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Tardiness of Attorneys as Contempt of Court

Thomas L. Esper

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I. It is the duty of the lawyer not only to his client but also to the courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.[1]

TARDINESS OF AN ATTORNEY is a violation of the Canons of Professional Ethics. A continual disregard of the canons of ethics constitutes misconduct or moral turpitude. Misconduct or moral turpitude are grounds for disbarment.[2]

Just as clearly, tardiness of an attorney is punishable as contempt of court. Contempt of court is viewed as a criminal conviction, since the contemner is subject to fines and imprisonment.[3] Contempt of court, if sufficiently repeated, is ground for disbarment.[4]

Attorneys, as members of the court, are subject to the courts' inherent powers to punish for contempt. Proceedings to punish for contempt may be summary or by trial, depending on whether or not the absence of the attorney is considered to occur within the presence of the court or within its personal knowledge. If the attorney's tardiness is considered to be committed within the presence of the court, he is punishable summarily for direct contempt. If tardiness is not considered to occur in the presence of the court, it is viewed an indirect contempt and notice and a trial are required. Whether the contempt is viewed as direct or indirect, it is also considered criminal.[5]

The classification of the contempt as direct, punishable summarily; and indirect, with trial required, becomes significant when considering that in the former the contemner is considered to have waived all his constitutional safeguards.[6]

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1 ABA Canons of Professional Ethics, No. 21.

2 In re Dombey, 68 Ohio L. Abs. 36, 121 N.E. 2d 183 (1954).

3 Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477 (1968).

4 Ohio Supreme Ct. Rules, Rule XVII (1964).

5 In re Neff, 20 Ohio App. 2d 213, 254 N.E. 2d 25 (1969).

6 *Ibid.*

II. A direct contempt consists of something done, or omitted to be done, in the presence of the court tending to impede or interrupt its proceedings or reflect upon its integrity. It occurs only when the acts constituting the contempt have been committed in the presence of the court . . .[7]

The key element of direct contempt is that it must occur in the presence of the court or so near as to disrupt its proceedings. All the elements of the contempt are within the personal knowledge of the judge and he may summarily inflict punishment upon the contemner. The purpose of this summary proceeding is the immediate necessity of vindicating the power and dignity of the court.

A "minority" [8] of jurisdictions (most notably California) hold that an attorney's absence occurs within the presence of the court. However, if the contempt is direct but the judge must take testimony from witnesses to establish the contempt, the alleged contemner must receive notice, even if summary punishment is prescribed.[9] In those jurisdictions holding an attorney's absence to occur in the presence of the court, tardiness is considered prima facie contemptuous, unless satisfactorily explained.[10]

III. Constructive (indirect) contempt consists of an act done, not in the presence of the court, but at a distance, which tends to obstruct, interrupt, prevent, or embarrass the administration of justice, and which tends to degrade or weaken its authority . . .[11]

The "majority" [12] of jurisdictions throughout the United States hold that tardiness of an attorney is an indirect contempt not committed within the presence of the court. Where this is the position on tardiness, due process requires that the attorney be given notice and a fair trial. Indirect contempts are not punishable summarily, since all the elements of the contempt are not considered to have occurred within the personal knowledge or in the presence of the court. The rationale behind the majority position is that "the court cannot ascertain by its own observation and without inquiry, the operational facts from which an inference of wilfulness or of a wrongful intent can be drawn." [13]

In classifying tardiness as an indirect contempt, the courts are preserving the alleged contemner's constitutional rights to due process. He

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[7] Dangel, N.L.M. "Contempt" 4 (1939); cf. Blankenburg v. Comm., 272 Mass. 25, sc. 260 Mass. 369.

[8] 97 A.L.R. 2d 431, 435 (1964).

[9] People v. Skar, 30 Ill. 2d 491, 198 N.E. 2d 101 (1964); cf. People v. Sherwin, 334 Ill. 609, 166 N.W. 513 (1929).

[10] *Supra* n. 8.

[11] Dangel, N.L.M. "Contempt" 3 (1939).

[12] *Supra* n. 8.

[13] *Ibid.*

is entitled to notice of trial, right to confront witnesses and cross-examination. These rights are not afforded the attorney convicted of direct contempt where summary proceedings are prescribed.

