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MISCONDUCT OF JUDGES AND ATTORNEYS DURING TRIAL: INFORMAL SANCTIONS

An attorney has a duty and an obligation as a member of the bar to conform to the standards of conduct prescribed by the legal profession.[1] The sanctions which may be applied to punish improper professional conduct cover a broad spectrum. At one extreme, an offending attorney faces possible disbarment. Less serious offenses may result in suspension or in a formal reprimand. Likewise, those members of the profession who have been elevated to the bench must conduct themselves properly or risk removal by impeachment. Fortunately, resort to such extreme penalties is seldom necessary. However, the everyday strife of the legal world inevitably results in improper conduct which, although not requiring the severity of formal discipline, should not go unrebuked. Much of this improper conduct may understandably be attributed to the tension and passions of the trial courtroom. This Note will endeavor to examine that misconduct of both attorneys and judges which arises in the courtroom and the various informal sanctions available to the courts with which to meet those offenses.[2]

I. Attorneys

A. Conduct

The standards of proper conduct for attorneys are prescribed by the *Canons of Professional Ethics* and by the usages, customs, and practices of the bar.[3] The lawyer owes a duty and an obligation not only to his client, but to the court,[4] opposing litigants and counsel, witnesses,

[1] See Platnauer v. Superior Court, 32 Cal. App. 463, 473, 163 Pac. 237, 241 (3d Dist. 1917) (dictum):

> The members of the legal profession should, above all other members of society, be the first to uphold the dignity of judicial tribunals . . . . Indeed, such is among the first and most important of the obligations to which the lawyer under his oath solemnly subscribes when he is granted the right to practice his profession . . . .

[2] Formal sanctions for professional and judicial misconduct are not within the ambit of this Note and will not be discussed further. For discussion of these sanctions, see Miller, *The Discipline of Judges*, 50 Mich. L. Rev. 737 (1952) (impeachment of judges); Note, *Disbarment: Misconduct and Defenses*, 49 Iowa L. Rev. 516 (1964) (this Symposium) (disbarment of attorneys—conduct); Note, *Disbarment Procedure*, 47 Iowa L. Rev. 984 (1962) (same—procedure). See also Vestal, *The Pretrial Conference and the Recalcitrant Attorney: A Study in Judicial Power*, 48 Iowa L. Rev. 761 (1963); Note, *Extrajudicial Activities of Judges*, 47 Iowa L. Rev. 1026 (1962).

[3] See Professional Canon 25, A.B.A. Canons of Professional and Judicial Ethics 18 (1957) (known customs or practice of the bar should not be ignored) [hereinafter cited as A.B.A. Canons]; Drinker, Legal Ethics 22 (1953). Drinker suggests that statutes and the common law are additional sources of the standards. A number of states have adopted the *American Bar Association Canons of Professional and Judicial Ethics* in whole or in part. See, *e.g.*, Iowa Sup. Ct. R. 119 (adopted except insofar as Professional Canon 27 conflicts with Iowa Code); Va. Code Ann. § 54-48 (1950); Wash. Rev. Code Ann. § 2.48.230 (1961).

[4] See People v. Beattie, 137 Ill. 533, 574, 27 N.E. 1096, 1103 (1891):

> The lawyer's duty is of a double character. He owes to his client the duty of fidelity, but he also owes the duty of good faith and honorable

and the jury as well. Nowhere is the proper exercise of this duty more evident, and more important,[5] than in his deportment in the trial courtroom.

Foremost, it is the duty of the lawyer to maintain a respectful attitude toward the court.[6] Decisions of the judge must be obeyed. When a ruling has been finally made, the lawyer must, for the time being, accept it and invoke his only proper remedy, appeal to a higher court.[7] The lawyer should also be punctual in attendance, and be concise and direct in the trial and disposition of causes.[8] His conduct before the court and with other attorneys should be characterized by candor and fairness.[9] He should be courteous at all times.[10] All personalities between counsel should be scrupulously avoided as such colloquies only cause delay and promote unseemly wrangling.[11] Likewise, it is indecorous to allude to the personal history or the personal peculiarities and idiosyncrasies of opposing counsel.[12] Adverse wit-

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dealing to the judicial tribunals before whom he practices his profession. He is an officer of the court—a minister in the temple of justice.

[5] In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men. Preamble, Canons of Professional Ethics, A.B.A. CANONS 1.

Perhaps no facet of judicial life is more influential in stimulating that essential confidence in our courts than the impression created by the courtroom. Participation in the trial of a lawsuit, not just as a litigant but as a witness or juror as well, is a dramatic experience for most laymen. However, in large part, it is from this brief personal glimpse of our judicial system that public opinion is shaped. And this opinion, whether favorable or unfavorable, is primarily the result of the impression created by the conduct of those officers of the court, the judge and the lawyers, upon whom is focused the attention of so many strange and unsophisticated eyes. A trial conducted with efficiency and impartiality, with mutual respect and courtesy between bench and bar, and with an aura of dignity, cannot fail to generate that essential public confidence in the integrity of the courts. On the other hand, when discipline and decorum fall below expected standards, that essential confidence and approval are in jeopardy.

[6] See Professional Canon 1, A.B.A. CANONS 1.

[7] See United States v. United Mine Workers, 330 U.S. 258, 293 (1947).

[8] See Professional Canon 21, A.B.A. CANONS 15.

[9] See Professional Canon 22, A.B.A. CANONS 15-16. Canon 22 lists many acts which are not candid or fair: knowingly misquoting the contents of a paper, a witness' testimony, the language or argument of opposing counsel, or the language of a decision or a textbook; citing as authority a decision that has been overruled or a statute that has been repealed with knowledge of the invalidity; asserting in argument a fact which has not been proved.

[10] See DRINKER, LEGAL ETHICS 22 (1953).

[11] See Professional Canon 17, A.B.A. CANONS 14.

[12] *Ibid.*

nesses and suitors should also be treated with fairness and due consideration, and the lawyer should never minister to the malevolence or prejudice of a client.[13] Finally, counsel must maintain an impersonal attitude toward the jury[14] and should never assert his personal belief in the justice of a client's cause.[15]

However, misconduct must be examined to some extent in a practical light. In the pressure and tension of trial, attorneys are not always required to adhere to the niceties of manner or choice of phrase to be expected under other circumstances. Conduct which, if separated from the whole context of trial and viewed in the cold analysis of an appellate bench, would not receive unqualified approval is nevertheless condoned.

Disrespect towards the court is perhaps the most serious type of misconduct. Judges are quite rigid in their reaction to conduct which threatens the dignity of the court.[16] The character of the judge is beyond the bounds of proper comment.[17] Personal epithets, slurs,[18] intimations of bias or prejudice,[19] charges of incompetence,[20] or derogatory aspersions of any kind are not tolerated. Conduct disrupting the decorum of the courtroom, such as shouting or yelling, is improper.[21] It is imperative that counsel refrain from arguing with the court as such behavior manifests disrespect for the judge's authority.[22]

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[13] See Professional Canon 18, A.B.A. CANONS 15.

[14] See Professional Canon 23, A.B.A. CANONS 17.

[15] See Professional Canon 15, A.B.A. CANONS 13. "Proper" conduct may therefore be characterized as a scrupulous adherence to the letter and spirit of the canons and to the customs and etiquette of the profession. However, to define "improper" conduct as merely that conduct which falls below such standards is an oversimplification. Any violation of the canons, even in spirit, is, in a strictly ethical sense, "improper" as opposed to "proper" conduct. But our main concern is to examine "improper" conduct as a notion to connote that conduct for which the attorney becomes subject to sanction. In this sense the terms "permissible" and "impermissible" may be more apposite. However, once expressed and considered, the distinction may be forgotten, as such precision is neither necessary nor desirable. The line between "improper" and "impermissible" conduct is vague and overlapping and is seldom enunciated. See Felix v. Hall-Brooke Sanitarium, 140 Conn. 496, 101 A.2d 496 (1953). The courts do not usually concern themselves with such niceties, but rather, while attending the business of deciding cases, confine their attentions to the practical issue of whether the conduct in question is "sanctionable" or not, and it is in this context that the word "improper" will be used.

[16] See Love v. United States, 138 A.2d 666 (D.C. Munic. Ct. App. 1958).

