 1, at 488–89.

115. See generally Raveson, *supra* note 112, at 745–78.

116. Raveson, *supra* note 1, at 488–89.

endeavor.”<sup>117</sup> This ethical obligation includes “act[ing] with commitment and dedication to the interests of the client and with *zeal in advocacy* upon the client’s behalf.”<sup>118</sup>

The zeal with which a lawyer may advocate on behalf of a client is bounded by the ethical obligation not to “engage in conduct *intended to disrupt a tribunal*.”<sup>119</sup> “Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants.”<sup>120</sup> A comment to one of the ethics rules states that “[a] lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate.”<sup>121</sup>

A lawyer will not violate the ethical prescription against disrupting a tribunal unless the lawyer acts intentionally. States pattern their ethics rules after the American Bar Association (ABA) Rules of Professional Conduct, and ABA Model Rule 3.5 states: “A lawyer shall not . . . (d) engage in conduct *intended to disrupt a tribunal*.”<sup>122</sup> Negligent conduct is not sufficient, but rather there must be clear and convincing evidence that a lawyer has intentionally acted to disrupt a tribunal before there is a violation of Rule 3.5(d).<sup>123</sup>

Legally, a violation of the federal contempt statute, or any state contempt law that is patterned after it, requires both an actual disruption of a court proceeding and intent to disrupt the court proceeding.<sup>124</sup> In considering the contempt citations against the Chicago Seven and their lawyers, the Seventh Circuit Court of Appeals noted that “mere disrespect or insult cannot be punished where it does not involve an actual and material obstruction.”<sup>125</sup> The court continued, “This is particularly true with respect to attorneys where the ‘heat of courtroom debate’ may prompt statements which are ill-considered and might later be regretted.”<sup>126</sup>

With regard to intent, the Seventh Circuit Court of Appeals stated that

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117. MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. [1] (AM. BAR ASS’N 2018).

118. *Id.* (emphasis added).

119. *Id.* at r. 3.5 (emphasis added).

120. *Id.* at r. 3.5 cmt. [4].

121. *Id.*

122. *Id.* at r. 3.5 (emphasis added).

123. *See, e.g., Att’y Grievance Comm’n v. Hermina*, 842 A.2d 762, 769 (Md. 2004) (holding that there must be clear and convincing evidence that an attorney was deliberate and intentional, rather than negligent); CTR. FOR PROF’L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 391 (Ellen J. Bennett et al. eds., 8th ed. 2015) (“There should be no violation of [Rule 3.5] paragraph (d) unless a lawyer ‘intended’ to disrupt the proceeding.”).

124. Raveson, *supra* note 1, at 513 n.151; *see also supra* notes 111–12 and accompanying text.

125. *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972).

126. *Id.*

“an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.”<sup>127</sup> The Seventh Circuit previously held in Seale’s appeal that intent must be proven beyond a reasonable doubt.<sup>128</sup> Thus legal contempt has a higher standard of proof than clear and convincing evidence necessary to prove an ethics violation under Model Rule 3.5(d) for engaging in conduct intended to disrupt a tribunal.<sup>129</sup>

In describing what is permitted in terms of zealous representation, the Seventh Circuit stated: “Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client’s behalf. An attorney may with impunity take full advantage of the range of conduct that our adversary system allows.”<sup>130</sup> In evaluating a lawyer’s conduct for requisite intent and actual obstruction by an attorney, the court stated that “the search for these essential elements of the crime of contempt must be made with full appreciation of the contentious role of trial counsel and his duty of zealous representation of his client’s interests.”<sup>131</sup>

Judge Gignoux summarized the standard by which an attorney’s conduct should be considered by stating: “In sum, attorneys must be given ‘great latitude’ and ‘extreme liberality’ in the area of vigorous advocacy, and doubts in delineating the line between vigorous advocacy and obstruction are to be resolved in favor of advocacy.”<sup>132</sup> With this in mind, the following sections describe where the court of appeals and Judge Gignoux drew lines between advocacy and contempt.

