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Exercising Control Without Contempt

by David M. Rothman

A judge's conduct in ignoring proper procedures in a con–tempt case, "without more, constituted an act of bad faith," a necessary element of willful misconduct in office. *Cannon v. Commission on Judicial Performance*, 537 P.2d 898 (California 1975). The California Commission on Judicial Performance has stated that, "[b]efore sending a person to jail for contempt, or imposing a fine, judges are required to provide due process of law, including strict adherence to the procedural requirements contained in the Code of Civil Procedure. Ignorance of those procedures is not a mitigating but an aggravating factor." *Commission on Judicial Performance Annual Report* at 23 (1990), *citing Ryan v. Commission on Judicial Performance*, 537 P.2d 898 (California 1988).

A judge, therefore, is obliged to know proper contempt procedures. "The contempt power, which permits a single official to deprive a citizen of his [or her] fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation, must be used with great prudence and caution. It is essential that judges know and follow proper procedures in exercising this power, which has been called a court's 'ultimate weapon.'" *In re Vassie*, Public Reproval (California Commission on Judicial Performance February 28, 1995), *quoting Cannon v. Commission on Judicial Performance*, 537 P.2d 898 (California 1975).

Seasoned judges rarely, if ever, rely on the use of contempt to control their courts. They employ a variety of other

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Legal Defense Funds for Judges

by Bradley James Bolerjack

A legal defense fund is a reser–voir of donated money used to defray legal costs a judge incurs when charged with a criminal violation by law enforcement authorities or with misconduct by a judicial conduct organization. With certain qualifications that vary by state, all judicial ethics advisory committees that have examined the issue have found that a judge may establish — or allow others to establish — a legal defense fund.

Only the New York committee has not given blanket authority to judges to create legal defense funds under all circumstances. The committee did state that where extraordinary publicity surrounded an investigation of a judge by the Commission on Judicial Conduct and elected public officials had called for the judge's removal, a judge could allow friends, acquaintances, and professional colleagues to form a defense fund. *New York Advisory Opinion 96-33*. In a subsequent opinion, however, the committee stated that a judge may not set up a defense fund to assist in paying the judge's legal fees incurred in answering charges before the Commission

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Exercising Control Without Contempt *(continued from page 1)*

means to control the courtroom, the heart of each being the impact of the judge's personal presence. Judges have suggested the following, used singly or in combination, as some of the techniques for controlling the court without the use of contempt.

1. Self-Control

The most important means of achieving control of others is the achievement of self-control. If the judge is angry and out of control, it is not possible for him or her to control the courtroom. The conduct of the judge is a factor in determining how people will behave in court. If the judge is rude, angry, peremptory, short with people and not listening, it will be no surprise when those that appear before the judge engage in similar behavior.

Ordinarily, an incident that ultimately escalates into contempt begins with someone being angry. If the person before the court is angry, the best means of de-escalation of anger is for the court to not respond in kind, but to exhibit patience, self-control, and dignity. It is difficult for the angry person to continue in that mode when met with this response, and it is salutary to the stress of the judge to be under control. Again, "treat anger with kindness" (from a fortune cookie).

2. Control of Staff

Chaos in the courtroom when the judge is not present makes a strong negative impression. Court staff must be made to understand that maintenance of dignity, order, and decorum is required even when the judge is not present in the courtroom, and must begin when the telephone is answered by the staff and the courtroom doors are opened; and, indeed, when the courthouse doors are opened. Disorderliness, improper joking, racist or sexist remarks, rudeness, and impatience are no more acceptable behavior by courtroom and courthouse staff before the judge enters the courtroom than afterward.

3. The Formal Opening and Setting Rules and Limits

One of the very first things that a new judge faces is whether to have a formal or an informal opening at the start of a court day or session. The formal opening announces the presence of the court and requires all to rise. Usually this opening is employed only at the first session of the court for the day. This calling of the court into session has a long history and gives an unmistakable message of dignity, respect, and control.