[17] See State v. Seminary, 165 La. 67, 115 So. 370 (1927) (trial judge objected to assertion of his lack of legal knowledge); People v. Kimbrough, 193 Mich. 330, 159 N.W. 533 (1916) (intimation that judge was not fair in his rulings).

[18] See State v. Seminary, note 17 *supra*.

[19] See People v. Kimbrough, 193 Mich. 330, 159 N.W. 533 (1916); Harris v. State, 47 Miss. 318 (1872); State v. Elder, 130 Wash. 612, 228 Pac. 1016 (1924).

[20] See State v. Seminary, 165 La. 67, 115 So. 370 (1927); State v. Whitworth, 126 Mo. 573, 29 S.W. 595 (1895).

[21] See Hughes v. State, 103 So. 2d 207 (Fla. Ct. App. 1958); Waukegan Park Dist. v. First Nat'l Bank, 22 Ill. 2d 238, 174 N.E.2d 824 (1961).

[22] See Fisher v. Pace, 336 U.S. 155 (1949), 34 IOWA L. REV. 673; Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d 479, 9 Cal. Rptr. 276 (2d Dist. 1960).

Obstructing the orderly progress of trial is also improper. Such tactics as interposing frivolous objections,[23] or attempting to proceed in a manner previously barred by the court,[24] such as repeated attempts to introduce evidence already ruled inadmissible, are grounds for reprimand. Punctuality for sessions of court is essential;[25] deliberate stalling or delay is reprehensible.[26]

The conduct of attorneys in their relations with each other is also subject to scrutiny and discipline by the court. While such relations ought to be conducted with courtesy and consideration, the rules of rectitude do not require counsel to coddle the rights of his opponent.[27] He is free to employ all the forensic arts and wiles of the advocate. It must always be remembered that clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other.[28] Therefore opposing counsel should never engage in personal opprobriums.[29] Although considerable latitude is allowed for legitimate criticism, attacks on opponent's trial tactics or ability are not condoned.[30] Bare allegations such as implying counsel has intentionally suppressed evidence are highly improper unless supported by facts.[31] Constant bickering between counsel and the "baiting" of opponents create a hostile atmosphere which often permeates the entire trial and are to be sedulously avoided.[32]

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[23] See Corn v. French, 74 Nev. 329, 331 P.2d 850 (1958); Dallas Ry. & Terminal Co. v. Bishop, 203 S.W.2d 651 (Tex. Civ. App. 1947); TEX. R. CIV. P. 269(g): "The court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds."

[24] See Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d 479, 9 Cal. Rptr. 276 (2d Dist. 1960) (continued to argue "last clear chance" doctrine to the jury); Johnson v. Johnson, 245 Iowa 1216, 65 N.W.2d 157 (1954) (attempted to introduce evidence previously excluded). In Swonger v. Celentano, 17 Wis. 2d 303, 116 N.W.2d 117 (1962), after the court sustained an objection, the attorney told the witness that they would still get the testimony admitted. The resulting reprimand by the trial judge was approved on appeal.

[25] See Bolden v. United States, 266 F.2d 460 (D.C. Cir. 1959).

[26] See Jardine Estates, Inc. v. Koppel, 24 N.J. 536, 133 A.2d 1 (1957) (party falsely contended he was physically unable to continue trial).

[27] See People v. Vollmer, 274 App. Div. 1011, 85 N.Y.S.2d 1 (3d Dept. 1948). Following a long and tense murder trial, the district attorney made several indecorous statements in his summation to the jury. The court upheld the conviction concluding that the jury's verdict was uninfluenced by the untoward remarks and that the defendant had had a fair trial.

[28] See Professional Canon 17, A.B.A. CANONS 14.

[29] See Kroger Grocery & Baking Co. v. Stewart, 164 F.2d 841 (8th Cir. 1947) (counsel told jury opposing counsel "had tried everything except the facts").

[30] See People v. Burnett, 190 N.E.2d 338 (Ill. 1963) (said opponent's tactics were a smoke screen to fool the jury); Manteuffel v. Theo. Hamm Brewing Co., 238 Minn. 140, 56 N.W.2d 310 (1952) (likened opposing counsel to Merlin the magician trying to pull legal rabbit out of hat).

[31] See Missouri-K.-T. R.R. v. Ridgway, 191 F.2d 363 (8th Cir. 1951).

[32] See New York Cent. R.R. v. Milhiser, 231 Ind. 180, 106 N.E.2d 453 (1952); *cf.* State v. Lorts, 269 S.W.2d 88 (Mo. 1954); State v. Tiedt, 360 Mo. 594, 229 S.W.2d 582, 588 (1950).

Objectionable conduct is perhaps most prevalent during argument to the jury, at least as indicated by the frequency with which it appears in the appellate reports. However, in light of the devotion and zeal with which the advocate often turns in the performance of his classical role of persuasion, this is understandable. Although momentary lapses caused by the heat of trial are often excusable,[33] such lapses are not to be condoned. As a general rule, counsel is limited in argument to the evidence admitted at trial and any reasonable inference therefrom.[34] Remarks that are made for the purpose of arousing the sympathy or passion of the jury, such as reference to the wealth of a party,[35] are prohibited. Similarly, appeals to racial prejudice are condemned.[36] Inflamatory words in themselves are not objectionable if they are a proper inference from the evidence; however, mere epithets are not permitted. Accordingly, reference to the defendant in a rape prosecution as being "animalistic" was held to be acceptable as within the scope of reasonable inference.[37] Likewise, references to an accused as "lowdown, degenerate and filthy,"[38] and as a "pimp,"[39] a "mad dog,"[40] and an "ex-convict and a rattlesnake"[41] have all been held permissible inferences. Even slang expressions have been found proper; for example, referring to an opponent's testimony as a "cock and bull story"[42] when contradicted by other evidence. By the same token, it is highly improper for an attorney to attempt to get facts before the

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[33] See Dean v. Trembley, 185 Pa. Super. 50, 57, 137 A.2d 880, 885 (1958) (dictum). The court noted that such lapses are excusable in the eyes of the jurors and the court and are usually attributed to the zealousness of counsel in behalf of their client and their cause.

[34] See People v. Wein, 50 Cal. 2d 383, 326 P.2d 457 (1958) (called defendant "strange breed" of "kidnappers, robbers and forcible rapists"); People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27 (1962) (referred to defendant in rape prosecution as being "animalistic"); Brown v. Commonwealth, 310 Ky. 306, 220 S.W.2d 870 (1949) (argued decedent lost life protecting children from moonshiners and bootleggers).

[35] See Southern Elec. Generating Co. v. Leibacher, 269 Ala. 9, 110 So. 2d 308 (1959) (reference to defendant as wealthy corporation improper); Robinson v. Sims, 227 Miss. 375, 86 So. 2d 318 (1956) (comment to jury that corporate defendant ought to "feel" verdict improper); Graham v. Morris, 366 S.W.2d 792 (Tex. Civ. App. 1963) (argument farmer had as much right on highway as biggest trucking company improper); Smith v. Riedinger, 95 N.W.2d 65 (N.D. 1959) (reference to defendant as a rich man improper).

[36] See Emerson v. State, 90 Ga. App. 323, 82 S.E.2d 882 (1954) (argument Negroes should be given severe sentences improper); Daylight Grocery Co. v. Jackson, 158 Fla. 314, 28 So. 2d 871 (1947) (argument injecting race prejudice improper).

[37] See People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27 (1962).

[38] See Williams v. State, 93 Okla. Crim. 260, 226 P.2d 989 (1951). The court concurred emphatically in the prosecutor's description of the defendant who, according to the evidence, had raped a small girl while afflicted with gonorrhea.

[39] See State v. Armstead, 283 S.W.2d 577 (Mo. 1955) (substantial evidence that defendant was a panderer).

[40] See Commonwealth v. Capps, 382 Pa. 72, 114 A.2d 338 (1955).

[41] See Commonwealth v. Narr, 173 Pa. Super. 148, 96 A.2d 155 (1953).

