Professional Responsibility Problems and Contempt in Advocacy

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> 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. Given this extreme liberality necessary to a vital balance and thus the effective discovery of truth through the adversary process, 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 in hindering rather than facilitating the search for truth.

Thus spoke the Seventh Circuit in *In re Dellinger*[1] on appeal from contempt convictions in the Chicago Seven trial. In the companion case of *United States v. Seale*,[2] the Court pointed out that mere disrespect or the affront to a judge's sense of dignity will not sustain a citation for contempt. It further held[3] that under 18 U.S.C. § 401(1) four elements are required in order to support a contempt citation: the conduct at issue must constitute misbehavior; the misbehavior must rise to the level of obstruction of the administration of justice; the conduct must be in the court's presence or so

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1. 461 F.2d 389 (7th Cir. 1972).
2. 461 F.2d 345 (7th Cir. 1972).
3. *Id.* at 366-67.

proximate that it obstructs the administration of justice; and finally there must be some intent to obstruct.

The Chicago Seven cases appear to be landmark cases in the area of contempt in advocacy. The Seventh Circuit has set as stringent requirements for findings of contempt, because of vigorous advocacy, as are to be found in any decided cases.

In this article I propose to deal with a comparison between the standards of the ABA Code of Professional Responsibility and general contempt standards in two contexts: advocacy in the court room and the limits of pre-trial publicity by advocates. Although there have been many interesting developments in the law of contempt where judges have waited until the end of the trial to deal with what is basically summary contempt,[4] an analysis of these problems is beyond the scope of this article.

To attempt a clear definition of contempt in advocacy is exceedingly difficult. To attempt to define what kind of advocacy constitutes professional misconduct is even harder.

I. ADVOCACY IN THE COURT

As pointed out above, *Dellinger* and *Seale* are high-water marks in condoning vigorous advocacy and protecting advocates from contempt citations, but the United States Supreme Court likewise has spoken strongly on the subject. In *In re McConnell*,[5] McConnell, who was counsel for the plaintiff in an anti-trust suit, insisted on his right to ask questions after the judge had stopped him from a certain line of questioning. McConnell stated he proposed to continue the questions unless some bailiff stopped him. The district judge found him guilty of criminal contempt and imposed a jail sentence. The Supreme Court of the United States reversed, relying upon 18 U.S.C. § 401, providing that the contempt power may be imposed summarily for misbehavior of any person in the Court's presence or so near thereto as to obstruct the administration of justice. Quoting *Ex parte Hudgings*,[6] the Court said:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest . . . ."[7]

4. Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Codispoti v. Pennsylvania, 94 S. Ct. 2687 (1974); Taylor v. Hayes, 94 S. Ct. 2697 (1974).
5. 370 U.S. 230 (1962).
6. 249 U.S. 378 (1919).
7. *In re* McConnell, 370 U.S. 230, 234 (1962).

The Court went on to say that the question in the instant case came down to whether it can " 'clearly be shown'. . . that the petitioner's statements, while attempting to make his offer of proof, actually obstructed the district judge in the 'performance of judicial duty'."[8]

The Court stated:

> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom . . . 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. . . . 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 . . . .[9]

And in *Offutt v. United States*,[10] the Court emphasized the importance of assuring self-restraint by district judges in the employment of the summary contempt power.

In *Holt v. Virginia*,[11] contempt proceedings were instituted by the trial judge against a lawyer who had represented some defendants in a libel suit. The attorney filed a motion asking the trial judge to disqualify himself from trying the contempt case, and, after denial of the motion, filed a motion for change of venue, alleging in both motions bias on the part of the judge. Another attorney representing the first attorney in the contempt proceedings read this motion to the judge as part of his argument urging a change of venue. Both attorneys were adjudicated guilty of contempt and each was fined $50. The Virginia Supreme Court of Appeals affirmed, holding that the language used in the motion authorized the invocation of the summary contempt power.

