The Intersection of Zealous Advocacy and Criminal Contempt

One of the many challenges a criminal defense attorney faces in the course of representing a client is appropriately balancing the attorney’s duty of zealous representation against the contempt power of the court. The tension between advocating on behalf of a client as forcefully as the law allows while showing the “respect due”\(^1\) to the authority of the court is a common dilemma confronting defense attorneys.

The leading authority on the issue, Prof. Louis S. Raveson, of the Rutgers University School of Law (Newark) notes that “the exercise of the contempt power, and even the potential for its exercise, can have a serious chilling effect on the vigor of advocacy. Indeed, the greatest danger of this kind of Sword of Damocles “is that it hangs – not that it drops.”\(^2\) Raveson recognizes the dilemma caused by the need of a court to maintain its authority and the need of an attorney to zealously represent her client.

Courts must have the power to enforce order and to compel compliance with their authority. Orderly proceedings and obedience of the courts’ commands are essential to the proper administration of justice. . . . If attorneys must fear that momentary antagonism, inadvertent insults, and the occasional lapses of decorum that inevitably result from zealous advocacy in the heart of courtroom battle might result in punishment for contempt, they will have little choice but the practice a more hesitant brand of advocacy, to avoid the personal jeopardy for such excesses.\(^3\)

---

\(^1\) N.C. Gen Stat. § 5A-11


\(^3\) Id. at 482.
The Duty of Zealous Advocacy and The Role of Criminal Contempt

An attorney’s duty to advocate zealously on behalf of a client is driven by constitutional requirements, professional rules of responsibility, and industry culture. Recognizing that the adversarial system of justice often leads to conflict, the Supreme Court has vowed to defend the work of zealous advocates from frivolous charges of contempt.4 Outlining the proper role of an attorney the Court writes that “[o]ur criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers.”5

United States Constitutional Requirements

The Sixth Amendment of the United States Constitution guarantees criminal defendants a right “to have the Assistance of Counsel for his defense.”6 The First Amendment of the United States Constitution protects freedom of speech.7 Together, these fundamental elements of the Bill of Rights create a judicial system where attorneys are required to represent the interests of criminal defendants, and they are allowed to do so using protected free speech even when the language used is critical of the judicial system or officers of the court. The Supreme Court, in Craig v. Harney, summarized the tension between constitutionally protected speech and the contempt power of the court:

---

5 Id. at 9
6 United States Constitution, Amendment 6
7 United States Constitution, Amendment 1
The history of the power to punish for contempt . . . and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.8

There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.9

[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.10

The first of the three quotations above describes an “imminent threat” test that is to be used when evaluating contemptuous language in the courtroom. In Craig, the Court considered an appeal of criminal contempt convictions from “a publisher, an editorial writer, and a news reporter of newspapers published in Corpus Christi, Texas.”11 The newspaper employees were covering the case of Jackson v. Mayes where Jackson was attempting to reclaim possession of a building from Mayes (who was represented by an agent because he was then a member of the armed services) due to nonpayment of rent. The presiding judge refused four times to accept the jury’s verdict in favor of Mayes. Eventually the jury returned a verdict for Jackson but the jury noted that it “acted under coercion of the court and against its conscience.”12 The alleged contemnors published reports about the case that portrayed the presiding judge in unfavorable light. According to the Supreme Court’s opinion, the newsmen produced “rather sketchy and

8 Craig v. Harney, 331 U.S. 367, 373 (1947)
9 Id. at 374
10 Id. at 376.
11 Id. at 369.
12 Id.
one-sided report[s]” of the case. Additionally, the published reports accused the presiding judge of being “high handed,” described the proceedings as a “travesty on justice,” and explained that the public was “outraged.” Interestingly, the presiding trial judge was an elected layman and was not an attorney. *Craig* establishes that the Constitutional guarantee of freedom of speech may only be impinged upon by the judiciary when the speech presents a real and immediate threat to the effective administration of justice by the courts. Because speech is protected by the constitution, judicial officers are required to yield to statements that they may find offensive but that do not obstruct the functioning of the court.

Over time, the Supreme Court has considered instances of alleged contemptuous speech occurring both outside of (*Craig*) and within (*In re McConnell*14) courtrooms. Regardless of whether speech occurs inside a courtroom or not, the Supreme Court has held that the First Amendment protects individuals from convictions for contempt arising from speech except when the language used is so inflammatory that “[t]he fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice.”15 Essentially, the “imminent threat” test applies to alleged contemptuous speech regardless of whether the offending words are uttered inside or outside of an actual courtroom. The Supreme Court, understanding that an attorney has a duty to represent a client’s interests as forcefully as possible within the bounds of the law, established a legal framework that requires either actual obstruction of or an imminent threat to the administration of justice to be shown in order to sustain a contempt conviction.

