DUE PROCESS OF LAW FOR LAWYERS WHO CRITICIZE JUDGES

NOTES AND COMMENT ON THE LEGAL PROFESSION

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Among the primary functions of American law schools is critique of the courts and the legal profession. Members of the bar sometimes object to ivory-tower-academic-jurisprudence in legal education. Indeed, a popular article in the New York Times Magazine[1] says law students aren't taught to think like lawyers, but like law professors. If that is so, it is to be hoped that the law professors are questioning the doings of lawyers and judges. You may want to comment on or object to what you see here. Socratic questioning flourishes on interchange and I will respond here or by mail.

COURT CRITICISM AND THE ETHICAL INJUNCTION TO MAINTAIN THE RESPECT DUE TO COURTS

Preserving the independence of attorneys is as imperative as preserving the independence of judges.

A lawyer who criticizes judges needs constitutional protection, but is under "ethical" constraint to "maintain the respect due to courts."[2]

The injunction to maintain the respect due to courts ordinarily coincides with the mandate of common sense. It is more likely that lawyers concerned with community and judicial predilections will be too slow to publicize negative information about the legal system than that they will casually disparage judges or courts.[3] Occasionally, however, a concerned, foolish, angry, or malicious lawyer does disparage a judge or court. Sometimes these lawyers commit excesses of expression.

An article in this issue of the DRAKE LAW REVIEW[4] advocates the view

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1. Turow, *Law School v. Reality*, N.Y. Times, Sept. 18, 1988, § 6 (Magazine), at 52.

2. Derived from the 1908 Canons, the language is contained in IOWA CODE § 602.10112 (1989) and is part of the lawyer's oath administered upon admission to practice in Iowa and many other states.

3. "Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights." Supreme Court v. Piper, 470 U.S. 274, 281 (1985) (citing Leis v. Flynt, 439 U.S. 438, 450 (1979) (Stevens, J., dissenting)).

4. Hoye, Silencing the Advocates or Policing the Profession? *Ethical Limitations on the First Amendment Rights of Attorneys*, 38 DRAKE L. REV. 31 (1988-89).

that the U.S. Supreme Court should clarify the extent of the constitutional right of an attorney to criticize courts. The U.S. Supreme Court has not ruled on the issue,[5] but there is a conflict of non-decisional pungent quotes. Justice Harlan said, "We do not hold that lawyers, because of their special status in society, can therefore be deprived of constitutional rights assured to others."[6] Justice Stewart said, "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."[7]

The article by Mr. Hoye focuses on cases in which the attorney made disparaging remarks about a judge or judges or about courts. (The classic free press—fair trial case in which attorney comment may adversely affect the public environment in which adjudication occurs is a related but different matter.[8]) Lawyer comment about matters *sub judice* is addressed by A.B.A. Disciplinary Rule 7-107. That Rule generally prohibits speech which has a "substantial likelihood" of materially prejudicing an adjudicative proceeding. Model Rule 3.6 adopts the same general standard and prohibits some comment allowed by D.R. 7-107. The U.S. Court of Appeals for the Seventh Circuit reviewed federal court rules based on D.R. 7-107 and found them unduly restrictive, holding that the test should be more narrowly drawn so that only comments constituting a "serious and imminent threat" of interfering with a fair trial would be prohibited.[9]

It is arguable that political cases should be treated separately as well, both because incivility challenging judicial action is more likely in such matters and because the first amendment clearly contemplates political and religious liberty as special cases requiring the most vigorous protection.[10] The U.S. Supreme Court has distinguished cases along this line in connection with newspaper comment about public figures.[11]

The rationale that criticism of judges will bring disrespect on the system and adversely affect the administration of justice is the same as the argument for suppression of seditious libel—preservation of the peace of the

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5. *In re* Snyder, 472 U.S. 634 (1985).

6. Cohen v. Hurley, 366 U.S. 117, 129-30 (1961).

7. *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring).

8. *E.g.* Sheppard v. Maxwell, 384 U.S. 333 (1966) and Estes v. Texas, 381 U.S. 532 (1965).

9. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975). It is amusing to note that while *In re* Snyder, 472 U.S. 634 (1985), was *sub judice* in the U.S. Supreme Court and the American Bar Association was appearing by amicus brief, the Association itself published a story about Mr. Snyder in the *Journal*. Of course, there may have been neither a "substantial likelihood" nor a "serious and imminent threat" that the Association's article would affect the Supreme Court.