### B. Permitted Advocacy and Its Limits

The Seventh Circuit Court of Appeals dismissed nearly half of the original contempt citations against Kunstler and Weinglass,<sup>133</sup> and the government abandoned some of the remaining contempt charges against them.<sup>134</sup> Judge Gignoux acquitted most of the remaining charges against

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127. *Id.*

128. *United States v. Seale*, 461 F.2d 345, 367–68 (7th Cir. 1972).

129. *See* MODEL RULES OF PROF’L CONDUCT r. 3.5(d) (AM. BAR ASS’N 2018); *see also supra* notes 121–22 and accompanying text.

130. *In re Dellinger*, 461 F.2d at 400.

131. *Id.* at 397.

132. *In re Dellinger*, 370 F. Supp. 1304, 1316 (N.D. Ill. 1973).

133. The court of appeals dismissed seven of the fourteen contempt citations against Weinglass, nine of the twenty-four citations against Kunstler, and portions of three more of the contempt citations against Kunstler. *In re Dellinger*, 461 F.2d at 400, 403.

134. The government proceeded with only 52 of 141 contempt citations remanded for trial. *In*

Kunstler and Weinglass after the government's case, and Gignoux's opinion discusses five remaining contempt citations against Kunstler and one contempt citation against Weinglass.<sup>135</sup> The lessons from both the appellate court's and Judge Gignoux's decisions follow.

1. *Lesson One: Persistent Argument Alone Is Not Contempt*

Judge Hoffman found Weinglass in contempt after Weinglass persisted in arguing the relevance of an intended line of questioning.<sup>136</sup> Judge Hoffman had sustained the government's objection that the testimony would be irrelevant, and Weinglass persisted in explaining why the testimony was relevant even after Judge Hoffman repeatedly ordered Weinglass to continue examining the witness.<sup>137</sup> Judge Gignoux found that Weinglass "sincerely believed that the judge had not given him a reasonable opportunity to be heard and did not fully understand his position."<sup>138</sup> Weinglass did not insult or show disrespect for Judge Hoffman, and he confined his remarks to argument. Judge Gignoux found no evidence "that his statements were made in an offensive manner or in any way disrupted the proceedings."<sup>139</sup> Judge Gignoux concluded that "while Mr. Weinglass approached the brink, he did not cross the line between advocacy and obstruction."<sup>140</sup>

In contrast, Judge Gignoux found Kunstler's persisting in making an argument did constitute contempt. Judge Hoffman had denied Kunstler's request to call a defense witness who had unexpectedly become available and was traveling to the court at the close of the defense case.<sup>141</sup> Judge Hoffman instructed Kunstler not to make any reference to the fact that the defense wished to call this witness in the presence of the jury.<sup>142</sup> Subsequent to this ruling, Kunstler interrupted the government's examination of its first rebuttal witness to announce that the defense witness was present. In the presence of the jury, Kunstler renewed his motion to call the defense witness, continued to argue the motion after it had been denied, and did not sit down after Judge Hoffman repeatedly ordered him to do so.<sup>143</sup> Judge Gignoux found:

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*re Dellinger*, 370 F. Supp. at 1307. The trial court decision does not delineate how many contempt charges the government pursued against Kunstler and Weinglass on remand. *Id.*

135. *Id.* at 1317–20.

136. *Id.* at 1318.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1319.

141. *Id.* at 1320.

142. *Id.*

143. *Id.*

The record clearly shows that Mr. Kunstler flagrantly and defiantly violated the court's order not to renew his motion in the presence of the jury and persisted in continuing argument after the judge's repeated directions to stop. His conduct exceeded the "outermost limits" of vigorous advocacy and constituted contemptuous misbehavior which he assuredly knew or reasonably should have been aware was wrongful. His actions plainly caused a substantial delay in the proceedings and obstructed the judge in the performance of his judicial duty.<sup>144</sup>

Judge Gignoux's analyses of the contempt citations against Weinglass and Kunstler are consistent with the U.S. Supreme Court case *In Re McConnell*,<sup>145</sup> in which a lawyer who was trying to preserve important issues for appeal was convicted of contempt for telling the trial judge, "we have a right to ask the questions, and we propose to do so unless some bailiff stops us."<sup>146</sup> The Court stated: "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."<sup>147</sup> While recognizing that it is a "necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice," the Court continued, "it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases."<sup>148</sup> The Court summed up the rationale for a judge to take the least restrictive approach in limiting advocacy as follows:

An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case.<sup>149</sup>

In reading Judge Gignoux's reasoning as well as the Court's decision in *In Re McConnell*, a few points should be emphasized. First, a defense lawyer who wishes to persist in an argument should have a basis to do so, such as completing one's argument or making a record necessary for appeal. Second, persisting in an argument should be done professionally and without showing disrespect for the court. Referring to the judge as "Your Honor," or saying something such as, "With all due respect," as

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144. *Id.*

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

146. *Id.* at 235.