[42] See People v. Sinclair, 190 N.E.2d 298 (Ill. 1963) (proper where inference from evidence that testimony false).

jury in argument which are inadmissible in evidence, such as a criminal defendant's prior convictions.[43] Deliberate violation of the rules of evidence, for instance, comment upon the failure of an accused to testify in his own behalf, is likewise improper.[44] Finally, it is improper for counsel to express his own personal belief or opinion as to his client's innocence or to the justice of his cause.[45]

B. Sanctions

Primary responsibility for the discipline and control of counsel's conduct rests with the trial court.[46] In carrying out this duty the judge is given wide latitude in the exercise of his discretion.[47] He not only may but he has an affirmative obligation to take corrective action in the case of misconduct.[48] Disciplinary measures in the sense of informal sanctions cover a broad range, and the judge must apply the punishment he feels is commensurate with the offense. The least severe form of sanction is the reprimand. Misconduct of a more serious nature will result in contempt proceedings. Both reprimand and contempt may be employed in varying degrees of severity. Appellate courts are reluctant to interfere with the judgment of the trial court in the discipline of errant attorneys;[49] generally they will not reverse a judge except in the case of a manifest abuse of discretion.[50] However, it is within the authority of higher courts to censure the misconduct of counsel, either in addition to the admonitions of the trial court[51] or in the first instance when circumstances so require.[52]

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[43] See People v. Lyons, 47 Cal. 2d 303, 300 P.2d 329 (1956) (improperly referred to defendant's prior conviction); People v. Ford, 89 Cal. App. 2d 467, 200 P.2d 867 (2d Dist. 1948) (repeated prejudicial statements of facts not in evidence held flagrant misconduct).

[44] People v. Wilkes, 44 Cal. 2d 679, 284 P.2d 481 (1955). However, some jurisdictions allow comment upon the accused's failure to testify. See LADD, EVIDENCE 278-86 (2d ed. 1955).

[45] See Williams v. United States, 168 U.S. 382 (1897) (prosecutor's comment that no immigrant could enter without paying off defendant was improper); People v. Hoffman, 399 Ill. 57, 77 N.E.2d 195 (1948) (improper for prosecutor to express personal belief of defendant's guilt). *But see* People v. Acuff, 94 Cal. App. 2d 551, 211 P.2d 17 (1949) (prosecutor's comment he was satisfied defendant guilty held proper inference from evidence).

[46] See Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d 479, 9 Cal. Rptr. 276 (2d Dist. 1960); Waukegan Park Dist. v. First Nat'l Bank, 22 Ill. 2d 238, 174 N.E.2d 824 (1961).

[47] See New York Cent. R.R. v. Milhiser, 231 Ind. 180, 106 N.E.2d 453 (1952); Dean v. Trembley, 185 Pa. Super. 50, 137 A.2d 880 (1958).

[48] See Rowe v. State, 87 Fla. 17, 98 So. 613 (1924); Waukegan Park Dist. v. First Nat'l Bank, 22 Ill. 2d 238, 174 N.E.2d 824 (1961).

[49] See State v. Case, 247 Iowa 1019, 1030, 75 N.W.2d 233, 240 (1956) (dictum).

[50] See State v. Haffa, 246 Iowa 1275, 1285, 71 N.W.2d 35, 42 (1955); Dean v. Trembley, 185 Pa. Super. 50, 137 A.2d 880 (1958).

[51] See People v. Ford, 89 Cal. App. 2d 467, 200 P.2d 867 (2d Dist. 1948).

[52] See Whitney v. Whitney, 15 Ill. App. 2d 425, 146 N.W.2d 800 (1957); Neff v. City of Cameron, 213 Mo. 350, 111 S.W. 1139 (1908); McGill v. State, 269 S.W.2d 398 (Tex. Crim. App. 1954).

1. *Reprimand*

The reprimand or censure is the most common informal sanction available to the trial court to rebuke counsel's misconduct. Generally, it is accomplished by merely pointing out the impropriety of counsel's conduct or remarks and an admonition not to let it happen again.[53] The severity of the reprimand should be commensurate with the nature of the misconduct and the likelihood of its recurrence. The nature and use of the reprimand rests entirely with the discretion of the judge.[54] No precise form or exact language need be used. For example, the judge may simply say, "[T]hat remark was entirely uncalled for and as a member of the bar it should not have been made."[55] However, the court should limit his remarks to counsel's misconduct in the case at bar and should not rebuke counsel for misconduct which occurred in previous trials.[56]

There is a split of authority as to whether or not it is proper for the court to reprimand an attorney in the presence of the jury.[57] Although reprimand in open court may have a detrimental effect on counsel's case, it would seem warranted in upholding the public's respect for the courts, especially where the dignity of the court is involved.

All too frequently, reprimands go ignored by recalcitrant attorneys. The regrettable weakness of the informal censure is that it relies on counsel's solicitude for his professional reputation for its effectiveness. Unfortunately, this reliance is not always well-founded. For example, in *Eizerman v. Behn*,[58] the court cited two previous instances in which

[53] In Ganter v. Ganter, 39 Cal. 2d 272, 279, 246 P.2d 923, 928 (1952), upon refusing to allow counsel to ask a question, the judge commented, "I am running the court and you are going to mind the judge."

[54] See Rowe v. State, 87 Fla. 17, 98 So. 613 (1924); Dean v. Trembley, 185 Pa. Super. 50, 137 A.2d 880 (1958).

[55] Felix v. Hall-Brooke Sanitarium, 140 Conn, 496, 503, 101 A.2d 500, 503 (1953). In Swonger v. Celentano, 17 Wis. 2d 303, 304, 116 N.W.2d 117, 119 (1962), counsel's comment that he would still be able to get into evidence certain testimony which had previously been excluded by the court drew the following rebuke from the trial judge: "Don't make any more statements like that. I am warning you on that."

[56] See Roy v. United Elec. R.R., 52 R.I. 173, 180, 159 Atl. 637, 640 (1932). The court's remark that "other members of this court as well as myself have stood [counsel's] petulance *shown in these cases* as long as we can" held reversible error. (Emphasis added.)

[57] The minority view considers it improper for the trial judge to discipline counsel in the presence of the jury. See Whittenburg v. State, 46 Okla. Crim. 380, 287 Pac. 1049 (1930); Bell v. State, 130 Tex. Crim. 90, 92 S.W.2d 259 (1936). Although both courts say the trial judge should have excused the jury before reprimanding counsel, the court in *Whittenburg* held the error to be so prejudicial as to require reversal, while in *Bell* the error was not considered sufficient to merit reversal.

Under the majority view the court is free to discipline counsel in the presence of the jury. See Abbott v. United States, 239 F.2d 310 (5th Cir. 1956) (small fine imposed); Vaughn v. State, 263 Ala. 552, 183 So. 428 (1938) (discipline threatened); State v. Seminary, 165 La. 67, 115 So. 370 (1927) (reprimand). However, in each case it was also noted that the court's action was not prejudicial.

[58] 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956).

counsel had been castigated by appellate courts for similar misconduct with no effect.[59] Even more reprehensible was the court's observation in *People v. Wilkes*[60] that despite repeated denunciation, prosecutors flagrantly and deliberately continued to comment improperly on the failure of criminal defendants to testify in their own behalf.[61] It would seem that in such instances the time had come for resort to more drastic and effective sanctions.

Occasionally, an attorney will be reprimanded in an appellate court opinion.[62] Censure by an appellate court is usually rather stinging;[63] for instance, in admonishing counsel for an improper reference to his client's poverty the court said, "That such remarks were improper is something which is known to the most inexperienced trial lawyer. Counsel . . . is not inexperienced."[64] Unfortunately, the name of the offender is usually not mentioned in the opinion.[65]

However, attorneys are not without recourse from unfounded criticism by appellate courts. *Petition of Sterling*[66] was a petition praying for exoneration filed by Sterling protesting an opinion by the Supreme Court of Colorado in which he had been publicly censured by name for improper conduct. A hearing was held which vindicated his actions, whereupon the court published a separate opinion recognizing its previous error and clearing Sterling's name.[67] Although no similar case has been found, the procedure would seem to be a desirable method of affording relief from unwarranted reprimand.

2. *Contempt*

The power to punish contempts is an ancient and inherent prerogative of all courts.[68] Contempts are of two kinds, constructive and

[59] *Id.* at 285-87, 132 N.E.2d at 798-99.

[60] 44 Cal. 2d 679, 284 P.2d 481 (1955).

[61] *Id.* at 687-88, 284 P.2d at 486.

[62] See Whitney v. Whitney, 15 Ill. App. 2d 425, 146 N.E.2d 800 (1957); Neff v. City of Cameron, 213 Mo. 350, 111 S.W. 1139 (1908); McGill v. State, 269 S.W.2d 398 (Tex. Crim. App. 1954).

