BENCH vs. BAR (ROUND ONE)

Presented to:

Judicial College of Arizona
Loews Ventana Canyon Resort
Tucson, Arizona

Presented by:

Gary L. Stuart
Jennings, Strouss & Salmon
Phoenix, Arizona
June 5, 1996

TABLE OF CONTENTS

THE DISCLAIMER

I claim no special ability to lecture judges on how or when to exercise the kind of restraint or forcefulness needed to maintain order in court. I have no real experience in making the critical and immediate decisions necessary for decorum in the tribunal. I am not a judge.

I claim only the experience of occasionally observing advocates and judges harm one another by injudicious or disrespectful remarks and actions. I have a great deal of experience in the pit of the courtroom and have the perspective of "he who must obey." I am a trial lawyer.

PREFACE

The tension inherent in the adversarial system accounts, in part, for the Bench vs. Bar conflict. Judges exercise broad control over a variety of matters in both the public and private spheres. Almost every facet of life is affected by judicial decisions. That includes the well-being of the advocates who must live with those decisions.

Noblesse Oblige

Judges are central to our society and therefore must be competent and ethical. Their actions must foster respect for their decisions as well as for the judiciary as a whole.[1] Lawyers, on the other hand, are fast becoming a central part of the business world as they leave behind the historical precept of "*Noblesse Oblige"*. How many of today's trial lawyers would accept Dean Pound's description of those who aspire to courtroom advocacy? He said:

> "[The profession is] a group of men pursuing a learned art as a common calling in the spirit of public service, no less a public service because it may incidentally be a means of livelihood."[2]

The 1854 Model

Arizona is fortunate to have hundreds of highly professional trial advocates who are as dedicated to the cause of justice as are the best of our judges. Many of them still believe in the "model" set forth in one of the earliest American works on professional ethics:

---

[1] Judicial Conduct and Ethics, Shaman, Lubet & Alfini, Sec. 1.01 (The Michie Company, 1990).

[2] Survey of the Legal Profession; The Lawyer From Antiquity to Modern Times, p. 5 (1950).

> "No man can ever be a truly great lawyer, who is not in every sense of the word, a good man . . .There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things that we hold dearest on earth—our fortunes, reputations, domestic peace, the future of those dearest to us, nay liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but without suspicion. From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity and candor; they are the cardinal virtues of a lawyer."[3]

It is by design that judges must first be schooled as lawyers. It is critical to how well judges apply the law that they will have served a suitable apprenticeship as a trial lawyer. It is unfortunate that we occasionally elevate "office" lawyers to the bench.[4]

---

[3] Sharswood, Professional Ethics, (1854), pp. 168, 169.

[4] I say unfortunate because the length of the learning curve makes it extremely difficult for a transactional lawyer to ever get up to speed in the courtroom. We greatly need a diverse bench but we ought to seek diversity from those with real trial experience, not administrative or "litigation by motion" experience. It seems obvious that years of discovery practice do not necessarily translate into the kind of experience needed to sit on the bench. The results of elevating such lawyers to the bench are predictable: Rule 42(f) notices are high and trial lawyer confidence in them is low.

RESPECT

"Eminence without merit earns deference without esteem."[5]

Respect is given to the Court but must be earned by the judge.

Judicial ethics are not simply a matter of doing what's right while on the bench. Judges, like the advocates who appear before them, are bound by specific ethical rules. Those rules have been promulgated as the "Arizona Code of Judicial Conduct."[6] *For trial lawyers, it is the "Arizona Rules of Professional Conduct."*[7]

A Public Trust

The Preamble to the Arizona Code of Judicial Conduct recognizes the precept that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. This recognition is carried over into the first two Canons:

Canon 1. A judge shall uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be

[5] *Sebastein-Roch Nicolas de Chamfort (1741-94); Maxims and Considerations, vol. 1, no. 60 (1796; tr. 1926).*
[6] *Rule 81; Rules of the Supreme Court for Arizona, as revised Feb. 1, 1985.*
[7] *Rule 42: Rules of the Supreme Court for Arizona, adopted August 2, 1983 and thereafter amended.*

preserved.

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The fact is that there are hundreds of Arizona judges who spend their entire judicial careers in full compliance with these Canons. A sad fact is that a small minority of judges do not personally observe high standards of conduct and do not always respect the law they serve.

Robitis

When ordinary citizens are admitted to the bar, a few of them become so impressed with the money they make, they lose sight of the public service aspect of lawyering. When ordinary lawyers are elevated to the bench, a few of them become so immersed in the power of the position that they lose sight of the need to be respectful. "Robitis" is what lawyers (at least in private) call the judicial disease of unduly-empowered judges.

This colloquial slur is easily diagnosed (by one's colleagues), swiftly treated (by presiding judges) and rarely fatal. What the bench, as well as the bar, needs occasional reminding of is that we are respected by those we respect.