10. See the dissent of Justice Douglas which draws this distinction in Illinois v. Allen, 397 U.S. 337, 351 (1970). For disciplinary proceedings, *see In re* Sawyer, 360 U.S. 622 (1959) and *In re* Isserman, 345 U.S. 286 (1953), rev'd on rehearing, 348 U.S. 1 (1954).

11. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The Court also drew the political commercial speech distinction in *In re* Primus, 436 U.S. 412 (1978), an attorney discipline case based on solicitation of a client for a political matter by an A.C.L.U. attorney.

realm at the price of repression of the truth and silencing of discussion. That is precisely the view which has been rejected with respect to comment about public officials from the trial of John Peter Zenger to *New York Times Co. v. Sullivan.*[12] It should be no more acceptable when judges seek to silence attorney critics.

However, even if the U.S. Supreme Court were to determine that actual malice—a showing of knowing false statement of disregard for truth or falsity—were required in attorney speech cases, the problem would be only half-solved.

Due Process of Law in Hearings Before Offended Judges

In every case in which an attorney is charged with failure to maintain the respect due to courts, there is, in addition to the speech issue, a due process of law concern of serious proportions.

There is no doubt that courts have authority to maintain the minimum level of civility necessary to conduct an adjudicative proceeding.[13]

However, the contempt power, once truly regal,[14] has been substantially curtailed in the United States.[15] Except for summary findings of direct contempt allowed because such power is essential to control the courtroom, no contempt case, not even direct contempt committed in the presence of the court, is now to be tried by the offended judge.[16]

Further, a contempt punishable by more that six months in jail[17] must be tried by jury.[18]

In *In re Frerichs*[19] the Iowa Supreme Court issued a show cause order to an attorney whose comments in a brief the judges thought disrespectful. Although the case came substantially after the U.S. Supreme Court ruling limiting the contempt power,[20] the judges "tried" the issues themselves—rather than designating another court to try the matter or using either the attorney disciplinary procedures previously established by the court itself in Rule 118 or the legislatively established attorney disciplinary procedures provided in the Iowa Code.[21]

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12. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

13. Illinois v. Allen, 397 U.S. 337 (1970).

14. "[In] 1631, a man threw a brickbat at the Chief Justice after being convicted of a felony. Though he missed the judge, his right hand was cut off and fixed to the gibbet, and he was immediately hanged in the presence of the court." R. Goldfarb, The Contempt Power 15 (1963) (citing Anon. (1631) Dy. 1886). *See also Henry IV, Part II,* act 5, sc. 2.

15. Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

16. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

17. This includes multiple contempts arising in the same matter aggregating more than six months. Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

18. *See supra* note 15.

19. *In re* Frerichs, 238 N.W.2d 764 (Iowa 1976).

20. *See supra* notes 15 and 16.

21. Iowa Code § 602.10123 *et seq.* (1989).

The problem of fairness, and the appearance of fairness, in a proceeding where the judge(s) felt the sting of the offending remarks is no less when the offended court is the supreme court of a state.

What *is* more difficult is defining a procedure insulated from the influence of the offended judges in such a case. Even if the Iowa Supreme Court had sent the matter of attorney Frerichs for hearing before the Attorney Discipline Commission, it would have come right back to the court for de novo review.[22] The legislative procedure (which is applicable by its terms only to suspension or disbarment matters) also involves the supreme court, not only in the selection of judges but also in the review process.[23] It does have the advantage of a three-judge court, legislatively mandated substantive law, and prosecution by the attorney general, which might offer some insulation from the pique of the offended judge(s).[24]

No matter how difficult it may be, safeguarding procedural due process of law for attorneys whose speech offends judges in or out of court is essential whether the proceeding is denominated as a contempt or as an attorney discipline matter.

Perhaps the answer is for the courts to pursue neither contempt nor discipline proceedings to punish or regulate speech by an attorney unless the speech actually impairs the immediate function of the court as in *Illinois v. Allen*,[25] or there is, in fact and in appearance as well, an independent tribunal to try the matter as required by *Codispoti v. Pennsylvania*[26] and *Mayberry v. Pennsylvania*.[27]

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22. Iowa Supreme Court Rule 118.
23. Iowa Code § 602.10123 *et seq.* (1989).
24. *Id.*
25. Illinois v. Allen, 397 U.S. 337 (1970).
26. Codispoti v. Pennsylvania, 418 U.S. 506 (1974).
27. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).