[63] In Zaulich v. Thompkins Square Holding Co., 10 App. Div. 2d 492, 200 N.Y.S.2d 550 (1st Dept. 1960), the court said that counsel were indeed fortunate that the trial court was indulgent enough to limit his disapproval of their conduct to a mere reprimand. In People v. Steinhardt, 9 N.Y.2d 267, 213 N.Y.S.2d 434 (1961), the appellate court reversed a conviction noting that the trial court was mild in his reproofs and the jury may thereby have gotten the impression that the prosecution's prejudicial tactics were necessary and proper.

[64] Eizerman v. Behn, 9 Ill. App. 2d 263, 285, 132 N.E.2d 788, 798 (1956).

[65] Occasionally the court mentions the name of the errant counsel. See Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d 479, 9 Cal. Rptr. 276 (2d Dist. 1960); Whitney v. Whitney, 15 Ill. App. 2d 425, 146 N.E.2d 800 (1957).

[66] 134 Colo. 211, 301 P.2d 346 (1956).

[67] *Id.* at 211-12, 301 P.2d at 346-47. Sterling was censured in Blackwell v. Midland Sav. & Loan Ass'n, 132 Colo. 45, 284 P.2d 1060 (1955), for supposedly withdrawing as counsel without notifying his client. Although the alleged misconduct did not occur in the courtroom, the instant method of vindication could still have been used if it had.

[68] See *Ex parte* Terry, 128 U.S. 289, 303 (1888); Flannagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916); State v. Owens, 125 Okla. 66, 256 Pac. 704 (1927). "The

direct. Constructive contempts are those occurring outside the presence of the court and will not be considered further.[69] Direct contempts, on the other hand, are those committed in the presence of the court[70] and the contempt proceeding is summary in nature;[71] that is, the judge has the authority to dispose of the matter on the spot. He is, in effect, accuser, prosecutor, and judge at the same time. However, this procedure has been held to satisfy the requirements of due process.[72] Today, many states define contempt by statute.[73] Also, contempt orders are now usually subject to appellate review,[74] and most

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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." *Ex parte* Terry, *supra* at 303.

[69] Disobedience or an unlawful interference with any lawful judgment, order, or process of the court is a constructive contempt; so too, are utterances and publications outside the presence of the court. See MINN. STAT. § 588.01(3) (1961). Before punishing for constructive contempt the offender must be given notice and an opportunity to be heard. A rule or order to show cause against the contempt is often employed. See IOWA CODE § 665.7 (1962).

[70] Direct contempts are those occurring in the immediate view and presence of the court, and arise from one or more of the following acts:
(1) Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceedings;
(2) a breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the business of the court. MINN. STAT. § 588.01(2) (1961).

[71] See Sacher v. United States, 343 U.S. 1, 9 (1952); State v. Circuit Court, 97 Wis. 1, 72 N.W. 193 (1897); MINN. STAT. § 588.03 (1961); Nelles, *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956 (1931).

[72] See *In re* Oliver, 33 U.S. 257, 275 (1948); *Ex parte* Terry, 128 U.S. 289 (1888).

[73] See, *e.g.*, IOWA CODE ch. 665 (1962); MINN. STAT. ch. 588 (1961); TENN. CODE ANN. § 23-900-07 (1955).

[74] At common law, a court of competent jurisdiction was the sole judge of contempts against its own authority and dignity, and its judgment in such cases was final and conclusive and not reviewable. Many jurisdictions by constitutional or statutory provisions now authorize a review. See 20 IOWA L. REV. 121 (1934). In the federal courts review is by appeal, see Wilson v. Byron Jackson Co., 93 F.2d 577 (9th Cir. 1937), while in most states the procedure for review is statutory, see, *e.g.*, IOWA CODE § 665.11 (1962) (writ of certiorari); MASS. GEN. LAWS ANN. ch. 250 § 9 (1956) (writ of error); TEX. CODE CRIM. PROC. art. 113 (1948) (writ of habeas corpus). The distinction between civil and criminal contempt is well explained in State v. Wingo, 221 Miss. 542, 547, 73 So. 2d 107, 109 (1954):

> Contempt proceedings are generally regarded as being of two classes: Those brought to vindicate the dignity and authority of the court; and those brought to preserve and enforce the rights of private parties. The procedure in the classes differs. The former are, as a rule, held criminal in their nature and are generally governed by the rules applicable to criminal cases. They are treated as independent actions. The latter are generally held to be remedial and civil in their nature and part of the action in which they arise.

In Iowa, the distinction has been dropped from the statutes, see IOWA CODE ch. 665 (1962), and the court has held that contempt proceedings under the

jurisdictions require that a judgment of direct contempt recite specifically the evidentiary facts constituting the alleged offense.[75]

Contempt should be used against an attorney in the manner which would least tend to prejudice the jury against his client's case. Thus, in *Sacher v. United States*,[76] rather than entering contempt citations against defense counsel during the trial, Judge Medina reserved the right to punish them for contempt at the close of the trial.[77] It was his opinion that immediate action would inevitably have broken up the trial and would have lessened the chances of a well-considered judgment, thereby serving defendant's ends by a mistrial.[78]

A judgment of direct contempt is precipitated by more serious misconduct than that which results in a reprimand. Correspondingly, punishment of a contempt is more severe; both fine and imprisonment are authorized.[79]

Contemptuous conduct cannot be precisely delineated.[80] It is generally said that a contempt is an offense against the dignity or authority of the court.[81] Sometimes contempt is expressed as the failure to conduct one's self with decorum and in a respectful manner.[82] How-

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statute are neither civil nor criminal but rather are "quasi-criminal." See Sawyer v. Hutchinson, 149 Iowa 93, 127 N.W. 1089 (1910).

[75] See Scott v. Davis, 328 S.W.2d 394 (Mo. Ct. App. 1959). A contempt order must set forth the actual facts as they transpired, not merely the conclusions of the sentencing judge, to enable a supervisory court to review the contempt.

[76] 343 U.S. 1 (1952). For a bitter criticism, see MARION, THE COMMUNIST TRIAL (2d ed. 1950).

[77] 343 U.S. at 7.

[78] See United States v. Sacher, 9 F.R.D. 394, 395 (S.D.N.Y. 1949). The Supreme Court approved Judge Medina's reasoning. In a five-to-four decision interpreting Federal Rule of Criminal Procedure 42(a), it was held that the word "summarily" referred to the nature of the contempt proceeding and was not intended as a limitation on the time at which the contempt could be ordered. Sacher v. United States, *supra* note 76, at 11.

[79] Most statutes provide for two types of punishment: indefinite imprisonment to coerce the performance of affirmative acts ordered by the court and within the power of the person to perform, see, *e.g.*, IOWA CODE § 665.5 (1962); MINN. STAT. § 558.12 (1961); TENN. CODE ANN. § 23-904 (1955); fine and/or imprisonment for a definite period for acts which, being done, are completed contempts, see, *e.g.*, IOWA CODE § 665.4 (1962); MINN. STAT. § 558.10 (1961); TENN. CODE ANN. § 23-903 (1955). The available punishment for completed contempts in Iowa is dependent upon the court in which it occurs. In the supreme court a fine not in excess of one thousand dollars or imprisonment for not more than six months in the county jail, or both fine and imprisonment, are available. In all other courts of record, the maximum fine is reduced to five hundred dollars, but the maximum length of imprisonment remains unchanged. However, only a fine which does not exceed ten dollars is available in all other inferior courts. See IOWA CODE § 665.4 (1962).

[80] See Nelles, *The Summary Power to Punish for Contempts*, 31 COLUM. L. REV. 956, 957 (1931). See generally Note, 6 N.Y.U. INTRA. L. REV. 222 (1951).

[81] See Note, 20 IOWA L. REV. 121, 124 (1934).