Inherent Power to Command Respect

There is at least one Arizona case that equates respect due the trial court with the quantity of paper filed. In a 1994 case[8] *the Arizona Court of Appeals upheld sanctions against lawyers for both sides who submitted a motion for summary judgment that was "two feet high and contains something between 2000 and 3000 pages."*[9]

The sanction against both lawyers was that they could "not charge your clients one penny for any time that either [side] . . . spent on this motion." The trial judge's basis for the unusual sanction was that both parties "participated in an abuse of the trial court system."[10] *The trial judge cited the ethical rule that requires lawyers to demonstrate ". . .respect for the legal system and for those who serve it, including judges. . ."*[11] *The client for the moving party believed that the fees incurred in connection with the motion for summary judgment were entirely legitimate and wanted to pay the lawyer for the work. The appellate court dealt with that issue as follows:*

> *"Appellant misses the mark with this argument. The day is long gone when an attorney may excuse conduct prohibited by the rules because it conforms to his client's wishes. The violation of the rules of practice was a matter to be resolved between the trial court and the attorney and not between the attorney and his client."*[12]

Power to Impose Silence, Respect and Decorum

---

[8] *Precision Components, Inc v. Harrison, Harper, et. al., 179 Ariz. 552, 880 P.2d 1098 (1994).*
[9] *Id. at 553.*
[10] *Id. at 554.*
[11] *Ibid.*
[12] *Id. at 557. There does seem to be a mixing of apples with oranges here. There were no "rules" of practice violated by filing the 2000-3000 page motion and response. The sanction was not based on a violation of the "rules"; rather, it was based on a perceived abuse of the trial court system and a lack of respect for the trial judge. Few would argue with the trial court's inherent power to sanction in this instance but it does little to advance the point by prohibiting the clients from paying for what they believe to be good legal work.*

There is an historical understanding that certain implied powers must necessarily vest in our courts from the very nature of the institution:[13]

> *"Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence and submission to their lawful mandates. Anderson v. Dunn, 6 Wheat [19 U.S.] 204, 227, 5 L. Ed. 205 (1821)"*

A 3000 page motion for summary judgment was probably not only unknown but unknowable in 1821 when the case of Anderson v. Dunn was filed. Likely, the lawyers would have been shot, not sanctioned, for burdening the court so mightily.

Courtesy and Civility

Courtesy and civility toward judges are part and parcel of the respect due the court. *Ethical Rule* 8.4 dictates that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. A lawyer's abuse of a judge or public officer evinces an inability to fulfill the professional role of a trial lawyer.

One of the principal Arizona cases involving courtesy and civility toward the judiciary is *In re Salazar.*[14] *There the respondent trial lawyer was "loud, abusive and disrespectful to a superior court judge in the presence of others."*[15] *The Arizona Supreme Court held that such conduct warranted disbarment.*

COMMUNICATION

[13] *Id at 555.*

[14] *143 Ariz. 423, 694 P.2d 253 (1985).*
[15] *Id. at 428.*

"Something there is that doesn't love a wall,
And wants it down.[16]

There seems to be little doubt about the importance of communication in resolving disputes. From the lawyer side, there are a variety of ethical rules dealing with communication. For example, we must keep clients reasonably informed about their cases;[17] *we have to communicate the basis of our fees;*[18] *we have to reveal information regarding future criminal acts by clients;*[19] *we have to speak candidly to judges;*[20] *we have to refrain from extrajudicial statements that would materially prejudice the trial;*[21] *and, most importantly, we have to be truthful in all statements made to everyone.*[22]

Ex Parte Communications

With one exception, there are no comparable ethical rules for judges. The exception is *ex parte* communications. We do have a large body of law dealing with one-sided communications, to wit., *ex parte* communications. All Judicial Codes provide that, except as authorized by law, judges may "neither initiate nor consider *ex parte* communications."[23] Arizona's judicial conduct rule[24] prohibiting *ex parte* communications contains exceptions for scheduling matters, disinterested advice from experts, consultations with court staff, and settlement conferences.[25]

---

[16] *Robert Frost (1974-1963), "Mending Wall."*
[17] *Ethical Rule 1.4.*
[18] *Ethical Rule 1.5*
[19] *Ethical Rule 1.6*
[20] *Ethical Rule 3.3*
[21] *Ethical Rule 3.6*
[22] *Ethical Rule 4.1*
[23] *Judicial Conduct and Ethics, ibid at p 149.*
[24] *Arizona Supreme Court 81, Canon 3 (B) (7).*
[25] *Ibid. The commentary to the rule makes clear the proscription's reach to lawyers, law teachers and other persons who are not participants in the proceeding. The commentary also reminds everyone interested that judges must not independently investigate facts in a case and must*

If lying to the judge is the trial lawyer's biggest sin, *ex parte* communications rise to that level for judges. *Ex parte* communications deprive the absent party of the right to respond and be heard.[26] Most importantly, *ex parte* communications suggest bias or partiality on the part of the judge.[27] At its worst, an *ex parte* communication is an invitation to improper influence if not outright corruption.[28]