---

13 Id.
In *Holt v. Virginia*, two attorneys were convicted of contempt based upon motions filed for change of venue based upon claims of local prejudice and the bias and intimidating conduct of the trial judge. The United States Supreme Court reversed the conviction noting:

The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. . . . And since ‘A fair trial in a fair tribunal is a basic requirement of due process,’ . . . it necessarily follows that motions for a change of venue to escape a biased tribunal raise constitutional issues both relevant and essential. . . . Consequently, neither [of the two lawyers involved] could consistently with due process be convicted for contempt for filing these motions unless it might be thought that there is something about the language used which would justify the conviction.”

The court noted that the words used in the motions “were plain English, in no way offensive in themselves, and wholly appropriate to charge bias in the community and bias of the presiding judge.” The Court rejected the State’s arguments that the motion for change of venue was not in the proper form and that the charges of bias were false. The Court found the motion for change of venue to have been proper and the falseness of the charges irrelevant. The truth or falsity of the allegations had never been adjudicated. The Court concluded:

Our conclusion is that these petitioners have been punished by Virginia for doing nothing more than exercising the constitutional right of an accused and his counsel in contempt cases such as this to defend against the charges made.

Commenting on this case, Raveson states that the Supreme Court has taken the position that “the content of legitimate advocacy appears, under [Holt v. VA], immune to the contempt power, because, by definition, such advocacy cannot be deemed obstructive of justice.” This framework theoretically affords attorneys relatively generous behavioral latitude in arguing on behalf of clients.

---

16 381 U.S. 131 (1965).
17 Id. at 136-37.
18 Id. at 137.
In *In Re McConnell*, the Supreme Court considered the appeal of an attorney who had been convicted of contempt for telling the presiding judge “we have a right to ask the questions, and we propose to do so until some bailiff stops us” in an attempt to preserve important issues for appeal and zealously represent the client. The Court alluded to the Sixth Amendment’s guarantee of assistance of counsel as well as the established high threshold for contemptuous language in the following observations:

[W]e cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts. *The arguments of a lawyer in representing his client’s case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.*

While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as to actually obstruct justice, *it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients’ cases.* An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. *To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case.* (emphasis added)

In *McConnell*, the Supreme Court explains that preventing actual obstruction of courtroom business is important and a primary goal, but recognizes that it is “essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients’ cases.” Pressing their point further, the Court added that an “independent judiciary” as well as “a vigorous, independent bar are both indispensable parts of our system of justice.”

Raveson calls the Supreme Court’s recognition in *McConnell*, and subsequent similar cases –

---

21 Id. at 235.
22 Id.
23 Id.
Professor Raveson suggests, with the support of federal case law, that, because advocacy enjoys constitutional protection, “the sixth amendment and due process rights of a criminal defendant arguably demand greater latitude for defense counsel in criminal cases.” When one considers the position taken by the Supreme Court in *Craig* and *McConnell*, it is difficult to disagree with Raveson.

In a second expansive article dealing with advocacy and contempt, Professor Raveson restates his view of the Constitutional dictate laid down by the Supreme Court that judicial contempt power should be employed “only to punish actual obstructions of the administration of justice.” He notes that there is certainly a core of unprotected conduct, including instances in which individuals attempt to subvert judicial processes by illegal acts or acts wholly outside the established rules of procedure. Included would be the obvious: jury tampering, witness bribing, hurling an object at the prosecutor. Perhaps not so obviously, Raveson includes insults to a judge. But importantly, Raveson seeks to develop rules that provide sufficient breathing room for advocacy and provide adequate notice to attorneys of when they have stepped over the line.

In order to provide both breathing room and notice, Raveson finds case law support for the proposition that only intentional conduct is contemptuous. The Seventh Circuit Court of Appeals, in a case arising out of the infamous Chicago Seven trials, held that intent to obstruct justice was essential to a contempt finding and that “an attorney possesses the requisite intent only if he knows or reasonably should be aware in view of all the circumstances, especially the

---

24 Raveson, *supra* note 2 at 506.
25 Id. at 512
27 Id. at 758.
heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth."  