In recent years, the formal opening has not been as widely used in state courts. Judges in the nineties may be embarrassed at too much formality, and, understandably, may resist the idea of a formal opening. Time pressures and less formality in society as a whole may also contribute to this decrease in formality in court. It may also contribute to a growing incivility in society and its institutions. A judge need not, however, be concerned about being seen as an ogre or egomaniac because he or she starts the court each day with a public recognition that the court of law is not the corner delicatessen. If a judge is to adopt a formal opening, he or she should do so early on. Once the judge is on the bench a while, change is difficult. It also helps if other judges in the courthouse also adopt the formal opening.

4. Make Sure Courtroom Users Know What the Rules Are

Every judge runs her or his courtroom differently. Some judges want lawyers to stay near the lectern in the courtroom, and prohibit them from sitting on the rail that separates the well of the court from the audience. If one thinks about it, there may be many such rules. Some judges prepare these rules in a written form so that all persons who appear before the court understand that there are rules and are aware of what they are. These rules range from specifics concerning when jury instructions need to be turned in, to rules regarding approaching the witness with exhibits, examination from the podium, leaning against the jury box, and so forth. Such rules send a clear message that certain conduct is expected and enforced.

The comfort of those appearing in court is significantly improved when they know what is expected of them.

5. Do Not Argue or Personalize an Encounter

In a stressful situation, a judge maintains control by keeping professional judicial distance from the fray. Debating with someone who is angry or inappropriately aggressive will accomplish nothing. The judge needs to deal with the behavior and not get in the position of trying to convince an out-of-control person that he or she is wrong. Professional distance requires that the judge stay in the "parental role." The lawyers and others in court are "involved," the court is not. They can get emotional, the judge cannot. It is the judge's role to provide them with clear rules and boundaries.

6. Enforce Rules Early and Consistently

Unfortunately, many who come to court will take advantage of every opportunity to "test the limits." If one permits the first transgression to go unnoticed, one can anticipate a second

transgression to follow. A judge should expect proper demeanor and back it up by prompt and consistent enforcement of court rules. Never let the first transgression of rules go unnoticed.

7. Use Escalating "Penalties"

The first minor transgression might warrant a prompt admonition at the side bar. ("Counsel, in this court you address your questions to the prospective jurors from the lectern.") The next time, the admonition may need to be addressed, again promptly, without the delicacy of the side bar. If the situation persists, the court may have to consider a prompt rebuke, even if it is in front of the jury. Admonitions in front of the jury need to be carefully done to avoid prejudice to the lawyers' clients or their cause, but this does not mean that the lawyer should be allowed to rest secure in the belief that he or she can engage in inappropriate behavior without fear of suffering a rebuke in front of the jury.

A judge should avoid threatening contempt to secure behavior, especially in the heat of the moment, unless such a warning is legally required. In addition, one should not consider contempt unless previous attempts at control have utterly failed.

8. Contempt as the Last Resort

Control of the courtroom is essential to the administration of justice. The judge has the legal and inherent power to employ all means necessary to obtain order. Although contempt is the ultimate tool of control, it is the last one to use. "Because it carries with it a 'heightened potential for abuse' . . . , the contempt power should be the last resort of a judge in maintaining control in his courtroom. It should be used with 'great prudence and caution' . . . ." *Kloepfer v. Commission on Judicial Performance*, 782 P.2d 239 (California 1989).

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Legal Defense Funds for Judges *(continued from page 1)*

arising from the judge's re-election campaign and wholly unrelated to judicial duties. *New York Advisory Opinion 97-94*.

Other state judicial ethics advisory committee have not limited under what circumstances a legal defense fund may be formed for a judge but do impose conditions on the operation of the fund. Those committees state that a judge's legal defense fund may accept contributions from:

- Attorneys, so long as they have not practiced and are unlikely to practice before the judge (*California Advisory Opinion 33* (1986) (charges filed by Commission on Judicial Performance); *Florida Advisory Opinion 98-11* (charges filed by Judicial Qualifications Commission); *Illinois Advisory Opinion 97-14*) (criminal charges));
- Other judges (*Illinois Advisory Opinion 97-14*; *New York Advisory Opinion 96-53* (charges filed by Commission on Judicial Conduct)); and
- Non-attorneys, including litigants, so long as their interests have not and are unlikely to come before the judge (*California Advisory Opinion 33* (1986); *Florida Advisory Opinion 98-11*; *Illinois Advisory Opinion 97-14*).