The Supreme Court of the United States reversed, and stated:

> [T]he words used in the motions were plain English, in no way offensive in themselves, and wholly appropriate to charge bias in the community and bias of the presiding judge. . . . [I]f the charges were "insulting" it was inherent in the issue of bias raised, an issue which we have seen had to be raised, according to the charges, to escape the probability of a constitutionally unfair trial. . . . The issue of truth or falsity of these charges was not heard, the trial court choosing instead to convict and sentence petitioner for having done nothing more than make the charges. Even if failure to prove their allegations of bias could under any circumstances ever be made part of the basis of a contempt charge against petitioner, these convictions cannot rest on any such unproven assumption.[12]

8. *Id.*
9. 370 U.S. at 236.
10. 348 U.S. 11 (1954).
11. 381 U.S. 131 (1965).
12. *Id.* at 137.

In *In re Little*,[13] the petitioner appeared *in pro per* on a charge of carrying a concealed weapon. Prior to trial, he moved for a continuance because his lawyer had a trial in a different city, but the trial judge denied the motion and proceeded with trial. In his summation following the closing of the evidence, petitioner stated the court was biased, had pre-judged the case, and that he (the petitioner) was a political prisoner. He was held guilty of contempt and the appellate courts of North Carolina denied review. The Supreme Court of the United States reversed, stating:

> We hold that in the context of this case petitioner's statements in summation did not constitute criminal contempt. . . . He was . . . clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously expousing a client's cause. . . . There is no indication . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding.[14]

Although some of the language of other cases, such as *Mayberry v. Pennsylvania*,[15] *Taylor v. Hayes*,[16] and *Codispoti v. Pennsylvania*[17] would indicate that similar types of actions could have been dealt with summarily by the trial court, those case convictions were reversed because the trial judge waited until the end of the case to impose summary contempt penalties. It should also be noted that the *Seale* court, relying on *Morissette v. United States*,[18] held that there was a strict requirement of intent in every case. Further, relying upon *In re Brown*,[19] it found that there must be proof beyond a reasonable doubt that the alleged contemnor possessed the required intent to forerun a criminal contempt conviction.

Nothing in Supreme Court cases seems to cast serious doubt upon the conclusions in *Dellinger* and *Seale*. The four standards of *Seale* appear to have solid support when the Supreme Court's cases on contempt and advocacy are analyzed. Not only must the conduct constitute misbehavior, it must rise to the level of obstruction of the administration of justice. It also must be in the Court's presence or so proximate that it obstructs the administration of justice

13. 404 U.S. 553 (1972).
14. *Id.* at 555.
15. 400 U.S. 455 (1971).
16. 94 S. Ct. 2697 (1974).
17. 94 S. Ct. 2687 (1974).
18. 342 U.S. 246 (1952).
19. 454 F.2d 999 (D.C. Cir. 1971).

and there must be an intent to obstruct. Additionally, proof beyond a reasonable doubt is required.

It is true that most of the cases cited have relied upon the language of 18 U.S.C. § 401, which limits the summary contempt power to misbehavior that obstructs the administration of justice, but it is clear that sixth amendment problems are involved. The sixth amendment protects a lawyer in providing adequate, proper and vigorous representation of his clients, and in each instance in which the Court has reversed contempt citations, it has been concerned with the protection of these sixth amendment rights.

With the broad freedom now apparently given in advocacy in trial, one must consider the effect of the ABA Code of Professional Responsibility in the advocacy areas. Several Ethical Considerations (EC) and Disciplinary Rules (DR) address this point. EC 7-36 provides, in pertinent part, as follows:

> Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of the proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears.[20]

EC 7-37 provides in part:

> Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.[21]

Further, DR 7-106(C), which sets a minimum standard below which a lawyer may not go without subjecting himself to professional discipline, provides:

> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
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> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
>
> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
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> . . . .
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> (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

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20. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-36.

21. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-37.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.[22]

If an intent to obstruct justice or obstruction of justice is necessary before a lawyer can be found guilty of contempt in the trial of a lawsuit, the question necessarily arises as to whether, against a claim of sixth amendment advocacy, a lawyer can be disciplined for violation of DR 7-106, when there is no showing that his conduct constitutes an obstruction of justice and when there is no showing of any intent to obstruct justice.