Similarly the California Supreme Court, has discussed the needed balancing in a useful way. In *In re Buckley*, the court stated:

[W]e have warned that the judge's ultimate weapon of the summary contempt power 'must be exercised with great caution, lest it stifle the freedom of thought and speech so necessary to a fair trial under our adversary system. That system is built upon the belief that truth will best be served if defense counsel is given the maximum possible leeway to urge, in a respectful but nonetheless determined manner, the questions, objections, or argument he deems necessary to the defendant's case: ‘He has the right to press a legitimate argument and to protest an erroneous ruling.’ [Citation] Indeed, so essential is this ‘fundamental interest of the public in maintaining an independent bar’ . . . that ‘a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly processes.’ [Citations] When, however, aggressive advocacy gives way to insolence and disrespect towards the court and particularly when it degenerates into ‘impertinent, scandalous, insulting or contumacious language reflecting on the integrity of the court. . . . it is the trial judge’s ‘bound duty to protect the integrity of his court’ . . .  

I. Criminal Contempt in North Carolina

A. Statutory Law

---

28 In re Dellinger, 461 F.2d 389, 400 (7th Cir. 1972).
A wide range of behaviors, some specific but many broad, are defined as criminally contemptuous conduct in North Carolina.\(^{30}\) Subsection (a)(1) of the relevant statute gives a particularly broad definition explaining that contemptuous behavior is “willful behavior committed during the sitting of a court and directly tending to interrupt its proceeding.”\(^{31}\) Similarly unhelpful, subsection (a)(2) of the statute explains that “willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority” is an act of criminal contempt.\(^{32}\) Following the same trend, subsection (a)(3) of the statute defines criminal contempt as “willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.”\(^{33}\)

Frankly, none of the definitions of contemptuous behavior provided in the statutes are of much help to an attorney who is concerned about the intersection of zealous advocacy and criminal contempt. Each definition describes a broad range of activities that will necessarily be subjectively perceived.

Not only are contemptuous activities broadly defined, the punishment for engaging in such behavior may be imposed quickly and with little opportunity to mount a defense. In North Carolina, “the presiding judicial officer may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.”\(^{34}\) Attorneys charged with contempt have the right under the law to “summary notice of the charges and a summary opportunity to respond.”\(^{35}\) These procedural protections are cold comfort,
however, for the alleged contemnor; the requirements of satisfactory “notice” and “opportunity to respond” are minimal. According to the Official Commentary to the North Carolina statute, notice and opportunity to respond are “intended not to provide a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.” The statutory provisions of the summary contempt power of judicial officers offer little direction for attorneys and judges as to what behavior is contemptuous yet judges have broad authority to use the contempt power.

B. Case Law

Similarly to the statutory language, North Carolina case law provides inadequate guidance about what acts are contemptuous and what procedure is sufficient in court proceedings regarding contempt. One important United States Supreme Court case dealing with contempt came out of this state. In In re Little, the Court considered an appeal, arising from a North Carolina case, from a pro se criminal defendant who had been convicted of “committing a direct contempt of a judge.” Little “argued in his closing statement that he was a political prisoner, accusing the court of prejudice.” The Supreme Court reversed the contempt conviction explaining that the tone and language used by Little in his closing argument did not rise to the level of contempt (subsequent to the contempt conviction Little apparently called the presiding

36 N.C. Gen. Stat § 5-14 (Official Commentary), See also In Re Owens
37 In Re Little, 404 U.S. 553 (1972).
38 Raveson at 530.
Pointing to precedent for support, the court cited language from *Craig v. Harney*, discussed above:

The vehemence of the language used is not alone the measure of the power to punish for contempt. *The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice.* The danger must not be remote or even probable; it must immediately imperil (emphasis added).

The “imminent threat” test espoused by the court is in line with similar cases which describe a “clear and present danger” standard to potentially contemptuous language, and both tests seem to favor wide latitude for language usage by courtroom advocates. The Supreme Court’s position is that even a “likely threat to the administration of justice” is insufficient for a contempt conviction.