IV. Criminal contempt is conduct that is directed against the dignity and authority of the court, and may occur in either criminal or civil actions and special proceedings . . .[14]

Where in a contempt proceeding, the court is prosecuting the contemner toward the end of preserving the power and vindicating the dignity of the court and preventing the obstruction of the administration of justice, in which the accused may be sentenced to pay a fine or to imprisonment or both, the contempt is criminal in nature.[15] The Ohio Revised Code provides a penalty, upon a guilty finding for contempt of court, of $500.00 and not more than 10 days, or both.[16]

Even if contemptuous conduct does not violate provisions of criminal law, convictions for criminal contempt are indistinguishable from ordinary criminal convictions.[17] Conviction for contempt of court because of tardiness falls within these cases. The court, in punishing the attorney, is vindicating the authority and dignity of the court. Tardiness does delay the administration of justice. Those convicted of contempt for tardiness are subject to fines and imprisonment. Therefore, whether it is viewed as direct or indirect contempt, it is also viewed as criminal.

V. The power of courts to punish for contempt is independent of legislation and that which the legislature does not give, it cannot take away.[18]

At common law, courts of justice and legislative assemblies were deemed to have inherent powers to punish for contempt.[19] This power is not limited by legislative authority as applied to the courts.[20] The various state codes specify acts which constitute contempt and provide for their punishment, but courts are not limited by these enactments when vindicating their authority.

While tardiness of an attorney may not be specifically enumerated in the statutes as contempt of court, courts do have the power to punish attorneys as officers of the court for causing delays and hampering the administration of justice. Whether or not the court chooses to exercise this power is within its discretion. The remainder of this paper is concerned with those cases in which the courts did exercise this power.

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14 Dangel, *op. cit. supra* n. 11, at 3.

15 In re Neff, *supra* n. 5.

16 Ohio Rev. Code, § 2705.05.

17 Bloom v. Ill., *supra* n. 3.

18 Hale v. State, 55 Ohio St. 210, 60 Am. St. Rep. 691, 36 L.R.A. 254 (1896).

19 8 A.L.R. 1564 (1920); cf. Bloniarz v. Roloson, 74 Cal. Rptr. 285, 449 P. 2d 221 (1969).

20 State v. Local Union 5760, 172 Ohio St. 75, 173 N.E. 2d 331 (1961).

VI. It is obvious that the disruption of judicial proceedings caused by the absence of an attorney occurs in the immediate view and presence of the court.[21]

That tardiness of an attorney constitutes contempt of court is not disputed. The only disagreement among the various jurisdictions is whether tardiness is direct contempt punishable summarily or whether it is indirect contempt requiring notice and a trial. The conflict in the states revolves around the interpretation of the phrases "in the immediate view and presence of the court" and "within the personal official knowledge of the judge." If it is determined that tardiness occurs within the presence of the court, the contemner is subject to summary punishment for direct contempt. Alternatively, if tardiness is not deemed to occur in the presence of the court, it is treated as an indirect or constructive contempt. In the latter event, due process requires that the attorney be given notice and a fair trial. Where all the elements of the contempt are within the personal official knowledge of the judge, the attorney may also be adjudged guilty of contempt.

A recent case advocating the minority position that tardiness is a direct contempt committed in the presence of the court or within its personal official knowledge is *Kandel v. State*.[22] The court pointed out that tardiness of an attorney is misconduct of an officer of the court and as such may be punished as contempt. Kandel was three hours late in showing for a trial. The court set out the elements within its personal knowledge, which included a previous warning about lateness, and punished Kandel summarily. He was fined $150.00.

In *Chula v. Superior Court of L.A. County*,[23] the attorney was sentenced to four days in jail for not being present for the sentencing of his client. The court held that the absence of the attorney occurs in the immediate view and presence of the court and is punishable summarily.

An attorney, who fell asleep in his office and returned 45 minutes late after a noon recess, was summarily sentenced to imprisonment for 5 twenty-four hour days. (Presumably to catch up on his sleep.)

The court in *Lyons v. Superior Court of L.A. County*[24] held that the attorney's tardiness occurred in the courts view and presence and hence constituted a direct contempt punishable summarily. Other California cases are all consistent with the above cases in holding that the attorney's tardiness occurs in the presence of the court or within its personal knowledge.[25]

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21 Chula v. Superior Ct. of L. A. County, 57 Cal. 2d 199, 368 P. 2d 107 (1962).

22 252 Md. 668, 250 A. 2d 853 (1969).

23 *Supra* n. 21.

24 43 Cal. 2d 755, 278 P. 2d 681 (1955).

25 Cantillion v. Superior Ct., 150 Cal. App. 2d 184, 309 P. 2d 890 (1957); Vaughn v. Municipal Ct. of L.A., 252 Cal. App. 2d 348, 60 Cal. Rptr. 575 (1967); In re Mackey, 140 Cal. App. 400, 35 P. 2d 385 (1934).