Removal from office is the appropriate remedy where the judge holds frequent *ex parte* conferences with one side of a case and listens to evidentiary and other legal issues without ever informing the other side.[29] Censure is an appropriate sanction for merely receiving *ex parte* communications.[30]

Arizona's most cited opinion on *ex parte* communications is *McElhanon v. Hing*.[31] In *McElhanon*, the trial judge was reported[32] to have the defendant's "apparent" consent to hold an *ex parte* conference with the plaintiff and his attorney. During the course of the *ex parte* conference the plaintiff made accusations against the defendant that went beyond the expected scope of the conference. The trial judge notified all parties and had the court reporter read the transcript of the *ex parte* proceeding. The court granted a mistrial, reversed himself and continued to preside over the remainder of the trial. The appellate court held the *ex parte*

---

consider only the evidence presented.

[26] *In re Fucshberg, 426 N.Y.S.2d 639 (1978); Fremont Indem. Co. v. Workers'Comp. Appeals Board, 153 Cal. App 3d 965 (1984).*

[27] *In Re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, (1987); Ryan v. Commission on Judicial Performance, 45 Cal 3d 518, 754 P2d 724 (1988).*

[28] *In re Laurie, 2 Ill. Cts. Comm's 83 (1985); In re Yaccarino, 101 N.J. 342, 501 A. 2d 3 (1985); In re Lewis, 535 N.E. 2d 127, (Ind. 1989); In re Kivett, 309 S.E. 2d 442, (N.C. 1983).*

[29] *Judicial Inquiry and Review Board v. Snyder, 523 A.2d 294 (Pa 1987).*

[30] *In re Fisher, 32 Cal. 3d 919, 647 P.2d 1075 (1982).*

[31] *151 Ariz. 403, 728 P.2d 273 (1986).*

[32] *Since the appellate court accepted that view of the facts, it is reported here. Unfortunately, the author has more than a passing familiarity with the case and continues to dispute the "fact" that the trial judge had his permission to meet with opposing counsel in an ex parte* chambers proceeding.

conference to be improper but decided the disclosure to all counsel at the time was sufficient to avoid reversal of the subsequent jury verdict. In other similar cases, irremediable prejudice was presumed and disclosure was held insufficient to avoid reversal.[33]

Candor Toward the Tribunal

To the extent that the natural tension inherent in our adversarial system of justice pits lawyers against judges, communication becomes critical. Candor toward the tribunal is demanded of the advocate but reciprocity is not always forthcoming.

Full explanation of the basis for any motion made by an advocate is standard trial practice. On the other hand, some judges routinely make rulings without explanation as to the basis or the rationale. When explanations are given they take the form of a final decision for which no rejoinder is welcome.

Trial advocacy colleges and advanced trial seminars teach the art of communicating such that the trial judge is fully informed on the issues and the positions of the competing sides. Are trial judges similarly encouraged in their own judicial education programs? Do trial judges want to communicate the full basis for their decisions?[34]

---

[33] *State v. Leslie, 136 Ariz. 463, 666 P.2d 1072, (1983) (judge's contact with victim's relatives mandated disqualification); United States v. Martinez, 667 F. 2d 886, (10th Cir. 1982) (ex parte strategy session between judge and prosecutor required mistrial.)*

[34] *I do not suggest that mere length or volume is the full answer; however, it is pretty clear that the effort at communication is mostly one sided if you compare the length and breadth of the motions in any given case to the brevity of the minute entries resolving those motions.*

ADMONISHMENTS

"Even if I had done wrong you should not have admonished me in public—people wash their dirty linen at home"[35]

Children are scolded; employees yelled at; ballplayers chewed out; but, lawyers are always "admonished." The dictionary makes clear the fact that this is a Bronx cheer by defining the word: 1. To reprove gently but earnestly. 2. To counsel another against something to be avoided. 3. To remind of something forgotten or disregarded, as an obligation or a responsibility.[36]

When used as a verb (as trial judges are wont to do) reference is consistently made to adverse criticism intended as a corrective or caution. To "admonish" implies the giving of advice or a warning so that a fault can be rectified or a danger avoided: as in, "A gallows erected on an eminence admonished the offenders of the fate that awaited them."[37]

It is not the admonishment that adds fuel to the Bench v. Bar fire, it is the way in which it is occasionally administered. No one expects Judges to shrink from admonishing advocates that need it. But, all of us expect that the admonishment should be done to correct, not embarrass.

---

[35] **Napoleon Bonaparte.**

[36] The American Heritage Dictionary of the English Language, Third Edition, copyright 1992 by Houghton Mifflin Company.

[37] William Hickling Prescott in Quotations -.