Therefore, advisory committees have indicated that the judge has the following responsibilities when a defense fund is established:

- Identifying attorneys who have practiced or are likely to practice before the judge and declining contributions from them;
- Determining which prospective donors have an interest that may come before the judge and declining contributions from them; and
- Determining which prospective donors have been litigants before the judge and declining contributions from them.

Florida Advisory Opinion 98-11; *Illinois Advisory Opinion 97-14*. The California judicial ethics committee explained that a judge may not accept a contribution from a person whose interests have been before the judge in the past even if it is highly unlikely they will ever come before the judge in the future because a "contribution from a former litigant may give the appearance of being compensation for a past decision favorable to the donor just as a contribution from a future litigant may appear to be advance payment on a forthcoming decision favorable to him or her." *California Advisory Opinion 33* (1986).

In addition, a judge must:

- Comply with applicable rules

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Judge Sanctioned for Bullying, Failure to Protect Rights

The Washington Supreme Court censured a municipal court judge and suspended him for six months without pay for (1) threatening life imprisonment or indefinite jail sentences to defendants who had not paid their fines, (2) using a guilty plea form that denied defendants due process, (3) holding trials in absentia, (4) a pattern of undignified and disrespectful conduct toward defendants, and (5) asking Hispanic defendants if they were ''legal.'' *In re Hammermaster*, 985 P.2d 924 (1999). The court also upheld the decision of the Commission on Judicial Conduct to monitor the judge for two years and to require the judge to meet with a mentor and complete courses in ethics, criminal procedure, and diversity.

Noting that the defendants in the cases at issue were not represented by counsel, the court stated that ''[p]eople appearing pro se and without legal training are the ones least able to defend themselves against rude, intimidating, or incompetent judges.'' Emphasizing that courts of limited jurisdiction perform an important function, the court concluded that the judge's conduct ''denigrates the public view of municipal courts as places of justice.''

The judge had told 12 defendants that he would either impose an indefinite jail sentence or life imprisonment until fines and costs were paid. The judge admitted that he knew he had no authority to impose such sentences. The court concluded that the judge's practice of intimidating defendants with threats of life imprisonment or indefinite jail sentences fell outside the bounds of the latitude a judge has when speaking with defendants.

The court rejected the judge's argument that a sanction would threaten the ''independence of the courts of this state.'' Noting that the concept of an independent judiciary traditionally refers to the need for a separation between the judicial branch and the legislative and executive branches, the court stated that judicial independence does not refer to independence from judicial disciplinary bodies or higher courts. The court concluded that judicial independence ''does not equate to unbridled discretion to bully and threaten, to disregard the requirements of the law, or to ignore constitutional rights of defendants.'' The court held that the judge's actions demonstrated an unwillingness to follow the law or to protect the rights of defendants—they were not an exercise of judicial independence.

The judge required defendants pleading guilty to sign a form approved by the judge that omitted much of the content required by statute, such as the elements of the charged offense, an indication that the defendant understood the nature and elements of the offense, and the potential penalties. The court noted that the omissions were not corrected during the plea colloquy. The judge claimed that he was acting in the good faith belief that the guilty plea form, in combination with the information sent to a defendant, substantially complied with the law, noting that prosecutors and defense attorneys had input in drafting the form and no attorney had ever complained about his method of taking pleas.

The court found there was no question that the judge's method of accepting guilty pleas was defective. The court held that neither the judge's ''good faith belief nor his misguided reliance on attorneys can excuse the deprivation of constitutional rights'' and that discipline may be appropriate even though the judge acted out of neglect or ignorance. The court stated that a ''judge has an affirmative duty to learn the relevant legal procedures,'' noting that the statute and cases provide a ''ready source'' for the requirements of written guilty pleas. Rejecting the judge's argument that he cannot be disciplined because his decisions had not been overturned or appealed, the court stated that a judge has ''the basic duty to ensure that courtroom practice conforms with the law'' and, while legal error is usually a matter for appeal and not judicial discipline, a ''pattern of failing to protect a defendant's constitutional rights can constitute misconduct.''