[82] See Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237 (3d Dist. 1917). In § 665.2 of the Iowa Code, contempt is partially defined as:

1. Contemptuous or insolent behavior toward such court while engaged

ever, these generalizations are not very helpful in defining the limits of contemptuous conduct. Deceiving the court with false statements[83] and failing to cease improper questioning[84] have been held contemptuous. The use of obscene words is a contempt.[85] However, mistaken acts of counsel, made in good faith, will not be held contemptuous.[86] Likewise, an attorney's assertion of his legal rights, or those of his client, such as the right of counsel to stand while examining a witness[87] or the right of an accused to counsel of his own choice,[88] have been held not to be contempts, even when insisted upon by counsel in the face of contrary orders of the judge. It would seem that intent, in the sense that the improper act be willful, is a necessary element of contempt.[89] However, the willful nature of the act alone is not sufficient to make the misconduct contemptuous. For example, improper argument[90] to the jury and use of derogatory language,[91] although sufficient grounds for contempt, are often dismissed with a mere reprimand. Thus, other factors besides willfullness are often determinative.

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in the discharge of a judicial duty which may tend to impair the respect due to its authority.
2. Any willful disturbance calculated to interrupt the due course of its official proceedings.

[83] See Albano v. Commonwealth, 315 Mass. 531, 53 N.E.2d 690 (1944) (intentional misrepresentation of fact by attorney to judge in open court); Butterfield v. State, 144 Neb. 388, 13 N.W.2d 572 (1943) (counsel substituted page on file without leave and later denied it); *In re* Estate of La Penta, 167 Ohio St. 536, 150 N.E.2d 404 (1958) (counsel misrepresented fees in probate report).

[84] See Glasgow v. State, 328 P.2d 185 (Okla. Crim. App. 1958); McEntire v. Baygent, 229 S.W.2d 866 (Tex. Civ. App. 1949).

[85] See Olimpus v. Butler, 248 F.2d 169 (4th Cir. 1957); United States v. Anonymous, 21 Fed. 761 (W.D. Tenn. 1884).

[86] See Sprinkle v. Davis, 111 F.2d 925 (4th Cir. 1940) (actions taken under a mistaken view of the law); Cooper v. Superior Court, 55 Cal. 2d 291, 359 P.2d 274 (1961) (objecting to counsel's comments counsel mistakenly thought improper).

[87] See Curran v. Superior Court, 72 Cal. App. 258, 236 Pac. 975 (1920); *Ex parte* Crenshaw, 96 Tex. Crim. 657, 259 S.W. 587 (1924). *But see* Creekmore v. United States, 237 Fed. 743 (8th Cir. 1916).

[88] See Platnauer v. Superior Court, 32 Cal. App. 463, 163 Pac. 237 (1917).

[89] See IOWA CODE § 665.2(2) (1962), set forth at note 82 *supra*.

[90] *Contempt.* See Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950); Taplin v. Stanley, 102 Vt. 398, 148 Atl. 750 (1930). *Reprimand.* See Emerson v. State, 90 Ga. App. 323, 82 S.E.2d 882 (1954); Williams v. State, 19 Okla. Crim. 307, 199 Pac. 400 (1921).

[91] *Contempt.* See MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951) (expressed opinion that judge should be ashamed of himself); Harding v. McCollough, 236 Iowa 556, 19 N.W.2d 613 (1945) (accused court of ulterior motive in refusing client bail); State v. Johnson, 171 Wash. 466, 18 P.2d 35 (1933) (referred to witness as "scab"). *Reprimand.* See Freedman v. Willeford, 121 Cal. App. 2d 145, 262 P.2d 642 (4th Dist. 1953) (called witness "the kind of man that a few dollars will influence"); People v. Kimbrough, 193 Mich. 330, 159 N.W. 533 (1916) (intimation that judge was not fair in his ruling); Manteuffel v. Theo. Hamm Brewing Co., 238 Minn. 140, 56 N.W.2d 310 (1952) (likened opposing counsel to Merlin the magician trying to pull legal rabbit out of hat).

An important factor seems to be the persistence of counsel in continuing his improper behavior in spite of repeated admonitions by the court to desist. For instance, counsel's insistence upon an improper line of questioning in the examination of a witness[92] and his refusal to break off an indecorous colloquy[93] with the court have resulted in contempt.

Perhaps the most important factors in defining the line between that conduct which is merely improper and that which is contemptuous are those intangibles such as tone of voice, manner, bearing, and attitude. Where these factors convey an impression of insolence or disrespect, counsel is held in contempt. Only the trial judge is in a position to pass upon the effect of those factors and appellate courts are extremely reluctant to overrule his judgment.[94] Obviously, the printed page is an inadequate record. However, for the same reason it is impossible to assess the validity of this conclusion.

As the right of appeal from a direct contempt order may be inadequate, attorneys have occasionally resorted to the equitable common-law writ of prohibition for relief. Superior courts have the inherent power to issue the extraordinary writ of prohibition to prohibit an inferior court from proceeding outside its jurisdiction, or from exercising its jurisdiction erroneously so as to result in irreparable injury for which there is no other adequate remedy.[95] Even where appeal will lie, it may be an inadequate remedy under some circumstances.[96]

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[92] See Glasgow v. State, 328 P.2d 185 (Okla. Crim. App. 1958); McEntire v. Baygent, 229 S.W.2d 866 (Tex. Civ. App. 1949).

[93] See Fisher v. Pace, 336 U.S. 155 (1949). The Supreme Court affirmed the contempt order resulting from the following exchange of words which occurred during attorney Fisher's opening argument to the jury:

> "By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.
> "By Mr. Fisher: That is all right. We take exception to the conduct of the Court.
> "By the Court: That is all right; I will fine you $25.00.
> "By Mr. Fisher: If that will give you any satisfaction.
> "By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the clerk $50.00
> "By Mr. Fisher: You mean for trying to represent my client?
> "By the Court: No, sir; for contempt of Court. Don't argue with me.
> "By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument—
> "By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.
> "By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.
> "By the Court: That will be a hundred dollar fine and three days in jail. Take him out. *Id.* at 158.

[94] See *Id.* at 161; Albano v. Commonwealth, 315 Mass. 531, 53 N.E.2d 690 (1944).

[95] See Williams v. Howard, 270 Ky. 728, 110 S.W.2d 661 (1937). The writ of prohibition is available in Iowa, for the writ of certiorari was judged not to be an adequate remedy by the Supreme Court of Iowa in State *ex rel.* O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73 (1935).

[96] See Herr v. Humphrey, 277 Ky. 421, 126 S.W.2d 809 (1939); Hammond v. District Court, 30 N.M. 130, 228 Pac. 758 (1924); Mayers v. Bronson, 100 Utah 279, 114 P.2d 213 (1941).

A recent Florida decision illustrates the effective employment of this device. In *Scussel v. Kelly*[97] an attorney was cited for contempt for his statements in an affidavit supporting a suggestion that the trial judge disqualify himself in a pending case because of his personal bias and prejudice against the attorney. However, the judge set the hearing on the suggestion of disqualification for the day following the contempt hearing. This placed the attorney in the embarrassing position, in proceeding on the disqualification suggestion for his client, of having to face on the prior day the contempt citations issued against him. Confronted with this dilemma, the attorney sought a writ of prohibition from the district court of appeals. A writ was issued prohibiting the judge from hearing the case, the court finding a reasonable basis for the allegations contained in the suggestion of disqualification, although it did not pass on the truth of the charges. The court also issued a writ prohibiting the trial judge from proceeding further in the contempt case, concluding that to allow the contempt to continue on the facts of this case would be to exceed the judge's jurisdiction.[98]

3. *Reversal—Quasi-Sanction*

The misconduct of an attorney may also be objected to by opposing counsel regardless of whether or not the trial court has taken any action on his own intiative. The sole basis for such an objection is that the effect of the attorney's misconduct was such as to prejudice opposing counsel or his client's cause in the eyes of the jury and not the misconduct in and of itself.[99] Objection must ordinarily be timely[100] to enable the trial judge to mitigate the prejudicial effect of the misconduct by an instruction to the jury such as an admonition to disregard the improper remark in their deliberations and to base their verdict solely on the evidence.[101] However, if the misconduct is of such pervasive prejudice that it can not be cured by an instruction the judge must declare a mistrial.[102] Appeal will lie without an objection being raised only to prevent a miscarriage of justice or where the prejudice could not have been cured by any action of the trial court.[103] If the objection is overruled, counsel may appeal on the issue of whether the conduct was in fact prejudicial.[104] Even if the trial court finds the conduct prejudicial and instructs the jury to disregard it, counsel may still urge a mistrial on appeal.[105] However, in either

[97] 152 So. 2d 767 (Fla. Dist. Ct. App. 1963).