147. *Id.* at 236.

148. *Id.*

149. *Id.*

one persists will demonstrate respect for the court. Third, there is a limit to how long one may persist in an argument, and a defense lawyer should stop at the point that the argument has been completed.<sup>150</sup>

### 2. *Lesson Two: An Invited Response Is Not Contempt*

In reviewing the contempt citations and the trial record, the court of appeals found that a number of contempt citations against Kunstler and Weinglass were for their alleged “refusal to obey a court directive to cease argument.”<sup>151</sup> The court of appeals found

that the trial judge, when ordering counsel to terminate their argument or sit down, frequently added a rejoinder or coupled the order with a statement which called for a response by the attorneys. In such situations, it is our view that an invited, additional response cannot subsequently be viewed as a contemptuous violation of the order.<sup>152</sup>

The flip side of this lesson is that when there is a direct order to cease an argument, and the argument has been sufficiently stated, a lawyer should stop arguing the issue. In discussing how long a lawyer may persist in an argument, the court of appeals cautioned that lawyers may not “press their positions beyond the court’s insistent direction to desist.”<sup>153</sup>

### 3. *Lesson Three: Disobeying an Ambiguous Court Order Is Not Contempt*

Judge Hoffman found Kunstler in contempt for making a motion to have Chicago Mayor Richard J. Daley, whom the defense had called as a witness, declared a hostile witness in the presence of the jury after Kunstler had asked Daley several questions.<sup>154</sup> Judge Hoffman had previously issued an order that any motion to declare Daley a hostile witness should be *made* outside of the jury’s presence, and the contempt citation stated that Kunstler had violated the court’s order.<sup>155</sup>

Kunstler testified that he thought the order only prohibited him from *arguing* the motion to declare Daley a hostile witness in the presence of the jury, and Judge Gignoux found that Judge Hoffman’s order was “somewhat ambiguous.”<sup>156</sup> Judge Gignoux observed that once the

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150. *See infra* note 153 and accompanying text.

151. *In re Dellinger*, 461 F.2d 389, 399 (7th Cir. 1972).

152. *Id.*

153. *Id.* The court of appeals also stated that a judge should “exercise tolerance in determining those limits and to distinguish carefully between hesitating, begrudging obedience and open defiance.” *Id.*

154. *In re Dellinger*, 370 F. Supp. 1304, 1317 (N.D. Ill. 1973).

155. *Id.*

156. *Id.*

prosecutor called Judge Hoffman's attention to the alleged violation of the court's order, Kunstler made several requests to have the jury excused, and Judge Hoffman denied those requests.<sup>157</sup> Judge Gignoux also found that Kunstler's "motion could not conceivably have prejudiced the jury, inasmuch as the hostility existing between Mayor Daley and the defendants was obvious to everyone in the courtroom."<sup>158</sup>

#### 4. *Lesson Four: Disrespect or Insult Alone Is Not Contempt*

In dismissing some of Judge Hoffman's contempt citations, the court of appeals stated that "mere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the 'heat of courtroom debate' may prompt statements which are ill-considered and might later be regretted."<sup>159</sup> Thus, disrespect or insult of a judge may be contempt only when there is some obstruction of the court proceeding. The court of appeals explained that this occurs when the lawyer's "remarks create an imminent prejudice to a fair and dispassionate proceeding."<sup>160</sup>

Whether there is contempt when a lawyer insults or otherwise shows disrespect for a judge may turn on how a remark or comment is made. For example, shouting an insult or disrespectful remark may trigger an obstruction of the judicial process where the insult or disrespectful remark alone would not.<sup>161</sup> Also, an insult or disrespectful remark that leads to a delay in the proceedings will likely be grounds for finding contempt.<sup>162</sup>

To illustrate when insult and disrespect becomes contempt, it is helpful to look at some comments that Weinglass made, which the court of appeals found did not constitute contempt. These comments are then contrasted with some comments that Kunstler made, which the court of appeals remanded for trial on a contempt citation, and which Judge Gignoux found to be contempt.

