THREAT TO DISSENT:

Repressing the Lawyer

By Monroe H. Freedman

A recent article in the *Harvard Civil Rights-Civil Liberties Law Review* begins with the alarming but demonstrably accurate sentence: "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities, and the politically unpopular." What this means, of course, is that we are faced with a serious threat to the independence of the Bar and, thereby, a serious threat to the achievement of equal protection of the laws for the poor and for minority groups, and to the political liberties of all of us.

I have selected four cases involving four individual lawyers as illustrative of the problem, but there are innumerable others. Attorneys across the country have been subjected to unwarranted disciplinary proceedings, activist law professors have been denied tenure, sponsorship of the Urban Law Institute by George Washington University Law School was recently revoked, and O.E.O. Legal Services has been severely crippled through political influence, harassment, and unjustified dismissals of effective attorneys.

Before turning to the four illustrative cases, it might be useful to explain briefly how a fairly typical professional grievance committee operates.

Grievance Panel

The Committee on Admissions and Grievances in the District of Columbia is an arm of the United States District Court. The Committee consists of nine members, three of whom serve as the Committee on Grievances.

The function of the Committee is to investigate any complaint against a lawyer, obtain a response in writing from the lawyer if the complaint appears to have sub-

Cont'd p. 2, col. 1

Cont'd from page 1

stance, and hold a hearing if that appears necessary. If the Committee resolves a complaint favorably to the lawyer, the matter stops there. If it finds against him, the Committee refers the case to a special three-judge panel of the District Court for a hearing and for possible disciplinary action, which could include a reprimand, suspension from practice for a period of time, and disbarment.

The Committee on Grievances, like most such committees, is notoriously slow to act and frequently fails to act at all except in extreme cases, such as embezzlement of clients' funds. For example, even judges of the Superior Court have charged that their own complaints to the Committee have been largely ignored—complaints against lawyers for being drunk in court, chronically unprepared, and failing adequately to represent their clients, and even a complaint that one member of the Bar had been making a practice of defecating in the courthouse stairwell.

It is therefore of considerable significance that the Committee is so quick to act on complaints against lawyers who represent disfavored clients or unpopular causes.

Freedman Case

Five years ago, for example, when I was chairman of the ACLU for the National Capital Area, I presented a lecture to a group of lawyers on some controversial aspects of legal ethics. The position I took was unorthodox, but hardly irresponsible—it has since been made a part of the required course materials at every major law school in the country and has been praised in an editorial in the ABA Journal. The lecture related to the problem faced by a lawyer whose client has, in confidence, given the lawyer self-incriminatory information. In such a case, I argued, the attorney's obligation of confidentiality takes precedence over any conflicting duty he might have of candor to the court. (See "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions," 64 Mich. L. Rev. 1469 (1966), *reprinted* Hall & Kamisar, Modern Criminal Procedure 783 (West, 1966), *reprinted* N.Y.L. Jour., Aug. 23-24, 1966, p.1.)

However, as suggested by a report in *Time* magazine, the unorthodox nature of the speech was seen as an opportunity by several anti-civil liberties judges to initiate grievance proceedings by way of retaliation.

THE LAWYER

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The uncharacteristic haste of the Committee is revealing. The speech was given on a Monday evening and reported in a short newspaper item Tuesday morning. By the end of the day on Tuesday the Dean of George Washington Law School had begun to receive both letters and telephone calls from judges and lawyers urging my dismissal from the faculty, and by Wednesday morning I received a certified letter from the Committee on Admissions and Grievances informing me that disciplinary proceedings had been commenced.

Opinions

The charge, surely, was a novel one—I was accused of "expressing opinions" that appeared to be inconsistent with the Canons of Professional Ethics. Of course, no such offense existed, nor could it exist consistent with the First Amendment.

I was not told the names of my accusers, only that they were "several federal judges." One of these judges proved to be Chief Justice Warren Burger (then a judge in the U.S. Court of Appeals), who has turned the episode into a continuing personal vendetta, including his engineering my removal from three different panels on professional ethics.

Ultimately, the complaint was dropped, but only after four embarrassing and worrisome months. Although the proceedings should never have been instituted, and should at least have been terminated promptly, one of the more distressing reasons for the delay was that the Grievance Committee members—who had set themselves up as judges of their fellow attorneys—were wholly ignorant of the relatively small number of Supreme Court decisions touching upon professional ethics. The proposition that lawyers, too, have First Amendment rights was a novel one to them.

A more recent case involves Florence Roisman, who was a Neighborhood Legal Services attorney. When only a few years out of law school, Mrs. Roisman was instrumental in revolutionizing the archaic and unfair rules of landlord-tenant law. Some of those rules go back to feudal times and put the tenement dweller roughly in the position of a medieval serf.