Several New Jersey cases indicate that it is also in the minority camp. Where both of the opposing counsel in *Vincent v. Vincent*[26] failed to appear for a habeas corpus hearing, both were summarily fined. The judge acted on the facts within his personal knowledge in finding them guilty of direct contempt. Also, *In re Clawans*[27] provides for summary punishment for tardiness. The attorney was 45 minutes late for an appeals hearing. She was fined $100.00. The court said that since all of the attorney's actions were within the personal knowledge of the judge, she was not denied due process in finding her guilty of contempt and punishing her summarily.

Where the tardiness of an attorney is considered to occur in the presence of the court, and all the elements of the contempt are within the personal knowledge of the court, the contemner has waived his right to due process. The court considers that there is an immediate necessity of inflicting summary punishment to vindicate its authority or preserve its dignity in punishing the tardy attorney.

On appeal,[28] the reviewing court is limited to determining whether there has been an abuse of judicial discretion in setting the fine or imprisonment that is disproportionate to the seriousness of the contempt.[29] The appeals courts are reluctant to overturn the summary convictions of the lower courts since, by definition, the direct contempt elements are within its personal knowledge and the courts may vindicate their authority and dignity where necessary.

VII. If some essential elements (of contempt of court) are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about the essential elements, due process requires . . . that the accused be accorded notice and a fair hearing.[30]

The majority view is that the tardiness of an attorney is an indirect or constructive contempt. The attorney's absence is not deemed to occur within the presence of the court, hence notice and a fair trial are required. In those jurisdictions holding tardiness to be a direct contempt, but where the judge must depend on statements by others to establish the contempt, notice is also required. Summary punishment is not provided in cases of indirect contempt.

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[26] 108 N.J. Eq. 136, 154 A. 328 (1931).

[27] 69 N.J. Super. 373, 174 A. 2d 367 (1961); see: In Re Newark Teachers Assn., 95 N.J. Super. 117, 230 A. 2d 165, 167 (1967).

[28] Chula v. Superior Ct., *supra* n. 21; In Re McHugh, 152 Mich. 505, 116 N.W. 459 (1908); Appeal of Levine, 372 Pa. 612, 95 A. 2d 222 (1953); Wieland v. Ind. Comm., 166 Ohio St. 22, 139 N.E. 2d 36 (1956).

[29] Wieland v. Ind. Comm., *supra* n. 28.

[30] In Re Oliver, 333 U.S. 257, 68 S. Ct. 499 (1948).

In the case of an indirect contempt, or direct, if all the elements are not within the personal knowledge of the judge, the contemner is not considered to have waived his constitutional right to due process. *Cooke v. United States*[31] requires that one charged with contempt of court be advised of the charges against him and have a reasonable opportunity to meet them by way of defense. The only exception to this requirement is if the misconduct occurs in open court, or in the presence of the judge and disrupts judicial proceedings. As previously stated, the majority view is that the attorney's absence does not occur in the presence of the court; thus, a trial is required.

Typical of the majority position is *Weiland v. Commissioner*.[32] Tardiness of an attorney was held to be an indirect contempt in that the reason for his tardiness could only be ascertained through inquiry. This court reversed the lower court's summary conviction and fine of $100.00 as an abuse of the trial judge's discretion, stating that the fine was disproportionate to the seriousness of the contempt. The attorney in this case was 40 minutes late because of automobile trouble. He had called the court to notify it that he would be late. When he arrived at the court, he was summarily fined for direct contempt. *Weiland v. Commissioner*[33] at least impliedly overrules an earlier Ohio case *State ex rel. Schroder v. Shay*,[34] which held tardiness to be a direct contempt. Since the court could see the attorney was not present, his absence occurred in the presence of the court.

Knajdek v. West[35] held that conviction of contempt for tardiness is constructive and criminal in nature and requires due process. The lower Court had convicted the attorney of contempt and summarily sentenced him to jail for 60 days. This court reversed stating that failure of an attorney to appear on time for a trial is an indirect contempt and not subject to summary proceedings. Minnesota law also provides for a trial by jury for cases of this nature.

Where an attorney walked out of a trial at adjournment and refused to return, the court in *Klien v. United States*[36] held that the attorney's absence did not occur in the presence of the court. He was not subject to summary punishment provided for by 28 USCA § 385. The attorney returned to New York; the trial was in Washington, D.C.

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[31] 267 U.S. 517, 45 S. Ct. 390 (1925).

[32] *Supra* n. 28.