EMOTIONAL REACTIONS AND TRIALS

"We find nothing easier than being wise, patient, superior. We drip with the oil of forbearance and sympathy, we are absurdly just, we forgive everything. For that reason we ought to discipline ourselves a little; for that very reason we ought to cultivate a little EMOTION, a little EMOTIONAL vice, from time to time."[38]

Easy for a German philosopher to say. Trial lawyers are always at risk with judges who want efficient, straight forward statements of the facts and the law. Trial lawyers are occasionally at risk with judges who think juries want the same thing. The fact is, juries expect lawyers to appear committed to the cause and to feel strongly about the positions they take.

Emotional Arguments

Clients are entitled to lawyers who understand their emotional needs and who can bring a level of emotion to their case in the courtroom. What is occasionally lacking is an appropriate accommodation between presenting the case with suitable emotion and arguing the case emotionally. They are not the same thing.

Juries assume that the trial lawyer who is not committed to the client's case represents the guilty party or the party at fault. To "appear" committed, the trial lawyer must not be hesitant. In order to convey commitment, a trial lawyer must feel commitment. Conveying such commitment necessarily involves an infusion of emotion.[39]

This emotion need not result in an "emotional"

---

[38] *Friedrich Nietzsche, Twilight of the Idols,* "Expeditions of an Untimely Man" at 28 (1889).

[39] See, Joseph V. Gustaferro, Nancy Hollander and Gerald J. Strick, Mastering the Craft of Trial Advocacy (CLE Materials) (The Professional Education Group, 1995).

argument. Rather, the lawyer must be able to harness the appropriate sentiment and express a true and believable commitment to the cause of the client.[40]

The ethical proscription against emotion in the courtroom can be loosely found in the prohibition against "alluding" to any matter the lawyer does not reasonably is relevant or will be supported by admissible evidence.[41]

If emotion in the courtroom causes jurors to misevaluate or disregard evidence, it is prejudicial.[42] Short of that, emotional arousal itself is not sufficient to constitute prejudice.[43]

Appealing to Passion or Prejudice

The lawyer's ethical rules do not prohibit a lawyer from feeling emotion about the case. No rule requires a lawyer to hide the inherent emotionalism of his client's cause. It is only when the lawyer's presentation targets the passions and sympathies of either the judge or the jury that the judge need be concerned. Appeals to emotion encourage jurors to base their decisions on personal bias. They do the same to judges.

Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. The comment to *Ethical Rule* 3.5 says that an attorney may advocate with patient firmness no less effectively than by belligerence or theatrics. *Ethical Rule* 3.5c proscribes conduct "intended to

---

[40] The author wishes to acknowledge the contribution of one of his students on this topic. Ms. Denise L. Regent-Lee wrote a thought provoking essay entitled "Appeals to Passion in Closing Arguments" in my class on "Courtroom Ethics" at the ASU College of Law. (Spring Semester, 1996)

[41] Ethical Rule 3.4.c.

[42] J. Alexander Tasnford, *"A political choice approach to limiting prejudicial evidence"* 64 Ind. L. J. 831, 841 (Fall 1989)

[43] See, advisory committee notes to Federal Rule of Evidence 403.

disrupt a tribunal."

Declining to Participate

In *State v. Cruz*,[44] approximately three weeks after the commencement of a murder trial, the defense lawyer became convinced that the trial judge was prejudiced against his client. He informed the court of his intention to file a motion for change of judge for cause under Rule 10.1 of the Arizona Rules of Criminal Procedure and stated his belief that it was inappropriate to proceed until the matter was resolved.

The trial court denied the motion for change of judge. For the rest of that trial day and the next day, the trial lawyer refused to participate in the trial. He did not call any additional witnesses and did not cross-examine witnesses called by the co-defendant. After a brief trial continuance for other reasons, the lawyer resumed active participation in the case until the completion of the trial. The Arizona Supreme Court described trial counsel's conduct as "indefensible."[45] The court noted that, as a result of the trial lawyer's conduct, the trial judge was presented with a difficult dilemma:

> "In a case where counsel refuses to participate, even after it is made clear that the claim of prejudice is preserved for appeal, the court should order counsel to proceed, on pain of contempt, fine and or bearing the cost of a mistrial. If this succeeds in changing counsel's mind the Court must then closely monitor counsel's coerced participation for its effectiveness. If counsel still refuses to participate, or counsel's participation is not effective or not in good faith, then the judge should declare a mistrial, hold counsel in contempt and report the case to the State Bar of Arizona. We believe this

[44] 137 Ariz. 541, 672 P.2d 470 (1983).
[45] Id. at 550.