However, the practical reality for advocates in North Carolina courts is a contempt law landscape fraught with peril that seemingly offers less protection for advocacy behavior than the level proscribed by the United States Supreme Court. This contradiction is particularly disconcerting because one of the Supreme Court decisions dealing directly with the advocacy and contempt issue and supporting the advocate-friendly “imminent threat” test is the North Carolina case *In Re Little* discussed above. In *State v. Randell*, the North Carolina Court of Appeals explains that “trial court judges must be allowed to maintain order, respect and proper function in their courtrooms.” To this end, the court has held that acts which, in the minds of some, may not rise to the level of an imminent threat to the administration of justice are

---

41 Raveson, *supra* note 2.
nonetheless contemptuous. In an effort to protect order, respect, and proper function within courtrooms, the Court of Appeals bluntly asserts that even “failure to stand when one is capable of doing so is indeed a contemptuous act in North Carolina.” Some may find it hard to accept that failure to stand when one is capable poses an imminent threat to the administration of justice. Perhaps the incongruence between the courts can be reconciled in that the Supreme Court considered alleged contemptuous language whereas the Court of Appeals was faced with non-verbal contemptuous behavior, but this technicality ignores the practical reality that failing to stand in an upright position likely poses little threat to the administration of justice in the courthouses of our country.

Interestingly, North Carolina Courts have as little patience for failing to sit as they do for failing to stand. In In Re Paul, defense counsel Jerry Paul was found to be in direct contempt of court at the conclusion of a murder trial in Wake County Superior Court for behavior during the course of jury selection. The conduct in question involved the defense attorney refusing to sit down while repeatedly being told to do so while making verbal objections. On appeal, the contempt conviction was affirmed and the court held that due process requirements were met (although the requirements are minimal as discussed below).

Some greater insights into what was going on in the Paul case, may be gleaned from the decision of the Fourth Circuit in denying the attorney habeas corpus relief from his contempt conviction. In Paul v. Pleasants, the court stated:

We agree with the Court of Appeals of North Carolina and the district court below that appellant's conduct clearly exceeded the bounds of vigorous advocacy. The conduct would have been disruptive absent the self-restraint exercised by the court. Appellant had been expressly warned by the judge not to continue his vocal criticisms of the court's

---

43 Id.
rulings once rendered, yet persisted. We further agree with the Court of Appeals of North Carolina that the trial court did not “invite” appellant's disrespect. Nothing indicates that the court “badgered” or “provoked” appellant. To the contrary, appellant quite clearly informed the court that it would not “worry him” to be held in contempt.

Appellant contends that his conduct constituted vigorous and effective advocacy constitutionally protected by the First, Fifth, Sixth, and Fourteenth Amendments. He argues that when the trial judge announced he was “busting up” (i.e. terminating the broad voir dire examination) that he did nothing more than respectfully request reconsideration by the court of that adverse ruling. Appellant adds that his conduct was effective advocacy since the court partially reversed its ruling on the scope of voir dire allowing certain questions to at least be asked, but not answered.

We find no constitutional infirmity in the contempt citation. If the trial court's ruling regarding the narrowing of the scope of permissible voir dire was unclear, the remedy was to seek clarification of the ruling at that time not to continue to argue with the court after the ruling, express personal disgust with the very trial itself, and turn one's back on the court to make speeches to the news media in a loud, disrespectful and angry voice. Conduct of this nature has long been expressly condemned.

The Paul contempt conviction took place after a widely publicized trial in which there had been numerous disruptions. The lawyer in question, Jerry Paul, had continually played to the crowd and to the press. The North Carolina Court of Appeals and the Fourth Circuit both must have been aware of all that had gone on at the trial and, rightly or wrongly, it is not surprising that the higher courts would find the necessary intent to disrupt the proceedings.

A case much in the headlines several years later is another example of both the trial court and the Court of Appeals dealing with a lawyer who had helped generate considerable publicity for the defendant. In In re Nakell, the court dealt with an incident in a hearing concerning the representation of Lumbee Indian activist Eddie Hatcher, who was charged, among other things, with the taking of hostages at a newspaper office. Attorney Barry Nakell

---

sought to participate in hearing in which Hatcher was seeking to fire his court appointed lawyer and to represent himself. Nakell asked to be heard at the hearing and was denied that opportunity by the presiding judge. Nakell continually pressed the matter to the delight of Hatcher’s supporters in the courtroom. Hatcher himself intervened hurling epithets and eventually a pen at the judge. Both Nakell and Hatcher were escorted from the courtroom.