In this connection *Spevack v. Klein*[23] must be considered. There, an attorney successfully asserted the fifth amendment in bar disciplinary proceedings. The attorney refused to answer any questions or produce any records relating to his handling of certain fiduciary matters. Solely upon his refusal to answer and upon his assertion of the fifth amendment, New York disbarred the attorney. On appeal, the United States Supreme Court reversed, overruling *Cohen v. Hurley*[24] and holding that a lawyer had an absolute right to assert his fifth amendment privilege in bar disciplinary proceedings without suffering any penalty therefor.

The Court stated:

> And so the question emerges whether the principle of *Malloy v. Hogan* is inapplicable because petitioner is a member of the Bar. We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and deprivation of a livelihood as a price for asserting it.[25]

Conceding that the fifth amendment privilege of self-incrimination is applicable to protect lawyers from bar discipline, it does not follow that the Code of Professional Responsibility can be flouted with impunity on a sixth amendment claim of vigorous advocacy. *Spevack* was, after all, a very narrow holding, and at no place did it assert that all of the protections of a criminal case are present

22. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-106 (C).
23. 385 U.S. 511 (1967).
24. 366 U.S. 117 (1961).
25. Spevack v. Klein, 385 U.S. 511, 514 (1967).

in bar discipline proceedings. No one has suggested, for example, that a lawyer in disciplinary proceedings has a right to a jury trial.

Courts simply cannot operate unless they are a forum for careful analysis and presentation of disputed issues of fact and law. Even though a lawyer cannot be punished for contempt, absent a showing of obstruction and intent to obstruct, it does not follow that bar discipline cannot be imposed absent obstruction or intent to obstruct. DR 7-106 allows vigorous advocacy in the trial of a law suit. DR 7-101[26] requires zealous representation of the client. It is submitted that a lawyer can zealously represent his client and still comply with the Disciplinary Rules.

To equate criminal contempt with bar discipline would inevitably lower standards of advocacy required of lawyers. We can expect no less and the standards of contempt should not be carried over to bar discipline. Vigorous advocacy can exist under the mandates of the Disciplinary Rules, and there is no good reason why criminal contempt standards should lower the minimum professional standards required of advocates. As the Supreme Court pointed out in *Taylor v. Hayes*:

> Nothing we have said here should be construed to condone the type of conduct described. . . . Behavior of this nature has no place in the court room, which, in a free society, is a forum for courteous and reasoned pursuit of truth and justice.[27]

The bar should expect no lower standard from its members.

The organized bar has also spoken on this subject in Standard 7-1 of the *ABA Standards Relating to the Prosecution Function and Defense Function.* That Standard provides:

> 7-1. Courtroom Decorum:
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> (a) As an officer of the court, the lawyer should support the authority of the Court and the dignity of the trial court room, by strict adherence to the rules of decorum and by manifesting an attitude of professional respect towards the judge, opposing counsel, witnesses and jurors.
>
> . . . .
>
> (c) It is unprofessional conduct for a lawyer to engage in behavior or tactics purposedly calculated to irritate or annoy the court or the prosecutor.
>
> . . . .
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> (e) Lawyers should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.[28]

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26. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-101.
27. 94 S. Ct. 2697, 2706 (1974).
28. ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (1971).

The Commentary to 7-1 makes this interesting observation:

> A reasonable balance must be reached on matters of conduct so that judicial proceedings are not permitted to degenerate to the level of street brawls, but it is important that no artificial standards of court room conduct impede the advocates from performing their legitimate function so as to preclude vigorous advocacy of their viewpoints on legal questions, and the zealous advancement of their side of the case. . . .
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> . . . An important aspect of the image of justice is the relations which are seen to exist in the court room between the several lawyer-participants: defense counsel, the prosecutor and the judge. . . .
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> Of necessity, the lawyer must often be forceful and vigorous in his questioning of the witness and his argument to the jury. This does not mean, however, that he may make a farce of the trial or undermine the dignity of the legal process by excessive histrionics. . . .
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> These standards seek to suggest certain limited forms of court room misconduct as unprofessional conduct, appropriate for the imposition of disciplinary sanctions. To avoid undue limitations on appropriate advocacy, the extreme sanctions are limited to conduct properly calculated to annoy or irritate. Repetition of misconduct after a warning from the bench should be sufficient to establish a prima facie showing of purposeful misconduct.[29]