> approach will best insure that a criminal defendant's right to counsel is not compromised, while at the same time deterring unscrupulous counsel from creating error to secure a mistrial or reversal on appeal.[46]

Right Objection-- Wrong Ruling

In *Buehman v. Smelker*,[47] the trial court apparently misconstrued the law in ruling on an objection and allowed a trial lawyer to pursue an improper line of examination of a witness. The court noted that when the admissibility of the evidence was "raised and passed upon adversely, opposing counsel should not continue to ask the same questions." In such case, "if counsel is right and the court wrong, he has made his record for appeal."[48] As long as the lawyer acts conscientiously and in good faith, although mistaken as to the law, the trial lawyer should not be charged with misconduct for "reasonable and respectful insistence that his view is right."[49] The court observed that it was:

> ". . . the duty of the trial court to control the conduct of the trial and to see to it that proper respect is paid to its rulings. . ."

In this context, the court further noted that trial counsel "until definitely and positively informed by the court's rulings to stop, may reasonably urge his views."[50]

---

[46] Ibid.
[47] 50 Ariz. 18, 68 P2d 946 (1937).
[48] Id at 24.
[49] Id at 25.
[50] Ibid.

COURTROOM DEMEANOR AND DECORUM

"Let them cant about decorum
Who have characters to lose."[51]

While demeanor and decorum are occasionally within the vocabulary of trial lawyers, they are truly at the heart of judicial propriety. I do not mean propriety for the sake of propriety. I mean propriety as a subset of impartially. The requirement of impartiality gives meaning to the essence of the judiciary. Justice Cardozo expressed it eloquently:

> *"One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness."*[52]

On the other hand, one of the world's most famous performing artists thought decorum to be a bad thing: "Decorum: One must not make oneself cheap here—-that is a cardinal point—-or else one is done. Whoever is most impertinent has the best chance."[53]

Public Confidence

There are a variety of Judicial Canons dealing with the demeanor and decorum. Among the most important are:

Canon 2A—"A judge shall respect and comply with
The law and shall act at all times in a manner that promotes

---

[51] *Robert Burns (1759-96); Love and Liberty,* A Cantata.
[52] *B.N. Cardozo, "The Nature of the Judicial Process, 112 (1921).*
[53] *Wolfgang Amadeus Mozart, (1756-91) Letter, 5 Sept. 1781; published in the Letters of Mozart and his Family, 2d ed. By Emily Anderson, 1966).*

public confidence in the integrity and impartiality of the judiciary.

Canon 3A1 requires that a judge "be faithful to the law and maintain professional competence in it and be unswayed by partisan interests and public clamor or fear of criticism.

Canon 3A2 requires judges to maintain order and decorum in courtroom proceedings.

Canon 3A3 calls upon the judge to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others whom he deals in his official capacity."

1. *Canon3A4 demands that a judge "accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law. . ."*

Perhaps Socrates said it best in a quote attributed to him in the American Judicature Society's Handbook for Judges:

> *"Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially."*[54]

Offensive Personalities

Most ethical codes require lawyers to give due respect to courts of justice, maintain only legal and just causes, refrain from misleading judges and abstain from "all offensive personality."[55]

The phrase "offensive personality" is of doubtful constitutional validity give the decision of the Ninth Circuit Court

[54] *See, Handbook for Judges; p. 29 (1961)*

[55] *For example, Rule 41 (g) of the Arizona Supreme Court Rules includes among the duties and obligations of the members of our bar: "to abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which he is entrusted.*

of appeals in a 1995 case.[56] *In this case a male attorney was sanctioned by a district judge for displaying gender bias in a letter he wrote to his opposing counsel, a female attorney. The sanction was based, in part, on California's Business and Professions Code which reads, in relevant part: "It is the duty of an attorney . . . to abstain from all offensive personality."*

The court held that the sanction could not be based on the California Code language as it was "unconstitutionally vague." Constitutional or not, offensive personalities ought to avoid appearances in courtrooms. They make everyone's job harder and contribute much to the lawyer-bashing frenzy so popular in this country.

Responsibility for Client Misbehavior

A trial lawyer has an obligation to advise clients as to proper courtroom decorum but is not responsible, absent encouragement or participation, if such advice is not heeded.[57] *To a limited extent, the trial lawyer's responsibility for a client's misbehavior was discussed in the "Chicago Seven" cases.*

The court said in In Re Dellinger[58] that "[a]n attorney has no affirmative obligation to restrain his client under pain of the contempt sanction, although we do not express an opinion as to the breach of professional ethics that may be involved in this situation."[59]

In the notorious *Seale* case, the court held that a lawyer does not have an obligation to advise the client about the requirements of court-room decorum, even though a further obligation to ensure that the client heeds the advice does not

---

[56] *United States v. Wunch, 1995 U.S. App LEXIS 9679 (April 28, 1995).*
[57] *See generally, ABA Lawyer's Manual on Professional Conduct, Sec. 61 (Supp. 1984, at 1501.*
[58] *461 F.2d 389 (7th Cir. 1972)*
[59] *Id. at 399.*

exist.[60]

[60] *United States v. Seale, 461 F.2d 345 (7th Cir. 1972)*

INEXPERIENCE

"Experience is the name every one gives to their mistakes."[61]

Newly Robed Judges

The vast majority of lawyers who move from the pit of the courtroom to the bench in its middle do so without fundamental change in their basic personality traits. Unfortunately, a few are immediately inflicted with "Robitis."