The court upheld a finding of contempt against Nakell, stating:

The record before us manifests that Nakell intended to disrupt the proceeding wherein he, as an interloper, continually interrupted the proceeding by attempting to argue matters not then being considered. The trial judge repeatedly ordered Nakell to sit down and be quiet. Nevertheless, Nakell willfully disobeyed the order and continued to interfere and disrupt the proceeding. Nakell not only intended that his conduct should disrupt the proceeding, it did in fact do so. His language, conduct, and attitude precipitated the violent outburst from Hatcher and applause from Hatcher's supporters in the courtroom. Hatcher's outbursts halted the proceeding and he had to be removed from the courtroom, bound and gagged. We cannot imagine a scenario more calculated to disrupt the proceeding and to impair the respect due the authority of the court.46

The North Carolina Court of Appeals has also provided some guidance for the sufficiency of procedural requirements for contempt proceedings. In the Nakell case, the court held the hearing on criminal contempt two days after the incidents giving rise to the charges. The court found that the hearing was “substantially contemporaneous” with the incidents within the meaning of the North Carolina statute.47 The court noted that it found no conceivable error to prejudice to Nakell based on the timing of the hearing stating that the hearing had been continued for two days “to afford Attorney Nakell adequate opportunity to respond to the direct criminal contempt charge.”48 Apparently, the protections of “notice” and “opportunity to respond”

46 104 N.C. App at 651, 411 S.E.2d at 166-67.
47 G.S. 5A-14.
48 In re Nakeel, 104 N.C. App. At 649, 411 S.E. 2d at 165-66.
afforded to attorneys who find themselves in jeopardy of being found in contempt are so minimal that even the mere use of the word “contempt” is not required at any point in the contempt adjudication.49

Arguably, the type of behavior occurring in *Paul* and *Nakell* is the type that should fall into the constitutionally protected buffer zone described by Prof. Raveson. Because the potential consequences for the defendant facing serious criminal charges are so severe, the interests of justice are best served by allowing the defense attorney to slightly cross the line between advocacy and contempt without being jailed. An attorney who is afraid of being held in contempt is unlikely to provide the most zealous representation possible for his client. Viewed in that light, rulings such as in the *Paul* and *Nakell* cases may have a chilling effect on zealous advocacy in North Carolina because attorneys are forced to restrain their zeal in order to avoid contempt charges. On the other hand, both cases may simply be a product of the sensational proceedings in which they occurred and the especially flamboyant behavior of the lawyers involved.

**Rules of Professional Conduct**

The preamble to the Rules of Professional Conduct that govern the behavior of attorneys in North Carolina outlines many of the roles and duties of lawyers practicing within the state. Section two of the preamble identifies “representational functions” of an attorney and provides guidance about properly performing each of these functions.50 According to the Rules, while performing the function of “advisor” an attorney must explain to a client the “practical

---

50 N.C Rules of Professional Conduct 0.1 [2]
implications” of a “client’s legal rights and obligations.” While operating in the capacity of “negotiator” an attorney “seeks a result advantageous to the client but consistent with the requirement of honest dealing with others.” Perhaps most importantly, as an “advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”

The Rules seem to contemplate that an attorney performs these “representational functions” independently of each other. In negotiations an attorney will be honest while seeking an advantageous outcome for their client. As an advisor an attorney will inform a client of their rights and the practical implications of whatever circumstance in which lawyer and client find themselves. As an advocate an attorney will be unrelentingly zealous in asserting the client’s position within the rule of the law. Attorneys may find grossly simplistic the assertion that an attorney’s roles and corresponding responsibilities can be as neatly divided as the Rules suggest. The truth of the matter is that, in the real world, an attorney performs each of these “representational functions” simultaneously. This practical reality presents tension in itself. An attorney must make strategic decisions about how best to achieve a favorable outcome for a client. The lawyer’s strategy often requires a blend of each of the representational functions outlined by the Rules.

The rules are similar unhelpful in predicting the kind of conduct that might give rise to a contempt citation. In the Preamble, the Rules state:

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when

\[51 \text{Id.} \]
\[52 \text{Id.} \]
\[53 \text{Id.} \]
\[54 \text{N.C. Rules of Professional Conduct 0.1[5].} \]
necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

Rule 3.5, dealing with the impartiality and decorum of the tribunal, states:

(a) A lawyer shall not:

. . .

(4) engage in conduct intended to disrupt a tribunal, including:

. . .

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal.

Rule 8.4, dealing with misconduct of a lawyer, provides:

It is professional misconduct for a lawyer to:

. . .

(d) engage in conduct that is prejudicial to the administration of justice;

. . .

(g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3 [dealing with candor toward the tribunal].

