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VERBAL MISCONDUCT IN THE COURTROOM —ARE ATTORNEYS IMMUNE?

Since ancient times, the attorney's duty has been to advocate his client's cause with vigor and zeal.¹ But this duty has long been subject to limitations designed to preserve the integrity of the judicial process.² An attorney is obligated to protect the interests of his client.³ However, if he speaks or behaves in such a way that respect for and confidence in the judicial office is undermined, he may be cited for contempt of court.⁴ Moreover, if he speaks or behaves in such a way as to create or promote an unfair bias against the defendant, the plaintiff, a witness, or the court, a favorable judgment may be overturned by an appellate court upon a finding of prejudicial misconduct amounting to error.⁵ Thus the theory goes: if an attorney oversteps the line between verbal misconduct impugning the court and legitimate argument, the court may cite him for contempt; if he oversteps the line between verbal misconduct constituting prejudicial error and advocacy appropriate to the heat of battle, a higher court may reverse for error. The judges holding the contempt and reversal powers view the system as being equitable in the long run. The attorney may appeal the contempt order, and a party aggrieved by an alleged prejudicial statement may petition a higher court on that claim.

But the line between verbal misconduct and statements within the bounds of legitimate argument is not a line at all: it is at best an unpredictable and erratically defined gray area whose shadings change from case to case and from judge to judge. In California, the kinds of courtroom conduct that may be deemed contemptuous are purportedly set out by statute.⁶ At best, however, the statutes—always subject to interpretation by the courts—do not provide a very helpful guideline for a trial attorney. The power to summarily punish an attorney for contempt of court remains solely within the

¹ As early as the first century B.C., Marcus Tullius Cicero (106—43 B.C.), regarded as the ancient world's greatest orator-advocate, was energetically and persuasively proclaiming legal arguments in behalf of clients. AMERICAN PEOPLES ENCYCLOPEDIA, Vol. 5, pg. 5-468 (1948).

² CAL. BUS. & PROF. CODE § 6068(b) (West 1962) provides: "It is the duty of an attorney to maintain the respect due to the courts of justice and judicial office."

³ *Cooper v. Superior Court*, 55 Cal. 2d 291, 298, 359 P.2d 274, 278, 10 Cal. Rptr. 842, 846 (1961).

⁴ See *In re Shortridge*, 99 Cal. 526, 34 P. 227 (1893).

⁵ See *People v. Braun*, 14 Cal. 2d 1, 92 P.2d 402 (1939).

⁶ CAL. CODE CIV. PROC. §§ 1209, 1210 (West 1955); CAL. PEN. CODE §§ 166, 1331 (West 1970).

discretion of the trial judge.⁷ What is worse—from a client's point of view—is that an attorney's verbal misconduct causing or promoting prejudicial error too often goes unchecked at the trial level. There are no guiding statutes to indicate to an attorney that saying such-and-such a thing in such-and-such a way might amount to contempt or prejudicial error in the eyes of the court. Today, an attorney who zealously argues his case does so at his peril.

This comment examines recent California cases involving contempt and prejudicial error committed by attorneys. It will show that existing procedures for dealing with the problem are inadequate because of a lack of enforceable standards. In addition to revealing the need for uniform enforcement of recommended disciplinary rules, the author proposes changes in existing judicial procedures. These changes would operate to reduce the number of appeals now processed by appellate courts in California.⁸

BACKGROUND—PRESENT MEANS OF DEALING WITH ATTORNEY
VERBAL MISCONDUCT IN CALIFORNIA COURTROOMS

Contempt Citations

The California case law indicates that a contempt of court may be committed by an attorney by spoken words, by insolent or contemptuous behavior,⁹ or by both.¹⁰ Spoken words, even if not in themselves contemptuous, may constitute contempt if uttered in an "insolent or defiant manner."¹¹ However, case law does not provide the exclusive criteria for determining contemptuous conduct in California. The California Code of Civil Procedure suggests the kinds of behavior that may constitute contempt of court: contemptuous, disorderly, or insolent behavior toward a judge;¹² acts tending to interrupt the due course of a trial;¹³ certain specified acts

⁷ *In re Hallinan*, 71 A.C. 1221, 459 P.2d 255, 81 Cal. Rptr. 1 (1969).