As a result of Mrs. Roisman's service to the poor people of the District of Columbia, charges were brought against her before the Grievance Committee by Sidney J. Brown, one of the most notorious slumlords in the District. Brown's complaint included such frivolous charges as that Mrs. Roisman had chosen to sue him rather than others who might have been sued, that she had filed a suit against him that in Brown's own judgment was without merit, and that she had on one occasion filed a complaint against him and later amended it pursuant to the rules of the court.

Hasty Action

As in other similar situations, the Grievance Committee was so eager to proceed against Mrs. Roisman that it violated its own rules. For example, the Committee instituted the proceedings despite the fact that Brown, a law school graduate, had failed to notarize his complaint. We also discovered in Mrs. Roisman's case a curious practice of the Committee. After Mrs. Roisman responded to the complaint, a reply was solicited from Brown without

JUDGE: "[Counsel,] you know that is a most improper question to ask."

ATTORNEY: "I know when a person has his mind made up, it is not easy to change it."

JUDGE: "I do not want you to make a speech now."

ATTORNEY: "I am going to make a speech—that is what I am paid for."

In the third transcript excerpt, the dialogue went this way:

ATTORNEY: "I stand here as an advocate for a brother citizen, and I desire that the [record in this case be complete and accurate]."

JUDGE: "Sit down, sir! Remember your duty or I shall be obliged to proceed in another manner [i.e., referring to disciplinary proceedings]."

ATTORNEY: "Your [Honor] may proceed in any manner you think fit. I know my duty as well as Your [Honor] knows yours. I shall not alter my conduct."

Lawyers Lauded

These incidents are of particular interest for two reasons. First, neither involved either Kunstler or Hirschkop or any other modern American lawyer; in each instance the attorney was a highly respected English barrister. Second, far from resulting in disciplinary proceedings against the lawyers, each of these instances has been cited by eminent authorities in the most favorable terms.

The comment on the judge's expertise in vulgarity was made by Sir Marshall Hall, a noted barrister of the earlier part of this century, and has been used as illustrative of his courtroom wit. The second exchange also involved Marshall Hall, and his biographer relates that having insisted upon making a speech, Hall did so and "won the day."

The lawyer in the third instance was no ess a figure in English law than Lord Erskine. According to Lord Campbell, Erskine's defiance of the court was "a noble stand for the independence of the bar." Similarly, one of the most highly egarded of American jurists, Judge Roger Traynor of the California Supreme Court, [illegible] has used Erskine's statement as illustrative of the attorney's duty to assert his client's ights in a forthright manner. And Professors Louisell and Hazard introduce the incident with the following comment:

"So much emphasis is currently placed upon avoidance of improper argument that t seems not amiss to remind today's young awyer of his duty of effective representation of his client in an adversary system."

Let me now turn to Philip Hirschkop s present difficulties. Over his own and his putative clients' repeated objections, Hirschkop was compelled by Judge Pratt to epresent the "D.C. Nine," a group of priests and nuns charged with destroying urniture and records in the Dow Chemical Company's Washington office. During the course of the trial, Hirschkop was given no ndication by the court that he was acting n a manner that would merit disciplinary action. At the conclusion of the trial, however, Judge Pratt ordered Hirschkop to appear the following day for a contempt hearing against him. When Hirschkop asked for specifications, he was told by the judge that he would receive them for the first time at the hearing itself.

The next day, Hirschkop appeared with his attorney, David Rein. Rein asked for 48 hours' continuance to obtain a transcript and examine the specifications, but the judge ruled that that would not be necessary. He thereupon found Hirschkop guilty of contempt.

Disqualification

Two specifications are fairly typical of Hirschkop's "contemptuous" conduct. Early in the trial he moved that the judge disqualify himself for prejudice. Such a motion is, of course, an attorney's duty—however awkward such a motion necessarily is—whenever he conscientiously believes that the judge cannot act fairly and objectively in the case. The relevant part of Hirschkop's argument was as follows:

"I fully believe, and with all due respect to the Court as a person, that you made up your mind about everything except the length of the sentence. And I ask you to explore your own conscience, Judge, because if that is the path you are going down, you shouldn't sit on this case. You should disqualify yourself and have another judge sit on the case. And I don't expect that we will get a better judge. But we will get a judge that won't have had the exposure, who won't have reached the conclusions that you have already concluded. And these are difficult things for me to say, Judge, and yet I feel compelled to say them."

At another point in the trial, Hirschkop tried unsuccessfully to put on the record his arguments on a particular point. (Compare the Lord Erskine excerpt above.) Judge Pratt cut him off, however, observing, "I know what your reasons are"—to which Hirschkop replied that if the judge knew his arguments without their being stated, there was no reason for him to remain in the case, and the judge should grant Hirschkop's many requests to withdraw as counsel.

On such specifications Philip Hirschkop is now facing a sentence of one month in prison. In addition, Judge Pratt took an extraordinarily active role in pressing charges against Hirschkop before the Grievance Committee, and succeeded in getting the Committee to recommend that he be disbarred. At the present time, therefore, Hirschkop's contempt sentence is pending in the Court of Appeals, and disbarment proceedings are pending against him in the District Court.