Although broadly stated, some general guidance may come from the American Bar Association Standards relating to the Administration of Criminal Justice, Defense Function:

Standard 4-7.1 Courtroom Professionalism
(a) As an officer of the court, defense counsel should support the authority of the court and the
dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting
a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the
courtroom.

(b) Defense counsel should not engage in unauthorized ex parte discussions with or
submission of material to a judge relating to a particular case which is or may come
before the judge.

(c) When court is in session, defense counsel should address the court and should not
address the prosecutor directly on all matters relating to the case.

(d) Defense counsel should comply promptly with all orders and directives of the court,
but defense counsel has a duty to have the record reflect adverse rulings or judicial
conduct which counsel considers prejudicial to his or her client's legitimate interests.
Defense counsel has a right to make respectful requests for reconsiderations of adverse
rulings.

(e) Defense counsel should cooperate with courts and the organized bar in developing
codes of professionalism for each jurisdiction.

Industry Culture

Regardless of whether zealous advocacy is required by the Constitution or by rules of
professional conduct, many criminal defense attorneys likely would say that the culture of their
profession and their personal convictions (hopefully of the moral rather than criminal variety)
demand unyielding dedication to the advancement of their clients’ interests. Answering the
accusatory question “how do you defend those people?” Johnnie Cochran Jr. responds by saying
that defense attorneys “proudly stand up and move forward with the advocate’s creed firmly in
mind” and goes on to recite the “advocates creed” which he describes as an “unofficial oath”
supported by members of the defense bar.55 The advocate’s creed speaks in powerful language
of an advocate’s “duty to [his] client” to resist “storms of human hate and passion” and Cochran

uses the creed as a call “to fight for fairness, humanity, and basic civil rights on behalf of our clients.” The sentiment expressed by Cochran and the advocate’s creed is common among many defense attorneys. In the minds of many defense attorneys and within the industry as a whole, anything less than truly zealous advocacy is unacceptable at best and shameful at worst.

**Synthesis and Suggestions**

For the sake of discussion, we can consider the position between the rock (zealous advocacy) and hard place (criminal contempt) as an unusual intersection where an attorney’s duty is at odds with a particular court’s sense of the proper administration of justice. It is at this intersection where Professor Raveson suggests that “perhaps a criminal defendant’s constitutional rights to a fair trial permit greater interference with the administration of justice by defense counsel’s advocacy before her conduct should be deemed contemptuous.” This point is likely broadly accepted within the defense attorney community. Who would not want a little more leeway in the courtroom? It is clear that this area of contempt law needs to be more fully developed so that attorneys do not overcompensate by curtailing their advocacy in the interest of avoiding contempt sanctions. Despite the likelihood that the relevant contempt laws may evolve at a pace too slow to make a meaningful difference in the behavior of currently practicing attorneys, there are still some ways that attorneys may be able to smoothly navigate the dangerous intersection of advocacy and contempt.

One strategy is that when an attorney finds themselves in a position where the court has severely and, arguably unfairly, limited her right to argue, the attorney should preface any further objection with: “Your Honor, I have tremendous respect for this court, but I am constitutionally

---

56 Id.
57 Raveson, supra note 2 at 512-13
obliged by the First and Sixth amendments to make this objection in the interest of zealously
advocating on behalf of my client.” However, it is critical that the attorney who is brave enough
to offer objections after being explicitly instructed not to do so be confident in their legal
judgment. There is a tremendous difference between thinking that a judge has made an
erroneous ruling and knowing that a judge has made an erroneous ruling. If an attorney is not
certain about the accuracy of the ruling, then it may be best not to transition from push to shove.

In the words of an experienced criminal defense attorney: “A true advocate will bump up
against the line between advocacy and contempt from time to time. Use your best instincts and
move forward. Don’t look back for too long.”
HYPOTHETICAL NUMBER ONE

You are representing Clyde Whitney on a probation violation. Whitney is well known regular in the courthouse, having been charged and convicted of numerous misdemeanors and low level felonies over the years. While he frequently gets probation for his charges, he has not always been the best probationer (although he is not an absconder or anything like that). This time the violations primarily concern missed appointments. Whitney has told you that he has a good reason for missing two of the five appointments he missed: one time he got caught in traffic because of a major accident on the road leading to the courthouse and the other time his car broke down. He claims to have good reasons for missing the other appointments, but can’t really articulate them. Still, you have gotten a news report verifying the accident for one meeting, and a receipt from the mechanic verifying he was having car trouble the day he missed another. The probation officer Jane Drake wants Whitney continued on probation, but to serve some jail time to teach him a lesson. You have talked to your client, and he is adamant that he should not have to spend a day in jail for these violations and he wants to fight them. Although you think that the evidence explaining these two missed appointments will ultimately not convince the judge not to violate him, you have promised your client to vehemently challenge the violations and resist any effort for him to spend any time in jail. When you come to court, the following occurs:

ADA: The next case on the probation calendar is State vs. Clyde Whitney.