The judge admitted that he had routinely held trials without defendants being present. He claimed he had the authority to do so because the defendants had signed a form that stated, ''If I am not in attendance at the time of trial, including the commencement thereof, it is because I have deliberately and intentionally refused to be present, and under such circumstances request that I be deemed 'excused' by the court pursuant to [statute].'' The judge's defense was that he believed in good faith that his practice was in accordance with the law and that appeal was the appropriate remedy.

The court held that trial may not begin in the absence of a defendant regardless of a purported waiver of the right to be present. The court further stated that, even if trial could begin without a defendant, it was unlikely that a defendant who signed the form was aware that he or she was waiving a constitutional right and consenting to be tried in his or her absence.

The judge made offensive remarks in at least four cases. In one case, for example, the judge criticized the defendant's living arrangement with his girlfriend when discussing the defendant's inability to pay his fine.

The judge stated: ''I'd suggest you get rid of her. So you're just throwing away money there. Why is she not working?… [W]hy are you allowing her to live with you and freeloading off of you?''

The judge admitted that remarks like these were routine in his courtroom but argued they did not rise to misconduct because they were not outrageous or vulgar and were used to alert defendants to the consequences of their actions. Noting that the record did not indicate that defendants reacted as positively as the judge believed, the court concluded that ''his remarks are consistent with his tendency to bully and intimidate defendants.''

The judge admitted that he frequently asked Hispanic defendants if they are ''legal'' and ordered them to enroll in English classes, ''become legal,'' and/or leave the country. Without addressing whether federal law gives a municipal court judge the authority to order deportation, the court found that the judge's ''practice of inquiring only about the citizenship of Hispanic defendants raises serious concerns about [his] motivation and undermines the public's confidence in the judiciary.''

New Hampshire Changes Confidentiality Rules

The New Hampshire Supreme Court has adopted new rules governing the confidentiality of proceedings of the Committee on Judicial Conduct. When the rules become effective on April 1, 2000, the judicial discipline process in New Hampshire will be the most open in the country.

Under the new rules, after a complaint has been dismissed or disposed of with an informal resolution or adjustment or when a statement of formal charges is filed, the Committee will make available for public inspection its records and materials that relate to the complaint, including the complaint itself, the judge's reply, and the Committee's disposition. The rules also make public grievances the Committee does not docket as complaints because, for example, they do not contain a statement of facts that if true would establish a violation of the code or they are related to a judge's findings, rulings, or decision. No records or materials become available for public inspection until after the judge has been given the opportunity to provide a reply that will be filed in the public record.

Work product and internal memoranda do not become part of the public file. When formal charges are filed, the Committee's file, hearing, and disposition are public, but Committee deliberations are confidential. If a grievance is filed against an individual who is not a judge, the Committee's dismissal letter is available for public inspection, but not the complaint itself.

The new rules allow the Committee to issue a protective order, at the request of any person or entity or on its own initiative, "prohibiting the disclosure of confidential, malicious, personal, or privileged information or materials submitted in bad faith."

Before the Committee disposes of a grievance or complaint, its proceedings remain confidential, and the person who filed the allegation of misconduct is prohibited from disclosing publicly that he or she filed the allegation with the Committee, although there is no prohibition on complaining publicly about the conduct of the judge. The Committee informs the person who filed an allegation of misconduct when it dismisses a grievance that does not comply with the requirements for docketing, dismisses a complaint after it has been docketed, dismisses formal charges, or disposes of a complaint by informal resolution or adjustment. The Committee may also "at the request or with the consent of the judge concerned, issue a short explanatory statement to the public."

The Committee may initiate an inquiry on its own motion, by the vote of six or more members of the Committee (there are 11 members). Unless the Committee decides to docket a complaint initiated on its own motion, all records of a Committee-initiated inquiry are confidential.

The Committee will not docket a grievance unless it was filed within two years of the alleged misconduct (the limit is one year when the alleged misconduct was committed before April 1, 2000) or, if the conduct was not discovered and could not reasonably have been discovered at the time it occurred, "within two years of the time the grievant discovers, or in the exercise of reasonable diligence could have discovered, the acts or omissions complained of."