"Robitis" is a colloquial slur used only by trial lawyers. Presiding Judges and Judicial Conduct Committees more often think of the ailment in terms of the abuse of judicial power and discretion.

The words "power" and "discretion" are not interchangeable. Judicial discretion is a subset of judicial power. It is thought of (at least by trial lawyers) as the power to decide those matters that call for the exercise of personal judgment rather than the application of strict rules.[62]

Judicial Discretion

From a historical perspective, the leading authority on the subject of judicial discretion is R.D. Bowers. He said that the term "judicial discretion" is a misnomer because "[t]here is in reality seldom a pure strict sense that implies a power of decision in every phase, uncontrolled and uncontrollable by any

---

[61] ***Oscar Wilde (1854-1900) "The Picture of Dorian Gray,"*** **ch. 4.**

[62] For an extensive collection of materials on the topic of judicial discretion, see J.E. Smithburn, Judicial Discretion (1980).

supervisory authority."[63]

Although it may come as a surprise to the judiciary, most trial lawyers only see the abuse of judicial power or discretion at the beginning of a judge's career. As judges gain experience on the bench they seem to acquire a balanced and even temperament. One of the more fervently articulated opinions on the subject was handed down by the New Jersey Supreme Court:

> "An intoxication with judicial power which would ignore basic constitutional precepts is a wholly unacceptable syndrome that cannot be tolerated in New Jersey courts. To brook it in a single courtroom would not only degrade the courts in general but would affront the vast majority of municipal judges who perceive their courtrooms as "place[s] of justice" rather than arenas for exhibitionism by display, before an intimidated audience, of naked and illegal judicial power."[64]

The Arizona Code of Judicial Conduct provides general guidance to the judges in the exercise of their adjudicative powers. *Canon 3B* requires judges to administer justice by being "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, . . ."

The same *Canon* mandates judicial performance without bias or prejudice. The Commentary to *Canon* 3B(5) notes that judges must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

On occasion the underlying source for the abuse of judicial power or discretion lies is the unduly literal application of

[63] R.D. Bowers, Judicial Discretion of Trial Courts 16 (1931).
[64] In re Yengo, 72 N.J. 425, 371 A.2d 41 (1977).

the mandate in *Canon* 3B that says the judge "shall require order and decorum in proceedings before the judge." A very small minority of judges read only the rule and skip the Commentary to the rule:"Judges can be efficient and business-like while being patient and deliberate."

Newly Admitted Attorneys

In *Pool v. Superior Court*,[65] an experienced trial judge presided over a trial that resulted in a mistrial due to the general belligerent and argumentative attitude and improper questioning by the prosecutor. The court noted that the "atmosphere" of the trial was "perhaps . . . the result of the combined inexperience of both lawyers."[66]

In its review of the case the Arizona Supreme Court noted that in light of the "emotionality" described by the trial judge and the prosecutor's inexperience:

> "We suggest that at this point the trial judge could have called counsel to the bench and admonished him. If, as the trial judge later stated, the prosecutor was inexperienced, it was even more important to educate him with regard to what would and would not be allowed."[67]

[65] 139, Ariz. 98, 677 P.2d 261 (1984).
[66] Id. at 102.
[67] Id. at 104.

COURTROOM CONDUCT

"When angry, count ten, before you speak;
If very angry, an hundred"[68]

Attitude

An "attitude" is variously defined as (1) a position of the body or manner of carrying oneself; (2) a state of mind or feeling as in an attitude of open hostility; (3) the orientation of an aircraft's axes relative to a reference line or plane.[69] Attitudes by lawyers or judges are to be avoided just as one avoids airplanes whose attitude is out of line relative to its axes.

Attire

Courtroom attire is occasionally the subject of judicial scrutiny. Joe Pesci's leather coat in his role in "*My Cousin Vinny*" certainly angered the trial judge to the point of contempt. The largely unwritten but accepted understanding is that trial counsel should wear "conservative" or "business attire."[70]

In one of the few cases directly dealing with courtroom attire, the Alaska Supreme Court held that a trial lawyer can be required to wear a coat and necktie. Such a requirement does not offend the United States Constitution by denying personal liberty, nor does it constitute sex discrimination. The court stated that,

---

[68] *Thomas Jefferson (1743-1826) Decalogue of Canons for Observation in Practical Life, no. 10, 21 Feb. 1825.*

[69] The American Heritage Dictionary of the English Language, Third Edition, 1992 by Houghton Mifflin Company.