THE COURT: May I see counsel and Ms. Drake at the bench.

(The following conference was held at the bench).

THE COURT: Ms. Drake, what has Clyde done now?
DRAKE: He has been missing appointments, is behind on his money, stuff like that. I am mainly concerned about him missing his appointments.

DEFENSE COUNSEL: You honor, he has an explanation for that.

THE COURT: Be quiet right now. I want to hear from Ms. Drake. What do you think we should do?

DRAKE: I want to continue him on probation, but I think we need to get his attention. I think he should have to do some jail time.

THE COURT: I think I agree. Clyde is not a bad kid, but we got to quit enabling him. I think some jail time will do him good. That is what I am going to do.

DEFENSE COUNSEL: I need to be heard about why he missed those appointments. We have some evidence---

THE COURT: Look, Clyde always has excuses. I have been dealing with him for ten years. I think I know him better than anyone in the courtroom, including you. It’s time we get serious with him. It’s time that we quit making excuses for him.

DEFENSE COUNSEL: Your honor I need to be heard. There are explanations.

THE JUDGE: You’ll have your chance to be heard.

(The following will be heard in open court).

THE COURT: Ms. Drake, could you tell us the violations.
MS. DRAKE: As detailed in the violation reports, Mr. Whitney has repeatedly missed appointments, and is behind on his moneys.

THE COURT: Mr. Whitney, I am finding that you have willfully violated your probation. But I have talked with counsel and Ms. Drake and we have decided—

DEFENSE COUNSEL: You honor, I need to be heard.

THE COURT: Be quiet, counsel. Clyde, you are not a bad guy. But you have got to quit thinking there are no consequences in your life. Therefore, you are going to spend the next three weeks in jail. Hopefully, that will teach you about the importance of probation.

DEFENSE COUNSEL: Your honor, we have an explanation for why he missed those appointments. I need to be heard.

THE COURT: I don’t want to hear his excuses. I have made my decision. If you have a problem with it, appeal. But I don’t want to hear one more word from you. I am doing what is best for your client.

DEFENSE CONSEL: I have evidence I need to pre---

THE COURT: Be quiet. Madam, clerk it is the judgment of the court that the defendant is in violation—

DEFENSE COUNSEL: I need to be heard.

THE COURT: I have heard enough. After lunch we will be hearing a contempt hearing in this matter.
Defense counsel is representing a forty-two year old man at trial charged with first degree rape and kidnapping. The alleged victim, a twenty-five year old woman, claims that she was abducted at knife point while walking home from a friend's house late at night, and was raped in an abandoned house. The defendant did not make any statements to the police, but has told his attorney that the alleged victim was a prostitute who had sex with him in exchange for a promise of money. He says that she is mad at him because after their sexual encounter, he refused to pay her. After reviewing the discovery and investigating the case, counsel's theory at trial is consistent with the defendant's story.

Counsel discovered that four years before this incident, the alleged victim was arrested twice within a four month period on prostitution charges. One of the charges was dismissed for insufficient evidence, and she pled guilty to disorderly conduct for the other charge. She has no other criminal record. Counsel filed a motion under North Carolina's rape shield law to be able to bring out the alleged victim's prior charges for prostitution and to question her about whether she had a history of prostitution. After a hotly contested in camera hearing, the trial judge ruled against the defense, and ordered counsel not to mention the alleged victim's prior arrests, or to attempt to infer or imply that she had a prior history of prostitution. Although, counsel believes the ruling is both erroneous and devastating to the case, counsel still plans to pursue its original theory, even if it means calling the defendant to testify. Because the defendant is going to testify that his sexual encounter with the alleged victim involved payment for sex, counsel still wants to ask potential jurors their views on prostitution.
Jury selection involved group voir dire with all perspective jurors either in the jury box or in the audience waiting to be called. After the state passed 12 jurors, the following occurred during defense questioning:

DEFENSE COUNSEL: Juror number one. Let me ask you this. What are your feelings about prostitutes who accuse their customers of rape?