Everyone agrees that the court room must be a place for the reasoned presentation of evidence and the reasoned disposition of litigation. All agree that lawyers have a duty to be respectful, while vigorous, as advocates. There is no reason for applying criminal contempt standards to bar disciplinary proceedings, so long as the right to vigorous advocacy remains.

II. PRE-TRIAL PUBLICITY BY ADVOCATES

A related problem arises under DR 7-107[30] covering pre-trial and trial publicity. This Disciplinary Rule severely restricts the freedom of a lawyer to make any statement except innocuous ones relating to both criminal and civil cases, both before and during trial.

DR 7-107 is drawn from the *ABA Standards for Fair Trial and Free Press*.[31] Again, the question arises whether a lawyer can be disciplined under this rule, where a contempt citation would be for-

29. *Id.* at Commentary to paragraph 7-1(c).
30. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102.
31. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968).

bidden unless it was shown that the actions of the lawyer constituted a clear and present danger to the administration of justice. The Supreme Court of the United States, in a series of major cases,[32] has held that where extra-judicial utterances do not constitute a clear and present danger to the administration of justice, such utterances may not be a basis for contempt action because of first amendment rights of freedom of expression.

On the other hand, the Supreme Court of the United States and various state courts have been very much concerned about pre-trial publicity. In *State v. Van Duyne*,[33] the New Jersey Supreme Court, in interpreting Canon 20 of the former Canons of Professional Ethics, held that the trial court might well proscribe extra-judicial statements by any lawyer, party, witness or court official which divulge prejudicial matters.[34]

In *Shepherd v. Maxwell*,[35] the United States Supreme Court endorsed reasonable restrictions on prejudicial extra-judicial publicity. The Court also spoke on the subject in *Estes v. Texas*:[36]

> [T]he atmosphere essential to preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.[37]

The Supreme Court has also come down heavily in favor of a fair trial as against unfettered right to pre-trial publicity in *Patterson v. Colorado*[38] and *Marshall v. United States*.[39]

In addition, the question of prior restraint of first amendment rights must be considered. The Supreme Court of the United States has uniformly held that there can be no prior restraint of expression, the most significant recent cases being *New York Times v. United States*[40] and *Organization for a Better Austin v. Keefe*.[41]

One U.S. district court case has analyzed the effect of DR 7-107 on the first amendment. In *Chicago Council of Lawyers v. Bauer*,[42] a proceeding was brought by an association of local lawyers for a

32. Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947); Wood v. Georgia, 370 U.S. 375 (1962).
33. 43 N.J. 368, 204 A.2d 841 (1964).
34. *Id.* at 389, 204 A.2d at 852.
35. 384 U.S. 333 (1966).
36. 381 U.S. 532, 540 (1965).
37. *Id.*
38. 205 U.S. 454 (1907).
39. 360 U.S. 310 (1959).
40. 403 U.S. 713 (1971).
41. 402 U.S. 415 (1971).
42. 371 F. Supp. 689 (N.D. Ill. 1974).

declaratory judgment and injunction against enforcement of a local criminal rule of the district court and DR 7-107. The claim was that the Disciplinary Rule and the local court rule of the U.S. district court were unconstitutional as violative of first amendment rights.