[98] *Id.* at 783.

[99] See State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 260 S.W.2d 596 (1953).

[100] See People v. Wein, 50 Cal. 2d 383, 326 P.2d 457 (1958); People v. Sinclair, 190 N.E.2d 298 (Ill. 1963); State v. Smith, 248 Iowa 603, 81 N.W.2d 657 (1957).

[101] See Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956); Pilgeram v. Haas, 118 Mont. 431, 167 P.2d 339 (1946); State v. Reppert, 132 W. Va. 675, 52 S.E.2d 820 (1949).

[102] See People v. Moore, 9 Ill. 2d 224, 137 N.E.2d 246 (1956).

[103] See People v. Albert, 182 Cal. App. 2d 729, 6 Cal. Rptr. 473 (2d Dist. 1960).

[104] See State v. Armstead, 283 S.W.2d 577 (Mo. 1955); Aultman v. Dallas Ry. & Terminal Co., 152 Tex. 509, 260 S.W.2d 596 (1953).

[105] See New York Cent. R.R. v. Milhiser, 231 Ind. 180, 106 N.E.2d 453 (1952); Commonwealth v. Wilcox, 316 Pa. 129, 173 Atl. 653 (1934).

case, the ruling of the trial judge will be given great weight by the appellate court because of the inherent limitations of a cold written record, especially as to such an elusive fact issue as prejudice. The test to be applied is whether or not the misconduct was so prejudicial, when considered in the light of all the circumstances and the evidence, as to have adulterated the fairness of the trial.[106] If so, but the jury was properly instructed to disregard the misconduct, the issue becomes whether the prejudicial effect was in fact vitiated by the curative instruction.[107] Error on either issue will result in reversal and a new trial.[108] Under these circumstances, reversal has a curious secondary effect which may be termed a quasi-sanction.

Reversal is clearly not a primary sanction because its purpose is not to discipline counsel for his misconduct. Rather, the sole intended purpose of a reversal is to grant to the appellant a new trial because of the error committed by the trial judge in his erroneous finding of fact either that the misconduct of appellee's counsel did not prejudicially affect appellant's case or that the curative instruction sufficiently vitiated the prejudice. Nevertheless, the reversal results in overturning a judgment favorable to appellee—the client of the attorney whose misconduct precipitated the reversal. Consequently, the client is compelled to endure the unwelcome bother and expense of a new trial. This in turn results in an unhappy client, a luxury most attorneys can ill-afford. For the lawyer on a contingent-fee contract, the expense of a new trial is as much an out-of-pocket loss as is a disciplinary fine. It may also be noted that public prosecutors who waste the taxpayer's money in securing convictions which are subsequently reversed as a result of their prejudicial misconduct often have brief careers. Therefore, the possibility of an ensuing reversal necessarily tends to coerce proper conduct, and thus accomplishes, in the end, the ultimate purpose of a primary sanction. Although fortuitous, it is a happy result.

II. JUDGES

A. Conduct

The judiciary must constantly bear in mind its position of esteem in our society and the tremendous influence that its opinions, conduct, and remarks will have on the jury.[109] Many times a mere remark from the bench will have more effect upon the jurors than will the testimony given by witnesses who are under oath.[110] The Canons of

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[106] See People v. Vollmer, 274 App. Div. 1011, 85 N.Y.S.2d 1 (3d Dept. 1948); Commonwealth v. Capps, 382 Pa. 72, 114 A.2d 338 (1955).

[107] See Southwestern Greyhound Lines, Inc. v. Dickson, 228 S.W.2d 232 (Tex. Civ. App. 1950).

[108] See Raucci v. Connelly, 340 Ill. App. 280, 91 N.E.2d 735 (1950); State v. Taylor, 320 Mo. 417, 8 S.W.2d 29 (1928).

[109] See La Chase v. Sanders, 142 Conn. 122, 111 A.2d 690 (1955); Commonwealth v. Myma, 278 Pa. 505, 508, 123 Atl. 486, 487 (1924).

[110] See Pickerell v. Griffith, 238 Iowa 1151, 1166, 29 N.W.2d 588, 596 (1947):

> [I]t is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the

Judicial Ethics require a judge's behavior to be impartial, patient, and attentive,[111] and he should strive to live up to these precepts.

In order for a judge's conduct to be reviewed by an appellate court, counsel must object to the conduct at the time it occurs[112] or objection will be deemed waived unless the misconduct is of such prejudicial nature as to deprive the party of essential justice.[113] Upon objection the judge himself will often attempt to vitiate the prejudicial effect by instructing the jury to disregard his remarks or actions.[114] However, where the prejudicial effect can not be cured by an instruction to the jury, the judge must declare a mistrial or the resultant verdict will have to be reversed.[115]

Derogatory remarks constitute perhaps the most prevalent breach of judicial decorum. Prejudicial remarks which belittle either the subject matter or the importance of the litigation,[116] or the merits of the defense, [117] are improper. For example, in *Myers v. George*,[118] a case involving professional wrestling, the trial judge referred to the spectators who attend wrestling shows as "suckers."[119] He also asked a witness from the bench how he promoted professional wrestling and kept his religion. In reversing the case the appellate court said that the judge's remarks "tended to make a mockery out of the trial."[120]

Moreover, a judge must refrain from making remarks which tend to discredit one of the parties.[121] Remarks which intimate that one of the litigants has engaged in tortious conduct or in a crime are im-

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effect of a witness' testimony, or the merits of the case, they almost invariably follow them.

[111] See Judicial Canon 5, A.B.A. CANONS 52.

[112] See Crooks v. Glen Falls Indem. Co., 124 Cal. App. 2d 113, 268 P.2d 203 (1st Dist. 1954).

[113] See Curd v. Todd-Johnson Dry Docks, Inc. 213 F.2d 864, 866 (5th Cir. 1954) (dictum).

[114] See Richman v. San Francisco, N. & C. Ry., 180 Cal. 454, 181 Pac. 769 (1919); Herndon v. City of Springfield, 137 Mo. App. 513, 119 S.W. 467 (1909).

[115] See Rabinowitz v. Lipschitz, 127 N.Y. Supp. 486 (Sup. Ct. 1911) (obvious disbelief of witness' testimony); Morris v. Kramer Bros. Co., 182 N.C. 87, 108 S.E. 381 (1921) (criticism of ethics of attorney called as witness).

[116] See La Chase v. Sanders, 142 Conn. 122, 111 A.2d 690 (1955) (importance of litigation); Clark v. Variety, Inc., 189 App. Div. 462, 178 N.Y. Supp. 698 (1st Dept. 1919) (importance of subject matter).

[117] See Maull v. Carbess Realty, Inc., 28 Misc. 2d 588, 208 N.Y.S.2d 500 (Sup. Ct. 1960) (evinced hostility toward position of defendants); Thompson v. Angel, 214 N.C. 3, 197 S.E. 618 (1938) (remarked that law upon which defense predicated was a bad law); Hambleton v. Selden, 163 Pa. Super. 259, 60 A.2d 369 (1948) (facetious comment belittling defense).

[118] 271 F.2d 168 (8th Cir. 1959).

[119] *Id.* at 171.

[120] *Id.* at 174.

[121] See Laney v. American Airlines, Inc., 295 F.2d 723 (6th Cir. 1961) (remarked defendant corporation corrected its records for purpose of trial); Mason v. United States, 63 F.2d 791 (2d Cir. 1933) (prompted plaintiff's witnesses while hostile to defendant's); Harms v. Simkin, 322 S.W.2d 930 (Mo. Ct. App. 1959) (attempt to aid layman acting as own counsel inadvertently prejudicial). See generally Note, *Off the Deep End: Bias from the Bench*, 11 SYRACUSE L. REV. 244 (1960).

proper.[122] Under the majority view, the court should also abstain from indicating in any manner his personal views upon the credibility of a witness[123] or upon the sufficiency of the evidence.[124] So too, the court must desist from directing disparaging remarks toward a witness.[125] However, if the remarks have been provoked by the behavior of the witness while on the stand, the judge may be permitted greater latitude.[126] Counsel must also be treated fairly by the judge, and prejudicial remarks, other than for the purpose of discipline, are improper.[127] It is not improper for the trial court to question a witness from the bench for the purpose of clarifying or properly understanding his testimony.[128] However, if the interruptions are of such frequency or duration that they create an impression of judicial preference for

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[122] See Kuzemka v. Gregory, 109 Conn. 117, 146 Atl. 17 (1929) (asked defendant whether he knew of usury law); Davison v. Herring, 24 App. Div. 402, 48 N.Y. Supp. 760 (4th Dept. 1897) (remarked in civil case that it should be taken before grand jury).