⁸ Mr. Chief Justice Burger has declared that ways must be found to cut down on the huge numbers of appeals that now pass from lower to higher courts, often doubling, and sometimes tripling, the amount of time given an individual case. Address by Mr. Chief Justice Burger on the State of the Judiciary—1970, at the ABA Annual Meeting, August 1970, in 56 A.B.A.J. 929, 934 (1970). It may be that if trial attorneys' convictions for misconduct could be fairly dealt with through means other than by petition to an appellate court for hearing, the problem that Chief Justice Burger points out could be greatly alleviated simply because of the great numbers of appeals that could bypass the appellate courts. This concept will be explored later in this comment.

⁹ *Ex parte Hallinan*, 126 Cal. App. 121, 14 P.2d 797 (1932).

¹⁰ See *Ex parte Grossman*, 109 Cal. App. 625, 293 P. 683 (1930).

¹¹ *Ex parte Hallinan*, 126 Cal. App. 121, 14 P.2d 797 (1932); *accord*, *Rose v. Superior Court*, 140 Cal. App. 418, 35 P.2d 605 (1934).

¹² CAL. CODE CIV. PROC. § 1209(1) (West 1955).

¹³ *Id.* § 1209(2).

by an attorney, clerk, sheriff, or coroner;¹⁴ and "other unlawful interference with the process or proceedings of a court."¹⁵ The Penal Code lists several of these same acts, as well as some others, as misdemeanors and punishable as contempt.¹⁶

Theoretically, in a given instance of verbal misbehavior, the trial judge interprets the statutes dealing with contempt. In a relatively short time he must decide whether or not to cite the offender for contempt of court. A trial attorney in danger of being cited therefore may find himself—at least momentarily—in a position where the judge hearing his case assumes a role not unlike that of an adversary attempting to squelch a particular element of his argument. What effect, one may ask, does one or more citations for contempt have on a trial attorney's subsequent statements and manner before the same judge who cited him? Is the summary contempt power a tool by which judges shape and reform arguments, muzzle overzealous attorneys, or settle differences of opinion with respect to close questions of law? How effective can a judicial system be where the trial judge must not only rule on the correctness of the law but is charged with sole responsibility for disciplining counsel's misconduct as well?

Reversal for Prejudicial Error

It is proper for a trial judge to instruct a jury to base its verdict exclusively on the evidence and to disregard statements made in the courtroom that amount to misconduct.¹⁷ Sometimes such instructions may cure the error and prevent a reversal of the trial court's judgment.¹⁸ Other appellate courts, however, hold that such instructions do not prevent a reversal on grounds of prejudicial misconduct.¹⁹ It is extremely difficult to cure a prejudicial error committed in the presence of a jury. Instructing the jury to disregard the prejudicial comments is "like an attempt to unblow a blown horn."²⁰ Here, as with contempt, the trial attorney does not have a suitable guideline for determining whether his conduct is preventing a defendant from having that "fair and impartial trial which the

¹⁴ *Id.* § 1209(3).

¹⁵ *Id.* § 1209(8).

¹⁶ CAL. PEN. CODE §§ 166, 723, 724, 907, 1331 (West 1970).

¹⁷ *See* *People v. Kirkes*, 39 Cal. 2d 719, 249 P.2d 1 (1952).

¹⁸ *People v. Jackson*, 59 Cal. 2d 375, 379 P.2d 937 (1963); *People v. Brice*, 49 Cal. 2d 434, 317 P.2d 961 (1957); *People v. Hampton*, 47 Cal. 2d 239, 302 P.2d 300 (1956).

¹⁹ *People v. Berryman*, 6 Cal. 2d 331, 57 P.2d 136 (1936); *People v. Fleming*, 166 Cal. 357, 136 P. 291 (1913).

²⁰ *Cooper v. Superior Court*, 55 Cal. 2d 291, 300, 359 P.2d 274, 280, 10 Cal. Rptr. 842, 848 (1961).

law requires for every person charged with a crime."²¹ An experienced trial attorney knows that appellate courts are somewhat reluctant to reverse a trial court judgment where the attorney accused of prejudicial misconduct during the trial is the prosecutor.²² A prosecuting attorney is given wide latitude in his statements, right or wrong, and an appellate court will reverse only where it is "clear from all the facts that there has been a miscarriage of justice."²³ This procedure resounds heavily upon the defendant in the trial court. Although still presumed innocent by the law, he often must endure verbal abuse from a prosecuting attorney who, with almost total immunity, may mercilessly deride and soundly humiliate him. The question that poses itself in this situation is not only that of how far a prosecuting attorney may go before he is guilty of prejudicial misconduct, but also how long and to what extent the victim of his misconduct must endure the effects of the damaging statements before a ruling on assignment of error comes down from some appellate court.