The revised confidentiality rule is section 3 of Rule 39 of the New Hampshire Supreme Court and can be found on the court's web-page at www.state.nh.us/courts/supreme/orders/ordr0103.htm.

Judge Sanctioned for Comments that Manifested Socioeconomic Bias

Adopting the findings of fact and conclusions of law of a judicial conduct panel based on the Judicial Commission's complaint, the Wisconsin Supreme Court publicly reprimanded a judge for his intemperate expression of personal views concerning the character of a person who was not before him and for statements in his letter of apology that manifested a bias based on socioeconomic status. *In the Matter of Michelson*, 591 N.W.2d 843 (1999). The court also agreed with the panel's suggestion that the judge participate in anger management and diversity training.

At the end of a court session, a woman told the judge she would not be able to pay her fine because she had to care for the two small children of her daughter, who had become ill. When he asked why the children's father could not support them, the woman explained that the father of the older child no longer could be found and that the identity of the younger child's father had not been established. The judge became angry and said, ''I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut.'' He then stated that the daughter should not have brought into the world children she was not in a position to support. No one else was present except court personnel. The judge established a monthly payment plan for the fine.

Embarrassed and angered by the judge's comments, the woman reported them to her other daughter, a high school student. That daughter demanded an apology in a letter. The judge replied in a letter stating, in part:

> I will clearly state that my remarks are what I personally believe—that people should not bear children out of a marriage relationship; that it is immoral, and often means that a child will grow up both without a father and in poverty. With the planet already overcrowded, my personal belief is that a young woman who finds herself unmarried and pregnant should get an abortion.
>
> However, whatever my personal beliefs, it is not always appropriate for a judge to express them from the bench because the judge is in a position of power at that moment and the person being spoken to cannot talk back. For that, having used my position to strongly express my personal views, I apologize.

The court noted the panel's findings that the character of the woman's daughter was immaterial to the matter being decided and that the judge had no information upon which to base his negative characterization. The court also noted the panel's view that the judge's language showed a ''significant lack of judgment and insight into appropriate judicial demeanor'' and was ''egregious and reveal[ed] a profound lack of sensitivity and disrespect for the litigants and other members of the public who appear before court.'' The panel had noted that the younger daughter's demand for an apology evidenced the damage the judge's comments did to the integrity of the judicial system.

The court adopted the panel's additional finding that the judge's letter of apology, even though well-intentioned, manifested an unacceptable bias based on a person's socioeconomic status. The panel viewed his letter as demonstrating a ''lack of sensitivity to the socioeconomic differences in society'' and ''reflect[ing] an unacceptable prejudgment of persons based upon their marital status and financial standing.''

Judge Sanctioned for Smoking in Chambers

The Texas State Commission on Judicial Conduct publicly admonished a judge who smoked in her office despite a ban on smoking in all buildings owned or leased by the county. *Public Admonition of Stephenson* (August 26, 1999). The judge openly smoked in her office while citizens were present to conduct business in her court and allowed her court clerk and other county employees and officials to smoke in her office. Five years after the ban was first approved, the judge's request that she be permitted to designate a smoking area in her office was approved. The Commission noted that there was an argument about the enforceability of the ban but stated that it was undisputed that the county had the authority to ban smoking within and on county property. The Commission concluded that the judge should have complied until the ban was clarified, modified, or repealed, noting that the fact that the judge did obtain approval to modify the ban five years after it was enacted did not negate her violations.

Legal Defense Funds for Judges *(continued from page 3)*

regarding financial reporting (*Florida Advisory Opinion 98-11*; *Illinois Advisory Opinion 97-14*); and

- Ensure that donated funds are disbursed for the payment of legal fees and related expenses, not to the judge (*Florida Advisory Opinion 98-11*; *Illinois Advisory Opinion 97-14*; *New York Advisory Opinion 96-33*).

Both the Florida and New York advisory committees have stated that any funds left when legal expenses have been paid must be returned to donors pro rata. *Florida Advisory Opinion 98-11*; *New York Advisory Opinion 96-33*.