PROSECUTOR: Object---

THE COURT: Sustained. Counsel my ruling in camera was perfectly clear. I expect you to follow it during jury selection, opening statements, evidence, the entire trial. Do you understand me?

DEFENSE COUNSEL: I don't think I was violating the court's order. I think my question was appropriate even considering the court's order.

THE COURT: The objection is sustained. Don't violate my in camera order again. You may proceed.
DEFENSE COUNSEL: Juror number one, can you tell me in general your feelings about prostitution and the laws of this State governing prostitution?

THE COURT: Sustained. Counsel, I've warned you. You need to follow my ruling. I am not going to tolerate this type of questions any more. I am going to take action if you continue to violate my ruling.

DEFENSE COUNSEL: Your honor, with all due respect, I don't think I am violating your order. But I understand what you are saying. I will move on.

Juror number one, would you hold it against my client if you found out that he was trying to employ the services of a prostitute the night of the alleged offense in this case?

THE COURT: That's it. I have had enough. This jury has been tainted. Perspective jurors, please return at this time to the jury room for another case. Madam clerk, I would like to schedule a contempt hearing in this case.
Chris Griffin is charged with several counts of larceny. Based on his record level and the class of felony charged, a conviction will mean that a judge would have discretion to give the defendant anywhere from probation to an active sentence of up to eight months. Trial counsel feels that Griffin has a triable case, and advises his client to go to trial. One of the reasons for advising him to go to trial is that given the circumstances of the case, almost no judge would ever give him an active sentence. However, shortly after Griffin's trial begins, the judge calls counsel back into chambers. She suggests strongly that the State offer Defendant a deal where Griffin could plead to only one felony and get supervised probation. The State agrees to make the offer, and the judge tells trial counsel that the defendant really needs to take the deal. Trial counsel does not believe it is a very good deal given the State's problems with their case and Defendant's prior criminal record, but informs the client of the offer. Griffin tells his lawyer to reject the deal. When trial counsel informs the State and the judge of his client's decision, the judge tells him, “Your client and you are going to regret that decision.” During a break, trial counsel talks to other defense attorneys who have tried cases in front of this judge. They say that the judge means that the judge is going to do everything he can to get the defendant convicted and will give him every day he can if he is convicted. One of the attorneys tells trial counsel that the prosecutor and the judge are good friends from the time the judge worked in the District Attorney's office several years ago. She says the two of them always talk, and she speculates that the reason why the judge did not press the state into offering a misdemeanor is because of something the prosecutor might have told the judge. Despite what the attorneys told trial counsel, the attorney continues to advise the client to decline the deal and proceed with trial. Griffin follows his attorney’s advice, and rejects the deal.
The trial goes exactly as the attorneys predicted it would. The judge makes every ruling against the defense, and in trial counsel's mind, some of the rulings are absolutely shocking. In fact, some of the most significant rulings actually come from the judge *ex moro motto* without any motion or suggestion from the State. The defendant is convicted of all charges. While trial counsel is convinced that almost any judge in the state would still give the defendant probation in this case, counsel is convinced that this judge will now give the client an active sentence. Trial counsel believes this would be a truly unjust result, and Defendant's only hope would be for a different judge to consider the case.

The following occurred right before sentencing:

THE COURT: Is the defense ready to proceed to sentencing.

DEFENSE COUNSEL: No your honor. At this point we are requesting that you recuse yourself from participating in the sentencing portion of this case. I have prepared a written motion to that effect.

THE COURT: What is the basis for your motion?
DEFENSE COUNSEL: Your honor, with all due respect, we believe that you have a vendetta against our client because we refused to take the deal you tried to broker between us and the State. Ever since we have done that, your rulings have been so one sided and blatantly wrong that they cannot be considered to be reasoned jurisprudence. Since I do not believe that you are actually that incompetent, the only possible explanation for your rulings is that you are completely biased against Mr. Griffin because he dared to reject your brokered offer. I also have reason to believe that your bias against my client is related to improper ex parte communications that you and your good friend, the assistant DA, have had about Mr. Griffin. Therefore, I believe that this travesty of a trial will only be further hampered if you are allowed to sentence him. Therefore, I am simply requesting that a new judge be assigned for sentencing purposes.

THE COURT: Madam clerk, could you see what judges are available to hear Mr. Griffin’s motion immediately. Also, I would also like to find a judge to hear a contempt hearing as soon as possible.