NEEDED: ENFORCEABLE AND UNIFORM DISCIPLINARY RULES

California needs to establish uniform and definitive guidelines for attorney verbal behavior during trials to minimize instances of criminal contempt and prejudicial error. To this end the California Legislature and State Bar Association should examine closely the provisions of the American Bar Association's new Code of Professional Responsibility.²⁴ Canon DR 7-106(C) of the Code formulates the following clearly stated rules governing courtroom conduct:²⁵

"DR 7-106(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

- (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.

²¹ *People v. Braun*, 14 Cal. 2d 1, 7, 92 P.2d 402, 405 (1939).

²² See *People v. Ross*, 178 Cal. App. 2d 801, 3 Cal. Rptr. 170 (1960); *People v. Wein*, 50 Cal. 2d 383, 326 P.2d 457 (1958); *People v. Kirkes*, 39 Cal. 2d 719, 249 P.2d 1 (1952).

²³ *Id.* See also CAL. CONST. art. VI, § 4.5 (West 1954).

²⁴ ABA, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF PROFESSIONAL JUDICIAL ETHICS (1970).

²⁵ The code contains nine Canons in all, each with its own rules and ethical considerations; discussion of the merits of each of these is beyond the scope of this comment. (For a general comparison of the provisions of Canon 7 with existing California law, see Comment, *Professional Responsibility in Client Representation—A Re-evaluation*, 10 SANTA CLARA LAW. 112, 148 (1969).

- (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
- (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters herein.
- (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.
- (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."

California should incorporate the specific provisions of Canon DR 7-106(C) into the state's substantive law so that they will have binding legal effect.²⁶ The provisions clarify and strengthen ethical standards for trial lawyers; and unlike the now outdated Canons of Professional Ethics, the new provisions lend themselves to practical application. Canon DR 7-106(C) does not contain recommendations as to specific disciplinary actions to be taken against attorneys who commit verbal misconduct in a courtroom—instigation of these actions is left to the disciplinary agencies of each state. The Canon's provisions *are* aimed at realistic substantive rules for courtroom conduct that trial attorneys could safely observe and properly rely upon.

RECENT CASES

The existence of a few clearly defined rules of verbal conduct, such as those proposed above, might well have obviated the sort of appeal taken in *People v. Kirkes*.²⁷ In that case a defendant was convicted in the trial court of murder in the second degree. On appeal, the defendant charged that certain statements made during the trial by the deputy district attorney were grossly unfair and unsupported by the evidence.²⁸

After the murder trial had been underway for some time, the deputy district attorney approached the jury box, proffering the following comments to the jury:

As member of the District Attorney's Office of this County [for 19 consecutive years] I have taken an oath to prosecute cases to the

²⁶ The method of incorporation will be discussed later in this comment.

²⁷ 39 Cal. 2d 719, 249 P.2d 1 (1952).

²⁸ He also charged that several instructions given to the jury and certain rulings of the court upon the admission of evidence were prejudicially erroneous. *People v. Kirkes*, 39 Cal. 2d 719, 721, 249 P.2d 1, 3 (1952).

best of my ability. If, during the conduct of this trial I have been—I have appeared to you to have been overly aggressive or tenacious, then I say to you that I was following out that oath, that in all sincerity *I believe and I still believe and knew prior to the time that I became associated in this particular prosecution* in the month of October, that this particular Defendant was guilty of this particular offense. I would not have been associated with the prosecution of this particular case unless I had so believed.²⁹

The California Supreme Court granted a new trial. In a vigorously written opinion, the court said that unfounded statements made by a prosecuting attorney constitute misconduct. The court noted that not only did the deputy district attorney state his belief in the defendant's guilt, but he also flatly stated that he *knew of defendant's guilt prior to the time* that he entered the case. Quoting with approval from *People v. Podwys*,³⁰ the court said that “[t]here can be no excuse for such conduct.”³¹

The court's reasoning in *Kirkes* is, of course, unassailable. The unfortunate aspect of the case, and there are many similar cases, is that the issue of the prosecutor's misconduct during the trial reached the highest tribunal in the state. Had provisions (C)(1),³² (C)(3),³³ and (C)(4)³⁴ of Canon DR 7-106(C) been in effect as enforceable rules of conduct at the time of the murder trial, grounds for the appeal just described would not have materialized. The existence of clear and explicit rules like those of Canon DR 7-106(C)—having the force of law—would have acted as a deterrent to such conduct. Proper observance of the rules of DR 7-106(C) by attorneys could help minimize appeals such as that taken in *Kirkes*.