[123] See Bloom v. Hopman, 173 Pa. Super. 292, 98 A.2d 414 (1953) (hoped jury was not foolish enough to follow witness' reasoning); Stoffel v. Metcalf Const. Co. 145 Neb. 450, 17 N.W.2d 3 (1945) (said witness' testimony was far afield and hearsay); Dye v. Rathbone, 102 W. Va. 396, 135 S.E. 274 (1926) (asked witness if he was sure that was what defendant had said).

[124] See Harms v. Simkin, 322 S.W.2d 930 (Mo. Ct. App. 1959); State v. Bogner, 382 P.2d 254 (Wash. 1963). However, unlike the majority view, the trial judge in the federal courts is not a mere moderator. This was the rule at common law at the time of the adoption of the Constitution and is often referred to as the English system. See Myers v. George, 271 F.2d 168, 173 (8th Cir. 1959). A federal judge may comment upon either the credibility of a witness or the sufficiency of the evidence provided that he makes it perfectly clear to the jury that they are not bound by the court's views but that they are the sole judges as to the facts. See Northcraft v. United States, 271 F.2d 184 (8th Cir. 1959); Cook v. United States, 18 F.2d 50 (8th Cir. 1927).

[125] See Podlasky v. Price, 87 Cal. 2d 151, 196 P.2d 608, 616-18 (2d Dist. 1948) (told witness, "Just pretend you have a brain now. Just play you have."); Brown v. Frederick Loeser & Co., 244 App. Div. 819, 280 N.Y. Supp. 115 (2d Dept. 1935) (characterized witness' act as pure and simple larceny); Crenshaw v. Southern Ry., 214 S.C. 533, 53 S.E.2d 789 (1949) (claimed witness did not have sense enough to understand English language).

[126] In Bullock v. Sklar, 369 S.W.2d 381, 386 (Mo. Ct. App. 1961), the trial court had remarked that the witness, who was a lawyer, should not quibble, and should answer the question propounded. The record disclosed that the witness had exhibited a tendency to temporize or give inapposite answers. The appellate court said that under the circumstances the trial court did not exceed the bounds of judicial propriety.

[127] See Lan Lee v. United States, 67 F.2d 156 (9th Cir. 1933); People v. Godsey, 334 Ill. 11, 165 N.E. 178 (1929); Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959) (asked counsel "was he not taught that in his first year of law school").

[128] See Morello v. Brookfield Const. Co., 2 App. Div. 2d 849, 156 N.Y.S.2d 163 (1st Dept. 1956) (desired full and fair presentation of all issues); Andrews v. Andrews, 243 N.C. 779, 92 S.E.2d 180 (1956) (to clarify and facilitate taking of witness's testimony); Judicial Canon 15, A.B.A. CANONS 48-49.

one side or the other[129] or intimate the judge's disbelief of a witness's testimony,[130] whether intentionally or inadvertently, they are improper.

In addition to misconduct resulting from improper affirmative actions of the judge, misconduct may result from his failure to heed established practices and procedures. Deliberate refusal of the court to abide by applicable rules of civil procedure constitutes error.[131] Likewise, it has been held improper for the judge to instruct the court reporter to abstain from recording comments made from the bench.[132] Furthermore, failure of the judge to remain in the courtroom while the trial is in progress has been held improper.[133]

B. Sanctions

It is essential in trial courts that the judges who are appointed to administer the law should be permitted to administer it independently and freely and without fear of consequences.[134] Within the limits of their functions, they possess powers which require the exercise of deliberation and judgment, and while so acting they are entitled to broad discretion. Ultimate reliance must be on the sense of honor and duty, the wisdom and self-restraint of each individual judge.[135] Unfortunately, as has been seen, all judges do not measure up to the high ideals of the bench. The sovereignty of the judge in his own courtroom is subject to abuse. If a judge demeans his high office by gross misconduct, he may be removed by impeachment. But for judicial misconduct insufficient to warrant impeachment, judges are accountable only indirectly. Informal sanctions, at least in the true sense, do not exist.

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[129] See Williams v. United States, 93 F.2d 685 (9th Cir. 1937); People v. Raymond, 249 App. Div. 121, 291 N.Y. Supp. 198 (1st Dept. 1936); State v. Lea, 130 S.E.2d 88 (N.C. 1963).

[130] See Andrews v. Andrews, 243 N.C. 779, 92 S.E.2d 180 (1956).

[131] See Thews v. Miller, 121 N.W.2d 578 (Iowa 1963).

[132] See Roberts Elec., Inc. v. Foundations & Excavations, Inc., 5 N.J. 426, 75 A.2d 858 (1950).

[133] See Snodgrass v. Charleston Nugrape Co., 113 W. Va. 748, 169 S.E. 406 (1933); Frangos v. Edmunds, 179 Ore. 577, 598-602, 173 P.2d 596, 605-08 (1946); BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS § 242 (1931). In the *Frangos* case, with the assent and stipulation of counsel, the judge retired to his chambers during opening argument to the jury. However, the door to the courtroom remained open during his absence and he was able to and did hear the arguments. Noting that such absence during argument was general practice in certain counties, the supreme court said the practice should be discontinued, and held it to be reversible error. *But see* People v. Kimbrough, 193 Mich. 330, 159 N.W. 533 (1916), where the judge's absence under similar circumstances was held to be not prejudicial and therefore not reversible error.

[134] *Cf.* Scott v. Stanfield, [1868] L.R. 3 Exch. 220, 223 (judges immune from slander or libel while acting in judicial capacity).

> This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

[135] See Dawson, *The Functions of the Judge*, in TALKS ON AMERICAN LAW 18, 28-29 (Berman ed. 1961).

If the improper conduct of the court is so prejudicial as to frustrate the essential fairness of the trial, the decision will be reversed on appeal. As in the case of an attorney's misconduct, the purpose of the reversal itself is not to sanction the perpetrator of the mischief, although it does give expression to the impropriety. But unlike the attorney, the judge does not have even an indirect pecuniary interest in the outcome of the litigation, and thus he is insulated from the quasi-sanction effect of the reversal. However, it is a well known fact that most trial judges are very sensitive to appellate reversal and extremely jealous of their records. Therefore, the effect of the reversal still tends to discourage improper conduct.

There is also a marked reluctance on the part of appellate courts to accompany reversals for judicial misconduct with a reprimand in its opinion. This reluctance reflects a legitimate and conscious desire on the part of the judiciary to refrain from the open discipline of judges because of its possible detrimental effect on the integrity of the courts in the eyes of the public.[136] Flagrant abuses may evoke only a seemingly innocuous response, but most judges are responsive to even the slightest suggestion of their judicial superiors. A terse and simple comment, such as "the judge's remarks were highly improper,"[137] may thus be as telling to a judge's pride as a withering harangue.

Unfortunately, even in the few instances when reviewing courts have felt constrained to criticize openly the actions of a judge, all too often the censure has gone to no avail. For example, in *Etzel v. Rosenbloom*,[138] the California Court of Appeals, in reversing the decision, cited four previous opinions in which the same judge's attention had been directed to the impropriety of his conduct. He was again rebuked although the court noted prophetically that "anything we may say will have no effect on his future course of action."[139] Only six months later, in *Podlasky v. Price*,[140] the court was again forced to reverse the decision for the prejudicial misconduct of the same judge, the majority noting regretfully that previous reversals had still not effected a reform in his behavior. In a concurring opinion, two justices scathingly denounced the contumacious judge's irresponsible conduct and urged that he be retired either by resolution of the state legislature or upon recommendation of the governor on the grounds of mental disability.[141]

The foregoing travesty of justice serves to illustrate the ineffectiveness of the appellate reprimand as a sanction for the misconduct of the recalcitrant judge. Verbal censure depends on the sensitivity or vulnerability of the judge for its effectiveness. Mere words accomplish

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[136] See Scussel v. Kelly, 152 So. 2d 767, 768 (Fla. 1963):

> It is regrettable that we must detail in this opinion allegations that we would much prefer to delete because of the high position which Judge Kelly occupies and the unnecessary and unwarranted reflection that a case of this kind brings upon the entire judiciary and bar in the eyes of the public.

