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# Attorneys - Contempt of Court by Absence from Courtroom - Direct or Indirect

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## CASE NOTES

### ATTORNEYS—CONTEMPT OF COURT BY ABSENCE FROM COURTROOM—DIRECT OR INDIRECT

The defendant is an attorney at law who, on April 17, 1964, had several matters pending in the Superior Court of Los Angeles County. After completion of one matter, the defendant was notified of the jury's return in another case, and he immediately left the court in which another of his cases was to be heard in order to receive the returned verdict in yet another case. When the second case in the first courtroom was called, the attorney did not appear. The trial judge cited the defendant for contempt, and after two hearings on the matter, the contempt order was made final. The defendant petitioned for certiorari, and the Supreme Court of California held that the defendant's conduct amounted to direct contempt, and the two-day jail sentence was affirmed. *Arthur v. Superior Court of Los Angeles County*, 42 Cal. Rptr. 441, 398 P.2d 367 (1965).

The Supreme Court of California was called upon to decide whether the defendant's conduct constituted contempt, and if it was, whether the contempt was direct or indirect, civil or criminal.<sup>1</sup>

Historically, the power of the courts to punish for contempt dates back to the early days of England. The purpose of the contempt power was to assure the "efficiency and dignity of, and the respect for the governing sovereign."<sup>2</sup> Every contempt of court was considered indirectly a contempt of the King. As time went on, the courts claimed the contempt power was an inherent right, and it became part of the judicial process.

In the United States, the Judiciary Act of 1789<sup>3</sup> was the first federal legislation concerning contempt. This act allowed federal courts to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before the same."<sup>4</sup> Subsequently, the individual states enacted their own contempt legislation, and they joined the federal courts in defending the necessity of the contempt power as an essential means of deterring obstructions to the administration of justice. In *Ex Parte Robinson*,<sup>5</sup> Justice Field held that

<sup>1</sup> The other issue presented in this case is the procedure followed by the court. This issue will be mentioned only briefly as it does not directly enter in this discussion.

<sup>2</sup> GOLDFARB, *THE CONTEMPT POWER* 9 (1963).

<sup>3</sup> Judiciary Act of 1789 § 17, 1 Stat. 83.

<sup>4</sup> *Ibid.*

<sup>5</sup> 86 U.S. 505 (1873).

“the power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.”<sup>6</sup>

Contempt of court can be defined as any act which is calculated to embarrass, hinder or obstruct a court in the administration of justice, or which is calculated to lessen its authority or dignity. Contempt may be broken down into four classifications: direct contempt, which is an act committed in the presence of the court; indirect contempt, or constructive or consequential contempt, which is an act committed outside the presence of the court; civil contempt, which is the disobedience of a court order designed to help the opposing party to the litigation; criminal contempt, which is the commission of a disrespectful act directed against the court itself. There must be some combination of the above classifications. The Supreme Court of California spoke only of direct or indirect contempt and did not label whether it was civil or criminal. Contempt is either direct civil or direct criminal, or indirect civil or indirect criminal.

All states agree that the absence or tardiness of an attorney from the courtroom at an appointed time may be punishable as criminal contempt. The act of an attorney being absent from a courtroom goes to the very heart of the definition of contempt; that is, a hindrance and obstruction to the administration of justice. The courts differ, however, as to whether such a situation is direct or indirect criminal contempt. Where an attorney's absence is considered as direct criminal contempt, punishment is usually summary and immediate, and affidavits are not necessary. Indirect criminal contempt is punishable only after the charge is made (the most common means is by affidavits), and the accused has an opportunity to be heard and to offer an explanation. If the Court accepts the explanation, the accused will not be held in contempt.<sup>7</sup>

The California Supreme Court decided that Arthur's conduct, his absence from the courtroom, constituted direct contempt, reasoning that the defendant's absence was in the presence of the court. Although apparently much time was taken with the consideration of whether the defendant's conduct amounted to direct or indirect contempt, no mention was made of whether this conduct amounted to civil or criminal contempt. The failure of the attorney to be present in court, when he has the ability to do so, is an obvious act of disrespect to the court and would constitute criminal contempt.

The decision in the *Arthur* case represents the accepted view of the State of California on the effect of an attorney's absence from the court-

<sup>6</sup> *Id.* at 510.

<sup>7</sup> RAPALJE, CONTEMPT 26 (1887).

room.<sup>8</sup> The rationale underlying the holding in this case was that if the court treated the defendant's acts as indirect contempt, the procedure which would have been applied would "provide insulation to attorneys who now overextend themselves and encourage them to go further in trying the patience of trial judges through absences which obstruct normal courtroom procedure but border on being excusable."<sup>9</sup>

Analysis of the California court decision reveals an inconsistency. The court stated that the defendant's absence amounted to direct contempt which is punishable summarily. However, the court held two hearings to allow the defendant to give an explanation. The procedure followed was quite similar to that required for indirect criminal contempt, and the defendant was not formally held in contempt until his explanation was deemed unsatisfactory.