[70] See generally ABA Lawyer's Manual on Professional Conduct, Sec. 61 (Supp 1993, at 1341.

while a rigid dress code which attempts to dictate matters of taste and aesthetic preference would be improper, a requirement that a lawyer wear a coat and tie in court is reasonable.[71]

Teck v. Stone[72] treated the issue of female attire in the courtroom. A woman trial lawyer was ordered out of the courtroom for wearing what the trial judge described as a "mini skirt." The appellate court acknowledged the judge's authority to control dress in the courtroom but reversed the trial judge on the ground that there was no showing that the lawyer's skirt created any distraction or disrupted orderly processes.[73]

Anger

Horace said that anger was a brief lunacy.[74] *Horace's* predecessor-in-law (and in anger) said:

> "We praise a man who feels angry on the right grounds and against the right persons and also in the right manner at the right moment and for the right length of time."[75]

Angry judges are rare indeed. The few instances of courtroom hostility on record are of marginal interest (at least to trial lawyers). In a 1980 New York case a judge was disciplined for engaging in two frenzied displays of overt physical violence against two defendants (both adolescents).[76] A Wisconsin judge was disciplined for demonstrating unprivileged and

---

[71] Friedman v. District Court, 611 P.2d 77 (Alaska 1980)/
[72] 304 N.Y.S.2d 881 (N.Y. App. Div. 1969).
[73] See also, In re CeCarlo, 141 N.J. Super. 42 (1976).
[74] Horace (65-8 B.C., Epistles, bk 1, Epistle 2 (22-8 B.C.)
[75] Aristotle (384-322 B.C., The Nicomachean Ethics, ch. 4, sct 5, subsct 3 (written c. 340 B.C.)
[76] In re Kuehnel, 49 N.W. 2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980)

nonconsensual physical contact with offensive sexual overtones.[77]

In our system of adversarial justice, the office of judge is very often that of a referee. The judge is there to protect the citizenry both from government over-reaching and individual self-help.

One of the more instructive cases in Arizona on the role of the trial judge in dealing with angry lawyers is *Pool v. Superior Court*.[78] The Arizona Supreme Court sustained the trial court's order that the prosecutor's abusive, argumentative and harassing conduct was so egregiously improper that a mistrial was not only permitted, it was required. The court noted that the opening statement in the case evidently "angered" the prosecutor who "sought to ventilate his feelings to the court."[79] The court reasoned:

> "The best and most effective method to control the courtroom and prevent verbal guerrilla warfare such as that show by the record in the case at bench is a strong, impartial trial judge. . . [quoting *Wigmore* on the abuse by trial lawyers of witnesses] The remedy for such an abuse is in the hands of the judges. The disgrace of these occurrences is even more theirs than that of offending counsel; for the former have not the temptation of partisanship to sway them, and their duty to interfere is easier to fulfill that the counsel's duty to refrain."[80]

---

[77] In re Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485 (1980).
[78] 139 Ariz. 98, 677 P.2d 261 (1984)
[79] Id. at 100 wherein the court approved the trial judge's lecture to both attorneys on behavior.
[80] Id. at 103 wherein the court noted that its discussion of the trial judge's action in the case was appropriate in that he did not "sit by and allow the prosecutor full reign." The court emphasized to the bench and bar that firm action might well serve as an "ounce of prevention" that can avoid the cure of a mistrial.

When the judge on the bench metaphorically scraps the robe and dons the uniform of the courtroom combatants in an angry mood the very concept of judging is lost.[81]

Frequent use of racial epithets or ethnic or gender stereotypes demonstrates disrespect for the public in its starkest form. Although not directly harmful to any specified person, such comments exemplify, at least, an ungenerous attitude toward the targeted group. Since Judges hold a trust for all of the public, they violate their obligations—even in the absence of demonstrable bias—when they vilify or belittle certain groups.[82]

[81] Judges who are tempted to vent their anger in the courtroom but can find no precedent to do so might well turn to literature rather than law. For example: "The only justice is to follow the sincere intuition of the soul, angry or gentle. Anger is just, and pity is just, but judgment is never just." D. H. Lawrence (1885-1930), Studies in Classic American Literature, ch. 2 (1924).

[82] See, Shaman et. Al. Judicial Conduct and Ethics, Sec. 10.27.

REMEDIES FOR COURTOOM MISCONDUCT/MISTAKES

"Doctors bury their mistakes.
Lawyers hang them.
Judges hold them in contempt"[83]

Contempt

It is not an overstatement to say that the threat by a judge of holding a lawyer in contempt is far more fearsome than the threat of malpractice by the lawyer's client.

Part of the reason is that clients come and go; judges are with you for an entire career. Another part of the reason is that judges are assumed by the legal community to be "right"; clients are often wrong.

But the most significant reason lies in the unique relationship established by the system for the lawyer and the judge. Neither can do their job without the other; this interdependence breeds a core need for respect. Respect, by definition, cannot exist where one is contemptuous of the other.

No less an authority than the original Justice Harlan noted more than 100 years ago that the ". . . power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings."[84]

Contempt v. Discipline

[83] *Anonymous [except that line three is the creation of the author].*
[84] *Ex Parte Terry, 128 U.S. 289, 303 (1888).*

Trial lawyers never assert that judges lack the power of contempt. However, many believe that judges routinely confuse the need for contempt with the need for professional discipline.