[137] See La Chase v. Sanders, 142 Conn. 122, 124-25, 111 A.2d 690, 692 (1955).

[138] 83 Cal. App. 2d 758, 189 P.2d 848 (2d Dist. 1948).

[139] *Id.* at 764-65, 189 P.2d at 852.

[140] 87 Cal. App. 2d 151, 196 P.2d 608 (2d Dist. 1948).

[141] *Id.* at 169-71, 196 P.2d at 619-20 (concurring opinion).

naught in trying to sear the conscience of the calloused judge, while the autonomy of the bench renders his position impregnable to mere criticism. Although the threat of impeachment is only a bluff at best,[142] in those jurisdictions in which judges are elected the concerted efforts of the bar may be brought to bear against the recalcitrant judge's re-election to office.[143]

It would therefore appear as if some procedure were necessary by which limited pressure could be brought to bear on a recalcitrant judge.[144] A procedure of this kind would necessarily require teeth to be effective, and yet it should preferably be flexible enough to facilitate the application of varying degrees of coercion.

At the present time only one state possesses a procedure similar to that envisaged.[145] Pursuant to a constitutional mandate charging the Michigan Supreme Court with general supervisory powers over the state judiciary,[146] the *Supreme Court Rules Concerning Superintendence of the Judiciary of Michigan*[147] were adopted in 1959 prescribing the procedure for the discipline of judicial officers. In general the rules provide that the chief justice shall, upon request or upon his own initiative, cause to be investigated the misconduct of any court, in-

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[142] Between 1928-1948, only three judges were formally charged with impeachment. Each was successful in his defense. See Miller, *Discipline of Judges,* 50 MICH. L. REV. 737 (1952).

[143] The Iowa State Bar Association has recently approved a bar plebiscite. Prior to election campaigns, local bar members will be secretly polled on the question of whether the incumbent judge should be retained in office. If a judge receives over fifty per cent approval, his re-election will be endorsed by the bar; if over fifty per cent vote no his re-election will be opposed. See 23 News Bulletin of the Iowa State Bar Ass'n, 1-2 (No. 9, 1963). This innovation should be effective in forcing judges to be more responsive to the criticisms of the bar.

[144] In Brand, *The Discipline of Judges,* 46 A.B.A.J. 1315, 1316 (1960), the author states that "the most urgent need is methods to deal with judicial conduct not warranting or requiring removal." He goes on to say that the ultimate responsibility for disciplinary action should rest with the highest court of the state and be clearly defined; that provision should be made for the initiation and investigation of complaints before presentment of formal charges; and that the hearings should be private unless the judge under consideration requests otherwise. His recommendations appear well considered.

[145] However, the idea of reform in this area is not unique. Brand discusses the various procedures which have been adopted in five other jurisdictions. *Id.* at 1316-17.

[146] See MICH. CONST. art. VII, §§ 4, 10 (1908). The new constitution which is to become effective Jan. 1, 1964, retains these provisions. MICH. CONST. art VI, §§ 4, 13 (1963). This provision is not peculiar to Michigan. See, *e.g.,* COLO. CONST. art. VI, § 2; IOWA CONST. art. V, § 4; WIS. CONST. art. 7, § 3. There is a question whether the power of supervision is limited to express constitutional grants or if it is an inherent power which may be implied from general constitutional provisions establishing the judicial departments of government. See collection of cases in Annot. 112 A.L.R. 1351, 1352 (1938). At least one state has established a disciplinary procedure relying solely on bare judicial power. See OHIO SUP. CT. R. XXVII, discussed in Brand, *supra* note 144, at 1317.

[147] SUP. CT. R. CONCERNING SUPERINTENDENCE OF THE JUDICIARY OF MICH. 1-9. The rules were adopted June 5, 1959, by a five-to-three vote of the supreme court.

cluding personal practices of any judicial officer contrary to the *Canons of Judicial Ethics*, previously adopted by the court, and any other practices likely to expose the court or judge to public censure or reproach or that are prejudicial to the proper administration of justice. If the investigation produces reasonable cause to believe that the judge is guilty of misconduct, the chief justice must direct a hearing upon an order to show cause. If the charges are sustained, the court in its discretion then determines the corrective and disciplinary measures to be taken, or, upon sufficient grounds, it may recommend to the legislature or the governor that the judge be impeached.

In the only case reported to date involving the new procedure, *In re Graham*,[148] the court briefly considered the disciplinary measures which it might employ, although unanimously deciding that the conduct of Judge Graham was so "intolerable and unpardonable"[149] that it was recommended he be impeached. The court noted, however, that had it been merely a question of ethically questionable conduct, its normal instinct would have been sympathetic, and had doubt existed, it would have leaned toward application of the presumption of innocence and crass ignorance. In such instances, the court said, it would have been inclined to order a judgment of censure and reprimand only.[150] One concurring justice would have gone further than the majority and enjoined the judge from exercising the powers and duties of his judicial office pending the legislative and executive action recommended.[151] This idea was considered by the majority but expressly rejected, the court saying the constitutional mandate included no power to remove or impeach a judicial officer as that function belonged to the coordinate branches of government.[152] However, it is interesting to note that on failure of the legislature to act, the court subsequently, and without opinion, enjoined Judge Graham from exercising his powers and duties as a judge.[153] Thus, the extent of those sanctions which may be or can be fashioned under this procedure is still far from clear. It is felt that because of the formality of the procedure a judgment of censure and reprimand, as suggested by the court, will be considerably more effective than a mere informal admonition since it would impress upon even a recalcitrant judge the gravity of his offense.

This procedure apparently provides the intermediate sanction between reprimand and impeachment which is so vitally needed for the adequate control of judicial misconduct. At the same time it retains the requisite flexibility by leaving the punishment to the court's discretion. It would therefore seem that the device deserves a careful appraisal by other jurisdictions.

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[148] 366 Mich. 268, 114 N.W.2d 333 (1962).

[149] *Id.* at 275, 114 N.W.2d at 336.

[150] *Id.* at 276, 114 N.W.2d at 336.

[151] *Id.* at 280, 114 N.W.2d at 338 (concurring opinion).

[152] *Id.* at 278, 114 N.W.2d at 337. This is in accord with the position of other courts. See State *ex rel.* Murray v. Bozarth, 167 Okla. 321, 29 P.2d 579 (1934).

[153] See reporter's note, 366 Mich. at 280-81.

III. Conclusion

An analysis of the cases involving the misconduct of attorneys in the courtroom leads to but one inevitable conclusion—it is impossible to define in any precise or meaningful capacity the fine line between proper and improper conduct. The line separating censurable from contemptuous conduct is equally vague and there is a considerable overlap. Probably the most important reason for this, and a valid one, is that the responsibility for the discipline of attorneys rests within the discretion of the trial courts rather than on any one set of strict rules, and the standards of conduct thus vary from judge to judge. The task of the scholar is made even more difficult because of the inherent limitations of the cold record in portraying the many intangible factors which are so vital to a clear understanding of the subject. However, it may safely be said that conduct in conformity with the *Canons of Professional Ethics* is well within the bounds of propriety. Unfortunately, informal reprimands do not appear to be very effective in curbing courtroom misconduct. Summary contempts have considerably more effect. In this regard it is worthy of note that on review of contempt orders appellate courts carefully scrutinize the alleged misconduct and do not hesitate to reverse the order in cases where counsel was acting within his rights or the misconduct was prompted by the judge's arbitrariness.

The judiciary is held to a higher standard of conduct than the bar and as a result the line between proper and improper conduct is more crystallized. Judicial prerogatives are occasionally abused. However, there are in fact few effective sanctions presently available to curtail judicial misconduct. Michigan has pioneered the development of a much needed intermediate disciplinary procedure, but it is still too early to evaluate its success. The problems of reconciling judicial independence and freedom with a meaningful sanction present many conceptual as well as practical difficulties. However, the unimpeachable character of the judiciary must be constantly maintained if it is to command the continued essential approval of the people.[154]

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[154] See Preamble, Canons of Professional Ethics, A.B.A. Canons 1, discussed note 5 *supra*.