*People v. McDonnell*,<sup>10</sup> the most recent Illinois case on contempt of court due to attorney's absence from the courtroom, is representative of the view of all jurisdictions except California and New Jersey. McDonnell, an attorney, absented himself from a murder trial in which he represented the defendant. He alleged that he had to attend a civil proceeding in another court. Because of his absence, the criminal proceeding was declared a mistrial, and upon his being cited for contempt, the attorney's explanation was that he felt ill and that he suffered from nervousness, insomnia and amnesia.<sup>11</sup> This explanation was not considered a satisfactory excuse, and the contempt charge was upheld. The Illinois court held that the attorney's absence constituted indirect contempt. The attorney's act of appearing in another courtroom was not in the presence of the court which was trying the criminal proceeding.<sup>12</sup>

Until 1956, Ohio considered an attorney's absence from the courtroom as direct contempt.<sup>13</sup> However, the decision in *Weinland v. Industrial*

<sup>8</sup> *Chula v. Supreme Court*, 57 Cal. 2d 199, 18 Cal. Rptr. 507, 368 P.2d 107 (1962); *Lyons v. Superior Court*, 43 Cal. 2d 755, 278 P.2d 681 (1955).

<sup>9</sup> *Arthur v. The Superior Court of Los Angeles County*, 42 Cal. Rptr. 441, 445, 398 P.2d 777, 781 (1965). *Accord, Re Clawans*, 69 N.J. Super. 373, 174 A.2d 367 (1961); *Vincent v. Vincent*, 108 N.J. Eq. 136, 154 Atl. 328 (1931).

<sup>10</sup> 307 Ill. App. 368, 30 N.E.2d 80 (1940).

<sup>11</sup> *Ibid.*

<sup>12</sup> Among other states in accord with Illinois on contempt of court due to attorney's absence are: *Lee v. Bauer*, 79 So.2d 792 (Fla. 1954); *Re McHugh*, 152 Mich. 505, 116 N.W. 459 (1908); *Re Clark*, 208 Mo. 121, 106 S.W. 990 (1907); *Re Walker*, 275 App. Div. 688, 86 N.Y.S.2d 726, *aff'd*, 299 N.Y. 686, 87 N.E.2d 71 (1949); *Levine Contempt Case*, 372 Pa. 612, 95 A.2d 222, *cert. denied* 346 U.S. 858 (1953); *Ex Parte Hill*, 122 Tex. 80, 52 S.W.2d 367 (1932); *State v. Winthrop*, 148 Wash. 526, 269 Pac. 793 (1928); *Wise v. Commonwealth*, 97 Va. 779, 34 S.E. 453 (1899).

<sup>13</sup> Previously, Ohio held that an attorney's unauthorized absence from the courtroom constituted direct contempt. *Ex rel Shroder v. Shay*, 3 Ohio N.P. (n.s.) 657, 16 Ohio Dec. 446 (1906).

*Com.*<sup>14</sup> placed Ohio with the majority of jurisdictions in holding that an attorney's absence from the courtroom constitutes indirect contempt. Previous support for the "direct criminal contempt" approach was based on *Univis Lens Co. v. United E.R. and M.W.*,<sup>15</sup> where it was held that in the presence of the court is more than merely physical presence.

If the act is of such character . . . that naturally its effect would be felt in the actual administration of justice, then the act is as much done in the court's presence as if the person doing it were actually in the court's presence.<sup>16</sup>

In the *Weinland* case, an attorney experienced mechanical difficulty with his automobile while driving to the courtroom where he was to appear at 9:30 A.M. The attorney telephoned the court that he would arrive by 10:00 A.M., but he did not appear until 10:10 A.M. He was held in contempt of court and fined \$100.00. On appeal, the Supreme Court held that "if the [attorney] was guilty of contempt, only a portion of the offense was direct and in the presence of the court, namely, entering the court late and after the trial had started."<sup>17</sup> Since part of the alleged misconduct occurred on the highway, it was not in or near the presence of the court, and it was therefore in the nature of an indirect criminal contempt for which the attorney was entitled to give an explanation.<sup>18</sup>

All jurisdictions hold that an attorney's absence from a courtroom may constitute contempt. The vast majority of states label such conduct indirect contempt. The attorney is cited for contempt and is given an opportunity to explain his absence before the contempt order is final. In the instant case, the attorney's conduct was labeled direct contempt. The only apparent difference in the instant case and in similar cases in the majority of jurisdictions is the label attached to the attorney's conduct. The procedure followed in all jurisdictions is very similar.

*Howard Frank*

<sup>14</sup> 166 Ohio St. 62, 139 N.E.2d 36 (1956). The Supreme Court of Ohio reversed the decision of the Court of Common Pleas and the Court of Appeals for Muskingum County, both of which held that an attorney's absence or tardiness constituted direct criminal contempt, which is punishable summarily.

<sup>15</sup> 86 Ohio App. 241, 89 N.E.2d 658 (1949).

<sup>16</sup> *Id.* at 246, 89 N.E.2d at 661.

<sup>17</sup> *Weinland v. Industrial Com.*, 166 Ohio St. 62, 66, 139 N.E.2d 36, 39 (1956).

<sup>18</sup> *Accord*, *District Attorney of Alamosa County v. District Court of Alamosa County*, 150 Colo. 136, 371 P.2d 271 (1962). Colorado is the only other state along with Ohio which reasons that an attorney's absence has elements of both direct and indirect criminal contempt. Both Ohio and Colorado hold that the absence is in the presence of the court, but the reason for the absence is not in the court's presence, and therefore the contempt is not direct and cannot be punished summarily.