²⁹ *Id.* at 722, 249 P.2d at 3.

³⁰ 6 Cal. App. 2d 71, 44 P.2d 377 (1935).

³¹ *People v. Kirkes*, 39 Cal. 2d 719, 723, 249 P.2d 1, 4 (1952).

³² ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON DR 7-106(C)(1) (1970):
“In appearing in his professional capacity before a tribunal, a lawyer shall not:
(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.”

³³ ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON DR 7-106(C)(3)
(1970):

“... [A] lawyer shall not:

(3) Assert his personal knowledge of the facts in issue, except when testifying
as a witness.”

³⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON DR 7-106(C)(4) (1970):
“... [A] lawyer shall not:

(4) Assert his personal opinion as to the justness of a cause, as to the
credibility of a witness, as to the culpability of a civil litigant, or as to
the guilt or innocence of the accused; but he may argue, on his analysis
of the evidence, for any position or conclusion with respect to the matters
herein.”

But more importantly, the rules could serve to prevent violation of defendants' rights during trial.

The lack of enforceable standards governing attorney verbal misconduct has led to inconsistent treatment of the problem by the courts. In some cases, overreaching and gross verbal misconduct extremely detrimental to an accused has been held not to constitute prejudicial error and reversal has been denied. In others, appellate courts have found reversible prejudicial error grounded on comparatively mild statements made during trial.

In *People v. Ross*,³⁵ strong statements and improper questioning by a prosecuting attorney were held not to constitute prejudicial error. The defendant was charged with statutory rape³⁶ and lewd and lascivious conduct.³⁷ During the trial, and in the presence of the judge and jury, the district attorney, after referring to defendant as "a very strange man indeed,"³⁸ made the following remark concerning the defendant: "If the testimony is true, he's got the sexual appetite of a barbarian or an ape."³⁹

The district attorney then chided a defense witness who at the time of trial was serving a two-year term in the county jail for drunk-driving. He first told the jury that the witness was presently incarcerated on a drunk driving charge and had served prison terms for two different felonies. Then the district attorney challenged the witness: "Is it possible, . . . by the fact that you're doing two years in the County Jail for violation of—five violations of Section 502, drunk driving, that you figure you have got nothing to lose in this Courtroom?"⁴⁰

On appeal, the defendant contended that these questions were improper and degrading. The court, however, refused to reverse the conviction. It found that evidence of the defendant's guilt was very strong, that no prejudicial error was committed, and that *even if the defendant were correct in some of his contentions of error*, no miscarriage of justice resulted.⁴¹

In *People v. Bandhauer*,⁴² the district attorney declared to the jury that he believed the defendant was guilty and should be given

³⁵ 178 Cal. App. 2d 801, 3 Cal. Rptr. 170 (1960).

³⁶ CAL. PEN. CODE § 261(1) (West 1970).

³⁷ *Id.* § 288.

³⁸ *People v. Ross*, 178 Cal. App. 2d 801, 808, 3 Cal. Rptr. 170, 174 (1960).

³⁹ *Id.*

⁴⁰ *Id.* at 807, 3 Cal. Rptr. at 174.

⁴¹ *Id.* at 809, 3 Cal. Rptr. at 175.

⁴² 66 Cal. 2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967).

the death penalty. The jury subsequently convicted the defendant of first-degree murder and sentenced him to death. On appeal to the California Supreme Court, the defendant contended that the prosecutor had gradually injected prejudicial statements into his argument in the penalty phase of the trial. When grounds for objection became apparent it was *too late* to cure the error by admonition or retraction. The California Supreme Court found that the prosecutor's statements made during trial on the issue of guilt were not prejudicial but that later, during the penalty phase of the trial, the prosecutor's language had become stronger.

The prosecutor began his argument on the issue of penalty by informing the jury that he was running for office and that as a public officer he bore a mantle of trust that required him to be fair.⁴³ He continued to speak at great length about how interested he was in seeing justice served, stating that it was his desire to see the defendant treated fairly.⁴⁴ Then he began to delve into the brutal nature of the killing for which the defendant was charged—the fact that the defendant had “emptied this gun into his victim's body, some from the back and some from the front.”⁴⁵ He drew attention to the defendant's long history of criminal conduct and other antisocial conduct. Then he declared to the jury:

During the many years that I have been a prosecutor, I have seen some pretty depraved character [sic]. Usually they are kind of old because it takes a little while to become this depraved. But it has seldom been my misfortune to see a more deprave [sic] character than this one. If Mr. Walter Ashley Smith has forfeited his right to live at the hands of Mr. Bandhauer, I don't think that we should be particularly upset about Mr. Bandhauer now having to forfeit his life for the life that he has led in the past few years. It is not a very equal trade, is it?⁴⁶

The prosecutor pursued his urgings for the death penalty. He told the jury that in some first-degree murder cases in which he had been the prosecutor, he had not demanded the death penalty but had recommended life imprisonment. He cited two examples of cases where the death penalty might not be justified. The first was a crime of passion where a spouse is found in a compromising position by the other spouse.⁴⁷ The other was a crime in which the particular participant took no active part in a robbery and murder except to drive the getaway-car and had told his partner not to use a loaded

⁴³ *People v. Bandhauer*, 66 Cal. 2d 524, 529, 426 P.2d 900, 904, 58 Cal. Rptr. 332, 336 (1967).

⁴⁴ *Id.*

⁴⁵ *Id.* at 533, 426 P.2d at 906, 58 Cal. Rptr. at 338.

⁴⁶ *Id.* at 534, 426 P.2d at 906, 58 Cal. Rptr. at 338.

⁴⁷ *Id.* at 534, 426 P.2d at 907, 58 Cal. Rptr. at 339.

gun because he did not want to be involved in a killing.⁴⁸ The prosecutor then said to the jury:

[Y]ou don't have just a trigger man. You have a vicious, cold-blooded killer here. This man wanted to make sure Mr. Walter Ashley Smith was dead. There was only one reason for that—so he couldn't get on this witness stand and tell us what happened. This man has had enough of State Prison and didn't want to go back, and the one man who could send him back . . . was Mr. Walter Ashley Smith.⁴⁹

The California Supreme Court reversed the penalty judgment, but affirmed the judgment as to guilt. The court ruled that the statement that the defendant was one of the most depraved characters that the prosecutor had ever seen was testimonial and not related to the evidence in the case.⁵⁰ It presented to the jury an external standard by which to fix the penalty, based on the prosecutor's long experience.⁵¹ The error was aggravated, said the court, by the prosecutor's telling the jury that he would recommend life imprisonment in a proper case, for he thus made it clear that his request for the death penalty was based on his personal judgment and belief.⁵²

The preceding case, like *Kirkes, Ross*, and many others,⁵³ shows the need for invoking Canon DR 7-106(C) against errant attorneys who commit verbal misconduct. But the Canon's provisions could also be used to protect the rights of attorneys as well. If the Canon were considered the basic guideline for acceptable verbal conduct, any allegation of attorney misbehavior—such as a

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 529-30, 426 P.2d at 904, 58 Cal. Rptr. at 336.

⁵¹ *Id.* at 530, 426 P.2d at 904, 58 Cal. Rptr. at 336.

⁵² *Id.*

⁵³ In *People v. Carr*, 163 Cal. App. 2d 568, 329 P.2d 746 (1958), unsupported statements in the prosecutor's opening statement, together with a statement in his closing argument that defendants "were out working at their trade" of robbers, for which there was no support in the evidence, combined to bring about a reversal for prejudicial error. See also *People v. Vienne*, 142 Cal. App. 2d 172, 297 P.2d 1027 (1956), where the deputy district attorney ignored admonishments of the court and referred to the defendant as a professional gunman. The appellate court held that there was no evidence to support such a remark. *People v. Perez*, 58 Cal. 2d 229, 373 P.2d 617, 23 Cal. Rptr. 569 (1962), involved a conviction for the sale of heroin. The California Supreme Court reversed because of the prosecutor's highly improper questioning and argument on matters on which he had offered no proof. In *People v. Beal*, 116 Cal. App. 2d 475, 254 P.2d 100 (1953), and *People v. Talle*, 111 Cal. App. 2d 650, 245 P.2d 633 (1952), the courts, as in *Perez* and *Carr*, reversed because of prejudicial statements made by the prosecutor. *People v. Shaffer*, 150 Cal. App. 2d 287, 309 P.2d 475 (1957); *People v. Brophy*, 122 Cal. App. 2d 638, 265 P.2d 593 (1954); and *People v. Hail*, 25 Cal. App. 342, 143 P.2d 803 (1914), were reversed for misconduct where "the evidence presented a close question of fact," and the prosecutor argued matters for which there was no evidentiary support.

contempt citation by a trial judge—could be measured against the Canon's provisions. The Canon would thus serve to establish a bulwark against unjustified contempt actions against trial attorneys such as arose in *People v. Finch and Pappa*.⁵⁴ In that case, Grant B. Cooper was acting as a defense counsel for a defendant charged with murder in the first degree. The following verbal exchange took place in the presence of jurors, defendants, and counsel:

THE COURT . . . To my mind the testimony given by the [prosecution] witness John Cody [who had testified, in effect, that he had been employed by the defendants in the murder case to kill Finch's wife] regarding the purpose for which he was employed by the defendants was more believable than the testimony of the two defendants on that subject.