Judge Hoffman made an evidentiary ruling that Weinglass's examination of a witness had opened the door to permit the government to elicit testimony that was harmful to the defense.<sup>163</sup> Judge Hoffman found Weinglass in contempt for these comments, stating that the court believed the comments indicated Weinglass's "belief that the court had

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157. *Id.*

158. *Id.*

159. *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 457 (Weinglass, contempt citation III).

been prejudicial in its rulings on evidence.”<sup>164</sup> The contempt citation contains the following exchange from the trial transcript:

The Court: What do the lawyers say about that, they open the door? Is that what you lawyers all say?

Mr. Weinglass: We do not open the door to a prejudicial question. I very carefully avoided any mention of any section of a code.

The Court: That is the reason for the open-the-door rule.

Mr. Weinglass: Well, the door has been—

The Court: Very often it kicks back in your face.

Mr. Weinglass: The door in this courtroom seems to swing in one direction. Many times I have attempted to—

The Court: Miss Reporter, please make note of that. The court admonishes counsel to be cautious in his observations, in the observations he makes such as he just completed.<sup>165</sup>

Judge Hoffman had originally sentenced Weinglass to fourteen days in jail for these comments.<sup>166</sup> The court of appeals found that the contempt citation based on these comments was insufficient as a matter of law, and did not remand the citation for trial before Judge Gignoux.<sup>167</sup> It is clear that although Judge Hoffman apparently felt insulted by Weinglass, indicating his belief that the judge was prejudiced against the defense, the comments did not obstruct the proceedings.

As part of two other contempt citations that the court of appeals remanded for trial, Weinglass implied that Judge Hoffman had been dishonest in an evidentiary ruling in one contempt citation,<sup>168</sup> and that Judge Hoffman's ruling preventing Kunstler from arguing for the release of one of the defendants who was in custody was “disgraceful” in another citation.<sup>169</sup> Judge Gignoux did not find that either of these comments or Weinglass's continuing to argue after the Judge had ordered him to cease argument constituted contempt.<sup>170</sup>

In contrast, some of the insults and disrespectful comments Kunstler directed to Judge Hoffman did constitute contempt. These comments were in one of the contempt citations against Kunstler and involved Kunstler's reaction to Judge Hoffman's denial to a defense request to call a witness. Kunstler

termed the judge's ruling “about the most outrageous statement I have ever heard from a bench,” violating “every principle of fair play;” stated

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164. *Id.*

165. *Id.*

166. *Id.* at 403.

167. *Id.* at 400.

168. *Id.* at 461.

169. *Id.* at 465.

170. *In re Dellinger*, 370 F. Supp. 1304, 1319, 1323 (N.D. Ill. 1973).



that he felt “disgraced to be here” and that the judge could hold him in contempt if he wished to do so; accused the judge of extreme bias; documented his accusations with a quotation from *The New York Times* which had characterized a prior ruling of the judge as “the ultimate outrage in American justice”; called the trial “a legal lynching”; and concluded with the following observation:

—and that, your Honor, is wholly responsible for that, and if this is what your career is going to end on, if this is what your pride is going to be built on, I can only say to your Honor, “Good luck to you.”

Shouts of “Right on” and applause followed.<sup>171</sup>

Considering these remarks by Kunstler and the reaction in the courtroom they caused, Judge Gignoux found that they constituted contempt, and he explained:

Mr. Kunstler testified that his remarks constituted “forceful and vigorous” argument. However, the extent and violence of the diatribe and the bitterness and anger expressed demonstrate that his comments constituted a vicious personal attack on the judge which could only have served to vent his spleen. His remarks plainly created an “imminent prejudice to a fair and dispassionate proceeding.” Unquestionably, the line “beyond which disrespect becomes obstruction” was crossed. . . . Mr. Kunstler knew his conduct was wrongful; and that the conduct, which resulted in an entirely unnecessary and not insignificant delay and disruption of the proceedings, exceeded the “outermost limits” of advocacy and rose to the level of an actual and material obstruction of the administration of justice.<sup>172</sup>