The district court, in an opinion signed by five judges of the court constituting its Executive Committee, rejected the first amendment argument and upheld the validity of DR 7-107 and the local criminal rule. Relying upon *Shepherd v. Maxwell*,[43] the court held that the adoption of the one-sided approach urged by plaintiff would ignore the correlative interest of society to a fair trial. It rejected the "prior restraint argument," saying:

> However, unlike the cited cases, the instant situation does not impose a blanket prohibition on all speech irrespective of conduct. Rather, the challenged rules seek only to punish speech from which prejudice is reasonably likely to result. They impose a responsibility on those who violate them as do the laws on slander, libel, and obscenity. The rules are therefore clearly not a prior restraint.[44]

The court also rejected the clear and present danger test of *Bridges, Pennekamp, Craig* and *Wood:*

> *Bridges* and its progeny are more accurately cited for the proposition that, where no "judicial proceeding [is] pending," the First Amendment rights of the press and private citizens cannot be proscribed by court order without a serious and imminent threat to the administration of justice. . . . This court, however, cannot accept the notion that these principles must be extended to lawyers participating in on-going litigation.
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> . . . Each of the cases cited by the plaintiffs was concerned with defining the permissible scope of the contempt power, "a common law concept of the most general and undefined nature". . . . None dealt with the violation of a narrowly drawn statute or court rule which seeks to accommodate competing constitutional interests.
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> The Supreme Court has made it abundantly clear that review of contempt convictions will differ drastically from review of statutory violations, where the need for regulation has been buttressed by prior legislative deliberations. . . . In the later [*sic*] situation, great deference is accorded to the judgment of the legislature. . . . In view of the extensive deliberations which preceded the promulgation of the challenged rules . . . it is evident that they must be judged by standards analogous to those applied to legislative action. . . .

43. 384 U.S. 333 (1966).
44. Chicago Council of Lawyers v. Bauer, 371 F. Supp. 689, 693 (N.D. Ill. 1974).

> Perhaps the most effective distinction may be drawn from the language of *Wood* itself. There . . . the Court was dealing with hostile remarks directed at judges or the general administration of justice. This must be distinguished from the situation where the communication might prejudice a pending trial.[45]

The court concluded that the clear and present danger test was not applicable in measuring the constitutionality of court rules proscribing the dissemination of prejudicial publicity by trial counsel.

This is the most complete analysis the writer has found covering the specific question before us. The court clearly rejected the clear and present danger test, and held that the balance between free press and fair trial justified what otherwise might be illegitimate restraints upon free speech.

It is clear that a balance must be struck. Pre-trial and trial publicity must not endanger a defendant's right to fair trial. And at the same time, first amendment rights must be protected. In light of the *Chicago Council of Lawyers*, *Shepherd*, and *Estes* cases, it appears clear that the limited restraints contained in DR 7-107 will withstand constitutional test. And they should. It is true we must have freedom of expression for all persons, but when freedom of speech prejudices a fair trial in a specific case, the restraints of DR 7-107 and the *ABA Standards Relating to Fair Trial and Free Press* seem to be justified. The reasoning of the *Chicago Council of Lawyers* case is persuasive and, supported as it is by earlier statements of the United States Supreme Court, it seems that bar discipline can and should properly follow a deliberate violation of DR 7-107. It is not difficult to find an obstruction of justice in unfettered pre-trial publicity. Such publicity can be offered only for the purpose of interfering with a fair trial, and these guidelines clearly maintain a proper balance between free press and fair trial.

III. Conclusion

In advocacy, a lawyer has a duty to be a vigorous advocate and that right is protected by DR 7-101 and 7-106. It is also protected by the *ABA Standards on the Prosecution Function and the Defense Function.* Although these standards are higher than those required for a finding of criminal contempt, lawyers should be held to such standards in advocacy, and there appears no valid reason that an obstruction of justice or intent to obstruct need be shown before bar discipline can follow. A lawyer can operate properly and as a vigorous advocate within the limits of the Disciplinary Rules. The *Standards* should not be equated with those of criminal contempt. *Spe-*

45. *Id.* at 693-94.

vack v. Klein does not require otherwise.[46]

DR 7-107 relating to pre-trial and trial publicity has struck a proper balance between the right of free expression and the right to fair trial. No serious first amendment problems can be raised by the invocation of these rules. Lawyers should be required to adhere to them and for their violation should suffer disciplinary action.

46. 385 U.S. 511 (1967).