MR. COOPER [petitioner herein]: If your Honor please—

THE COURT: Now Mr. Cooper, I don't want a word out of either one of you.

MR. COOPER: If your Honor please, as a lawyer I have a right to address this court.

THE COURT: You don't have a right to say a word when the jury is down here in the process of their deliberations, and I instruct you and Mr. Bringgold [counsel for defendant Pappa] to keep seated and wait until the jury is out to make your objections.

MR. COOPER: If your Honor please, I feel your Honor has no right to invade the province of the jury.

THE COURT: Mr. Cooper, I hold you directly in contempt.

MR. COOPER: Very well, your Honor.

THE COURT: I will dispose of the matter as soon as I have instructed this jury.

MR. COOPER: Very well, if your Honor please, it is your Honor's prerogative.

THE COURT: It certainly is, and I am going to exercise it.⁵⁵

After the judge had concluded his remarks, he asked the jury to retire and deliberate. Before the jurors left the courtroom, however, the following exchange occurred:

THE COURT: One thing more before you go, you should not in any way consider in your deliberations the fact that the Court felt it necessary to hold Mr. Cooper in contempt. That was nothing to do with the issues in this case, and it should not be considered by you at all. That is all.

MR. COOPER: Your Honor—

THE COURT: Just a minute, Mr. Cooper—

MR. COOPER: I have a right to address the Court.

THE COURT: You do not; while the jury is here you do not have any such right; you sit down.

MR. COOPER: If your Honor please, I feel your Honor has invaded the province of the jury.

⁵⁴ Los Angeles Superior Court Number 220164, Nov. 7, 1960.

⁵⁵ Cooper v. Superior Court, 55 Cal. 2d 291, 295-96, 359 P.2d 274, 276-77, 10 Cal. Rptr. 843, 844-45 (1961).

THE COURT: That is a matter of subsequent argument; I again hold you in contempt, Mr. Cooper. You sit down, and then I will let you say what you want to say. You have no business saying anything in the presence of this jury.⁵⁶

Only after the jury had left the room was Cooper allowed to present his objections to the comments of the court.

A hearing was held at which Cooper was sentenced to pay a fine of \$250 on each of the two counts of contempt or to serve one day in jail for each \$100 thereof. Cooper appealed.⁵⁷ The California Supreme Court, in an opinion in which Justice Schauer strongly criticized the trial judge's conduct, annulled the judgment of contempt. The court held that the trial judge had no more right to invade the province of the jury during deliberations than did counsel, and that the order of the judge in attempting to still Cooper's valid objections was not a lawful order.

The holding in *Cooper* simply strengthens an earlier opinion handed down by the California Supreme Court in *Gallagher v. Municipal Court*.⁵⁸ In that case, the court had implied that an order that results in silencing an attorney before he has had an adequate opportunity to make a timely objection is not a lawful order. The *Cooper* case undoubtedly enunciates good law, but it is one of the few cases that provides trial attorneys and judges with a practical rule concerning permissible verbal conduct during a trial.⁵⁹ Adoption of the fundamental rules of Canon DR 7-106(C) could go a long way toward relieving the California Supreme Court of the dubious task of formulating rules for trial conduct *one at a time*.

PROPOSED BLUEPRINTS FOR ATTORNEY DISCIPLINARY ENFORCEMENT

The aftermath of the spectacular and unduly celebrated Chicago Seven trial has produced several proposals for solving the

⁵⁶ *Id.* at 297, 359 P.2d at 277-78, 10 Cal. Rptr. at 845-46.

⁵⁷ *Id.*

⁵⁸ 31 Cal. 2d 784, 192 P.2d 905 (1948).