The Florida and New York advisory committees have also stated that a judge must not take part in the solicitation of contributions to the judge's defense fund. *Florida Advisory Opinion 98-11*; *New York Advisory Opinion 96-33*. In contrast, the California judicial ethics committee advised that a judge may "privately and discreetly" solicit contributions from those whose interests are "very unlikely" to come before the judge and whose interests have not come before the judge in the past. *California Advisory Opinion 33* (1986). However, the committee warned that a judge must be cautious to avoid giving the impression that the judge's judicial performance could be affected by the contribution. The Illinois committee advised that a judge facing criminal charges may permit his or her name to be used in publicizing a fund-raising dinner planned by community members who wish to establish a defense fund but only if the funds will benefit only the judge and not the judge's co-defendants. *Illinois Advisory Opinion 97-14*.

The Maryland advisory committee requires a judge to establish a blind trust through which donated funds raised for his or her defense will flow without the trustee telling the judge the names of the contributors. *Maryland Advisory Opinion 85* (1980) (criminal charges). Similarly, the New York committee stated that, if a defense fund is formed for a judge, "the judge may not know the contributors' identities, and appropriate steps are required to shield the judge from acquiring such knowledge." *New York Advisory Opinion 96-33*.

The use of such arrangements, however, has been rejected by both the California and Florida advisory committees. *Florida Advisory Opinion 98-11*; *California Advisory Opinion 33* (1986). These committees note that the donee judge must be aware of the donors' identity and the amount of the contributions to comply with financial reporting provisions.

Questions have also arisen about the role of other judges when a defense fund is established for a colleague. A judge may make a contribution to another judge's legal defense fund but may not solicit contributions to a colleague's defense fund. *Illinois Advisory Opinion 97-14*; *New York Advisory Opinion 96-53*. *But see Illinois Advisory Opinion 97-14* (where associate judges are re-appointed by circuit judges every four years, an associate judge should not contribute to a legal defense fund established for a circuit judge in the same judicial circuit).

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Judge Agrees to Resign and Censure for Variety of Misconduct

Pursuant to an agreement, the Washington Commission on Judicial Conduct censured a judge for (1) having court staff check public information on the Judicial Information System computer for purposes not related to court business; (2) initiating contact with the media about a case pending before him; (3) shouting at a public defender in chambers in the presence of others; (4) on multiple occasions, signaling his staff to go off the record without informing the parties; and (5) directing staff to delete specific court docket entries in a case, leaving an incomplete record during the appeal period. The judge had agreed to resign and not to hold any judicial office or perform any judicial duties without Commission approval. *In re Mittet*, No. 98-2793-F-79, Stipulation, Agreement and Order of Censure (December 3, 1999). The Commission decision can be found on its web-page at www.cjc.state.wa.us/announcements.htm#decisions_12/3/99.

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17th National College on Judicial Conduct and Ethics

Chicago, Illinois October 26-28, 2000

The Center for Judicial Conduct Organizations will hold its 17th National College on Judicial Conduct and Ethics on October 26-28, 2000, at the Wyndham Chicago, 633 St. Clair, Chicago, Illinois. The hotel is on Chicago's Magnificent Mile, just one block east of Michigan Avenue. Registration for the College will be $250. The rate for rooms will be $169 a night, plus tax.

The National College provides a forum for commission members, staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Thursday evening with a reception. Friday through Saturday morning, there will be six sessions with three concurrent workshops offered during each session. Topics under consideration include: sanctions; issues for new members of conduct commissions; issues for public members; appearance of impropriety; the Kline case from California; quick response procedures for campaign speech violations; ethics for judges and their families; handling difficult cases; fund-raising for civic and charitable organizations; ex parte communications—the subtle issues; investigative techniques; imposing conditions as part of sanctions—anger management programs and diversity training; adoption of the 1990 model code; judicial ethics on the Internet; and bifurcated judicial discipline systems.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter*. If you want to be on the mailing list for information about the College, contact Clara Wells at cwells@ajs.org or 312-558-6900 ext. 103.