That difference is important. It is thoughtfully distinguished in In re Schofield:[85]

> *"A contempt proceeding for misbehavior in court is designed to vindicate the authority of the court; on the other hand the object of a disciplinary proceeding is to deal with the fitness of the court's officer to continue in that office, to preserve and protect the court and the public from the official ministrations of persons unfit or unworthy to hold such office."*

Contempt is the exercise of a police power since it protects the court from present direct interference and annoyance in a trial or proceeding taking place before it. Professional discipline, on the other hand is intended to protect, generally, the administration of justice. The power of contempt is lodged in the court before whom an offense is committed; professional discipline is meted out exclusively by the court of last resort since it is authorized to license those in the profession. The penalty for contempt is fine or imprisonment whereas the sole penalty in connection with professional discipline is a restriction or a prohibition on one's right to practice law.

At least one appellate court has expressed the need for "judges to be ever vigilant in guarding against the erroneous use of the contempt power."[86] The court reasoned:

---

[85] *362 Pa. 201, 214 (1949)*

[86] In re Johnson, 395 A. 2d 1319 (Pa. 1978).

> "The authority of a judge to hold one in contempt, depriving as it does a person of liberty, is an authority that should be used rarely, and with extreme caution. Nevertheless, judges overly sensitive, or judges acting in pressure-laden situations, should not be required to fear automatic discipline because a contempt ruling might later be reversed on appeal. Judges have [sic] and will make mistakes. They are human beings and not robots woven from steel mesh."[87]

What trial judges occasionally misunderstand is that a contempt may constitute ground for discipline but it by no means follows that the cause for discipline must, in all cases, constitute a contempt. What judges often see as a deliberate act is in reality just a mistake (perhaps a gravely serious one but nevertheless just that: a mistake). No one should be held in contempt for a mistake.[88]

At the risk of heresy, I submit that more discipline and less contempt will serve the profession well and advance the prestige of the judiciary.

[87] Id. at 1326.
[88] It is said by the poet that mistakes are a fact of life; it is the response to error that counts. Nikki Giovanni (b. 1943) Of Liberation. St 16, in Black Feeling/Black Talk/Black Judgment (1970).

CONCLUSION

"It is the true office of history to represent the events themselves, together with the counsels, and to leave the observations and conclusions thereupon to the liberty and faculty of every man's judgment."[89]

Sir Francis Bacon's quotation always gives me pause at the end of a paper such as this. Like all trial lawyers, I fear what I say will be taken offensively if directed to the judiciary. Maybe that is yet another reason why the Bench vs. Bar conflict continues to inhibit better relations between us.

I hope that what I say does not divert the thoughtful judge from the real issue involved in the controversy. Contesting the court's power or the court's will in resolving disputes is not productive. Whining about judicial over-reaction is idle surplusage. Good judges have exercised power responsibly since Statehood. Good lawyers have advocated their positions patiently and with respect for that same period of time.

Why then are sanctions commonplace now when they were rare a decade or so ago? Why are trial lawyers more resentful of docket management by judges? Why do judges demand "more" brevity and still read less? Why do lawyers file more Rule 42(f) notices? And, why do they file them so casually?

The answers to these not-so rhetorical questions is that we have changed. That change is a complex mix of over-crowded dockets, too few judges, too many lawyers and, sadly, selection of trial advocates based on the yellow pages.[90]

---

[89] *Francis Bacon (1856-1626), Advancement of Learning, bk.2 (1605).*

[90] The constitutional right to advertise one's availability as a trial lawyer is an important facet of modern professional life. The right to do so has become, for many, a business necessity as opposed to a professional goal. Its connection to the deteriorating relationship

A relationship of trust and confidence between trial advocates and judges is an indispensable part of justice in this country. There must be a trial bench and an appellate review system to which every citizen, high or humble, rich or poor may appeal for the vindication of rights and the preservation of life, liberty and property.

That bench and those reviewers cannot exist in a vacuum. We need ethical trial lawyers who can advocate without fear of reprisal and judges who can resolve conflict without fear of reversal. Mutual respect will serve all sides well.

Respectfully submitted,

Gary L. Stuart

---

between bench and bar is pure conjecture on my part. While I am at the business of conjecturing, I cannot help but direct the reader's attention to the ethical code applicable to French advocates at the time of the French Revolution in 1790. Their code specifically precluded them from exhibiting "a sordid avidity of gain, by putting too high a price upon [their] services." Prophetically, that same code also precluded French lawyers from bargaining with their clients "for a share of the fruits of the judgment." For the full list of prohibited activities of French lawyers at the time of the ultimate sanction, to wit., the *guillotine,* see: Warvelle's Essays in Legal Ethics (Appendix B, Fred B Rothman & Co., 1902).