⁵⁹ In a recent case, the California Supreme Court confirmed another singular but useful rule concerning contempt rulings. A defense attorney was charged with two instances of contemptuous conduct for his "antagonistic, insulting, and disrespectful tone of voice." The court reversed the trial judge's order, noting in the opinion that the trial judge had failed to *warn* the attorney that his statements and manner were objectionable before citing him for contempt. Writing for the court, Justice Burke stated the rule of the case: If the words used by counsel are respectful and pertinent to the matter before the court, before citing him for contempt it is not unnecessarily burdensome to require the judge to first warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceedings. *In re Hallinan*, 71 A.C. 1221, 459 P.2d 255, 81 Cal. Rptr. 1 (1969).

difficult problems of disciplining errant attorneys.⁶⁰ In California, Attorney-General Evelle Younger, then the District Attorney of Los Angeles County, told a Monterey, California, audience in a September speech that there is a "crisis in the criminal courts, with delays threatening the entire law enforcement system."⁶¹ In that speech, Younger outlined certain proposals that he will present to the 1971 California Legislature for dealing with the crisis. These proposals include:⁶²

- Disciplinary proceedings including disbarment for lawyers who engage in antagonistic, offensive, or insulting court conduct.
- Certification of attorneys by the state bar as professionally competent to represent defendants in capital cases.
- Adoption of the federal system whereby prospective jurors in criminal cases are examined by a judge or commissioner, rather than by attorneys involved in the trial.⁶³

While these recommendations address themselves directly to the need for effective attorney discipline in California, they are likely to meet with considerable resistance from trial attorneys who might not endorse such sweeping changes in existing procedures. The best of the recommendations to date appear to be those presented in July of this year by retired Supreme Court Justice Tom C. Clark's American Bar Association Committee for Disciplinary Enforcement. In a 190-page study,⁶⁴ Justice Clark's committee reported on the existence of what he termed a "scandalous situation

⁶⁰ Following this trial, the American College of Trial Lawyers warned in a twenty-three-page report that disruptive courtroom tactics that convert trials into spectacles of disorder and even violence pose a new, direct, jugular threat to the judicial process. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORTS AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS (1970). The ACTL report contends that while there is need for vigorous prosecution and defense in trial cases, as well as for firm guidance by the trial judge, there are also limits as to what lengths defense counsel, the prosecutor, and the judge in a court case may go. The report recommends, among other things, the use of summary contempt power; sanctions to limit an attorney's right to appear in court; immediate appellate review; and references sent to appropriate disciplinary bodies concerning improper conduct by either lawyers or judges for expedited action. The College's proposals, however, already are drawing heavy fire from trial attorneys. Alfred S. Julian, President of the New York Metropolitan Trial Lawyers Association, a 37-year-old organization with approximately 200 members in the New York area, warns that the public will not long be properly represented if the bar becomes subservient and pusillanimous. Julian feels that the drastic remedies suggested by the College constitute a dangerous threat to the independence of the bar.

⁶¹ San Jose Mercury, Sept. 26, 1970, at 2, col. 4.

⁶² Recommendations quoted here are limited to those that deal directly with the present discussion.

⁶³ San Jose Mercury, Sept. 26, 1970, at 2, col. 4.

⁶⁴ ABA, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970).

that requires the immediate attention of the profession."⁶⁵ The report—said to be the most thorough national study ever made of the disciplinary processes of the legal profession⁶⁶—contains 36 sweeping recommendations.⁶⁷ The proposals cope with the difficult problems in formulating and enforcing any uniform scheme for disciplining errant attorneys. Justice Clark and his committee want to see the creation, in each state, of powerful statewide lawyer disciplinary agencies with ultimate authority resting in the highest court of the state.⁶⁸

CONCLUSION

It may be fortunate indeed that the structure, if not the substance, of California's present scheme for dealing with attorney verbal misconduct is not too far afield from the measures proposed by Justice Clark's committee. Disciplinary proceedings against attorneys in California are already within the jurisdiction of the California Supreme Court and the State Bar Board of Governors. The California Supreme Court, for example, may suspend or disbar an attorney for disobedience of an order of the court,⁶⁹ violation of his oath or statutory duties,⁷⁰ or commission of any act involving moral turpitude, dishonesty or corruption.⁷¹ The California State Bar Board of Governors may hold a hearing on any of the above

⁶⁵ *Id.* at 1.

⁶⁶ Bernard G. Segal, President, American Bar Association. *Los Angeles Daily Journal*, Jul. 2, 1970, at 1, col. 6.