[33] *Ibid.*

[34] 3 Ohio N.P. 657, 16 Ohio Dec. 446 (1906).

[35] 278 Minn. 282, 153 N.W. 2d 846 (1967).

[36] 8 App. D.C. 106, 151 F. 2d 286 (1945); People v. McDonnell, 337 Ill. 568, 37 N.E. 2d 159 (1941).

Similarly, in *Ex Parte Hill*,[37] where an attorney was 30 minutes late, the court said that the attorney's act of contempt was his absence. If the attorney is absent, the offense does not take place in the presence of the court. His contempt was indirect and he is entitled to a trial on the merits of the charge. "If an attorney is absent, his acts are absent." Tardiness in *Re Clark*[38] was held to be an indirect contempt since it did not occur in the presence of the court. The court said the attorney's absence could be explained by innocent circumstances and refused to uphold the lower court's summary conviction of the attorney.

An attorney, previously sitting in the courtroom, had stepped out before his case was called. He was summarily fined when he had not returned by the time the case came up. The court, in *State v. Winthrop*[39] reversed the summary conviction, holding that an attorney's absence does not occur in the presence of the court and requires the testimony of witnesses to establish the contempt. Tardiness or absence is an indirect contempt not committed in the presence of the court.

The majority holding, that tardiness is an indirect contempt not committed in the presence of the court, seems to be the better rule. The attorney is being punished for his absence, and it seems a logical inconsistency to say that his *absence* occurs in the *presence* of the court. Summary punishment deprives the alleged contemner the protection of the 5th, 6th, and 14th Amendments to the constitution of the United States.[40] While some jurisdictions provide for the attorney to present exculpatory reasons for his absence by supporting affidavit, which may or may not be acceptable, the fact remains that with the minority view the contemner is considered to have waived all these constitutional safeguards. Agreeing with *Re Clark*,[41] that the attorney's absence could be explained by innocent circumstance, the majority opinion on tardiness is more readily acceptable.

Conclusion

> *Misconduct* shall mean any violation of any provision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the court from time to time, . . . , or the commission or conviction of a crime involving moral turpitude. (Emphasis added.)[42]

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[37] 122 Tex. 80, 52 S.W. 2d 367 (1932).

[38] 208 Mo. 121, 106 S.W. 990 (1907).

[39] 148 Wash. 526, 269 P. 793 (1928).

[40] U.S. Const. Amend. V. A person may not be compelled to be a witness against himself, nor may he be deprived of life, liberty, or property without due process. Amend. VI. *Inter Alia*: Right to a speedy trial; notice of the charge; right of cross-examination and right to counsel. Amend. XIV. Requirement of due process and equal protection of the law.

[41] 208 Mo. 121, 106 S.W. 990 (1907).

[42] Ohio Supreme Ct. Rules, Rule XVII (1964).

In defending the opening statements, that tardiness of an attorney may constitute grounds for disbarment, be it for contempt of court conviction or violation of the canons of ethics, one has only to look to Rule XVII of the Ohio Supreme Court Rules on disciplinary procedures to appreciate the consequences of tardiness. Canon 21 of the Canons of Professional Ethics clearly requires punctuality in attendance. Rule XVIII § 4, setting out the authority of local and state bar committees states:

> Any State Bar Association shall investigate any matter referred to it or which comes to its attention, and may cause a complaint to be filed pursuant to this rule in cases where *misconduct, contempt,* or mental illness is found; . . . (Emphasis added.)[43]

The board, upon consideration of its findings, may recommend to the Supreme Court that the attorney be reprimanded, suspended, or disbarred. The Supreme Court has inherent power to discipline attorneys.[44]

The Attorney contemner is open to disciplinary proceedings on two fronts. Each is sufficient for bar committees to consider disciplinary action. Granting that an occasional tardiness or one contempt conviction for tardiness should not be grounds for disbarment, there are other disciplinary measures available that are less severe but, which if employed, would point out to the offender the seriousness of his lack of punctuality or respect toward the court. Recognizing that infractions or convictions which have come to their attention through the courts or otherwise are compiled by local bar associations, habitual offenders can easily be detected and complaints issued.

Although there are relatively few reported cases on tardiness of attorneys as contempt of court, they are unanimous in their holdings. There may be disagreement as to whether it is direct or indirect contempt, but there is no disagreement that tardiness of an attorney is contempt.

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[43] *Id.*, § 4.

[44] Mahoning County Bar v. Franko, 169 Ohio St. 17, 50 Ohio Ops. 2d 282, 151 N.E. 2d 17 (1958).