Permanent Damage

Of course, Hirschkop may ultimately be vindicated—although this is far from certain, and it would be a foolhardy lawyer indeed who would willingly stand in his place.

The damage to his professional reputation, however, will never be adequately repaired. For example, Hirschkop at one time was retained by a large union that subsequently had a change of leadership. The new leaders, in order to embarrass their predecessors, published in the union magazine a lengthy criticism of Hirschkop's legal ability and professional integrity, under a large, bold-face heading, "HIRSCHKOP FACES DISBARMENT." No reversal on appeal of the actions taken against Hirschkop will ever restore his professional status with the thousands of union members who read that story. Regardless of the clear lack of justification for the charges against Hirschkop, Judge Pratt and the Grievance Committee have successfully smeared his name with a large group of potential clients.

Following the Chicago Conspiracy trial, Judge Hoffman also held the lawyers in contempt, sentencing Kunstler to more than four years and Leonard Weinglass to more than a year and a half in the federal penetentiary. Here, too, it is instructive to consider some of the specifications and to set them beside earlier incidents in Anglo-American jurisprudence.

Cont'd p. 9, col. 1

New York Times Photo

REPRESSING THE LAWYER

Cont'd from page 2

Weinglass

For example, compare Erskine's "I will not alter my conduct," and Hall's "I am going to make a speech," with the following item of allegedly contemptuous conduct by Weinglass:

MR. WEINGLASS: "If the Court please, there is a defendant in court, Mr. Bobby Seale, who is sitting here. He is entitled to counsel. As of now he does not have counsel."

THE COURT: "That is not a fact, as appears in the record."

MR. WEINGLASS: "Mr. Birnbaum and Mr. Bass have withdrawn from the case as trial counsel. Mr. Seale is not represented here in court."

THE COURT: "Mr. Weinglass, I direct you to sit down."

MR. WEINGLASS: "If the Court please, I would like to know—"

THE COURT: "I would like you to sit down or I will ask the marshal to escort you to your chair."

MR. WEINGLASS: "I will sit down, but I do so under protest."

Similarly, one might compare Sir Marshall Hall's "vulgarity" joke, at the expense of the court, with the following exchange between Kunstler and Judge Hoffman:

THE COURT: "Let the record show that after I requested the marshal to keep Mr. Dellinger quiet he laughed right out loud."

MR. DELLINGER: "And he is laughing now, too."

THE MARSHAL: "And the defendant Hayden, your Honor."

MR. KUNSTLER: "Oh, your Honor, people can't help it sometimes, your Honor. You have laughed yourself."

THE COURT: "I really have come to believe you can't help yourself. I have come to believe it. I have never been in a case where I have seen such bad manners."

MR. KUNSTLER: "I know, but your Honor, when you make a joke and the courtroom laughs, nobody is thrown out."

For that comment alone, William Kunstler was sentenced to three weeks in the penitentiary.

Shouting

As background to the next instance of "contempt" by Kunstler, it should be noted that brief recesses by defense counsel were denied by the judge, and that on one occasion Kunstler was reprimanded by the court for suggesting (as trial attorneys not uncommonly do) that it might be an appropriate time to break for lunch.

MR. FORAN (the prosecutor): "Your Honor, I have to get some materials to properly carry on my cross-examination of this witness. It will take some time to go downstairs to get them."

THE COURT: "Are you suggesting we recess?"

MR. FORAN: "I would think yes, your Honor."

THE COURT: "All right. We will go until two o'clock."

MR. KUNSTLER: "Your Honor, we asked for five minutes two days ago in front of this jury and you refused to give it to us."

THE COURT: "You will have to cease that disrespectful tone."

MR. KUNSTLER: "That is not disrespect. That is an angry tone, your Honor."

THE COURT: "Yes, it is. Yes, it is. I will grant the motion of the Government."

MR. KUNSTLER: "You refused us five minutes the other day."

THE COURT: "You are shouting at the Court."

MR. KUNSTLER: "Oh, your Honor—"

THE COURT: "I never shouted at you during this trial."

MR. KUNSTLER: "Your voice has been raised."

THE COURT: "You have been disrespectful."

MR. KUNSTLER: "It is not disrespectful, your Honor."

THE COURT: "And sometimes worse than that."

That episode, in which the attorney essentially was challenging prejudicially discrepant treatment in the presentation of his clients' case, cost William Kunstler three months in the federal penitentiary.

As I suggested earlier, numerous other instances could be given of abusive use of disciplinary and contempt procedures against anti-establishment lawyers. In short, "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities, and the politically unpopular." And what that means, of course, is that we are faced with a serious threat to the independence of the Bar and, thereby, a serious threat to the achievement of equal protection of the laws for the poor and for minority groups, and to the political liberties of all of us.

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