Because an insult or disrespectful remark usually serves no other purpose but to provide some satisfaction to the person making the remark, the more prudent course of action is for a lawyer to refrain from making such comments even if the comments may not rise to the level of contempt. Especially in trial, a defense lawyer not only has to worry about a judge’s reaction but also the reaction of the jury. Before insulting a judge, a defense lawyer should ask, “Is this going to help my client?” Much more often than not, the likely answer is “no.” On the other hand, in some extreme situations such as the Chicago Eight Trial, voicing well-founded beliefs about the judge’s rulings that do not interfere with the proceedings may call attention to how unjust the proceedings are.

##### 5. *Lesson Five: An Attorney Does Not Have an Obligation to Restrain Others from Disruptive Conduct*

Judge Hoffman cited Kunstler for contempt for “failing to assist the

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171. *Id.* at 1319.

172. *Id.* at 1319–20 (citations omitted).

court in maintaining order” when Seale was bound and gagged.<sup>173</sup> The court of appeals looked unfavorably upon this type of contempt charge, and stated that “[a]n attorney has no affirmative obligation to restrain his client under pain of the contempt sanction.”<sup>174</sup> The court of appeals recognized that such an expectation would intrude on and undermine the client’s “confidence in the attorney-client relationship which is necessary to a proper and adequate defense.”<sup>175</sup> On the other hand, the court of appeals cautioned that a lawyer may not encourage a client to engage in disruptive behavior.<sup>176</sup> The court of appeals remanded the citation for trial to determine if Kunstler contributed in some way to the disruption in the courtroom when Seale was bound and gagged.

In evaluating Kunstler’s behavior, Judge Gignoux found that Kunstler’s refusal to assist Judge Hoffman in maintaining order when Seale was bound and gagged was not contempt.<sup>177</sup> Judge Gignoux’s review of the record also did not support a finding that Kunstler’s comments encouraged or caused disorder.<sup>178</sup>

Thus, a defense lawyer does not have to obey a judge’s order to stop a client from engaging in disruptive behavior. Of course, there usually will be strategic reasons, even without a judge’s order, for a defense lawyer to ask a client to refrain from disrupting a proceeding. In my experience, jury members hold disruptive behavior against the defendant in a criminal case. In contrast, when one is defending a client in a patently unfair trial, such as the Chicago Eight Trial, Bobby Seale’s disruption in the courtroom called attention to the unfairness of the trial and ultimately led to the dismissal of the underlying criminal and contempt charges.

#### CONCLUSION

My interest in contempt and the Chicago Eight Trial stems from hearing Leonard Weinglass give a lecture while I was a law student. He talked about the Chicago Eight Trial and how to advocate for a client zealously without being held in contempt of court. He told us that at times some judges would try to interfere with our clients’ rights and our ability to advocate for our clients. Weinglass told us that in addressing the court and pressing a point, it was important to preface when we said with “Your honor,” or “May it please the court,” and, when you disagreed with the judge, say “With all due respect.” He said that once those words or similar

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173. *Id.* at 1317.

174. *In re Dellinger*, 461 F.2d at 399.

175. *Id.*

176. *Id.* at 399–400.

177. *In re Dellinger*, 370 F. Supp. at 1317.

178. *Id.*

words were spoken, we could make the arguments we thought most effective and necessary for our clients.

Weinglass's advice is sound. It worked for him, as the ultimate dismissal of all fourteen contempt citations against him in the Chicago Eight Trial demonstrates. Even if he "approached the brink, he did not cross the line between advocacy and obstruction."<sup>179</sup> Weinglass's advice also worked for me. Though a few judges threatened me with contempt from time to time as I pressed a point or tried to make a record for appeal, I never had to go through the contempt process.

The lessons from the Chicago Eight Trial on the limits of a judge's contempt power and the limits of advocacy confirm Weinglass's advice on the subject and provide additional guidance. I hope no one reading this Article has to face contempt charges, and, if they do, the court will agree that they did not cross the line.

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179. *Id.* at 1319; *see supra* notes 136–40 and accompanying text.