⁶⁷ Highlights of the committee's 36 recommendations are:

- Centralization of disciplinary jurisdiction in statewide agencies with ultimate authority resting in the highest court in the state. Larger states might consider "field units" for efficiency and coordination. A major benefit of statewide jurisdiction would be uniformity of investigations and punishment.
 - The agencies would be professionally staffed and funds for operation would come from both private and public sources including bar associations, public revenue, and assessment of costs against a respondent attorney when the charges are sustained.
 - Elimination of jury trial disciplinary proceedings.
 - Granting statewide subpoena power to every authorized disciplinary agency as well as the attorney under investigation.
 - Balancing the makeup of disciplinary agencies by having membership include single and small-firm practitioners, members of minority groups, and attorneys engaged in negligence and criminal law. Members would serve three-year terms with appointments staggered to rotate one-third of the membership annually.
 - Court rules providing that any attorney who regularly engages in practice within a jurisdiction submits himself to the disciplinary jurisdiction of that court.
 - Court rules giving disciplinary agencies power to give warnings to attorneys for minor misconduct. Notice of such admonitions would be recorded permanently.
- ABA, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970).

⁶⁸ *Id.*

⁶⁹ CAL. BUS. & PROF. CODE § 6103 (West 1962).

⁷⁰ *Id.*

⁷¹ *Id.* § 6106.

causes or may establish disciplinary commissions to hold hearings subject to review by the California Supreme Court.⁷² The Board of Governors or its disciplinary commissions may recommend to the California Supreme Court that an attorney be suspended from practice for any wilful breach of the Rules of Professional Conduct.⁷³ They may also discipline members of the State Bar by public or private reproof.⁷⁴

California has sufficient existing statutory power to enforce judicial disciplinary rules; *what is lacking are the rules themselves*. The solution to this problem, however, may be just a step away. As proposed earlier in this comment, California should incorporate the provisions of Canon DR 7-106(C) into the State's substantive law so that they will have binding legal effect.⁷⁵ The Legislature could incorporate Canon DR 7-106(C) into the existing Business and Professions Code. Furthermore, the State Bar Board of Governors and the Supreme Court of California could formulate the new provisions as enforceable Rules of Professional Conduct.

To provide uniform and effective enforcement of the new rules, the author proposes that California establish an extra-judicial commission under the auspices of the California State Bar Board of Governors. It seems entirely feasible that such a commission could take over completely certain functions now being performed by California's intermediate appellate courts. The Review Commission could function in the areas of both contempt and prejudicial error in the following ways:

(A) *Contempt*. Contempt citations against attorneys would continue to be issued by the trial judge. The Board of Governors Review Commission would automatically review the attorney's trial conduct for possible violations of the Rules of Conduct, which would include the provisions of Canon DR 7-106(C). While the trial judge would have authority to cite an attorney's conduct as contemptuous, the Review Commission would determine the issue of appropriate disciplinary action, if any. Discipline imposed on the attorney would range from reproof to suspension from practice. The Commission's careful weighing of an attorney's conduct against the trial judge's

⁷² "[T]he provisions of this article [concerning the disciplinary authority of the State Bar's Board of Governors] provide a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar." *Id.* § 6075.

⁷³ *Id.* § 6078.

⁷⁴ *Id.* § 6077.

⁷⁵ The ABA's Canons of Professional Ethics, which the Code of Professional Responsibility replaced as of January 1, 1970, has in the past served merely as an advisory standard in California. *Id.* § 6076.

charges and the criteria of the Rules of Professional Conduct would provide a means of competent review without appeal to an intermediate appellate court.

(B) *Prejudicial Error*. An appeal based on alleged prejudicial error involves possible violations of the substantial rights of a plaintiff or defendant. These appeals, therefore, must continue to be processed to an appellate court of law. If an appellate court found that the trial attorney had committed prejudicial error, the Board of Governors Review Commission would determine any disciplinary action to be taken against him.

(C) *Ultimate Jurisdiction*. An attorney disciplined by the Board of Governors Review Commission could appeal to the California Supreme Court.⁷⁶

Adoption of the recommended system of enforceable rules will help unclog California's overburdened appellate court dockets. But this relief is not the only benefit that would inure to the legal profession of our state. Today, more than ever, public attention is focused on the courtroom arena. Properly applied, Canon DR 7-106 (C) could help the trial attorney take his rightful place in the public forum as the recognized vanguard of justice.⁷⁷

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⁷⁶ At present, disciplinary hearings of the State Bar Board of Governors are subject to review by the California Supreme Court. *Id.* § 6078.

⁷⁷ "It is only by having clearly defined, generally accepted, and courageously enforced standards of conduct for all branches of the profession that we can hope to inspire that public confidence in the integrity and impartiality of the administration of justice that is so essential."—Bernard G. Segal, President, American Bar Association. *Los Angeles Daily Journal*, Jul. 2, 1970 at 1, col. 7.